INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "A": NEW DELHI

BEFORE SHRI R.K.PANDA, ACCOUNTANT MEMBER
AND
SHRI N. K. CHOUDHRY, JUDICIAL MEMBER

ITA No. 129/Del/2019
(Assessment Year: 2015-16)

AkshayKhetterpal, C/o. SurinderMahajan& Associates, A-134, Defence Colony, New Delhi PAN: BHUPK0131J (Appellant)	Vs.	ACIT, Circle-41(1), New Delhi (Respondent)

Assessee by :	ShriSurinderMahajan, CA ShriSamitMahajan, CAs
Revenue by:	ShriM. K. Jain, Sr. DR
Date of Hearing	11/04/2022
Date of pronouncement	31/05/2022

O R D E R

PER N.K. CHOUDHRY, J. M.:

1. The Assessee has preferred the instant appeal against the order dated 12.11.2018, impugned herein, passed by the Ld. Commissioner of Income-tax (Appeals)-14, New Delhi (in short 'Ld. Commissioner) u/s 250(6) of the Income-tax Act, 1961 (in short "the Act"), for the assessment year 2015-16, whereby the assessment order passed by the AO u/s 143(3) of the Act was upheld.

2. Brief facts of the case are that the Assessee is engaged in the business of importing "used digital multifunctional printer and copying machines" and during the year under consideration had e-filed its return of income u/s 139(1) of the Act on dated 16.09.2015 by declaring an income of Rs. 20,75,720/-. Lateron the case of the Assessee was selected for **limited scrutiny** under CASS for two reasons, firstly with regard to mismatch of custom duty paid asshown in the ITR with the duty paid as per Export Import data (CBEC tab of ITS) and secondly with regard to the purchases shown in the ITR is less than the invoice value of imports shown in the Export Import Data.

2.1 Statutory notices have been issued by the AO u/s 143(2) of the Act, in response to which the Assessee participated in the assessment proceedings from time to time and filed the relevant documents and other supporting material. The AO after examining the same made anaddition of Rs. 65,61,700/- (Rs. 48,42,900/- paid by the Assessee as fine and Rs. 17,18,800/- as penalty) by observing that the Assessee has claimed custom duty expenses of Rs. 97,18,996/- for Assessment Year under consideration, on which the Assessee was asked to furnish the details of the same. In response the Assessee submitted bifurcation of custom duty expenses which was examined and found by the AO that actual custom duty paid was only Rs. 31,57,296/- (including additional duty) out of Rs. 97,18,996/- and rest custom duty of Rs. 65,61,700/- pertains to the fine/penalty levied by the Custom Authority. It was further observed by the AO that the Assessee has imported used digital multifunction print and copying machine (photocopier) without obtaining license from Directorate General of Foreign Trade (in short 'DGFT') wherein it was a pre-condition for import. The Assessee also undervalued the good imported which resulted into levy of fine by the Custom Authorities. There were

total 16 instances wherein, the Assessee has failed to abide by the conditions imposed for the import of "used digital multifunction print and copying machines (photocopier) therefore, the said violation resulted into imposition of fine of Rs. 48,42,900/- and penalty of Rs. 17,18,800/-.

2.2 The AO while relying upon the explanation 1 of section 37(1) of the Act wherein, it is prescribed ' *that any expenditure incurred by an Assessee for any purpose which is an offence or which is prohibited by law shall not be deemed to have been incurred for the purpose of business or profession and no deduction or allowances shall be made in respect of such expenses,'* alsoheld that it is apparent that the said fine and penalty levied upon the Assessee are penal in nature and are levied for the violation of law, therefore, the said fine and penalty of Rs. 65,61,700/-are not admissible expenditure as per Explanation 1 to section 37(1) of the Act.

3. The said addition was challenged before the Ld. Commissioner by the Assessee and in support of its case it was claimed that the said expenses/payments are allowable u/s 37(1) of the Act as the same are compensatory in nature and not covered under explanation 1 to section 37(1) of the Act. The Assessee before the Ld. Commissioner also relied upon the various judgments as mentioned by the Ld. Commissioner in its order in para No. 4.1.

3.1 The Ld. Commissioner while considering the claim of the Assessee, observed that the Assessee has imported old and digital multifunction printer and copying machines which are classified as electrical and electronic assembled machines destined for direct use and not for recalling or final disposal and these items were falling under the entry B1110 of part B of schedule III of Hazardous Wastes (Management, Handling and trans boundary Movement)

Rules 2008 read with Environment Protection Act, 1986. These items can be imported only with the prior permission from Ministry of Environment and Forests. The Ld. Commissioner further observed that there was difference in the invoice value of the good and custom valuation and therefore, fine has been imposed in addition to the duty payable on the import of the goods including additional duty payable on account of valuation difference.

3.2 The Ld. Commissioner also observed that the confiscation had taken place not only for under valuation and for import without DGFT license required under foreign Trade Policy (2009-14) but also for import without permission under Environment Protection Act, 1986 in which the importer is required a separate permission from Ministry of Environment and Forests as mentioned in Schedule III part B Item B1110 of Hazardous Waste Management Handling and Trans Movement Rules 2008.

3.3 It was also claimed by the Assessee before the ld. Commissioner that the payment made on account of penalty/duty was in fact compensatory in nature,but the Ld. Commissioner did not get impressed by the said claim on the ground that the payment for violation of restriction imposed under Environment Protection Act can never be a compensating nature. The said violation is different from import with DGFT License as well which is issued under the Foreign Trade Policy (2009-14). The Ld. Commissioner also observed that the Environmental Protection Act has been enacted to prevent and regulate entry of hazards waste into the country. If Assessee's explanation is accepted people may violate environment laws, enacted as a matter of public policy and claim corresponding penalty and fine as allowable expenditure u/s 37(1) of the Act. Whether such expenditure falls under the explanation 1 to section 37(1) or not is immaterial as such expenditure cannot be

said to have incurred wholly and exclusively for the purpose of the business purpose and therefore cannot be allowed under the provisions of section 37(1) of the Act . The Ld. Commissioner ultimately upheld the addition by dismissing the appeal of the Assessee.

3.4 For ready reference the relevant part of the order is reproduced herein below:-

> *"5. Before proceedings further it is necessary to examine the relevant provisions in brief under which the above fine/penalty has been imposed The assesses is the proprietor of M/S Asian copier and imported old and used 'digital multi-function printers and device copying machines, classified as electrical and electronic assembled machines destine for direct use and not for recycling or final disposal. These items were falling under entry B1110 of part B of schedule III of Hazardous Wastes (Management, Handling and Trans Boundary Movement) Rules 2008 read with Environment Protection Act , 1986. These items can be imported only with the prior permission from the Ministry of Environment and Forests, The import of such items is also restricted under Para 2.-17 of the Foreign Trade Policy 2009-14, read with Para 2.33 of handbook of procedure volume 1 (2009-14) and therefore required a license from DGFT as well. The above description has been taken from orders of Commissioners of Customs NahavaSeva I, TalukaUranDistrict Raigad, Maharashtra Order No. 4276/2014-15 dated 14.03.12015. These are 16 such paper for import consignment imported by the appellant without the DGFT license and without permission from Ministry of Environment and Forests. Therefore, these goods were liable for confiscation u/s 111(d) of the Customs Act, 1962, which deals with import of goods contrary to any prohibition imposed under the Custom Act, 1962 or any other law.*
>
> *6. There was also a difference in the valuation of goods as per invoice and Customs's valuation, i.e. if was a case of under valuation. Therefore assessable value of goods tor customs duty purpose was determent by the chartered engineer as the assesses failed to submit contract, purchase order, dismantling*

cost details, and payments details, as mentioned in Para 5 of the above referred order No. 4276/2014-15. Consequently, the goods were liable for confiscation u/s 111 (m) of the Customs Act, 1962 as well, which deals with confiscation of goods whose values declared is lower than the correct value. For release of confiscated goads u/s 111 (d) and 111 (m) of the Customs Act a fine of Rs. 2.15,000/ was imposed u/s 125(1) of the Custom? Act 1962, which gives an option to the importer to pay the fine in lieu of such confiscation. This fine is in addition to the duty payable on the import of goods including-additional duty payable on account of valuation difference. The total such fine for all the 16 import consignments comes.jo Rs. 48,42,900/-. In addition, vide above a penalty of Rs. 68,000/- were also imposed u/s 112(a), which is again a penalty payable for any act which makes the goods liable for confiscation u/s 111. The total of such penalty comes to Rs. 17,18,800/- for 16 consignments. It cannot be out of place to reiterate here that this fine and penalty is an addition to the additional duty payable on account of correct valuation of the goods imported.

At the outset, the consignment had taken place not only for under valuation and for import without DGFT license required under Foreign Trade Policy (2009-14) but also for import without permission under Environment Protection Act, 1986. The import required a separate permission from Ministry of Environment and Forest as mentioned in Schedule III, part B item B1110 of Hazards Waster Management Handling and Trans-movement Rules, 2008.

8. Therefore, the above penalty and fine is not just related to wrong valuation of imported goods for duty purposes and for not obtaining DGFT, license, which relate to the Customs Act and Trade Policy, but also for violation of Environment Protection Act. 1986, which is a matter of public policy to restrict import of hazards waste/old goods in to the country. Therefore, any expenditure which is incurred as the fine or penalty for violating an act related to a matter of public policy. The Act is for protection of environment and expenditure for its violation cannot be an expenditure incurred wholly and exclusively for the purpose of business. Had this payment been only on account of under valuation of the value, imported goods for duty purposes, the Assessee's explanation

that if is a payment of compensating nature still could have had same weight. Even in that case it is the additional duty on account of valuation difference which is actually a payment of compensating nature and not the fine and penalty. However, the payment for violation of restrictions imposed under Environment Protection Act can never be of compensating nature. The said violation is different from import without DGFT license as well which is issued under the provision of Foreign Trade Policy (2009-14)

9. As regards, the case laws relied upon by the Assessee the same deal with the issue of expenditure in different categories. The CBDT Circular doted 23.12.2018 No. 772 relied upon by the assesses also deals with some such payment. However, those decisions are distinguishable on facts and deal with the proposition of law in different context. Only one decision in the case of NM Pathsarthi of Hon'ble Madras High Court deals with section 125 of Custom Act. None of the decisions deal with section 112 of the Custom Act. Moreover, even in the case of the aforesaid decision of Hon'ble Madras High Court, the payment has been held to be compensatory of nature considering the nature of violation as the confiscation in that case was u/s 111(d) of Customs Act, 1962 but in a different context. The Assessee in that case was manufacturing and selling heat treatment plants and heat treatment salts. He was granted a license for importing permissible spare parts for construction machinery and spares of machines tools. Due to misunderstanding, related to provisions, he imports sodium cyanide from Hungary. The goods were confiscated as the license did not permit the import of said item. Therefore, it was only because of misunderstanding as to whether the said item was included in the said license or not which led to imposition of penalty. At best these can be equated with the import without DGFT license. However, by no stretch of imagination, it can be equated with the import without the permission of Ministry of Environment and Forests, in contravention with the Environment Protection Act, which is an act which falls in the domain of public policy and not just a taxing statute like Customs Act or a Licensing statue like)DGFT License) Under Foreign Trade Policy 2009 to 14. The Environment Protection Act has been enacted to prevent and regulate entry of hazards waste into the country. If Assessee 's explanation is

accepted people may violate environmental laws, enacted as a matter of public policy and claim corresponding penalty and fine as allowable expenditure u/s 37(1). Whether such expenditure falls under explanation 1 to 37(1) or not is immaterial as such expenditure cannot be said to have been incurred wholly and exclusively for business purposes and cannot be allowed u/s main provisions of 37(1) itself."

4 Being aggrieved by the impugned order, the Assessee has preferred the instant appeal by raising following grounds of appeal:-

"*1 That on facts and circumstances of the case, learned CIT(A) has grossly erred in confirming addition of Rs. 17,18,000/- paid u/s 112(a) of the Customs Act, 1962. Addition confirmed is illegal and bad in law.*

2. That on facts and circumstances of the case, learned CIT(A) has grossly erred in confirming addition of Rs. 48,42,900/- paid u/s 125(1) of the Customs Act, 1962. Addition confirmed is illegal and bad in law.

3. That on the facts and circumstances of the case, Learned CIT(A) has grossly erred in law in confirming that fine and penalty paid by the Assessee amounting to Rs. 65,61,700/- is to be disallowed in view of explanation to section 37(1) of the Act since the same have been paid on account of infraction of law.

4. That on the facts and circumstances of the case, Learned CIT(A) has grossly erred in holding that fines and penalty paid are not of compensating nature."

5 Heard the parties and perused the material available on record. In the instant case the Assessee during the year under consideration imported old and digital multifunction printers and copying machines classified as electronic and electronic assembled machines for direct use and not for recalling or final disposal as

claimed by the Assessee. The goods of the Assessee wereconfiscated for violation of provisions of customs Act, 1962 by the Joint Commissioner of Customs, Group-V, NahavaSheva I, TalukaUran, District Raigarh, Maharashtra 400707, vide various orders, including order dated 14.03.2015(we are quoting for reference only) andconsequently the Assessee was given an option to redeem the goods on payment of fine of Rs. 2,15,000/-. Further, the Joint Commissioner of Customs also imposed penalty of Rs. 68,000/-. For ready reference the relevant part of the order is reproduced herein below:-

NHAVA-SHEVA-I
TALUKA-URAN,DISTRICT-RAIGAH, MAHARASHTRA 400 007
F. NO. s/26-MISC-3584/2014-15 Gr.-V

S/10-ADJ-226/2014-15 Gr. V

Date of Order: 13.03.2015
Date of issue: 14.03.2015

Passed By : Shri N. N. Shelka
Joint Commissioner of Customs,
NhavaSheva-I

Order No. 4276/2014-15

Name of the Party/ Notice: M/s. Asian Copiers

Order in Original

1.....
2.....
3. I have carefully gone through the records of the case, since the importer has requested for waiver of SCN & PH, the case is put up to me for adjudication on the basis of records / facts available. I find that the import of old and used photocopier is restricted for import in terms of Para 2.17 of the Foreign Trade Policy 2009-14 read with Para 2.33 of Handbook of Procedure Vol. I (2009-14). As the goods under import are old and used Multifunction Device Copying Machine (Photocopying Machine), the importer was required to produce specific license issued by DGFT in terms of Foreign Trade Policy 2009-14 read with ITC (HS) classification of Import & Export items, but they failed to produce the same. I find that Importer did not produce any license from DGFT, hence 1 hold that the goods are liable for

confiscated under section 111(d) & (m) of the Customs Act, 1962 and the importer is liable to pay penalty under Section 112 (a) of the Customs Act, 1962.

4. I find that import of these goods "Used digital multifunction print and copying machine (Photocopier) of Schedule III-.of Hazardous Wastes Management, Handling and Transbounday Movement) Rules, 2008 read with Environment Protection) Act, 1986. Importer has produced the Certificate No. 23-85/2012-HSMD dated 22/08/2013 issued from Ministry of Environment & Forest for import of these goods. The said Certificate specified the conditions as below.

(i) MFDs must have residual life of 5 years as certified by chartered engineer, or surveyors empanelled by Custom/DGFT.

(ii) the importer has license from DGFT, ,if applicable;

(iii) the importer have to provide a copy of invoice and contract relating to sale and/or transfer of ownership of the equipment ensuring that the equipment is destined for direct re-use and is fully functional.

As per condition (i) in this case the Chartered Engineer has certified that the impugned goods have a residual life of at least eight years. The importer has submitted an undertaking letter dated 13/03/2015 that the imported goods are old and used photocopier machine; that they will provide a copy of invoice and contract relating to sale or transfer of ownership of the equipment to the Ministry of Environment and forest and that the sale/transfer will be for re-use and not for recycling in view of condition (iii) as referred above. The goods are imported without a valid License from DGFT as discussed above. However, the goods are not of prohibit goods.

5. However as the goods were imported without valid License, there are reasons to believe that the value declared is not correct The Chartered Engineer has examined the imported goods and found that the goods are old and used photocopying machine and actual value was higher than the declared value. The importers have also failed to submit contract, purchase order, dismantling cost details and payment details. The value declared thus, cannot be accepted as transaction value, under Section 14 of the Customs Act, 1962 for charging duty. The value declared is liable to be rejected under Rule 12 of the Customs Valuation (Determination of Value of the imported goods) Rules, 2007. The value required to be re-determined under Rule 3 of the Customs Valuation (Determination of Value of the imported goods) Rules, 2007. The value cannot be re-determined by following Rules 4/5 of CVR 2007 as import data of identical goods/similar goods is

not available. The Rule 7 & 8 too cannot be applied for re-determination for want of sufficient data. The value is therefore required to be determined under Rule 9 of CVR, 2007. Asper Hon'ble Supreme Court decision in the case of Gajra Bevel Gears [2000 (115) ELT 612 (S.C.), in case transaction value is rejected under Rule 3 of CVR 2007, valuation of second-hand goods can be done under Rule 9 of CVR 2007, on the basis of value of new machine, as certified by the Chartered Engineer, and scaled down by the allowing depreciation commensurate with the period of usage. The value suggested by the Chartered Engineer should be the value for assessment under Rule 9 of Customs Valuation (Determined of Value of Imported Goods) Rules, 2007. The importer has waived SCN and PH. The Importer accepts the value suggested by the Charter Engineer. Therefore, I find that the assessable value of the goods imported vide Bill of entry No. 8554297 DT 10/03/2015 be re-determined as Rs. 1348479/- (Rs. THIRTEEN LAKH FOURTY EIGHT THOUSAND FOUR HUNDRED SEVENTY NINE ONLY.) under Rule 9 of CVR, 2007.

6. In view of the above, the goods imported vide BILL OF ENTRY No. 8554297 DT 10)03/2015 is liable for confiscation u/s 111(d) & 111 (m) of Custom Act 1962.The importer is also liable for penalty u/s 112(a) of the Custom Act 1962. The goods are covered under the certificate Issued from ministry of environment and forest as discussed above; hence I pass the following order:

ORDER

7. (i) I order that the assessable value of goods, Imported vide Bill of entry No 8554297 DT 10/03/2015 be re-determined as Rs. 1348479/- (Rs, THIRTEEN LAKH FOURTY EIGHT THOUSAND FOUR HUNDRED SEVENTY NINE ONLY.),under Rule 9 of the Customs Valuation (Determination of Value of the imported goods) Rule 2007.

(is) I confiscate the goods, imported vide Bill of entry No. 8554297 DT 10/03/2015 having re-determined value of Rs. 1348479/- (Rs. THIRTEEN LAKH FOURTY EIGHT THOUSAND FOUR HUNDRED SEVENTY NINE ONLY.) under Section 111(d) & (m) of the Customs Act, 1962.However, ***I give the importer an option to redeem the goods on payment of fine of Rs. 2,15,000/- (Rupees Two Lakh Fifteen Thousand Only) under Section 125(1) of the Customs Act, 1962. The option to redeem the goods on payment of fine of Rs. 2,15,500) (Rupees Two Lakh Fifteen thousand only) under section 125(1) of the Customs Act, 1962. The Option to redeem the goods shall be exercised within 15 days of receipt of this order and on payment of appropriate duty and other due as applicable.***

(iii) ***I impose a penalty of Rs. 68,000/- (Rupees: Sixty Eight Thousand Only) on the importer M/s. ASIAN COPIERS, under Section 112(a) of the Customs Act, 1962***.

(Underlined and highlighted by us for ready reference)

8. This order is issued without prejudice to any other action may be taken in respect of the goods in question and/or against the persons concerned or any other person, if found involved under the provisions of the Customs Act, 1962, and/or other law for the time being in force in the Republic of India.

(NILKANTH N SHELKE)
Jt. Commissioner of Customs,
Group-V, NhavaSheva I

To,

M/s. Asican Copiers,
BG-6/54A,
PaschimVihar,
New Delhi-110063

Copy to:-

1. *Commissioner of Customs, NhavaSheva 1.*
2. *The DC/Review Cell NhavaSheva I).*
3. *The Dy. Commissioner of Customs, Adjudication Cell, NhavaSheva I*
4. *M/s. MDS Logistics Pvt Ltd.(ll/218)*
5. *Guard file*

6 The Assessee claimed the expenditure of Rs. 65,61,700/- which includes Rs. 48,42,900/- as fine u/s 125(1) and Rs. 17,18,800/- on account of penalty u/s 112(a) of the Customs Act 1962. The Assessee contended that fine and penalty referred above are in compensatory in nature and for the purpose of getting the goods released from Custom Authorities and thus, liable to be allowed as expenditure u/s 37(1) of the Act. Whereas the revenue has claimed that the said fine and penalty levied upon the Assessee are penal in nature and are levied for the violation of law, therefore, the same areinadmissible expenditure as per Explanation 1 to section 37(1) of the Act.

7 On the rival claims of the parties, the question emerge as to whether the Assessee as per Explanation 1 to section 37(1) of the Act, is entitled to claim expenditure incurred in respect of fine and penalty as imposed u/s 125(1) and 112(a) of the Customs Act 1962 respectively.

8 At the outset it was claimed by the Assessee that the Ld. Commissioner wrongly held that the Assessee do not have any permission under Environment Protection Act, 1986 whereas the Assessee had the same. We are in agreement with the aforesaid facts,however in our view it is probable that the Ld. Commissioner may be due to oversight could not have noticed the said permission. Even otherwise permission under Environment Protection Act, 1986 cannot regularize the acts which are in derogation to the specific provisions specified in particular Act, which the Customs Act in this case.

9 The Assessee also claimed that CBDT Circular No. 722 dated 23.12.1998 (supra) has clarified qua disallowances of the illegal expenses as per section 37 of the Act, which relates to payments made on accounts of *protection money, extortion, hafta, bribes etc. only,* but does not include fine and penalty, therefore the fine and penalty paid by the Assessee can be allowed. We are not impressed by the contention of the Assessee because the instant CBDT circular cannot be considered as exhaustive in nature as every case has its own facts and is requiresadjudication as per its peculiar facts and circumstances and the laws of the land. Even otherwise explanation 1 of section 37(1) of the Act, clearly express that any expenditure incurred by an Assessee for any purpose which is an offence or which is prohibited by law shall not be deemed to have been incurred for the purpose of business or profession and no deduction

or allowances shall be made in respect of such expenses therefore the claim of the Assessee qua CBDT circular, is misplaced.

10 The Assessee further relied upon various judgments which we are referring for just decision of the case.

11 We observe that the jurisdictional High Court in the case of Usha Micro Process Control Ltd. Versus Commissioner of Income Tax {2013} 86CCH 0007 Del HC, dealt with issue wherein fine was imposed for redemption of goods u/s 125(1) of the Customs Act 1962 and held as under:-

> *1. .....*
> *2. This Court had by order dated 09.1.2001 framed the following question of law:*
>
> > *"Whether Tribunal was justified in holding that the levy of Rs. 4 lakhs in respect of redemption fine and personal penalty was in the nature of fine and penalty and are not to be allowed as deductible business expenditure while computing total income of the assessee?"*
>
> *3. Briefly, the facts are that the petitioner had imported some software during the relevant Assessment Year i.e. 1985-86. It had sought to re-export the software after making some declarations. The customs authorities were of the opinion that the appellant's action was not legal and directed it to pay differential duties. In addition its Managing Director was made personally liable to penalty. The goods were sought to be confiscated. The matter was carried in appeal. Eventually the Customs, Excise and Gold (Control) Appellate Tribunal (CEGAT) decided the matter on 30.5.1999. The Tribunal directed the deletion of personal penalty but proceeded to uphold the order in so far as the fine in lieu of confiscation is concerned--to Rs. 4,00,000/-; the original amount was Rs. 10,00,000/-.*
> *4.....*
> *5.....*
> *6.....*
> *7.....*
> *8.....*
> *9. In Prakash Cotton Mills Pvt. Ltd.'s case (supra), the Supreme Court pertinently observed that whenever an*

authority has to decide whether to grant or refuse deduction under section 37(1) of the Income Tax Act, the governing test would be whether the amount payable is compensatory in nature. In N.M. Parthasarathy's case (supra), the identical situation where redemption fine under the Customs Act was in issue, the Court after examining the scheme of the enactment held as follows:

> *"22. Coming to the facts of the case on hand, the goods belonging to the assessee had been confiscated under section 111(d) of the Customs Act, 1962, read with section 3 of the Imports and Exports (Control) Act, 1947. However, under section 125 of the Customs Act, 1962, an option had been given to the owner assessee to pay, in lieu of such confiscation, a fine of Rs. 1,84,000 which had been reduced on appeal to Rs. 84,000 and the goods had been cleared exercising the option. If the seized goods, without the exercise of option, had been confiscated once and for all, it goes without saying that the property in the goods shall vest in the Government, in the sense of the Government becoming the absolute owner thereof. The fine amount, whatever be its quantification, that is to say, whether it is equivalent to or below the value of the goods seized, cannot at all, in such a situation, be stated to be penal in nature, notwithstanding its nomenclature, but it is reparatory or compensatory in nature. Once it is compensatory in nature, its goes without saying that the authority has to allow deduction ITA 101/2000 Page 3 under section 37(1) of the Income Tax Act as laid down by the apex court in the two latest decisions aforecited. Further, the expenses incurred by way of payment of fees to advocates in defending penalty proceedings must also be construed as an allowable deduction. We, therefore, answer questions Nos. 1 and 4 in the affirmative and against the Revenue."*

10. In the present case, this Court notices that originally the penalty which the appellant had been directed to pay was deleted by the CEGAT. What remained was the confiscation; the appellant was given the choice of redeeming the goods by depositing redemption fine as is evident from combined reading of paragraph Nos. 18 and 19 of CEGAT order. The Tribunal went so far as to say that valuation of goods in question was on the basis of difference of opinion. Nevertheless, that being the rationale for deletion of penalty, the Tribunal felt that the order of confiscation did not require to be upset, instead redemption fine was reduced to Rs. 4,00,000/-. On a proper application of the ruling in M/s.

Prakash Cotton Mills Pvt. Ltd.'s case (supra), ***this Court is of the opinion that the amount of redemption fine in the present case was compensatory and therefore, fell outside the mischief of explanation of Section 37(1) of the Income Tax Act****."*

{**Highlighted by us** }

12 The Hon'ble Madras High Court in the case of CITVs. Parthasmarathy (1995) 212 ITRT 0105 (Mad HC) also dealt with issue related to imposition of fine and held as under:-

5. Coming to the facts of the case on hand, the goods belonging to the assessee had been confiscated under s. 111 (d) of the Customs Act, 1962, r/w s. 3 of the Imports and Exports (Control) Act, 1947. However, under s. 125 of the Customs Act, 1962, an option had been given to the owner-assessee to pay, in lieu of such confiscation, a fine of Rs. 1,84,000 which had been reduced on appeal to Rs. 84,000 and the goods had been cleared exercising the option. If the seized goods, without the exercise of option, had been confiscated once and for all, it goes without saying that the property in the goods shall vest in the Government, in the sense of the Government becoming the absolute owner thereof. The fine amount, whatever be its quantification, that is to say, whether it is equivalent to or below the value of the goods seized, cannot at all, in such a situation, be stated to be penal in nature, notwithstanding its nomenclature, but it is reparatory or compensatory in nature. Once it is compensatory in nature, it goes without saying that the authority has to allow deduction under s. 37(1) of the IT Act as laid down by the apex Court in the two latest decisions aforecited. Further, the expenses incurred by way of payment of fees to advocates in defending penalty proceedings must also be construed as an allowable deduction. We, therefore, answer questions Nos. 1 and 4 in the affirmative and against the Revenue.

For the reasons given for answering questions Nos. 1 and 4, we concur with the conclusion reached by the Tribunal as being correct, though not for the reasons assigned by it.

6. We may now refer to one of the erroneous or fallacious reasonings, namely, that the redemption fine levied by the customs authorities is an additional duty and, therefore, there was no infraction of law, which gave rise to second question, which in the circumstances of the case, cannot at all commend acceptance at our hands and this question is answered accordingly.

7. No doubt true it is that the third question involving on the liability for legal expenses, for defending cases before the customs authorities against the levy of redemption fine had not at all been adverted to and considered by the Tribunal. The non-consideration of such a question, involving a minimal amount of Rs. 2,005, we feel, in the circumstances, is an inadvertent slip, which cannot be taken serious note of, especially, when the Tribunal, in the ultimate analysis, dismissed the appeal, affirming the conclusions arrived at by the AAC, who had, however, considered such a question and rendered a finding in favour of the assessee. Accordingly, this question is answered."

13 The Hon'ble Apex Court in the case of Prakash Cotton Mills Pvt. Ltd.VsCommissioner of Income Tax (1993) 201 ITR 0684 has held as under:-

"When an amount paid by an assessee as interest or damages or penalty could regarded as compensatory (reparatory) in character as would entitle 'such assessee to claim it as an allowable expenditure under Section 37(1) of the I.T. Act. Therefore, whenever any statutory impost paid by an assessee by way of damages or penalty or interest, is claimed as an allowable expenditure under section 37(1) of the I.T. Act, the assessing authority is required to examine the Scheme of the provisions of the relevant statute providing for payment of such impost notwithstanding the nomenclature of the impost as given by the statute, to find whether it is compensatory or penal, in nature. The authority has to allow deduction under Section 37(1) of the I.T. Act, whereever such examination reveals the concerned impost to be purely compensatory in nature. Wherever such impost is found to be of a composite nature, that is, partly of compensatory nature and partly of penal nature, the authorities are obligated to bifurcate the two components of the impost and give deduction to that component which is compensatory in nature and refuse to give deduction to that component which is penal in nature."

13.1 The Hon'ble Apex Court in the case of Prakash Cotton Mills Pvt. Ltd (Supra) has clearly held that when an amount paid as interest or damages or penalty as would regard as compensatory (reparatory in character), the Assessee would entitled to claim it as

an allowable expenses u/s 37(1) of the Act . Therefore, whenever any statutory impost paid by an Assessee by way of damages or penalty or interest, is claimed as an allowable expenditure u/s 37(1) of IT Act, the AO is required to examine the scheme of relevant statuteproviding of such impostnot-withstanding the nomenclature of the impost as given by the statute, to find whether it is compensatory or penal in nature. The authority has to allow deduction u/s 37(1) of the IT Act, wherever such examination reveals the concern impost to be purely compensatory in nature.

13.2 The Hon'ble Apex Court further held wherever impost is found to be composite nature i.e. partly compensatory nature and partly of penal in nature, the authorities are obligated to bifurcate the two components of the impost and give deduction to that component which is compensatory in nature and refuse to give deduction to that component which is penal in nature.

14 Coming to the instant case, the goods i.e. 'used digitalmultifunction printer and copying machines' were imported by the Assessee without getting license from the DGFT and therefore, the same wereconfiscated by the Custom Authorities{we are referring only one order in original passed by the Ld. Joint Commissioner of Custom, Group-V, Nhava, Sheva-I, Maharashtra u/s 111(d) of the Custom Act, 1962} and consequently,determined the value of the goods imported at Rs. 13,48,479/- and gave an option to the Assessee to redeem the goods on payment of fine of Rs. 2,15,000/- u/s 125(1) of the Custom Act, 1962 on the condition that option to redeem the goods shall be exercised within 15 days on receipt of the order and on payment of appropriate duty as other dues as applicable.

15 Section 125 of the Custom Act, 1962 prescribes the imposition of fine and option to pay fine in lieu of confiscation. For ready reference the provisions of section 125 of the Custom Act 1962 are reproduced below :

> ***125. Option to pay fine in lieu of confiscation.—***
>
> *(1) Whenever confiscation of any goods is authorized by this Act, the officer adjudging it may, in the case of any goods, the importation or exportation whereof is prohibited under this Act or under any other law for the time being in force, and shall, in the case of any other goods, give to the owner of the goods [or, where such owner is not known, the person from whose possession or custody such goods have been seized,]* ***an option to pay in lieu of confiscation such fine as the said officer thinks fit****:*
>
> *[Provided that where the proceedings are deemed to be concluded under the proviso to sub-section (2) of section 28 or under clause (i) of sub-section (6) of that section in respect of the goods which are not prohibited or restricted, the provisions of this section shall not apply:*
>
> *Provided further that], without prejudice to the provisions of the proviso to sub-section (2) of section 115, such fine shall not exceed the market price of the goods confiscated, less in the case of imported goods the duty chargeable thereon.*
>
> *(2) Where any fine in lieu of confiscation of goods is imposed under sub-section (1), the owner of such goods or the person referred to in sub-section (1), shall, in addition, be liable to any duty and charges payable in respect of such goods.*
>
> *(3) Where the fine imposed under sub-section (1) is not paid within a period of one hundred and twenty days from the date of option given thereunder, such option shall become void, unless an appeal against such order is pending.*
>
> *Explanation.—For removal of doubts, it is hereby declared that in cases where an order under sub-section (1) has been passed before the date on which the Finance Bill, 2018 receives the assent of the President and no appeal is pending against such order as on that date, the option under said sub-section may be exercised within a period of one hundred and twenty days from the date on which such assent is received.*

15.1 The provisions speaks clearly that whenever confiscation of the goods is authorized by the Customs Act, the Custom

Authority/Officer Adjudgingis empowered to give an option to the owner of the goods [or, where such owner is not known, the person from whose possession or custody such goods have been seized] to pay in lieu of confiscation 'such fine' as the said officer thinks fit.

15.2 From the order passed by the Custom Authority it is clear that the said authority while exercising powers entrusted u/s 125 of the Act, imposed the 'FINE' under challenge to redeem the goods and therefore, the said fine amounts to compensatory in nature and is an allowable expenditure u/s 37(1) of the Act, as also held by the Hon'ble Delhi High Court in the case of Usha Micro Process Control Ltd (supra) and Hon'ble Madras high Court in the case of CIT Vs. Parthasmarathy (supra) in the identical facts. Consequently the 'FINE'paid by the Assessee is allowed as expenditure u/s 37(1) of the Act and resultantly the addition made and sustained on account of fine paid by the Assessee to the Custom Authorities, stands deleted.

16 Now coming to the issue which relates to the 'penalty' imposed by the Ld. JCIT (Customs)and paid by the Assessee, can be claimed as admissible expenditure under section 37(1) of the Act. The Ld. JCIT(Customs) in addition to the imposing a fine of Rs. 2,15000/- also imposed a penalty of Rs. 68,000/- u/s 112(a) of the Custom Act.

17 For ready reference the provisions of section 112 of the Customs Act, 1962 are reproduced herein below:

> ***Section 112***
>
> *Penalty for improper importation of goods, etc. —Any person,—*

(a) Who in relation to any goods does or omits to do any act which act or omission would render such goods liable to confiscation u/s 111, abates the doing or omission of such an act.

(b) .....

Shall be liable certain fines as prescribed in sub-clause (i) to (v) of section 112 of the Custom Act, 1962.

17.1 For clarity and ready reference, we are again revisiting the Explanation 1 of section 37(1) of the Act, which speaks clearly "*For the removal of doubts, it is hereby declared that any expenditure incurred by an Assessee for any purpose which is an offence or which is prohibited by law shall not be deemed to have been incurred for the purpose of business or profession and no deduction or allowances shall be made in respect of such expenses*."From the Explanation 1 of the section 37(1) of the Act, it is clear the embargo has been placed for claiming the deduction of expenditure which is an offence or which is prohibited by law.

18 We have given thoughtful to the consideration to the term of 'Penalty'. The Penalty is a punishment for doing something that is against a law. In simple word penalty is an amount of money that someone is forced to pay for failing to obey the law and its impositions. Further the penalty is an imposition to safeguard the laws and not to contravene the provisions of law and also not to act in derogation of law.

18.1 Purpose for prescribing punishment by way of fine is justified by its deterrence of criminal behavior and by its other beneficial

consequences for individuals as well as for society. Under the law, punishment is provided to cease the wrongdoer from committing the crime again. Punishment is a consequence or result of a wrong committed by a person. Deterrence prevents future crime by frightening the individual or the public. The two types of deterrence are specific and general deterrence. Specific deterrence applies to an individual. When the government punishes an individual, he or she is theoretically less likely to commit another crime because of fear of another similar or worse punishment. General deterrence applies to the public at large. When the public learns of an individual's punishment, the public is theoretically less likely to commit a crime because of fear of the punishment, the individual experienced. When the public learns, for example, that an individual was severely punished by a penalty, this knowledge can inspire a deep fear of criminal prosecution.The basic purpose of prescribing the penalty is for the rehabilitation, retribution and restitution and therefore, we cannotencourage the claim(s) of any expenditure incurred by an Assessee for any purpose which is an offence or which is prohibited by law or which is in derogation of law, as the statutory fiction u/s 37(1) of the Act, is very clear that the said expenditure shall not be deemed to have been incurred for the purpose of business or profession.

19 The Hon'ble Bombay High Court in the case of CIT Vs. PannalalNarottamdas& Co. ITA 82 of 1962 (1968) 67 ITR 0667 as referred by the Assessee, dealt with penalty imposed under Sea Customs Act and held as under:-

> *1. The question raised on this reference is:*
>
> *"Whether the penalties totallingRs. 31,302 paid in breach of the Sea Customs Act in respect of imports of stock-in-trade, but on bills of lading purchased in good faith, is a proper deduction under section 10 (1) of the Income-tax Act ?"*

2……..
3……..
4. Coming now to the question as framed, we think that it must be answered in the affirmative and in favour of the assessee. Under section 10 (1) of the Indian Income-tax Act, tax is made payable in respect of the profits or gains of business. Profits or gains of business would be the excess of the sale price over the cost price and in determining the profits or gains, therefore, the cost has to be deducted from the proceeds realised on sale of the goods. On the facts and circumstances of the present case, the actual cost of the goods to the assessee was not only what it had paid to the imports, but in addition thereto what it had to pay by way of penalty, in order to save the goods from being confiscated and lost to it. The penalty paid by it could, therefore, be regarded as part of the cost of the goods to it. It can also be regarded as an amount expended by it wholly and exclusively for the purposes of the business, because unless the said amount was expended, the goods could not have been saved from confiscation. It may be pointed out that, in cases where the penalty has to be incurred be incurred because of the fault of the assessee himself, as for instance, for the reason of his having carried on his business in an unlawful manner or in contravention of certain rules and regulation, the penalty paid by the assessee for such conduct thereof, could not be regarded as wholly laid out for the purpose of the business, because but by the conduct of the assessee in trying to carry out the business in an unlawful manner (see Haji Aziz and Abdul Shakoor Bros. v. Commissioner of Income-tax). ***In the present case, however, on the finding of the Tribunal the penalty has been imposed not for the fault of the assessee but he had to bear the same for the purpose of getting his goods released from the customs authorities****. In the present case, therefore, the expenses incurred by the assessee could be regarded as wholly and exclusively incurred for the purpose of his business. In our opinion, therefore, the conclusion arrived at by the Tribunal that the sum of Rs. 31,302 was allowable to the assessee as proper deduction is correct and the deduction is capable of being allowed under section 10 (1) of the Income-tax Act as held by the Tribunal or even under section 10 (2) (xv) of the Act.*

5. The result, therefore, is that the question referred to us must be answered in the affirmative. We answer accordingly. The department will pay the costs of the assessee."

(**Highlighted and underlined by us**)

19.1 The Hon'ble High Court in the aforesaid case, dealt with the imposition of 'penalty' under the Sea Customs Act, which was imposed for redemption of goods but not on the fault of the Assessee, so the facts are dissimilar to the facts of this case because there is specific provision in the Customs Act 1962 to give an option to pay 'FINE' in lieu of confiscation of goods, as done in this case u/s 125(1) of the Customs Act, by the Customs Authority by imposing the fine, however the 'PENALTY' has also been imposed separately as punishment for violation of law orfor the acts in derogation of law by the Assessee or forthe Assessee's fault in importing the goods without getting *specific license of the DGFT in terms of Foreign Trade Policy 2009-14 read with ITC (HS) classification of Import & Export items,* but not for redemption of goods.

20 In the instant case, the imposition for penalty u/s 112(a) of the Custom Act is prescribed in order to avoid doing or omit to do and abetting the doing or omission of such an act which causes violation of prohibited acts under the Custom Act and therefore in our considered opinion, imposition of 'Penality' is penal in nature and the payment made for discharge of punishment for violation of prohibited acts and/or restriction(s) imposed under the provisions of law, cannot be considered as compensatory in nature. Hence on the the facts and circumstances of this case, conclusions drawn by the authorities below and analyzations made above,, the amount paid as 'penalty'is an inadmissible expenditure and not allowable under the provisions of section 37(1) of the Act. Consequently the addition made and affirmed on account of 'Penalty'is sustained.

21 In the result, the Appeal filed by the Assessee is partly allowed.

Order pronounced in the open court on 31/05/2022.

Sd/-	Sd/-
(R.K.PANDA)	(N.K. CHOUDHRY)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Dated: 31/05/2022
A K Keot