

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Decided on: January 11, 2017

+ **CRL.A. 952/2012 and Crl. M.A. Nos. 14143/2012 and 11140/2014**

INNOVATIVE TECH PACK LTD

..... Appellant

Represented by: Mr. Rajshekhar Rao and Mr. K.
Harshavardhan, Advocates.

versus

SPECIAL DIRECTOR OF ENFORCEMENT

..... Respondent

Represented by: Mr. Kunal Dutt, Advocate.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J. (ORAL)

1. Show cause notice was issued to the appellant alleging violation of Section 8 (3) and Section 8 (4) of the Foreign Exchange Regulation Act, 1973 (in short 'FERA') read with Chapter 7A.20 (i) of the Exchange Control Manual, 1995.

2. It was alleged that though foreign exchange was remitted in four imports however, the appellant failed to submit exchange control copy of Bill of Entry for confirmation of having imported the material for which the amount was remitted, thus he had violated Section 8 (3) and Section 8(4) read with Chapter 7A.20 (i) of the Exchange Control Manual, 1995. Out of the nine imports alleged, the Adjudicating Authority was satisfied with six and as no bill of entry was by the appellant for three remittances, a penalty of ₹15 lakhs was levied on the appellant. The three remittances were USD 24,03,000 on 22nd September, 1993, USD 96,000/- on 23rd March, 1993 and JPY 11,24,500/- on 26th March, 1993.

3. Aggrieved by the order of the Adjudicating Authority, the appellant preferred an appeal before the Appellate Tribunal wherein though pre-deposit penalty was dispensed with however, the appeal was dismissed vide the impugned order dated 29th May, 2012. Hence the present appeal.

4. Learned counsel for the appellant respondent raises a preliminary objection as to the maintainability of the present appeal without the pre-deposit. Learned counsel for the appellant has pointed out towards the order impugned wherein the pre-deposit of the penalty was waived. Hence this Court is inclined to entertain the present appeal without insisting upon pre-deposit of penalty.

5. Learned counsel for the appellant contends that for three remittances dated 23rd March, 1993, 26th March, 1993 and 27th September, 1993 the appellant had placed on record the Bills of Lading. Since the show cause notice was issued on 27th May, 2002, just before the sunset period and served on the appellant on 15th February, 2006 after a lapse of 13 years, the appellant was not in possession of the exchange copies of Bills of Entry and the Bill of Lading having been placed on record the same was sufficient proof that the foreign remittances were against imports. Reliance is placed on the decision of this Court in Xerox Modi Corp Ltd. vs. The Special Director, Enforcement Directorate, Crl. A. Nos. 58 and 300/2009 decided on 15th January, 2015.

6. Learned counsel for the respondent however, submits that Bill of Lading is only a proof that goods were exported from the country of its origin however, whether they were imported into India or not can be only fortified from the exchange copy of the Bill of Entry which was not placed on record. Hence there is no illegality in the impugned order and the appeal

be dismissed.

7. Section 8 (3) and Section 8 (4) of FERA reads as under:

“8 (3) Where any foreign exchange is acquired by any person, other than an authorised dealer or a money-changer, for any particular purpose, or where any person has been permitted conditionally to acquire foreign exchange, the said person shall not use the foreign exchange so acquired otherwise than for that purpose or, as the case may be, fail to comply with any condition to which the permission granted to him is subject, and where any foreign exchange so acquired cannot be so used or the conditions cannot be complied with, the said person shall, within a period of thirty days from the date on which he comes to know that such foreign exchange cannot be so used or the conditions cannot be complied with, sell the foreign exchange to an authorised dealer or to a money-changer.

8 (4) For the avoidance of doubt, it is hereby declared that where a person acquires foreign exchange for sending or bringing into India any goods but sends or brings no such goods or does not send or bring goods of a value representing the foreign exchange acquired, within a reasonable time or sends or brings any goods of a kind, quality or quantity different from that specified by him at the time of acquisition of the foreign exchange, such person shall, unless the contrary is proved, be presumed not to have been able to use the foreign exchange for the purpose for which he acquired it or, as the case may be, to have used the foreign exchange so acquired otherwise than for the purposes for which it was acquired.

8. Further Chapter 7A.20 of Exchange Control Manual provides as under:

7A.20 (i) It is obligatory on the part of importers to submit Exchange Control copy of

Bills of Entry for Home Consumption/ Postal/ Wrappers to the authorised

dealer through whom relative remittance was made as evidence that the goods for which the payment was made have actually been imported into India. Authorised dealer should ensure that in all cases, including cases of advance remittances permitted vide paragraph 7A.10, these are submitted by their importer customers and are verified. In respect of imports made on D/A basis, since goods would normally be cleared before the due date of payment, authorised dealers should insist on production of documentary evidence of import i.e. Exchange Control copy of Bill of Entry for Home Consumption/Postal/Wrappers at the time of effecting remittance of the import bill. Authorised dealers should also advise this requirement to their importer customers in writing while delivering the documents against acceptance.

- NOTES:**
- A. In case of goods imported and stored by 100% Export Oriented Units/Units in Export Processing Zones and Free Trade Zones in bonded warehouses, it will be in order for authorised dealers to accept Exchange Control (quadruplicate) copy of Into Bond Bill of Entry for Warehousing as evidence of import.*
 - B. As regards submission of evidence in respect of imports by courier services, please see paragraph 7A.23.*
 - C. In respect of imports on D/A basis if importers fail to produce documentary evidence due to genuine reasons such as non-arrival of consignment, delay in delivery/customs clearance of consignment, etc. authorised dealers may, on merits, allow reasonable time not exceeding three months from the date of remittance to the importer to submit the evidence of import.*

(ii) Authorised dealers should in all cases acknowledge receipt of Exchange

Control copy of bill of entry/postal/wrappers from importers by issuing acknowledgement slips containing the following particulars:

(a) Importer's full name and address with code number.

(b) Import licence number and date (wherever applicable)

(c) Bank's reference of letter of credit number etc., if any.

(d) Number and date of Exchange Control copy of bill of entry/postal wrapper and the amount of import.

(e) Particulars of goods imported

(iii) Internal inspectors or auditors (including external auditors appointed by authorised dealers) should carry out 100% verification of all the Exchange Control copies of bills of entry/postal/wrappers and a certificate to that effect should be forwarded, on half-yearly basis, to the office of Reserve Bank under whose jurisdiction the authorised dealer is situated.

(iv) In case an importer does not furnish the Exchange Control copy of Bill of

Entry within three months from the date of remittance (or within prescribed period as provided in paragraph 7A.10), the authorised dealer should issue a reminder to the importer asking him to produce it forthwith. If there is still no response, a reminder by registered post with acknowledgement due

should be issued not later than one month from the date of the first reminder.

(v) Authorised dealers should forward to Reserve Bank a statement as at the end

of each calendar quarter in form BEF furnishing details of import transactions in respect of which the importers have defaulted in submission of Exchange Control copies of Bills of Entry within a period of 21 days from the date of issue of registered (acknowledgement due) reminder. The quarterly statement should be submitted to Reserve Bank within 15 days from the end of the quarter to which the statement relates. Exchange Control copy of Bill of Entry for Home Consumption/postal wrappers should be preserved by authorised dealers for a period of one year from the date of its verification as required under paragraph (iii) above. However, in respect of cases which are under investigation by investigating agencies, the Exchange Control copy of Bill of Entry for Home Consumption/postal wrappers should be preserved till the investigating agency concerned gives clearance for destruction.

9. This Court in Xerox Modi Corp Ltd. (supra) relying upon the decision of the Supreme Court in the decision reported as 1972 SC 330 Bareilly Electricity Supply Co. Ltd. vs. The Workmen & Ors. held:

19. Having heard learned counsels for the parties and perused the record, as well as the order in original and the impugned order, this Court is of the view that the impugned order of the appellate tribunal and the order-in-original suffer from serious infractions of the principles of natural justice and, even on merits, it appears that the appellants were able to provide sufficient material on record to raise a serious doubt about the alleged violation of FEMA.

20. The Supreme Court in Bareilly Electricity Supply Co. Ltd. (supra), inter alia, observed as follows:

"14. But the application of principle of natural justice does not imply that what is not evidence can be acted upon. On the other hand what it means is that no materials can be relied upon to establish a contested fact which are not spoken to by persons who are competent to speak about them and are subjected to cross-examination by the party against whom they are sought to be used. When a document is produced in a Court or a Tribunal the questions that naturally arise is, is it a genuine document, what are its contents and are the statements contained therein true. When the Appellant produced the balance-sheet and profit and loss account of the Company, it does not by its mere production amount to a proof of it or of the truth of the entries therein. If these entries are challenged the Appellant must prove each of such entries by producing the books and speaking from the entries made therein. If a letter or other document is produced to establish some fact which is relevant to the enquiry the writer must be produced or his affidavit in respect thereof be filed and opportunity afforded to the opposite party who challenges this fact. This is both in accord with principles of natural justice as also according to the procedure under Order XIX Civil Procedure Code and the Evidence Act both of which incorporate these general principles. Even if all technicalities of the Evidence Act are not strictly applicable except in so far as Section 11 of the Industrial Disputes Act, 1947 and the rules prescribed therein permit it, it is inconceivable that the Tribunal can act on what is not evidence such as hearsay, nor can it justify the Tribunal in basing its award on copies of documents when the originals which are in existence are not produced and proved by one of the methods either by affidavit or by witness who have executed them, if

they are alive and can be produced. Again if a party wants an inspection, it is incumbent on the Tribunal to give inspection in so far as that is relevant to the enquiry. The applicability of these principles are well recognised and admit of no doubt".

26. It appears that the appellants may have been penalized on account of a highly belated inquiry initiated by the ED, and with passage of time the appellants may not have preserved the original documents. In Vipin Gupta (supra) , the Court observed that the noticee could not have been expected to retain the proof of all remittances for over six years. The explanation given by it for not being able to immediately furnish the exchange control copies of the Bill of Entries was bonafide. I may note that in that particular case, during the appellate stage, the appellant had secured the certified copies of documents to prove the import of goods against some of the remittances - which is not the position in the case in hand. However, the same does not detract from the fact that notices have been issued belatedly - even though there is no period of limitation prescribed therefor. For such delays, the noticee cannot be made to suffer and the circumstance pleaded by the noticee that the documents have not been preserved or are not available would have to be given due weightage.

27. In Sunil Engineering Corporation (supra), the petitioner raised a similar plea that the authorized dealer was not shown to have issued a reminder in terms of the ECM. The Court observed as follows:

"6. Petitioners submit that original Bills of Entry had also been tendered but they were not having the receipt for the same as the same had been misplaced and was not traceable. However, petitioners had duly furnished the copies of Bills of Lading, Invoices. The photocopy of Exchange Control copy of the Bill of Entry duly carried endorsement by the Customs Authorities of the clearance of the goods. Mr. Sharma also submitted

that the Bank itself had failed to comply with the procedure.

7. *In this view of the matter, there was hardly any doubt left regarding genuineness of the transactions which fact is not even disputed by the respondents. In these circumstances, the omission of the petitioners is merely a procedural irregularity. Reference is invited to the judgment of the Supreme Court in M/s. Hindustan Steel Ltd. v. The State of Orissa, AIR 1970 SC 253 wherein the Court while dealing on the question of imposition of penalty observed as under:-*

"Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute."

28. *In Bata India Ltd. (supra) , the Calcutta High Court observed that it was obligatory for the authorities under FERA (which stands replaced by FEMA) to consider the question of propriety of imposing penalty in the facts of a given case. It observed that it is settled law that penalty would not be imposed in quasi criminal proceedings merely because it is lawful to do so. Whether penalty should be imposed or not is a matter of discretion to be exercised judicially and on a consideration of all the relevant circumstances. The Calcutta High Court also placed reliance on the decision in Hindustan Steel Ltd. v. State of Orissa, (1972) 83 ITR 26 SC, which had*

been relied upon by this Court in Sunil Engineering Corporation (supra). The Calcutta High Court held as follows:

"18. We are also of the view that in any event both the authorities under the said Act erred in not specifically considering the question of propriety of imposing penalty in the facts of the case. Decisions are legion in support of the proposition that penalty will not be imposed in quasi-criminal proceedings merely because it is lawful to do so. Whether penalty should be imposed or not is a matter of discretion to be exercised judicially and on a consideration of all the relevant circumstances. In this connection reference may be made to the decisions in Hindustan Steel Ltd. v. State of Orissa, [1972] 83 ITR 26 (SC), Anantharam Veerasinghaiah and Co. v. CIT, [1980] 123 ITR 457 (SC) , and in Cement Marketing Co. of India Ltd. v. Asst. CST AIR 1960 SC 346. There was no such consideration in this case at all.

19. That the proceedings for imposition of penalty under the Act are of quasi-criminal nature follows from the nature of the proceedings itself. It is also settled law that where proceedings are penal in nature, they are quasi-criminal proceedings. (See the decisions in CIT v. Anwar Ali, [1970] 76 ITR 696 (SC), and Shanti Prasad Jain v. Director of Enforcement, [1963] 2 SCR 297). The consequence of this is two fold, first is the question of mens rea before finding of guilt and second is the question of mens rea once guilt has been established. The decision in State of Maharashtra v. Mayor Hans George, [1965] 1 SCR 123, is an authority for the proposition that mens rea is not required to be established in respect of an offence under Section 8(1) of the Foreign Exchange Regulation Act, 1973, and that it was an offence which creates absolute liability. The decision is not apposite. We are not concerned with the pre-guilt finding of mens rea in this case. What is important is whether the appellant had any mala fide intention of violating the law".

29. In Shanti Prasad (supra), the Supreme Court observed that proceedings under FERA are quasi criminal in character, and it is the duty of the respondent/department as prosecutor to make out a case beyond all reasonable doubt that there has been a violation of the law. In this regard, reliance was placed on In re HPC Productions Ltd., 1962 (2) WLR 51.

10. Thus the Courts have repeatedly held that in quasi criminal proceedings the penalty should not be imposed merely because it is lawful to impose the penalty. Whether penalty should be imposed or not is a matter of discretion to be exercised judicially and on consideration of all the relevant circumstances. Further simplicitor from the non-compliance of placing on record no inference can be drawn that the foreign remittance was not used for the purpose of import. It is trite law that to impose a penal liability compliance should be sought within a reasonable time and a person cannot be penalised for not retaining the documents for a period of 13 years. During the course of the present appeal, exchange copy of Bill of Entry qua transaction at Sr. No. 2 has already been placed however, despite best efforts the appellant could not locate the exchange copies of Bills of Entry qua other two transactions.

11. In view of the belated show cause notice being served on the appellant, the defence of the appellant that it was not in possession of the copies of Bill of Entry for the two transactions is plausible. It cannot be held that the respondent has proved its allegation beyond reasonable doubt and the copies of the Bills of Lading probablise that the remittances were utilized for import.

12. Consequently, the impugned orders passed by the Appellate Tribunal

and the Adjudicating Authority are set aside.

Appeal and applications are disposed of.

(MUKTA GUPTA)
JUDGE

JANUARY 11, 2017
‘vn’

