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

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Decision delivered on: 12.09.2022

+ **CUSAA 45/2021 & CM APPL. 37896/2021**

ORIENTAL TRIMEX LTD

..... Appellant

Through: Mr B.K. Singh, Mr Abhishek Jaju,
Ms Vandna Singh and Mr R.S.
Yadav, Advs.

versus

THE COMMISSIONER OF CUSTOMS IMPORT Respondent

Through: Mr Harpreet Singh, Sr. Standing
Counsel with Ms Suhani Mathur and
Mr Jatin Gaur, Advs.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

HON'BLE MS. JUSTICE TARA VITASTA GANJU

[Physical Court hearing/ Hybrid hearing (as per request)]

RAJIV SHAKDHER, J. (ORAL):

1. This is an appeal preferred against the order dated 31.03.2021 passed by the "larger bench" of the Customs, Excise & Service Tax Appellate Tribunal [hereafter referred to as "Tribunal"].
2. The question of law which the larger bench was called upon to decide, as mentioned in the impugned order, reads as follows:

"When the order confiscating the goods has been issued and the party has not opted to pay fine in lieu of confiscation, then would the sale proceeds remain with the Government if the goods are auctioned or they have to be paid to the importer after deduction of such payment or without such deduction?"

3. The larger bench has answered the question thus:

"When the order confiscating the goods has been issued and the party has not opted to pay fine in lieu of such confiscation, then

the goods can be sold and the sale proceeds would vest with the government. Penalty can still be imposed under section 112 of the Customs Act. An order for payment of all sale proceeds without deduction of redemption fine cannot, therefore, be issued."

4. Furthermore, as is evident upon reading paragraph 27 of the said order, the larger bench of the Tribunal also kept the issue open, which is, as to whether the appellant i.e., the assessee, could, even at this stage, pay fine in lieu of confiscation.

4.1. Accordingly, it was indicated by the larger bench of the Tribunal that this issue could be raised before the Division Bench, if otherwise permissible in law.

5. The rationale provided by the Tribunal is contained in the following paragraphs of the impugned order:

"20. The contention of the learned Authorized Representative of the Department is that the order of confiscation has not been set aside by the Commissioner (Appeals) and so once the goods have been auctioned, the goods get replaced by the sale proceeds, and can be redeemed on payment of redemption fine.

21. This submission of the learned Authorised Representative of the Department deserves acceptance. If the reasoning given by the Commissioner (Appeals) is accepted, then the best course for a person to adopt after the goods are confiscated is to keep quiet till such time as the goods are auctioned because in that case redemption fine cannot be imposed. Obviously, the sale proceeds replace the goods and there can possibly be no change in the consequences that would flow from the order of confiscation. The Commissioner (Appeals), therefore, was not justified in holding that no redemption fine can be imposed after the "goods" have been sold because only the "goods" can be redeemed and not the sale proceeds.

22. What is important to notice is that the Commissioner (Appeals) has also ordered for payment of the entire sale proceeds

to the respondent after deduction of the penalty amount. Section 126 of the Customs Act provides that where any goods are confiscated under the Act, such goods shall thereupon vest in the Central Government. The respondent did not make any request for either the redemption of the goods or the sale proceeds and, therefore, a direction for payment of the sale products to the respondent could not have been issued. Of course, the redemption fine can be imposed only when a request for redemption of the "goods" or the "sale proceeds" is made. Imposition of the penalty is independent of the request for redemption and can be imposed under Section 112 of the Customs Act.

*23. The view taken in **Oriental Trimex** that once the "goods" have been disposed, there is no question of payment of redemption fine as the "goods" are no longer available is, therefore, not a correct view.*

24. What also impressed the Commissioner (Appeals) is the fact that the goods should not have been auctioned if an appeal had been filed to challenge the imposition of redemption fine and penalty. In the first instance, there is nothing on the record to indicate when the appeal was actually filed though the appeal must have been filed beyond period of 60 days from the date of the communication of the order since the appeal was earlier dismissed on August 28, 2013, as it was not accompanied by a delay of condonation application. Secondly, there is nothing on the record to indicate when the delay condonation application was actually filed. Even otherwise, the records indicate, that it was only by letter dated 28.04.2014 that the respondent informed the adjudicating authority that an appeal had been filed. In this view of the matter, the Commissioner (Appeals) was not justified in concluding that the goods should not have been auctioned as an appeal had been filed."

6. The only question which the larger bench was, as is evident, called upon to consider was, whether the revenue could adjust redemption fine against the sale proceeds from goods which were sold by it upon confiscation.

7. It is not in dispute that in the instant case, the Order-in-Original was passed on 26.11.2012.

7.1. The concerned authority that passed the Order-in-Original, was not persuaded by the justification given by the appellant/assessee as to why the goods in issue i.e., marble blocks, were not cleared within the stipulated period as provided in Section 48 of the Customs Act, 1962 [in short “Act”].

7.2. Consequently, the concerned authority i.e., Additional Commissioner of Customs, ICD, Tughalakabad, New Delhi, directed confiscation of the subject goods and gave an option for redeeming the same on payment of redemption fine of Rs.20,00,000/-.

7.3. Besides this, penalty of Rs.10,00,000/- was also imposed on the appellant under Section 112 of the Act.

8. The appellant, being aggrieved by the aforesaid order, preferred an appeal on 25.03.2013.

8.1. The appeal came up for hearing before the concerned appellate authority i.e., Commissioner of Customs (Appeals), in the first instance, on 20.08.2013.

9. A perusal of the order shows that the said authority noticed the fact that the Order-in-Original (and the addendum dated 28.12.2012) had been received by the appellant/assessee on 31.12.2012 and that the appeal was instituted only on 25.03.2013, i.e., after the expiry of the stipulated period provided under section 128 of the Act, for institution of the appeal i.e., 60 days.

9.1 Thus, having concluded that the appeal had been filed beyond 60 days, the Commissioner of Customs (Appeals) held that the appeal was not maintainable, *albeit*, on “procedural grounds”.

9.2 However, the Commissioner of Customs (Appeals) went further and indicated in the very same order that if the appellant/assessee were to submit an explanation on a later date, the appeal could be restored and taken up for disposal in due course. This order was passed on 20.08.2013.

10. The record shows that the appellant/assessee did file an application for condonation of delay on 06/07.11.2013.

10.1. We are told that the application for condonation of delay preferred by the appellant/assessee and the appeal were taken up together and a substantive order on the appellant/assessee's appeal was passed on 10.04.2019.

10.2. A perusal of the first paragraph of this order does establish that such a step was taken i.e., that an application for condonation of delay had been filed.

10.3. The order indicates that the then Commissioner of Customs (Appeals), having regard to the fact that an application for condonation of delay had been filed, restored the appeal and then proceeded to decide the matter on merits.

10.4. A perusal of this order shows that, although the Commissioner of Customs (Appeals) did not disturb the finding returned in the Order-in-Original that the subject goods had to be confiscated, it varied the order to the extent of imposition of redemption fine.

10.5. The reason why such a direction was issued by the Commissioner of Customs (Appeals) was that during the pendency of the appeal, the subject goods i.e., imported marble blocks had been sold in a public auction by the respondent/revenue.

11. It is not disputed before us by Mr Harpreet Singh, who appears on

behalf of the respondent/revenue, that the sale took place in May–June 2013.

12. As would be evident from the narration of the events set forth hereinabove, the order closing the appeal which had been filed by the appellant/assessee, in the first instance, was passed only on 20.08.2013. Clearly, at the stage when the marble blocks were sold the appeal was pending adjudication before the Commissioner of Customs (Appeals).

12.1. Moving further, the respondent/revenue, being aggrieved by the direction issued by the Commissioner of Customs (Appeals) *via* the order dated 10.04.2019, preferred an appeal with the Tribunal.

12.3. The grievance, as is apparent from the record, concerned the direction whereby the Commissioner of Customs (Appeals) had directed that the redemption fine could not be adjusted against the sale proceeds received by the respondent/revenue from auction of the subject goods.

12.4. It is in these circumstances that the Division Bench of the Tribunal referred the issue for consideration by the larger bench.

13. Mr B.K. Singh, who appears on behalf of the appellant/assessee, has submitted that the order passed by the larger bench of the Tribunal is not sustainable.

13.1 Mr B.K. Singh submits that once goods are sold by the revenue, which they could not have sold while the appeal of the appellant/assessee was pending before the Commissioner of Customs (Appeals), there can be no question of adjusting the redemption fine imposed *via* the Order-in-Original.

13.2. Mr B.K. Singh also informs us that since the revenue had failed to obtain a stay on the operation of the order passed by the Commissioner of Customs (Appeals), the revenue remitted Rs.34,20,884/- out of the total sale

proceeds received by it amounting to Rs.45,09,555/-.

13.3. This figure, according to Mr B.K. Singh, was arrived at after adjustments had been made against the said sale proceeds towards an amount of Rs.88,671/- which had to be paid to the MSTC and Rs.10,00,000/- which was the amount imposed upon the appellant/assessee on account of penalty.

13.4. Mr B.K. Singh, thus, concedes that the appellant/assessee has received the aforementioned amount without any adjustments being made towards redemption fine. As noticed above, the redemption fine imposed *via* the Order-in-Original dated 26.11.2012 was Rs.20,00,000/-.

13.5. In support of his submission that the order of the Commissioner of Customs (Appeals) dated 10.04.2019 ought to be sustained, Mr B.K. Singh has relied upon the following judgments:

- (i) ***Shilp Impex v. Union of India***, 2001 (128) E.L.T. 54(Del.)
- (ii) ***Shilp Impex v. Union of India***, 2002 (140) E.L.T. 3 (S.C.)
- (iii) ***Kailash Ribbon Factory Ltd. v. Commr. Of Cus. & C. Ex., New Delhi***, 2002 (143) E.L.T. 60 (Del.)
- (iv) ***Commissioner v. Kailash Ribbon Factory Ltd.***, 2004 (174) E.L.T. A130 (S.C.)

14. On the other hand, Mr Harpreet Singh submitted that the view taken by the larger bench of the Tribunal ought to be sustained.

14.1 It is Mr Harpreet Singh's contention that if the submission made by the appellant/assessee is accepted, then, in every case, the assessee would create a situation whereby the goods are sold in public auction and they are not called upon to account for redemption fine imposed by statutory authorities.

14.2. According to Mr Harpreet Singh, this, in sum and substance, is the view of the larger bench of the Tribunal.

14.3. Furthermore, Mr Harpreet Singh also says that upon confiscation of the subject goods, the right and title in the said goods vested in the revenue and therefore it had every right to sell the same and make adjustments, *inter alia*, towards penalty and redemption fine.

15. We have heard the learned counsel for the parties and perused the record.

16. According to us, what needs to be borne in mind is the fact that all throughout i.e., right up till the stage the larger bench of the Tribunal rendered a decision in the matter, the finding that the goods had, rightly, been confiscated has not been disturbed.

16.1. As noted above, the appellant/assessee, according to the Tribunal as well as the authorities below, concluded that since the appellant/assessee had not cleared the goods within the timeframe provided under Section 48 of the Act, confiscation had to follow.

17. It is because the adjudicating authority, while passing the Order-in-Original, concluded that the subject goods had to be confiscated that it also imposed penalty of Rs.10,00,000/-, with the caveat that the appellant/assessee would have the option to seek the release of the goods, *albeit* on payment of redemption fine amounting to Rs.20,00,000/-.

18. As adverted to hereinabove, there is no dispute that the respondent/revenue sold the goods in May 2013. This action of the revenue was clearly, contrary to law, as at that time, the appeal preferred by the appellant/assessee with the Commissioner of Customs (Appeals) had not been disposed of.

19. The order disposing of the appeal in the first instance, as noticed above, was passed on 20.08.2013. At that stage, the Commissioner of Customs (Appeals) while disposing of the appeal, indicated that he had closed the appeal on “procedural grounds”.

19.1. Furthermore, it was also indicated that if an application for condonation of delay is filed by the appellant/assessee, he could consider restoring the appeal and consequently, have it decided on merits.

20. It is on this account, perhaps, that the appellant/assessee filed an application for condonation of delay on 06/07.11.2013 which led to the second order being passed by the Commissioner of Customs (Appeals). This order, as alluded to hereinabove, is dated 10.04.2019.

20.1. The only variation that was brought about by the Commissioner of Customs (Appeals), was to excise that portion of the Order-in-Original whereby redemption fine of Rs.20,00,000/- had been imposed on the appellant/assessee.

20.2. This direction was issued by the Commissioner of Customs (Appeals) as it was brought to his notice that the subject goods had already been sold by the respondent/revenue. Therefore, logically, the Commissioner of Customs (Appeals) concluded that since the subject goods could not be returned to the appellant/assessee, the redemption fine could not, possibly, be adjusted against the sale proceeds.

21. The record shows that, in line with this view taken by the Commissioner of Customs (Appeals) *via* order dated 10.04.2019, a sanction order was passed on 14.08.2019.

21.1. Since the revenue had failed to obtain an interim order in its appeal, with regard to the order dated 10.04.2019, the appellant/assessee received

Rs.34,20,884/- after adjustment of the amount payable by it towards penalty and charges paid to a third party by the respondent/revenue, perhaps, for conducting the public auction.

21.2. To our minds, this could have been the only logical sequitur in the instant case.

22. Mr Harpreet Singh's argument that the property vested in the respondent/revenue since confiscation was ordered, is an unexceptional submission. No fault can be found with this submission of Mr Harpreet Singh.

23. The point where we disagree with Mr Harpreet Singh is with regard to the next submission, which is that, since the property in the subject goods vested in the respondent/revenue, it could adjust, apart from penalty and other charges incurred towards the sale of the goods, redemption fine as well.

24. We are of the view that, since the goods were not available, redemption fine cannot not be adjusted against the sale proceeds.

25. While passing the Order-in-Original, confiscation was ordered by the adjudicating authority, at which point, said authority thought it fit to give the appellant/assessee an option of redeeming the goods and, hence, indicated the redemption fine, as it did not, perhaps, wish to take the trouble of selling the goods.

26. The respondent/revenue, having sold the goods, which it could not have done, since the appeal was pending at the relevant time, we find that there is no good reason for adjustment of redemption fine.

27. For the foregoing reasons, we are unable to persuade ourselves to align with view taken by the larger bench of the Tribunal. The decision of

the larger bench, according to us, deserves to be set aside.

27.1. It is ordered accordingly.

28. The next steps in the appeal will follow in view of the opinion expressed by us hereinabove.

29. The appeal is disposed of in the aforesaid terms.

30. Consequently, the pending application shall stand closed.

(RAJIV SHAKDHER)
JUDGE

(TARA VITASTA GANJU)
JUDGE

SEPTEMBER 12, 2022/aj