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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/TAX APPEAL NO. 504 of 2022
With
CIVIL APPLICATION (FOR STAY) NO. 1 of 2022
In
R/TAX APPEAL NO. 504 of 2022
With
R/SPECIAL CIVIL APPLICATION NO. 14527 of 2022

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COMMISSIONER OF CUSTOMS, AHMEDABAD
Versus
BARODA RAYONS CORPORATION LTD.

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Appearance:
MR PRIYANK P LODHA(7852) for the Appellant(s) No. 1
MR SAURABH SOPARKAR, SENIOR COUNSEL WITH
MR HAMESH C NAIDU(5335) for the Opponent(s) No. 1

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CORAM: **HONOURABLE THE CHIEF JUSTICE MR. JUSTICE ARAVIND KUMAR**
and
HONOURABLE MR. JUSTICE ASHUTOSH J. SHASTRI

Date : 02/01/2023

COMMON CAV JUDGMENT

(PER : HONOURABLE THE CHIEF JUSTICE MR. JUSTICE ARAVIND KUMAR)

1. This appeal is admitted to consider the following substantial questions of law:

> *"(i) Whether the Hon'ble Tribunal was justified in entertaining an appeal against the Chief Commissioner's letter under Section 129A of the Act which mandates appeal against the Order of Commissioner /Commissioner (Appeals)?*

(ii) Whether in the facts and circumstances of the case and law, the Tribunal was justified in holding that even though the duty was confirmed by adjudication process, the same is payable only when goods are cleared for home consumption, considering the provisions of section 72 of the Customs Act, 1962?

(iii) Whether in the facts and circumstances of the case and law, the Tribunal was justified in holding that in terms of the board circular 03/2003-Cus dated 14/1/2003, the Respondent was entitled to re-export of the goods without payment of duty and consequently also entitled for extension of warehousing period?

(iv) Whether in the facts and circumstances of the case and law, the Tribunal was justified in entertaining and allowing the appeal which is against its own Order dated 25.11.2002 that had attained finality and thus reviewing their own order."

BRIEF BACKGROUND OF THE CASE:

2. Respondent is a public limited company engaged in a commercial production of Viscose Filament yarn i.e. Rayon Yarn. In the year 1995-96, respondent imported plant and machineries – equipment under Open General Licence (OGL) from Japan, Germany and Korea, after executing 21 bonds amounting to Rs.18,01,31,442/- and initially it was stored at Bombay and later on shifted to

the private bonded warehouse at Surat. On expiry of the warehousing period, respondent sought for extension for six months on the ground of it being unable to clear the imported plants and machineries – equipments due to financial crunch. Later on four extensions were sought for which came to be granted upto 31.12.1997. When the 6th extension was sought for from 01.01.1998 upto six months i.e. 30.06.1998, same was rejected and so also 6th, 7th, 8th, 9th and 10th extensions sought for. It was the stand of the respondent that there was no reply in respect of extensions sought for from 6th extension onwards till the end.

3. On account of the equipments in the bonded warehouse not having been cleared after the expiry of the permitted extension warehousing period, the appellant was issued show cause notices, initially 16 show cause notices resulting in 16 Orders in Original (For short 'OIO') came to be passed on 30.03.2001 which became the subject-matter of appeals which came to be adjudicated by the appellate authority and a common

order dated 15.01.2001 came to be passed and rejected the same. Further, challenge to the same before the Tribunal – CESTAT, Mumbai, also ended in its dismissal on 25.01.2002. Simultaneously, in respect of remaining goods, five show cause notices came to be issued on 27.11.2001 which resulted in OIO dated 28.04.2013 being passed and appeal filed against the same was also dismissed vide order dated 12.12.2003 and appeal filed before the CESTAT was allowed in part by order dated 26.05.2004 by reducing the pre-deposit and directed the Commissioner (Appeals) to decide the appeals on merits and on account of there being no compliance, the order of Commissioner became final. Thus, the customs duty of 688.06 Lakhs was outstanding from the appellant as per the orders of the authorities which had attained finality.

4. The request of the appellant to transfer the equipments namely bonded plant and machinery lying in private bonded warehouse to inside factory premises at Surat was also rejected on the ground of show cause notice issued having already been adjudicated.

Subsequently, the request which was renewed by the respondent was considered and permission granted and accordingly the plant and machinery/ equipment came to be shifted inside the factory during 23-26.10.2007, which was duly acknowledged by the department on 29.10.2007. However, the plant and machinery imported in the year 1995-96 is said to have not been installed and was still lying in bonded warehouse.

5. The respondent is said to have become Sick Industrial Unit under Section 15(1) of the Sick Industrial Companies (Special Provision) Act, 1985, which resulted in BIFR proceedings being initiated and factory of the petitioner was closed from June, 1999 to June, 2000 and from August, 2002 to December, 2003 and from August, 2008 till date thereafter. Respondent submitted representations for re-exporting the plant, equipment and machineries and also sought for consequential extension of warehouse period. Undisputedly, respondent admits said representations were not pursued vigorously on account of BIFR proceedings pending.

6. After a period of 16 years, respondent sought for extension of the warehousing period which came to be rejected on the ground that show cause notice and the demand issued earlier had stood confirmed upto the level of Tribunal. Not being satisfied with the same, respondent again approached the department requesting for reconsideration of their prayer for extending the warehousing period which culminated in communication dated 07.03.2019 being issued and intimating the respondent that consideration for extension of the warehousing period is already over and as such show cause notices were issued and demand raised thereunder which have been adjudicated and same had attained finality by obtaining approval of the Chief Commissioner of Customs. Being aggrieved by the said communication, an appeal came to be filed under Section 129 of the Customs Act, 1962 (for short 'the Act') which has been allowed by the Tribunal by relying upon the circular dated 14.01.2003 by arriving at a conclusion that when importer makes a request for re-export of the goods

under Section 69 of the Act, same should be allowed even if the bonding period has expired and demand notice has been issued or even the goods are put under auction. It has been further held that appellant therein namely respondent herein stands on a better footing as the goods warehoused are not put to auction by the department and concluding that there is no conflict between the Board circular dated 14.01.2003 and Section 72(1)(d) of the Act, it has been held by the Tribunal that goods warehoused by the respondent were neither cleared for home consumption nor the department had initiated any action to sell/auction the goods and as such, appellant is entitled for re-export of the goods without payment of duty and consequently entitled for extension of the warehousing period. The Tribunal also held that even though goods are cleared for home consumption and same is exported, appellant would be entitled for 98% duty drawback under Section 74 of the Act and therefore appellant would not be liable to pay more than 2% of the total duty payable on the imported goods. Hence, concluding that appellant

therein had sought to export the goods from the warehouse itself and as such it would not be required to pay 2% duty. Hence, appeal came to be allowed and appellant therein namely the respondent herein was permitted to re-export the warehoused goods without payment of duty, fine and penalty, apart from extending the warehousing period of the imported goods for six months or further period within which the goods are re-exported. Hence, this appeal.

7. We have heard the arguments of Mr. Priyank Lodha, learned counsel appearing for the appellant and Mr. Saurabh N. Soparkar, learned Senior Counsel appearing for the respondent.

8. It is the contention of Mr. Lodha, learned counsel appearing for the department that appeal itself is not maintainable before the Tribunal as an appeal under Section 129(a) would lie to the Tribunal only against the order passed by the Principal Commissioner / Commissioner as an adjudicating authority and orders

passed by the Commissioner (Appeals). By drawing the attention of the Court to the communication dated 19.12.2008 and 07.03.2009, he would contend that it is not an order of the Commissioner of Customs or Commissioner (Appeals) and as such, appeal before CESTAT was not maintainable.

9. He would elaborate his submissions by contending that Tribunal erred in allowing the appeal as it would amount to setting aside its own order passed earlier whereunder appeal filed by the respondent challenging the order in original had been dismissed whereby the duty demand had been confirmed and thereby the original order had attained finality. He would submit that impugned order would amount to tribunal reviewing its own order and thereby rendering its earlier order infructuous.

10. He would contend that Tribunal committed a serious error in arriving at a conclusion that goods are lying in the warehouse without being cleared for home

consumption and therefore no custom duty would be payable, though Section 72 of the Act mandates full custom duty with interest and penalty being payable by the owner of the goods. He would also submit that action relating to the impugned goods had also attained finality as the demand raised under the show cause notice had been adjudicated by the original authority, confirmed by the appellate authority and affirmed by the Tribunal by dismissing the appeals on merits and now by virtue of the impugned order re-export has been permitted and it would result in nullifying the earlier order and the effect of payment of custody duty as directed thereunder would stand negated. Hence, contending that respondent is attempting to seek the relief indirectly which he could not get directly.

11. He would further submit that Tribunal erred in applying Section 69 inasmuch as liability to pay duty by the owner of the goods under Section 72(1) had already arisen with interest and penalty and as such, under Section 69 could not have been pressed into service at all.

12. He would also contend that circular No.03/2003 dated 14.01.2003 had no application to the facts on hand and Tribunal erred in relying on paragraph-2 of the said circular. He would submit that circular cannot be read in part and said circular itself indicates that it is subject to provisions of Section 61 and draws the attention of the Court to Sub-section (2) of Section 61. Hence, he would contend that Section 61 itself mandates that it is necessary to make payment of duty with interest without which the period of warehousing cannot be extended.

13. It is his further contention that circular dated 14.01.2003 does not indicate anything about liability of the owner to make payment of duty, interest and penalty and it only indicates about re-export, which has to be understood as it would be applicable in case of applications made prior to adjudication of the show cause notice. Hence, he prays for appeal being allowed by answering the substantial questions of law in favour of the appellant – revenue.

14. Per contra, Mr. S.N. Soparkar, learned Senior Counsel appearing for the respondent would support the order of the Tribunal. He would contend that as the communications which were impugned before the CESTAT namely communications dated 19.12.2018 and 07.03.2019 would decide the rights of the respondent and the order passed thereunder is an order passed by the adjudicating authority namely the authority which is competent to pass any order or take decision under the Act as defined under Section 2(1) and under the impugned communication, the Commissioner having decided the rights of the respondent by adjudicating the *lis*, an appeal filed assailing the correctness of the same by invoking Section 129(a) of the Act was fully justified. He would support the impugned order and to fortify his contention, he would rely upon the circular dated 14.01.2003 to contend that under Section 151A of the Act, the instructions issued to the Officers by way of circulars would be binding on them and as such, the Tribunal has rightly extended the benefit flowing from the

circular dated 14.01.2003. He would submit that whether accepting the demand made by not challenging the order or such adjudicating authority having passed any order adjudicating the show cause notice even if it had reached Tribunal will have no effect and still the circular dated 14.01.2003 would be binding and qualitatively it does not make any difference. He would draw the attention of the Court to the words and expression *"that till the goods are auctioned"* found in the circular to buttress his arguments that a right is kept open to the respondent to seek for re-export and the authorities are bound to consider such request and pass orders and it is this precise exercise which was not undertaken by the Commissioner though prayed for has resulted in the impugned order being passed by the Tribunal and rightly so. He would further contend that even if steps are taken to auction but goods are not auctioned, still the applicant would be entitled to seek protection under the circular dated 14.01.2003. He would also support the finding of the Tribunal with regard to payment of differential duty and contends that

Tribunal has examined the case from all angles to extend the relief which finding does not suffer from any infirmity calling for interference at the hands of this Court and as such, he prays for answering substantial questions of law in favour of the respondent. In support of his submissions, he has relied upon the following judgments :

(i) 2018 361 ELT, Page 51;

(ii) 2003 (5) SCC 528;

(iii) 2014 (3) SCC 154;

(iv) 2016 (340) ELT 162.

15. Mr. Soparkar, learned Senior Counsel would also contend that revenue having not raised any ground with regard to respondent being entitled for 98% duty drawback under Section 74 of the Customs Act, 1962, in its appeal memorandum, said issue cannot be agitated by the revenue or adjudicated by this Court.

16. In rejoinder, Mr. Priyank Lodha, learned counsel appearing for the appellant would submit that judgment of the Bombay High Court was rendered in the

background of Section 110A of The Customs Act, which provides for provisional release which is an inherent right given to a party and as such, the principles laid down thereunder would be inapplicable. He would submit that Commissioner had no right to adjudicate any right of the petitioner, that too on the basis of a representation and as such, the impugned communication dated 07.03.2009 would not partake the character of either being classified as an order or decision. He would also submit that circular dated 14.01.2003 will have no effect after adjudication as it is silent on this aspect. He would also submit that Commissioner has not adjudicated any claim of the petitioner as such by the impugned communication and respondent has been intimated that prayer for re-export was an issue which has already been decided, adjudicated and answered which has attained finality and thereby, respondent cannot rely upon said circular. He would also contend that payment of 2% differential duty was alternatively available to the respondent, as held by the Tribunal cannot be accepted as it involves two stages

namely clearance of the goods and such stage having not occurred namely the goods having not being cleared, Tribunal could not have taken upon itself this issue which was never raised by the respondent before the Tribunal and on this ground also he seeks for the order of Tribunal being set aside and substantial questions of law being answered in favour of the revenue.

17. Having heard the learned advocates appearing for the parties and proceed to answer the substantial questions of law, we deem it necessary to sate the factual background in brief.

BRIEF BACKGROUND OF THE CASE:

18. Petitioner is a public limited company and commenced its commercial production of Viscose Filament Yarn i.e. Rayon Yarn in 1962. Petitioner is said to have diversified its activities by starting Nylon Plant in 1974 and thereafter established its Polyester Plant and Nylon Tyre Cord Plant in the year 1981.

19. Petitioner had imported plant and machinery /

equipment in 1995-96 under OGL from Japan, Germany and Korea after executing 21 bonds amounting to Rs.18,01,31,442/-. The goods or the imported equipment were initially stored at Bombay for safety and security of the goods and same was allowed to be shifted from Bombay to petitioner's private bonded warehouse at Surat. After the expiry of initial warehouse period, petitioner had applied for its first extension of warehousing period which came to be granted upto 30.6.1996. However, petitioner was not able to clear the imported plant and machinery / equipment on account of alleged financial crunch. Hence, petitioner applied for second extension upto 31.12.1996. Subsequently, the extension sought for from time to time had been considered and granted upto 31.12.1997. Though applications for extension were made, same was not granted and petitioner was not able to clear the imported plant and machinery / equipment from their bonded warehouse after the expiry of permitted extended warehouse. This resulted in adjudication and the

department had issued 16 orders-in-original, all dated 30.3.2001 and confirmed the total custom duty of Rs.05,30,36,179/- and imposed penalty of 10% on each bond. It was also ordered to recover interest at appropriate rate. Being aggrieved by the same, petitioner filed appeals before the Commissioner (Appeals), Surat, who by common order-in-appeals dated 15.1.2001 rejected all the appeals filed by the petitioner. This was challenged before CESTAT, Mumbai which also ended in dismissal vide order dated 25.11.2002.

20. Hence, show cause notices were issued by the department on 27.11.2001 vide order-in-original dated 28.4.2003 whereby the department confirmed the customs duty of Rs.01,55,60,368/- and imposed penalty of Rs.10,000/- on each bond and the interest thereon. The appeal preferred against the said order came to be dismissed by the Commissioner (Appeals), Surat by order dated 12.12.2003 due to non-compliance of pre-deposit of Rs.1 crore. Petitioner assailed the said order by preferring an appeal before CESTAT, Mumbai who by

order dated 26.05.2004 reduced the pre-deposit from Rs.1 crore to Rs.50 lakh which was to be deposited within 3 months and report was to be submitted to the Commissioner (Appeals), Surat who was required to decide the appeal on merits. On account of non-compliance of the same, the appeal was not taken up for hearing on merits.

21. Thereafter the petitioner submitted an application on 26.10.2006 requesting the department for permitting transfer of the bonded plant and machinery / equipment lying in the private bonded warehouse outside the factory premises to inside factory premises at Surat. The department by reply dated 19.01.2007 informed the petitioner and since the request for extension of the warehousing period has been rejected in 1998 and show cause notices of consignment were already issued, permission was not granted. Despite there being no permission accorded, petitioner shifted plant and machinery / equipment inside the factory during 23-26.10.2007 and sought to justify its action by relying

upon the representation submitted on 09.02.2007.

22. On 23.06.2008, petitioner requested the department to accord permission for re-export of consignment by relying upon the board's circular dated 3/03-COSs dated 14.01.2003. After having kept quite for 5 years, petitioner renewed its request vide letter dated 22.07.2008 and 06.10.2008 seeking permission for re-export. Again after period of 10 years, i.e. on 15.11.2018, petitioner renewed its request by submitting a representation to the Chief Commissioner of Customs, Gujarat Zone, Ahmedabad for extending warehousing period on the ground that it intends to re-export the imported plant and machinery / equipment which was followed by communication dated 03.12.2018 which came to be rejected by the Chief Commissioner of vide letter dated 19.12.2018 on the ground that show cause notices had been issued and demand has been confirmed upto the level of Tribunal and the issue had attained finality. Yet petitioner submitted one more letter on 15.02.2019 to the Chief Commissioner of Customs, Gujarat Zone, Ahmedabad and

requested to re-consider the prayer for re-export of entire warehoused plant and machinery / equipment with consequent extension of warehousing period till the goods are re-exported. However, the said request was rejected by the Chief Commissioner of Customs, Gujarat Zone, Ahmedabad vide communication dated 07.03.2019, against which petitioner company preferred an appeal before CESTAT which has been allowed by the Tribunal vide impugned order dated 31.01.2022.

RE: SUBSTANTIAL QUESTION OF LAW No.(i):

23. Right of appeal is a creature of statute and there cannot be any dispute to this proposition. When the issue comes up before the Court with regard to the maintainability, it goes to the root of the matter namely jurisdictional aspect and at any stage this issue can be considered, as it would have a direct bearing on the core issue of maintainability. This view gets support from the authoritative principles laid down by the Hon'ble Apex Court in the case of **Corona Limited vs. M/s.Parvathy Swaminathan and sons,** reported in **(2007) 8 SCC 559**

and **Kanwar Singh Saini vs. High Court of Delhi,** reported in **(2012) 4 SCC 307**, whereunder it came to be held that issue of jurisdiction can be raised at any time and there can be no waiver or consent. In other words, it has been held consent does not confer jurisdiction.

24. In the instant case, the thrust of the arguments of the learned counsel appearing for the revenue is that there was no order adjudicating right of the parties which gave cause of action for the respondent herein to file an appeal before the CESTAT by invoking Section 129A of the Act. He has drawn the attention of the Court to the communication dated 07.03.2019 which was impugned before the Tribunal whereunder the Additional Commissioner of Customs with the approval of the Chief Commissioner has referred to the communications dated 14.02.2019 and 15.02.2019 addressed by the respondent herein requesting for reconsideration of the request for extension of the warehousing period and held such consideration would not arise as the matter had already attained finality. For the purposes of convenience and

necessity, we deem it proper to extract the contents of the said letter and it reads thus:

> *"Please refer to your letters dated 14.2.2019 and 15.2.2019 in the subject matter requesting for reconsideration of your request for extension of warehousing period.*
>
> *2. In this regard, it is to intimate that as far as extension of warehousing period is concerned, this stage is already over once a show cause notice was issued and demand was dated 14.01.2003 mentioned in your letters, your representation does not merit any consideration now since the matter has already attained finality as the issue was already decided by the Hon'ble Tribunal.*
> *3. This issues with the approval of the chief Commissioner.*
>
> *Yours Sincerely*
>
> *(Sushant Kumar)*
> *Additional Commissioner"*

25. A plain reading of the above communication would indicate that the representations made by the petitioner on 14.02.2019 and 15.02.2019 requesting for extending the warehousing period was held not warranting consideration since the matter had already attained finality. It would be apt and appropriate to note the Section 129A of the Act. It reads thus :

> *"**129A. Appeals to the Appellate Tribunal.—***
>
> *(1) Any person aggrieved by any of the following*

orders may appeal to the Appellate Tribunal against such order—

(a) a decision or order passed by the 1 [Principal Commissioner of Customs or Commissioner of Customs] as an adjudicating authority;

(b) an order passed by the 2 [Commissioner (Appeals)] under section 128A;

(c) an order passed by the Board or the Appellate 3 [Commissioner of Customs] under Section 128, as it stood immediately before the appointed day;

(d) an order passed by the Board or the 1 [Principal Commissioner of Customs or Commissioner of Customs], either before or after the appointed day, under section 130, as it stood immediately before that day:

[Provided that no appeal shall lie to the Appellate Tribunal and the Appellate Tribunal shall not have have jurisdiction to decide any appeal in respect of any order referred to in clause (b) if such order relates to,—

(a) any goods imported or exported as baggage;

(b) any goods loaded in a conveyance for importation into India, but which are not unloaded at their place of destination in India, or so much of the quantity of such goods as has not been unloaded at any such destination if goods unloaded at such destination are short of the quantity required to be unloaded at that destination;

(c) payment of drawback as provided in Chapter X, and the rules made thereunder:

Provided further that] the Appellate Tribunal may, in its discretion, refuse to admit an appeal in respect of an order referred to in clause (b) or clause (c) or clause (d) where—

(i) the value of the goods confiscated without option having been given to the owner of the goods to pay a fine in lieu of confiscation under section 125; or

(ii) in any disputed case, other than a case where the determination of any question having a relation to the rate of duty of customs or to the value of goods for purposes of assessment is in issue or is one of the points in issue, the difference in duty involved or the duty involved; or

(iii) the amount of fine or penalty determined by such order, does not exceed 5 [two lakh rupees].

[(1A) Every appeal against any order of the nature referred to in the first proviso to sub-section (1), which is pending immediately before the commencement of section 40 of the Finance Act, 1984 (21 of 1984), before the Appellate Tribunal and any matter arising out of or connected with such appeal and which is so pending shall stand transferred on such commencement to the Central Government and the Central Government shall deal with such appeal or matter under section 129DD as if such appeal or matter were an application or a matter arising out of an application made to it under that section.]

[(1B) (i) The Board may, 8 [by order], constitute such Committees as may be necessary for the purposes of this Act.

(ii) Every Committee constituted under clause (i) shall consist of two Chief Commissioners of Customs or two Commissioners of Customs, as the case may be.]

(2) [The Committee of Commissioners of Customs may, if it is] of opinion that an order passed by the Appellate 2 [Principal Commissioner of Customs or Commissioner of Customs] under section 128, as it

stood immediately before the appointed day, or by the 3 [Commissioner (Appeals)] under section 128A, is not legal or proper, direct the proper officer to appeal 4 [on its behalf] to the Appellate Tribunal against such order:

[Provided that where the Committee of 2 [Principal Commissioners of Customs or Commissioners of Customs] differs in its opinion regarding the appeal against the order of the Commissioner (Appeals), it shall state the point or points on which it differs and make a reference to the jurisdictional 6 [Principal Chief Commissioner of Customs or Chief Commissioner of Customs] who shall, after considering the facts of the order, if is of the opinion that the order passed by the Commissioner (Appeals) is not legal or proper, direct the proper officer to appeal to the Appellate Tribunal against such order.

Explanation.—For the purposes of this sub-section, —jurisdictional Chief Commissioner‖ means the 6 [Principal Chief Commissioner of Customs or Chief Commissioner of Customs] having jurisdiction over the adjudicating authority in the matter.]

(3) Every appeal under this section shall be filed within three months from the date on which the order sought to be appealed against is communicated to the 2 [Principal Commissioner of Customs or Commissioner of Customs], or as the case may be, the other party preferring the appeal.

(4) On receipt of notice that an appeal has been preferred under this section, the party against whom the appeal has been preferred may, notwithstanding that he may not have appealed against such order or any part thereof, file, within forty-five days of the receipt of the notice, a memorandum of cross-objections verified in such manner as may be specified by rules made in this behalf against any part of the order appealed against and such memorandum shall be disposed of

by the Appellate Tribunal as if it were an appeal presented within the time specified in sub-section (3).

(5) The Appellate Tribunal may admit an appeal or permit the filing of a memorandum of cross-objections after the expiry of the relevant period referred to in sub-section (3) or sub-section (4), if it is satisfied that there was sufficient cause for not presenting it within that period.

[(6) An appeal to the Appellate Tribunal shall be in such form and shall be verified in such manner as may be specified by rules made in this behalf and shall, irrespective of the date of demand of duty and interest or of levy of penalty in relation to which the appeal is made, be accompanied by a fee of,—

(a) where the amount of duty and interest demanded and penalty levied by any officer of customs in the case to which the appeal relates is five lakh rupees or less, one thousand rupees;

(b) where the amount of duty and interest demanded and penalty levied by any officer of customs in the case to which the appeal relates is more than five lakh rupees but not exceeding fifty lakh rupees, five thousand rupees;

(c) where the amount of duty and interest demanded and penalty levied by any officer of customs in the case to which the appeal relates is more than fifty lakh rupees, ten thousand rupees: Provided that no such fee shall be payable in the case of an appeal referred to in sub-section (2) or a memorandum of cross-objections referred to in sub-section (4).

(7) Every application made before the Appellate Tribunal,—

*(a) in an appeal 1 *** for rectification of mistake or for any other purpose; or*

(b) for restoration of an appeal or an application, shall be accompanied by a fee of five hundred rupees: Provided that no such fee shall be payable in the case of an application filed by or on behalf of the 2 [Principal Commissioner of Customs or Commissioner of Customs] under this sub-section.]"

26. The judgment of the Bombay High Court which has been heavily relied upon by Mr. Soparkar though at first blush looks attractive, on deeper examination it will have to be necessarily held that it would in no manner assist the respondent. We say so for reasons more than one. In the said matter which related to release of vessel namely the respondent therein that is S.S. Offshore Private Limited filed a bill of entry – BE for the import of a second hand vessel by declaring the value of the vessel to be of Rs.13.82 crores by classifying the same under Chapter 89, heading 8901 of Custom Tariff Act, 1975. The bill of entry was assessed and vessel was allowed to be cleared for home consumption. Subsequently, the vessel was allowed to be converted from a foreign run vessel to coastal run vessel. The officer of Intelligence and

Investigation Branch of Custom on a reasonable belief that vessel is liable for confiscation on account of incorrect classification / declaration seized it. Hence, respondent met the Commissioner of Customs and sought for provisional release of the vessel under Section 110A of the Act, which provision came to be substituted by Act 2 of 2014 and by virtue of the said section having undergone a change and interim order or decision could be taken by the adjudicating authority that is the Commissioner of Customs was the basis on which the application was made and it is this representation which resulted in a decision being rendered by the adjudicating authority on 25.09.2017 which was the subject-matter of adjudication before the Bombay High Court. In fact, this decision of the adjudicating authority which refused permission was carried in appeal before the Tribunal whereunder the Deputy Commissioner of Customs ordered for release conditionally and being aggrieved by the conditions imposed, the respondent challenged the same before the Tribunal. The Tribunal entertained the

appeal under Section 129A(1) of the Act and impugned order was set aside and matter was restored to the Commissioner of Customs for deciding the issue afresh. Challenging the said decision, an appeal under Section 130A of the Customs Act was filed and it is in this background, High Court of Bombay has held that Section 110A of the Act is required to be viewed and the decision in the letter dated 25.09.2017 is in terms of Section 110A.

27. High Court of Bombay has also referred to the Full Bench judgment of the Tribunal in the case of Gaurav Pharma wherein it has been held that an order of provisional release is a stand alone order irrespective of the final outcome of the investigation or adjudication. Hence, the owner has to have a remedy which is statutorily provided under Section 129A. Whereas in the instant case, we have noticed that under the communication dated 07.03.2019, the authority has neither adjudicated nor examined the claim of the respondent or the prayer of the respondent in the capacity of an adjudicating authority and as such, the

signatory to the said communication cannot be held to fall within the definition of *'Adjudicating Authority'* as defined under Section 2(1) of the Act so as to bring such communication within the sweep of the provisions of either order or decision as indicated in Section 129A.

28. A taxing statute is to be strictly construed. In a taxing statute, one has to look merely what is clearly said in the provision. There is no room for any intendment. There is no equity about a tax. There is no presumption as to tax. Nothing has to be read in, nothing is to be implied. One can look only fairly at the end use. For this proposition, judgment of the Hon'ble Apex Court in the case of **CIT Madras vs. Kasturi and Sons** reported in **AIR 1999 SC 1275** can be looked up and so also principles enunciated by the Hon'ble Apex Court in **(2014) 11 SCC 672**. **In that view of the matter, we are of the considered view that substantial question of law No.1 will have to be answered in the negative that is in favour of the appellant revenue and against the respondent**.

RE : SUBSTANTIAL QUESTION OF LAW NO.(ii):

29. The Tribunal having entertained the appeal against a communication dated 07.03.2019 whereunder the Department – Revenue had intimated the respondent about representation submitted for extension of warehousing period having already been adjudicated and reconsideration of the request would not merit consideration on account of the matter having been already attained finality, received the attention of the Tribunal and held that on account of goods lying in the warehouse without being cleared for home consumption and therefore, no customs duty would be payable. The grievance of the Revenue has been throughout that the issue regarding extension of warehousing period having been rejected and as such it is deemed under Section 72 of the Customs Act that such goods or improperly removed from warehouse and thereby the customs duty, penalty and interest are liable to be paid by the owner and same having been adjudicated and attained finality,

question of permitting the respondent to re-export the goods without payment of customs duty and penalty would not arise. In this background, we deem it proper to extract Section 72 of the Customs Act, 1962 and it reads:

> *"**72. Goods improperly removed from warehouse, etc.—**(1) In any of the following cases, that is to say,—*
>
> *(a) where any warehoused goods are removed from a warehouse in contravention of section 71;*
>
> *(b) where any warehoused goods have not been removed from a warehouse at the expiration of the period during which such goods are permitted under section 61 to remain in a warehouse;*
>
> *(c) where any warehoused goods have been taken under section 64 as samples without payment of duty;*
>
> *(d) where any goods in respect of which a bond has been executed under [section 59 ***] and which have not been cleared for home consumption or exportation are not duly accounted for to the satisfaction of the proper officer,*
>
> *the proper officer may demand, and the owner of such goods shall forthwith pay, the full amount of duty chargeable on account of such goods together with all penalties, rent, interest and other charges payable in respect of such goods.*
>
> *(2) If any owner fails to pay any amount demanded under sub-section (1), the proper officer may, without prejudice to any other remedy, cause to be detained and sold, after notice to the owner (any*

transfer of the goods notwithstanding) such sufficient portion of his goods, if any, in the warehouse, as the said officer may select."

30. A plain reading of the above provision would clearly indicate that when the goods are cleared from the warehouse after the expiry of the permitted period or its permitted extension, the goods are deemed to have been improperly removed. On a plain reading of the Clause (a) it would indicate that where any goods are removed from a warehouse in contravention of Section 71 or where any warehoused goods have not been removed from a warehouse at the expiration of the period, during which such goods are permitted under Section 61 to remain in a warehouse or where any warehoused goods have been taken under Section 64 as samples without payment of duty or where any goods in respect of which a bond has been executed under Section 59 and which have not been cleared for home consumption or exportation are not duly accounted to the satisfaction of the proper officer such goods are deemed to have been improperly removed and as a consequence thereof, the duty, interest and penalty

levied if any would become payable. Sub-section (2) of Section 72 enables the proper officer to sell such goods after notice to the owner, if any, in the warehouse in the event of the owner failing to pay any amount demanded under Sub-section (1) of Section 72. The issue relating to improper removal of goods has been laid to rest by the Apex Court in **SBEC Sugar Limited and another vs. Union of India and others**, reported in **(2011) 4 SCC 668**. It has been held:

> *"23. The scope and purport of Section 72 was examined by this Court in Kesoram Rayon (supra). It was held that:*
>
> > *"13. Goods which are not removed from a warehouse within the permissible period are treated as goods improperly removed from the warehouse. Such improper removal takes place when the goods remain in the warehouse beyond the permitted period or its permitted extension. The importer of the goods may be called upon to pay customs duty on them and, necessarily, it would be payable at the rate applicable on the date of their deemed removal from the warehouse, that is, the date on which the permitted period or its permitted extension came to an end.*
> >
> > *14. Section 15(1)(b) applies to the case of goods cleared under Section 68 from a warehouse upon presentation of a bill of entry for home consumption; payment of duty, interest, penalty, rent and other*

charges; and an order for home clearance. The provisions of Section 68 and, consequently, of Section 15(1)(b) apply only when goods have been cleared from the warehouse within the permitted period or its permitted extension and not when, by reason of their remaining in the warehouse beyond the permitted period or its permitted extension, the goods have been deemed to have been improperly removed from the warehouse under Section 72."

24. xxx xxx xxx

25. xxx xxx xxx

26. We are, therefore, of the opinion that the decision in Pratibha Processors on which heavy reliance is placed by learned counsel for the appellants, is clearly distinguishable on facts inasmuch as apart from the fact that in that case the clearance of goods was under Section 68 of the Act, the import of Section 72(1)(b) of the Act was not considered. On the contrary, the dictum laid down in Kesoram Rayon (supra) is on all fours on facts at hand, and therefore, the decision of the High Court cannot be faulted with."

31. In the instant case, undisputedly the goods remained in the warehouse beyond the period of extension granted and the prayer for further extension was not acceded to or in other words not granted and as such they did not qualify to be construed as goods warehoused in due compliance of Section 72 and in the facts obtained in the present case it would also emerge from the records that on account of such goods having continued in the

warehouse beyond the period permitted it is deemed to have been removed improperly attracting the penal provision which resulted in show cause notice being issued and same being adjudicated which resulted in orders being passed and assailed by the respondent before the appellate authority and also before the Tribunal which had resulted in its dismissal is a clear mirror to the fact that duty demand had been confirmed and as such, Tribunal was not justified in arriving at a conclusion that though duty demand was confirmed by adjudicating process, same would become payable only when it is cleared for home consumption. The Tribunal erred in applying section 69 of the Act to the present case. Hence, we deem it proper to extract section 69 of the Customs Act, 1962 and it reads:

> *"69. Clearance of warehoused goods for exportation. –*
>
> *(1) Any warehoused goods may be exported to a place outside India without payment of import duty if –*
>
> *(a) a shipping bill or a bill of export has been presented in respect of such goods in the prescribed form;*

(b) the export duty, penalties, rent, interest and other charges payable in respect of such goods have been paid; and

(c) an order for clearance of such goods for exportation has been made by the proper officer.

(2) Notwithstanding anything contained in sub-section (1), if the Central Government is of opinion that warehoused goods of any specified description are likely to be smuggled back into India, it may, by notification in the Official Gazette, direct that such goods shall not be exported to any place outside India without payment of duty or may be allowed to be so exported subject to such restrictions and conditions as may be specified in the notification."

32. A perusal of the above provision would clearly indicate that warehoused goods can be re-exported without payment of duty. The Tribunal has also held that as goods are lying in the warehouse without being home consumption and therefore no customs duty shall be payable. However, it ignored that as per the mandate of section 72 full customs duty with interest and penalty would be payable by the owner. Section 72 (1)(b) indicates that where any warehoused goods have not been removed from warehouse at the expiry of the period, then proper officer may demand and the owner of such

goods would forthwith be required to pay, the full amount of duty chargeable on account of such goods whether with interest, fine and penalty payable in respect of such goods. Undisputedly, in the instant case, the goods remained in warehouse beyond permitted period. Thus, the owner of the goods would be liable to pay full amount of duty with interest and penalty, as if the goods are to be cleared from home consumption. In the instant case, the owner of the goods has not complied with this statutory mandate. Clause (b) of sub-section (1) of Section 72 clearly mandates where warehoused goods have not been removed from the warehouse at the expiry of the period, then proper officer would be empowered to demand and the owner of the goods would be liable to pay full amount of the duty chargeable on account of such goods together with interest, fine and penalty. In the instant case, the action relating to the impugned goods had been initiated and had reached finality. Thus, when liable to pay duty, penalty and interest had already arisen on the owner as per section 72(1)(b), we are of the considered view that

section 69 would not be applicable. Section 72 provides for clearance of the goods by the importer within a stipulated period either for home consumption or for re-export and in the eventuality of such importer failing, then it is deemed that such goods are to be cleared for home consumption and thereby the importer would be liable to make payment of applicable customs duty with interest and penalty. In other words, section 69 would be attracted prior to applicability of section 72 and not thereafter. In that view of the matter also, we are of the considered view that the Tribunal was not justified in holding that even though the duty was conferred by adjudication process, section 69 would be applicable and as such finding recorded by the Tribunal requires to be set aside. **Hence, we answer the substantial question of law No.(ii) in the negative namely in favour of Revenue and against the respondent**.

RE: SUBSTANTIAL QUESTION OF LAW Nos. (iii) AND (iv):

33. Insofar as question Nos.(iii) and (iv) are concerned,

from the record, we notice that original order which had been passed on 30.3.2021 by Assistant Commissioner, Central Excise Division-I Surat who by virtue of powers conferred under Section 72 read with Section 47 and 15(1)(b) of the Customs Act, 1962 has ordered to recover customs duty amounting to Rs.59,43,140/- chargeable under Section 28 of the Customs Act, 1962 and also imposed a penalty of Rs.10,000/- under Section 117 of the Customs Act, 1962 in addition to recovery of interest at an appropriate rate in view of Section 61(2) of the Customs Act read with Sections 47 and 72 till date goods are not actually cleared had attained finality. Similar orders have been passed with respect to other show cause notices as can be seen from the record and these were the orders which came to be challenged in the year 2001 by preferring an appeal before the Appellate Authority has specifically rejected the request for extension of warehousing period. Said orders were passed way back in the year 2001 and carried further before the Customs, Excise and Gold Control Appellate

Tribunal also and Appellate Tribunal has also passed a specific order in November 2002. Said brief order being relevant, we deem it proper to reproduce hereunder:

> *"ORDER No.: C-II/236 to 268 WZB/2002 Dt. 25/11/02*
>
> *Per: Shri Krishma Kumar, Member (Judicial)*
>
> *Arguing the case of the appellant Shri V.N. Deshpande, learned advocate submits that the appellant's financial condition is very bad and as such they are not in a position to deposit the amounts towards duty, penalty etc. He submitted that appellants have imported 16 consignments of new machinery for making further improvement in their factory. The total duty amount - against the said consignments is Rs.6,80.93,056/-.*
>
> *2. Shri. M. K. Gupta, learned It. CDR stated that the appellants have been given four extensions and still they have failed to pay the duty etc. and remove the goods. Section 72 with Section 47 and 15(1)(b) provide that where warehoused goods have not been removed from the warehouse on expiration of period during which such goods are permitted under Section-61 to remain in the warehouse, the proper officer may demand and owner of such goods shall forthwith pay the full amount of duty chargeable on account of such goods together with all penalties. rent, interest and other charges payable in respect of such goods Thus the legal position is very clear. It is also is seen from the Commissioner's order that the appellants have not disputed their duty liability, In these circumstances we find that there is no merit in the appeals as well as the stay petitions filed by the applicant. Accordingly, we dismiss the stay petitions as well as the appeals at the stay stage itself.*

(Dictated in Court)

(C. SATAPATHY)
Member (Technical)

(KRISHNA KUMAR)
Member (Judicial)"

34. As can be seen from the aforesaid order of the Appellate Tribunal passed in 2002, respondent herein, had projected financial crunch and contended it is not in a position to deposit the amount towards duty and penalty, etc. in respect of 16 consignments, as indicated, and total duty was amounting to Rs.6,80,93,056/-. In the said order dated 1.11.2022 it has been specifically noticed that four extensions were already attempted to be secured, but still the opponent failed to pay duty and remove the goods as required under the Act. Thus, keeping the overall legal position in view and circumstances prevailing, appeal along with stay application came to be dismissed. Thus, it is clearly evident that appellant therein namely respondent herein had not disputed their duty liability at any point of time.

35. When aforesaid being the factual scenario and the issue regarding duty and penalty having attained finality,

an attempt came to be made by the respondent herein after several years, i.e. 16 years to revive the same issue by seeking permission to re-export the goods that too without payment of duty and penalty, by submitting representations commencing from 23.06.2018 and attempting to revive the dead cause of action representations were submitted during 2018-19 and rightly so said request has been rejected by the Chief Commissioner of Customs on 07.03.2019 on the ground said issue had been laid to rest by the CESTAT.

36. However, Tribunal entertained an appeal against such rejection and has held that in terms of the Board's Circular No.03/2003-CUS dated 14.01.2003, respondent was entitled to re-export the goods without payment of duty, penalty and consequently entitled for extension of the warehousing period. Tribunal has relied upon paragraph 2 of the aforesaid circular. Hence, it would be necessary to understand the circular relied upon by the Tribunal and same is extracted herein below for ready reference :

"Subject: Warehousing – Grant of extension of warehousing period of by Chief Commissioners under Section 61 of the Customs Act, 1962 – regarding –

I am directed to refer to the instructions contained in Board's Circular no. 47/2002-Cus., dated 29.07.2002, on the above subject and to say that some references have been received in the recent past seeking Board's clarification whether the goods imported and bounded in a warehouse can be permitted to be cleared for the purpose of export under Section 69 of the Customs Act, 1962 have been issued by the Customs authority demanding duty, interest and other charges upon expiry of the initial or extended period of warehousing.

2. The matter has been examined in the Board. It has been decided that in case an importer makes a request to permit re-export of the goods under Section 69 of the Customs Act, 1962, such a request may be allowed even if the permitted period for bonding has expired and demand notice has been issued, or it has been decided to put the goods under auction. Before permitting re-export in each such case, however, it will be necessary to extend the period of warehousing under Section 61 of the Customs Act to enable the importer to export the goods within the permitted period of warehousing.

3. Chief Commissioners are, therefore, requested to consider/decide such requests from the importers keeping in view the aforesaid guidelines of the Board and also taking into consideration all the relevant rules/regulations for export.

4. The contents of this Circular may be suitably brought to the notice of the field formations and the Trade under your jurisdiction.

5. This issues in partial modification of Board's earlier circular under reference."

37. It is a settled proposition of law that circular cannot have an overriding effect on a statutory provision. This well settled proposition of law is propounded by the Hon'ble Apex Court in the case of **Glaxo SmithKline Pharmaceuticals Limited Vs. Union of India and others** reported in **AIR 2014 SC 410** and since same is quite vogue, we may deem it proper to reproduce the relevant observations contained in paragraph 60 of the said judgment:

"60. In our view, it is well settled that if the departmental circular provides an interpretation which runs contrary to the provisions of law, such interpretation cannot bind the Court. 1979 circular falls in such category. Moreover, the 1979 circular is with reference to the DPCO,1979 whereas we are concerned with DPCO, 1987 and DPCO, 1995. We are not impressed by the argument of Mr. S. Ganesh that in view of the saving clause in DPCO, 1987, the circular is saved which is further saved by the saving clause in DPCO, 1995."

38. The exemption circular has to be read in its entirety and not in part. It would be necessary to consider the language of the circular in its entirety and it cannot be read in isolation. In fact, paragraph 2 of the said circular

which has been relied upon by the Tribunal would indicate the following expression being conspicuously present viz.

> *"2. The matter has been examined ... ... in each such case,* ***however, it will be necessary to extend the period of warehousing under Section 61 of the Customs Act to enable the importer to export the goods within the permitted period of warehousing****."*
>
> *(emphasis supplied)*

39. A plain reading of the aforesaid words found in the circular, it would make it clear that warehoused goods, even after expiry of warehousing permitted period, can be allowed to be re-exported, subject to provision of Section 61 and not otherwise. Hence, we deem it proper to extract Section 61(2) which would be relevant and it reads:

> *"61(2) Where any warehoused goods —*
>
> *(i) specified in [sub-clause (a) or sub-clause (aa)] of sub-section (1), remain in a warehouse beyond the period specified in that sub-section by reason of extension of the aforesaid period or otherwise, interest at such rate as is specified in section 47 shall be payable, on the amount of duty payable at the time of clearance of the goods in accordance with the provisions of section 15 on the warehoused goods, for the period from the expiry of the said warehousing period till the date of payment of duty on the warehoused*

goods;

(ii) specified in sub-clause (b) of sub-section (1), remain in warehouse beyond a period of ninety days, interest shall be payable at such rate or rates not exceeding the rate specified in section 47, as may be fixed by the Board, on the amount of duty payable at the time of clearance of the goods in accordance with the provisions of section 15 on the warehoused goods, for the period from the expiry of the said ninety days, till the date of payment of duty on the warehoused goods:

Provided that the Board may, if it considers it necessary so to do in the public interest, by order and under circumstances of an exceptional nature, to be specified in such order, waive the whole or part of any interest payable under this section in respect of any warehoused goods:

Provided further that the Board may, if it is satisfied that it is necessary so to do in the public interest, by notification in the Official Gazette, specify the class of goods in respect of which no interest shall be charged under this section.

Explanation.— For the purposes of this section, "hundred per cent. export- oriented undertaking" has the same meaning as in Explanation 2 to sub-section (1) of section 3 of the Central Excises and Salt Act, 1944 (1 of 1944)."

40. Thus, it would be mandatory on the part of owner of goods to make payment of duty with interest as contemplated under Section 61, without which period for warehousing cannot be extended. Thus, in effect, the circular would only indicate about re-export being

permitted of warehoused goods and it does not specify or mention about the liability of the owner to make payment of duty, interest and penalty. However, it indicates before permitting re-export in each case, it will be necessary to extend the period of warehousing under Section 61 of the Customs Act. In other words, Sections 61 would come into play. Thereby, Section 61(2) would be attracted. Hence, we are of the considered view that the circular cannot be read in isolation or it cannot be read against Section 72 which empowers the Revenue to demand payment of duty in case warehoused goods are not cleared within the permitted time.

41. The circular in question which has been dealt with is also *ex facie* not possible to be taken for assistance to order for re-export of goods, especially when liability to pay duty, interest and penalty had already been crystallised and said findings has attained finality. Hence, the circular which is sought to be pressed into service cannot be read contrary to the statutory provisions. Under the garb of the circular, the adjudicating process

cannot be given a go-by completely by permitting re-export of warehoused goods (when the warehousing period has expired and not extended and such extension sought for having been expressly refused) without payment of duty, fine, penalty. Hence, we are of the considered view that circular has been erroneously interpreted by the Tribunal and finding of the tribunal in this regard is misplaced and contrary to the statutory provisions.

42. A taxing statute is to be strictly construed. The Courts have stated greater latitude to the legislature is to be extended in formulating its tax policy either directly or by delegated legislation. For this proposition, judgments the Hon'ble Apex Court in case of **R.K. Garg vs. Union of India and others**, reported in **AIR 1981 SC 2138** and in case of **M/s. Satnam Overseas (Export) vs. State of Haryana and another**, reported in **AIR 2003 SC 66** can be looked up.

43. Viscount Simon quoted with approval a passage from

Rowlatt J.[1] expressing said principle in the following words:

> *"In a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."*

44. In fiscal legislation a transaction cannot be taxed on any doctrine of *'the substance of the matter'* as distinguished from its legal signification, for a subject is not liable to tax on supposed *'spirit of the law'* or *'by inference or by analogy'*. In IRC vs. Duke of Westminster, (1936) AC 1, Lord Tomlin while refuting the doctrine of *'the substance of the matter'* observed thus:

> *"It is said that in revenue cases there is a doctrine that the court may ignore the legal position and regard what is called 'the substance of the matter'. This supposed doctrine seems to rest for its support upon a misunderstanding of language used in some earlier cases. The sooner this misunderstanding is dispelled, and the supposed doctrine given its quietus, the better it will be for all concerned, for the doctrine seems to involve substituting 'the uncertain and crooked cord of discretion' for 'the golden and straight metwand of the law'."*

[1] Cape Brandy Syndicate v. IRC, (1921) 1 KB 64, also referred to in Canadian Eagle Oil Co. Ltd. v. R, (1945) 2 ALL ER 499

45. It was also pointed out in the same case by Lord Wright that *'the true nature of the legal obligation'* arising out of a genuine transaction *'and nothing else is the substance'*. This principle which is known as Duke of Westminster principle is subject to new approach of the courts towards tax evasion schemes consisting of a series of transactions or a composite transaction.

46. In interpreting a section in a taxing statutes, according to Lord Simonds, 'the question is not at what transaction the section is according to some alleged general purpose aimed, but what transaction its language according to its natural meaning fairly and squarely hits'. Lord Simonds calls this 'the one and only proper test'. It is, therefore, not the function of a court of law to give to words a strained and unnatural meaning to cover loopholes through which the evasive taxpayer may find escape or to tax transactions which, had the Legislature thought of them, would have been covered by appropriate words. As stated by Lord Simon:

It may seem hard that a cunningly advised

> taxpayer should be able to avoid what appears to be his equitable share of the general fiscal burden and cast it on the shoulders of his fellow citizens. But for the courts to try to stretch the law to meet hard cases (whether the hardship appears to bear on the individual taxpayer or on the general body of taxpayers as represented by the Inland Revenue) is not merely to make bad law but to run the risk of subverting the rule of law itself.

The same rule applies even if the object of the enactment is to frustrate legitimate tax avoidance devices for moral precepts are not applicable to the interpretation of revenue statutes.

47. In the teeth of aforesaid propositions of law, we notice in the instant case that entire adjudicating process with regard to liability of respondent to pay duty - penalty had got crystallised and had attained finality and as such by taking aid of the circular dated 14.01.2003 and reading the same disjunctively, no undue benefit could have been extended to the respondent by impugned order. Hence, we are of the considered view that Tribunal committed a gross error in entertaining the prayer of the respondent in the background of our aforesaid discussion.

We are also of the view that reliance placed by the Tribunal on the aforesaid circular was impermissible in the background of facts obtained in the present case. If taking recourse to the said circular, that too by reading it in isolation, it would have the effect of nullifying the adjudicating process under law which had attained finality, then such interpretation has to be necessarily held bad in law. Hence, we are of the clear opinion that order passed by the Tribunal is erroneous and unsustainable in law.

48. In view of this background of facts, judgments which have been cited and relied upon by the learned senior counsel for respondent herein are of no assistance and it is a settled law that if there is no similarity of facts and even one additional fact would make a world of difference in applying the ratio precedent would not arise. Hence, in view of the discussion made herein-before, we hold that decisions relied upon by the learned senior counsel for the respondent herein are of no assistance and we are of the opinion that appellant has made out a strong case to

accept the appeal. **Hence, substantial questions of law (iii) and (iv) are answered in the negative viz. in favour of the Revenue and against the respondent.**

49. Special Civil Application No.14527 of 2022 has been filed by the respondent in Tax Appeal No.504 of 2022 seeking for a direction to the respondent to grant permission to the petitioner for re-export of the goods, equipment / machinery which are lying at Surat and as permitted by CESTAT vide order dated 31.01.2022 passed in Customs Appeal No.14527 of 2022.

50. In the background of Tax Appeal No.504 of 2022 filed by the Revenue having been allowed by answering the substantial questions of law in favour of the Revenue and consequently setting aside the order dated 31.01.2022 passed by CESTAT in Customs Appeal No.10752 of 2019, we are of the considered view that prayer sought for in Special Civil Application No.14527 of 2022 cannot be entertained and said petition is liable to be rejected.

51. For reasons aforestated, we proceed to pass the following

O R D E R

(i) Tax Appeal No.504 of 2022 is allowed by answering the substantial questions of law in favour of the appellant – Revenue and against the respondent, by setting aside the order passed by CESTAT in Customs Appeal No.10752 of 2019 dated 31.01.2022. Consequently, Customs Appeal No.10752 of 2019 is dismissed;

(ii) Special Civil Application No.14527 of 2022 is dismissed;

(iii) No order as to costs;

(iv) All pending civil applications stand consigned to records.

(ARAVIND KUMAR,CJ)

(ASHUTOSH J. SHASTRI, J)

Bharat