IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 07.10.2020

CORAM

THE HON'BLE DR.JUSTICE VINEET KOTHARI

AND

THE HON'BLE MR.JUSTICE M.S.RAMESH

C.M.A.Nos.1566 and 1567 of 2020

M/s.Lahari Impex Pvt. Ltd,
represented by its Managing Director,
Shri G.Hari Babu
Head Office Plot No.723/A,
Road No.37, Jubilee Hills,
Hyderabad 500033
Telangana State — Appellant

Vs.

The Commissioner of Customs (Seaport-Import)
(Presently Commissioner of Customs, Chennai IV Commissionerate)
Custom House,
60, Rajaji Salai
Chennai 600 001 — Respondent

C.M.A.No.1566 of 2020 filed under Section 130 of the Customs Act, 1962, against the Miscellaneous Order Nos.40022/2020 dated 05.02.2020 in Customs Application No.C/52/2006 passed by the CESTAT, Chennai.

C.M.A.No.1567 of 2020 filed under Section 130 of the Customs Act, 1962, against the Miscellaneous Order Nos.41874/2017 dated 31.08.2017 in Appeal No.C/52/2006 passed by the CESTAT, Chennai.

For Appellant : Mr.Hari Radhakrishnan

For Respondent : Ms.R.Hemalatha,
Senior Standing Counsel

COMMON JUDGMENT

(made by DR.VINEET KOTHARI,J)

The learned counsel for the Appellant / Assessee Mr.Hari Radhakrishnan, has submitted that after the earlier appeal in C.M.A.No.468 of 2018 was withdrawn from this Court on 19 December 2019, with a liberty to file a Review Petition before the learned CESTAT, even the Review Petition has been dismissed by the learned CESTAT vide order dated 5 February 2020 and therefore, again the present appeals have been filed by the Assessee.

2. The controversy in brief is with regard to the Notification No.158/95/Cus on the question that whether the goods re-imported for repair/reconditioning of the goods, when again re-exported beyond the prescribed period of one year including the extension of six months permitted in the Notification, whether the Importer/ Assessee is liable to pay duty denying the concession/ exemption of the said Notification No.158/95/Cus or not?

3. The Tribunal in its original order dated **31 August 2017**, had decided the said issue against the Assessee with the following

observations :-

9. The core issues that arise for decision in all these appeals can be capsule as follows:

(i) Whether differential duty can be levied on goods re-imported with full duty exemption under Notification No.158/95-Cus. when the repaired/ reconditioned goods have been exported only after expiry of the period prescribed in that Notification?

(ii) Whether the demands made on this score in these appeals can be set aside even on the grounds of revenue-neutrality?

(iii) Alternatively, in such cases, whether the appellants can claim the benefit of another Notification No. 94/96-Cus or otherwise?

10. To understand the contentious issues in perspective, the relevant portions of the Notification No.158/95-Cus are reproduced as below:

TABLE

Sl. No.	*Description of goods*	*Conditions*
(1)	(2)	(3)
1	*Goods manufactured in India and parts of such goods whether of Indian or foreign manufacture and reimported into India for repairs or for reconditioning*	*1. Such reimportation takes place within 3 years from the date of exportation; 2. Goods are re-exported within six months of the date of reimportation or such extended period not exceeding a further period of six months as the Commissioner of Customs may allow; 3. The Assistant Commissioner of Customs is satisfied as regards identity of the goods; 4. The importers at the time of importation executes a bond undertaking to-(a) export the goods after repairs or reconditioning within the period as stipulated; (b) pay, on demand, in the event of his failure to comply with any of the aforesaid conditions, an amount equal to the difference between the duty levied at the time of reimport and the duty leviable on such goods at the time of importation but for the exemption contained herein.*

From the above, what emerges is that to be eligible for the benefit under Notification No.158/95, the importation should take place within three years from the date of original exportation, goods are re-exported within a maximum of twelve months from the date of re-importation and when such re-exportation is not effected as per the conditions of the Notification, the differential duty liability on account of availment of Notification No. 158/95-Cus. at re-importation is liable to paid up by the importer.

11. The common thread in all these appeals is that, for some reason or the other, the appellants therein were not able to effect the re-export after repair/reconditionings within the prescribed period allowed in the Notification, i.e. maximum of 12 months including the extended period. It appears that the duty forgone at the time of re-import of the goods will then have to be paid up by the importer. There seems to be broad agreement on this score, though appellant in C/52/2006 (Lahari Impex) has contended that as the goods have been eventually re-exported, the impugned demand is liable to be set aside on the ground of revenue-neutrality since even if duty demanded is paid up since the appellant is otherwise entitled to claim duty drawback. Be that as it may be, we find that the conditionalities of Notification No.158/95-Cus. are very much straightforward and require the duty forgone to be paid up in case of default. In our opinion, Notification No. 158/95-Cus. is a special purpose vehicle for the benefit of exporters, whose goods are rejected/sent back by foreign buyers and require repairs/ reconditioning, to facilitate the said re-import without the added cost on payment of import duty thereon, as would have been applicable in the case of similar imported goods.

Surely, this is a facilitation for exporters to carry out repairs/reconditionings on the goods returned for that purpose. A close look at the conditionalities of the Notification would reveal that the legislature has sought to clip any possibility of misuse. For example, by requiring that such goods are re-imported not beyond the period of three years from the date of their export. So also, to prevent any misuse of facilitating provisions by way of retention of goods in India, the Notification also requires that after reconditioning/ repair, the re-import goods shall have to be re-exported within a maximum period of 12 months from the date of such re-import. These time limits prescribed both, for re-importation as well as the re-exportation, in our view, are substantive conditionalities and not merely procedural. As held by the Hon'ble Apex Court in Re: Mangalore Fertilizers & Chemicals Vs. Deputy Commissioner MANU/SC/0035/1992 : 1991 (55) ELT 437 (SC), non-observation of a procedural condition of a technical nature is condonable, while that of a substantive condition is not, since it would otherwise facilitate commission of fraud and introduce administrative conveniences. The relevant portion of this judgment of Hon'ble Apex Court is reproduced below makes for illuminating reading:

"11. ..... The consequence which Shri Narasimhamurthy suggests should flow from the non-compliance would, indeed, be the result if the condition was a substantive one and one fundamental to the policy underlying the exemption. Its stringency and mandatory nature must be justified by the purpose intended to be served. The mere fact that it is statutory does not matter one way or the other. There are conditions and conditions. Some may be substantive, mandatory and based on considerations of policy and some others may merely belong to the area of procedure. It will be erroneous to attach equal importance to the non-observance of all conditions irrespective of the purposes they were intended to serve.

In Kedarnath's case itself this Court pointed out that the stringency of the provisions and the mandatory character imparted to them were matters of important policy. The Court observed:

"..... The object of S. 5(2)(a)(ii) of the Act and the rules made

thereunder is self-evident. While they are obviously intended to give exemption to a dealer in respect of sales to registered dealers of specified classes of goods, it seeks also to prevent fraud and collusion in an attempt to evade tax. In the nature of things, in view of innumerable transactions that may be entered into between dealers, it will well nigh be impossible for the taxing authorities to ascertain in each case whether a dealer has sold the specified goods to another for the purposes mentioned in the section. Therefore, presumably to achieve the two fold object, namely, prevention of fraud and facilitating administrative efficiency, the exemption given is made subject to a condition that the person claiming the exemption shall furnish a declaration form in the manner prescribed under the section. The liberal construction suggested will facilitate the commission of fraud and introduce administrative inconveniences, both of which the provisions of the said clause

seek to avoid".

(Emphasis Supplied)

12. It is also not the case that when being required to pay duty forgone in the event of non-compliance of Notification No. 158/95-Cus., the importer is left high and dry with no other remedy. Indeed, such importer, even if he has to discharge differential duty liability, provided he eventually re-exports the re-imported goods at some point, will surely be eligible to claim drawback towards the duties suffered on the goods exported. However, once the substantive post-importation condition of Notification No. 158/95-Cus. is not satisfied or complied with, the importer will have no other option but to pay an amount equal to the difference between duty levied at the time of re-import and the duty leviable on such goods at the time of importation, but for the exemption contained in Notification No. 158/95-Cus.

13. Viewed in this light, the issues framed at para 9 (i) and (ii) supra are held in the affirmative.

4. The appeal in C.M.A.No.468 of 2018, directed against the said order of the learned Tribunal dated 31 August 2017, was dismissed as withdrawn by this Court on 19 December 2019 and thereafter, the learned Tribunal has again dismissed the Review Petition of the

Assessee on 5 February 2020, against which the present CMAs have been filed with the delay of 756 days which is explained on account of the fact that after review, both the Original Order of Tribunal dated 31 August 2017 and the Review Order dated 5 February 2020 have been assailed in the present appeals. For the aforesaid reasons, we have condoned the delay and heard the matters for admission.

5. The learned counsel for the Appellant/Assessee also emphasized that the second question framed by the learned Tribunal that since the Assessee was entitled to claim a duty drawback on the duty, if paid by the Assessee on such re-export of the goods beyond the prescribed time limit of one year, under the Notification No.158/95/Cus and therefore, since it will be a revenue neutral situation, therefore, there is no point in the Assessee being required to first pay the said custom duty and then claim the duty drawback, and though the learned Tribunal in its order quoted above has said that the Assessee will be entitled to claim duty back towards the duty suffered when the goods are re-exported but still held that the Assessee should first pay the custom duty because admittedly the re-export of the goods took place after the extended period of one year under the said Notification. The relevant portion of the said Notification is also quoted

in the above extracted portion.

6. Since there is no dispute before us from the side of the Assessee that the reimport of the goods which had taken place to repair/recondition the goods in question were re-exported beyond the prescribed period of one year including the period of six months of extended period and therefore, the Assessee had admitted the breach of the condition of exemption from custody duty under the said Notification No.158/95/Cus. Merely because the Assessee could claim the duty drawback later on, and it may give rise to a revenue neutral situation, it cannot be said that the period of one year prescribed in the said Notification is without any meaning. Whether the Assessee/ Importer would actually get such duty drawback or not, is a question which was yet to be determined by the concerned Adjudicating Authority when such a claim of duty drawback was made by the Assessee. Therefore, that issue cannot be prejudged either by the Tribunal or by this Court. On the admitted breach of the Notification No.158/95/Cus, the Assessee/ Importer definitely became liable to pay the custom duty in question, denying the exemption under the said Notification in view of the admitted delay beyond the period of 12 months, for the re-export of the same goods. The learned CESTAT

therefore in our opinion was justified in denying the said exemption to the Assessee and also rejecting the Rectification Application filed by the Assessee. What Tribunal has done is nothing but asking the Assessee to comply with the law.

7. The reliance placed by the learned counsel on the judgment of the Hon'ble Supreme Court in the case of ***Commissioner of Central Excise, Pune vs. Coca Cola India Pvt. Ltd., 2007(213) ELT 490 (SC)*** is wholly misplaced.

In that matter, the Hon'ble Supreme Court by a short order, dismissed the appeal filed by the Revenue, leaving the question of law open on the ground that since the dispute related to classification of beverges bases or concentrates manufactured by the respondent company, which are supplied to the bottlers, who in turn use the same as raw material in the manufacture of beverages, the duty payable in respect of beverages bases/concentrates is modvatable and therefore, since the duty payable by the respondent is modvatable, there is no question of any revenue implication and therefore, the question of classification becomes academic.

8. No such situation has obtained in the present case yet, as we are only concerned with the compliance of the conditions in the Notification No.158/95/Cus. The question of claiming duty drawback by the Assessee was yet to arise, when such claim was made in accordance with law. This claim cannot be prejudged and holding it to be revenue neutral situation without that claim being examined would be premature and therefore, the learned Tribunal was justified in denying that relief to the Assessee. So also, we too cannot examine and decide the issue prematurely. Therefore, we do not find any question of law to be arising in the present Appeals. The Appeals filed by Assessee are liable to be dismissed and are accordingly dismissed. There is no order as to costs. Consequently, CMP No.11558 of 2020 is also dismissed.

(V.K.,J.) **(M.S.R.,J.)**
07.10.2020

Internet : Yes/No
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To

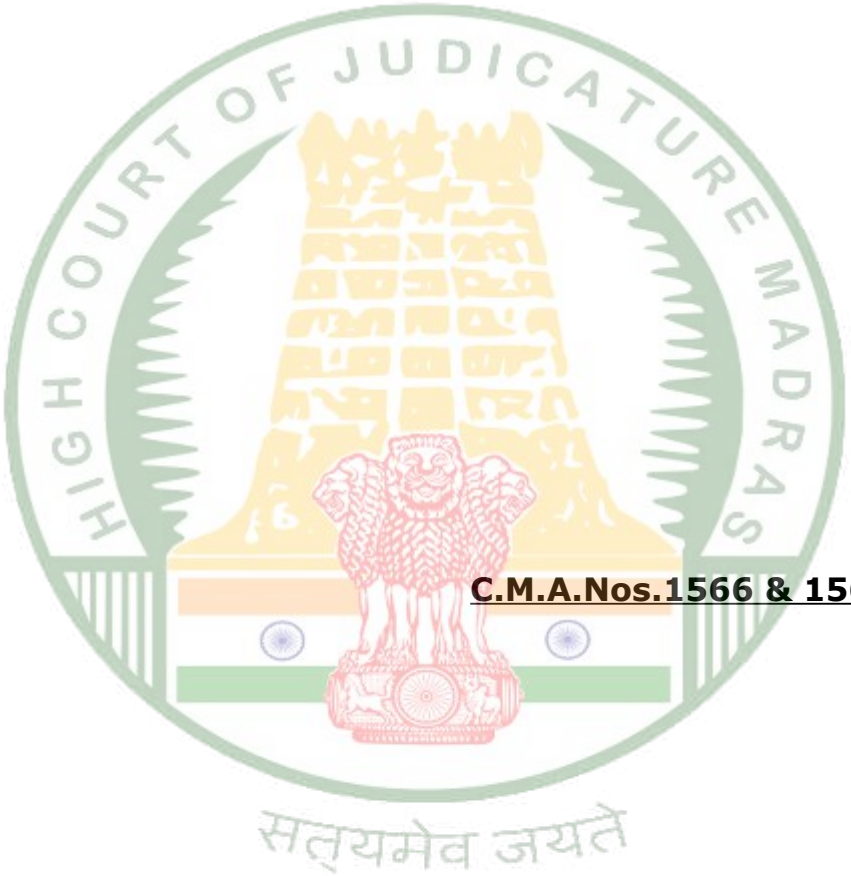
The Commissioner of Customs (Seaport-Import)
(Presently Commissioner of Customs, Chennai IV Commissionerate)
Custom House,
60, Rajaji Salai
Chennai 600 001

DR.VINEET KOTHARI, J.

and

M.S.RAMESH, J.

(tar)



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