

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.1701 of 2019

1. Insight Diagnostic Oncological &)
Research Institute Private Limited)
a company incorporated under the)
Companies Act, 1956 and having its)
office at 615, 'E', Shahupuri, 2nd Lane)
Opp Mahavir Bank, Kolhapur-416001)

2. Dr. Anil V. Purohit)
347, 'E' Opposite Railway Station,)
Kolhapur – 416 001)Petitioners

V/s.

1. The Union of India, through the)
Secretary, Ministry of Finance Department)
of Revenue, North Block, New Delhi-110001)

2. The Commissioner Central Goods)
& Service Tax having his office at)
Ratimal Complex, Opposite Basant Bahar)
Theatre Assembly Road, New Shahupuri)
Kolhapur – 416 001)

3. The Commissioner of Customs)
(Import), having his office at Air Cargo)
Complex, Sahar, Andheri (E),)
Mumbai 400 099) ...Respondents

Mr. Prakash Shah a/w Mr. Jas Sanghvi, Mr. Makrand Joshi i/b Mat Legal for
Petitioners.

Mr. Pradeep Jetly, Senior Advocate a/w Mr. J. B. Mishra, Mr. Satyaprakash Sharma
and Mr. Amit Singh for Respondents

**CORAM : K.R. SHRIRAM &
A.S. DOCTOR, JJ
DATED : 28th JULY 2022**

ORAL JUDGMENT (PER K. R. SHRIRAM J.) :

- 1 Petitioners had imported, on or about 11th December 1990, a Computerised Treadmill vide Bill of Entry No.003637 and earlier, on 4th April 1989, vide Bill of Entry No.X10/920 petitioners had imported CT Scanner “Somotom CR”. For these two imports, petitioners claimed exemption from payment of customs duty under Notification No.64/88-CUS dated 1st March 1988. As required under the Notification, petitioners had supported their claim for exemption relying on Customs Duty Exemption Certificates issued by the Directorate General of Health Services (DGHS). By letter dated 10th November 1997, DGHS, for reasons mentioned therein, withdrew the Customs Duty Exemption Certificate that it had issued.
- 2 An inquiry was initiated by respondent no.3-Commissioner of Customs (Import) and on 23rd January 1998, the Treadmill and CT Scanner that petitioners had imported in April 1989 and December 1990, respectively, were seized under a panchnama dated 23rd January 1998 in exercise of powers under Section 110 of the Customs Act 1962 (the said Act). Statement of Director of petitioner no.1 was recorded under Section 108 of the said Act.
- 3 By a show cause notice dated 16th June 1998, respondent no.2 called upon petitioners to show cause as to why the Treadmill and CT Scanner

(hereinafter referred to as medical equipments) valued at Rs.74,34,076/should not be confiscated under Section 111(o) of the said Act and why penalty under Section 112(a) of the said Act cannot be imposed on petitioner no.1 and one of its Director. Petitioner responded to the show cause notice by a letter dated 29th July 1998. Simultaneously, petitioner also filed Regular Civil Suit before the Civil Judge, Senior Division, Kolhapur challenging the legality and validity of the show cause notice. The said suit later came to be rejected.

- 4 By an order dated 4th June 2003, respondent no.3 disposed the show cause notice by ordering confiscation of the medical equipments under Section 111(o) of the said Act and also imposed penalty of Rs.50,000/- on petitioner. Though, in the show cause notice dated 16th July 1998, petitioners were not called upon to show cause as to why petitioners should not be directed to pay customs duty on the medical equipments amounting to Rs.35,73,223/-, respondent no.3 in the order also directed petitioners to pay customs duty of Rs.35,73,223/-. It is rather strange because petitioners were never given an opportunity to show cause on the payment of customs duty. Mr. Shah, stated that notwithstanding this position, petitioners paid the customs duty of Rs.35,73,223/- and the penalty of Rs.50,000/-. Petitioners did not bother to pay the redemption fine on the medical equipments, and in effect abandoned those equipments. Therefore, petitioners did not redeem the confiscated goods.

- 5 Almost 12 years after the order dated 4th June 2003 was passed by respondent no.3, the Deputy Commissioner of Central Excise, Kolhapur, by a letter dated 20th March 2015 called upon and directed petitioners to pay fine of Rs.5,00,000/- alongwith interest of Rs.91,17,397/- for the period from 9th October 1996 to 23rd February 2012.

It seems, 9th October 1996 is the date on which the Customs Notification No.47/1996-CUS (NT) was issued. 23rd February 2012 is the date on which petitioners had paid the customs duty of Rs.35,73,223/- and penalty of Rs.50,000/-.

- 6 Petitioners responded by a letter dated 5th May 2015 and once again submitted that they do not wish to redeem the goods and hence are not required to pay the redemption fine. Petitioners also submitted that there was no provision under the said Act requiring petitioners to pay interest at the time of import of medical equipments in the years 1989 -1990, and in any case to demand interest after 25 years, would make the demand time barred.

- 7 By a letter dated 28th July 2015, the Joint Commissioner of Customs, Mumbai informed petitioners that they are liable to pay interest in terms of Section 28AB and Notification No.47/1996-CUS (NT) dated 9th October 1996. Petitioners once again reiterated their stand and denied that any amount was payable to respondents.

Almost 3 years later, by letter dated 26th April 2018, the Assistant Commissioner Central GST, Kolhapur, called upon petitioners to pay interest. Petitioner once again replied denying any liability by a letter dated 21st May 2018. By another letter dated 14th August 2018, the Assistant Commissioner, Central GST, called upon petitioners to discharge liability of interest. Petitioners replied by a letter dated 3rd August 2018 and after referring to all the previous correspondence, denied any liability.

On 7th September 2018, petitioner received a letter dated 29th August 2018 issued by the Assistant Commissioner of Central GST, reiterating their earlier letters and threatening to initiate recovery proceedings under Section 142 of the Act. At this stage, petitioners have approached this court by this writ petition.

- 8 Mr. Shah submitted that respondents' case is that interest was payable under Section 28AB of the Act and Notification No.47/1996-CUS (NT) dated 9th October 1996. Mr. Shah submitted that on the date of import of the medical equipments, Section 28AB of the Act and Notification No.47/1996-CUS (NT) did not exist. This is not disputed by respondents. It is not respondents' case that Section 28AB was introduced with retrospective effect. It is not respondents' case either that Notification also provided for something similar to that. According to Mr. Shah, therefore, neither provisions of Section 28AB, nor the Notification could be applied to petitioners for the non-compliance with the conditions attached in

Notification No.64/88-CUS dated 1st March 1988 under which petitioners had imported the medical equipments.

- 9 Mr. Jetly submitted that petitioners, having committed breach of the conditions attached to Notification No.64/88-CUS, were issued show cause notice and imposed with penalty of Rs.50,000/-. Mr. Jetly states that the medical equipments were also confiscated under Section 111(o) and petitioners were directed to pay customs duty. Mr. Jetly submitted that the customs duty and penalty was paid by petitioners only on or about 23rd February 2012 and, therefore, interest has been claimed under Section 28AB of the Act. Mr. Jetly also submitted that there was no need to mention about interest liability in the original show cause notice.
- 10 Having heard the submissions of Mr. Shah and Mr. Jetly, one indisputable fact that comes to the fore, is that Section 28AB of the Act or Notification No.47/96-CUS (NT) were not in existence on the date of importation of the medical equipments. Section 28AB that was inserted through Finance (No.2) Bill, 1996, reads as under:

28AB. Interest on delayed payment of duty in special cases:-

(1) where any duty has not been levied or has been shortlevied or erroneously refunded by reasons of collusion or any wilful mis-statement or suppression of facts, the person who is liable to pay the duty as determined under sub-section (2) of section 28, shall, in addition to the duty, be liable to pay interest at such rate not below 10% and not exceeding 30% per annum, as is for the time being fixed by the Board, from the first day of the month succeeding the month in which the duty ought to have been paid under this Act or from the date of such erroneous refund, as the case may be, but for the provisions contained in

sub-section (2) of Section 28, till the date of payment of such duty.

(2) For the removal of doubts, it is hereby declared that the provisions of sub-section (1) shall not apply to cases where the duty became payable before the date on which the Finance (No.2) Bill, 1996 receives the assent of President.

Therefore, the provisions of sub-section (1) would not apply to the cases where duty became payable before the date on which Finance (No.2) Bill 1996 received assent of President. In this case, the goods were imported in 1989-90 and, therefore, duty would have become payable in 1989-1990, which is certainly much before receiving the assent of President to the Finance (No.2) Bill 1996, by which Section 28AB was inserted in the Act.

11 In the case of ***Diwan Chand Satya Pal Aggl. Imaging Research Centre Vs. Union of India***¹ where the facts were similar, the Delhi High Court held that when the provisions of Section 28AB did not exist in the statute at the time of import of the equipments by petitioners, provisions of Section 28AB could not have been invoked. We respectfully agree with the view expressed by the Delhi High Court.

12 Moreover, Section 28AB will be applicable only where any duty has not been levied or has been short levied or erroneously refunded by reasons of collusion or any wilful mis-statement or suppression of facts by a person, who is liable to pay the duty as determined under

¹ . 2017(345) E.L.T. 182 (DEL.

sub-Section (2) of Section 28. Section 28 as amended by Finance Act 1995, reads as under:

“28. Notice for payment of duties, interest etc.

(1) When any duty has not been levied or has been shortlevied or erroneously refunded, or when any interest payable has not been paid, part paid or erroneously refunded, the proper officer may,

(a) in the case of any import made by any individual for hispersonal use or by Government or by any educational, research or charitable institution or hospital, within one year;

(b) in any other case, within six months,

from the relevant date, serve notice on the person chargeable with the duty or interest which has not been levied or charged or which has been so short-levied or part paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:

Provided that where any duty has not been levied or has been short-levied or the interest has not been charged or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful misstatement or suppression of facts by the importer or the exporter or the agent or employee of the importer or exporter, the provisions of this sub-section shall have effect as if for the words one year and six months, the words five years were substituted.

Explanation. Where the service of the notice is stayed by an order of a court, the period of such stay shall be excluded in computing the aforesaid period of one year or six months or five years, as the case may be.

(2) The proper officer, after considering the representation, ifany, made by the person on whom notice is served under sub-section (1), shall determine the amount of duty or interest due from such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined.

(3) For the purposes of sub-section (1), the expressionrelevant date means,

(a) in a case where duty is not levied, or interest is notcharged, the date on which the proper officer makes an order for the clearance of the goods;

(b) *in a case where duty is provisionally assessed under Section 18, the date of adjustment of duty after the final assessment thereof;*

(c) *in a case where duty or interest has been erroneously refunded, the date of refund;*

(d) *in any other case, the date of payment of duty or interest.”*

Therefore, sub-section (2) of Section 28 provides that notice under sub-Section (1) should have been first issued. To demand interest under Section 28AB, in such a notice there shall be allegations of collusion or wilful misstatement or suppression of facts by the person liable to pay duty. Only after considering the representation of the person to whom such a notice has been issued, the proper officer should have determined the amount of duty or interest from such person. Otherwise no interest under Section 28AB can be demanded.

13 In our view, none of the pre-conditions required to demand interest under Section 28AB, viz; (a) issuance of notice under Section 28(1) containing justifiable allegations of collusion or wilful misstatement or suppression of facts by the person liable to pay duty; (b) Permit noticee to file representation in response to the notice; (c) Consider such a representation ; and (d) determine the amount of duty or interest due from such person; has been complied with.

14 When notice under Section 28 itself has not been issued in this case, the question of determination of any duty payable under sub-Section (2) of

Section 28 does not arise and consequently, any interest payable under Section 28AB also would not arise.

15 Therefore, Rule issued on 8th February 2019 is made absolute.

16 Petition disposed.

(A. S. DOCTOR, J.)

(K.R. SHRIRAM, J.)