

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI**

PRINCIPAL BENCH-COURT NO. 1

**CUSTOMS APPEAL NO. 2477 OF 2012
WITH
CUSTOMS MISCELLANEOUS APPLICATION NO. 50008 OF 2021**

[Arising out of Order-in-Original No. 07/RKB/CCE/NCH/2012 dated 30.03.2012
passed by the Commissioner of Central Excise(Adj.) New Delhi]

M/s Linear Technologies India Pvt Ltd.

Appellant

B-167, Freedom Fighters Enclave,
Neb Sarai, New Delhi-110068

Versus

**Commissioner of Central Excise (Adjudication)
New Customs House, Near IGI Airport
New Delhi-110037**

Respondent

With

CUSTOMS APPEAL NO. 2478 OF 2012

[Arising out of Order-in-Original No. 07/RKB/CCE/NCH/2012 dated 30.03.2012
passed by the Commissioner of Central Excise(Adj), New Delhi]

Shri P K Sood, Managing Director

Appellant

M/s Linear Technologies India Pvt Ltd.

B-167, Freedom Fighters Enclave,
Neb Sarai, New Delhi-110068

Versus

**Commissioner of Central Excise (Adjudication)
New Customs House, Near IGI Airport
New Delhi-110037**

Respondent

Appearance:.

Present for the Appellant :

Shri Shikhar Khare, Advocate

Present for the Respondent:

Shri Rakesh Kumar, Authorised Representative

COARM:

HON'BLE MR. JUSTICE DILIP GUPTA , PRESIDENT

HON'BLE MR. P V SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NOS. 50898-50899 /2022

C/2477 & 2478/2012

Date of Hearing: 22.08.2022

Date of Decision: 23.09.2022

P V SUBBA RAO

Customs Appeal no. 2477 of 2012 is filed by M/s. Linear Technologies Ltd. and Customs Appeal No. 2478 of 2012 is filed by Shri P K Sood against the same impugned order and hence these are being disposed of together.

2. The undisputed facts of the case are that M/s. Linear Technologies Ltd¹ imported CFL tubes which were subject to Additional Duty of Customs equal to the Central Excise duty leviable on similar goods manufactured in India. These goods were notified under Section 3A of the Central Excise Act and hence were subject to Additional duty of Customs based on the Retail Sale Price².

3. The importer imported goods declaring an RSP and accordingly, goods were assessed by the customs officers and cleared. Thereafter, on receiving intelligence, officers of Directorate of Revenue Intelligence³ searched the warehouse of the importer and found loose labels which indicated much higher prices than those declared in the Customs documents and also found price lists indicating higher prices in the warehouse. Officers of DRI investigated the matter further and recorded statements of Shri P K Sood the Director of the importer on 1.03.2005, 22.03.2005, 09.05.2005, 05.05.2005 and 25.05.2005 and Shri S K Kohli, Manager on 21.02.2005 under Section 108 of the Customs Act, 1962⁴ in which they confessed that the labels reflected the true RSP and

1 **Importer**
2 **RSP**
3 **DRI**
4 **Act**

lower prices were declared in the Customs documents to evade duty. Both had subsequently retracted their statements. The goods were seized by the officers of DRI and handed over to the importer under a Supurdnama for safe custody. Later, these were returned to the department.

4. A Show Cause Notice⁵ dated 19.08.2005 was issued by the Additional Director General of DRI proposing to reject the declared RSP and reassess the Additional Duty of Customs on the imported goods as per the RSP in the loose labels found in the warehouse and recover differential duty and also to confiscate the goods under section 111 (d) & (m) of the Customs Act and impose penalties. The SCN was adjudicated by the Commissioner and the impugned order was passed the operative part of which is as follows:

" (i) I order confiscation of goods imported by M/s Linear Technologies India Pvt Ltd. for a total value of Rs. 1,09,69,543/- (value of seized goods) under Section 111(d) and (m) of the Customs Act, 1962 due to mis-declaration of actual transaction value. However, the same are allowed to be redeemed on payment of redemption fine of Rs. 15,00,000/- (Rupees Fifteen Lacs Only) under section 125 of the Customs Act, 1962. The remaining balanced goods valued at Rs. 1,23,54,583/- are not physically available at this stage, therefore, I refrain from passing orders regarding confiscation of the said goods and redemption thereof under Section 125 of the Customs Act, 1962.

(ii) I order recovery of differential duty by way of CVD to the extent of Rs. 86,34,821/-(Rupees Eighty Six Lacs Thirty Four Thousand Eight Hundred Twenty One only) alongwith interest in terms of provisions of Section 28(1) read with section 28AB of the Customs Act, 1962 from M/s Linear Technologies India Pvt Ltd.

(iii) I impose a penalty of Rs. 20,00,000/- (Rupees Twenty Lacs Only) on M/s Linear Technologies India Pvt Ltd. under section 112 of the Customs Act, 1962.

(iv) I impose a penalty of Rs. 10,00,000/- (Rupees Ten Lacs Only) on Mr. P K Sood, Director, M/s Linear Technologies India Pvt Ltd. under section 112(a) of the Customs Act, 1962 for his acts of omission and commission which rendered the goods liable to confiscation under section 111(d) & (m) of the Customs Act, 1962.

(v) I order appropriation of an amount of Rs 25,36,272/- (Rs. 10,00,000/- + Rs. 15,36,272/-) voluntarily deposited by M/s Linear Technologies India Pvt Ltd during the course of investigation. The above mentioned amount should be adjusted towards the Customs duties and penalties payable by the noticees. The remaining balance amount be recovered from the noticees."

5. Aggrieved, this appeal is filed by the appellants.

6. Learned counsel for the appellants submits that the seized goods were confiscated and an option to redeem the goods has been given to the importer. However, the importer has not redeemed the goods. Since the goods have not been redeemed, the question of recovering duty or differential duty on the confiscated goods does not arise.

7. According to learned counsel duty has to be paid as per sub-section (2) of section 125 in addition to the redemption fine only if this option is exercised. Otherwise, the confiscated goods vest in the Central Government as per section 126 and consequently, any charge of duty on the goods shall also vest in the Central Government and not on the importer. He relies on the following case laws:

(i) **M/s B S N Joshi & Sons Limited vs. Nair Coal Services Limited⁶**

(ii) **Commissioner of Customs (Prev), Mumbai vs. Swastik Optical Co Pvt Ltd.⁷**

6 (2006) 11 SCC 548

7 Appeal No. C/689/04 dated 20.08.2015

- (iii) **Hindustan Appliances vs. Commissioner of C. Ex. New Delhi⁸**
- (iv) **Venus Stampings Pvt Ltd. vs. Commissioner of Central Excise Delhi IV⁹**
- (v) **Northern Plastics vs. Commissioner of Central Excise¹⁰**
- (vi) **Perfect Trading Company vs. Commissioner of Customs, New Delhi¹¹**
- (vii) **Union of India vs. Kisan Ratan Singh¹²**

8. He further submits that the rejection of the declared RSP and redetermination of the RSP based on loose labels and the price lists found in the warehouse is itself not sustainable. There is no evidence that the importer had either declared higher RSP in the market or sold any goods at such prices. There is no evidence that the price list was circulated in the market or that the price tags were affixed to the goods and displayed for sale in the market.

9. As far as the statements recorded under section 108 of the Act are concerned, he submits that these were recorded under coercion and were retracted by Shri S K Kohli on 23.02.2005 and by Shri P K Sood on 05.05.2005. This fact was also argued before the Commissioner who, however, relied on the retracted statements and passed the impugned order. Therefore, not only the redetermination of the duty but also the confiscation of the goods and imposition of penalties are also not sustainable.

8 2002 SCC Online CEGAT 1736
9 2022 (379) ELT 274 (SC)
10 (1998) 6 SCC 443
11 2001 SCC Online CEGAT 413
12 2020 SCC Online Bom 39

10. He further submits that as per section 111 'imported goods' can be confiscated. The term 'imported goods' as defined in section 2(25) of the Act which specifically excludes those goods which have been cleared for home consumption. Therefore, once the goods are cleared for home consumption by the Customs officers, they are no longer imported goods and hence cannot be confiscated under section 111. Since the goods were not liable for confiscation, their seizure itself was incorrect. Even on this ground the confiscation must be set aside along with the penalties.

11. Learned authorised representative for the Revenue supports the impugned order. He submits that confiscation of goods with an option for their redemption and payment of duty on the imported goods are two separate things as per the Act and the importer is bound to pay duty regardless of whether he chooses to redeem the goods or not. He relies on the judgment of High Court of Gujarat in **Commissioner of Customs (Prev). Vs. L D Textiles Industries Limited.**¹³

12. On the question of rejection of the declared RSP and re-determination of the duty based on the RSP found on the labels, he submits that the labels were found in the warehouse of the importer himself and were not found elsewhere. A price list was also found corresponding to these labels. The mere fact that the goods had not yet been sent to the market makes no difference. The importer had declared a certain RSP before the Customs when, in fact, the RSP as found in the labels and the price lists recovered from the warehouse of the importer itself were much higher. When questioned, Shri P K Sood and Shri S K

13 2017 (350) ELT 321 (Guj)

Kohli have both admitted that the price lists and the labels reflected the true prices. Therefore, rejection of the declared RSP and redetermination of duty as per the labels and the price lists and order of recovery of differential duty are correct and do not call for any interference. As far as the retractions of the statements are concerned, he submits that they were afterthoughts and do not explain the labels and price lists actually found.

13. He further submits that as the impugned goods did not correspond to the actual value (RSP), they were correctly confiscated under section 111(d) & 111(m) and were allowed to be redeemed on payment of fine which the importer had not opted for. Consequently, the penalties were correctly imposed.

14. We have considered the submissions on both sides and perused the records. The questions which we need to answer in this case are:

- a) If the goods are confiscated and allowed to be redeemed but have not been redeemed, will the importer still be liable to pay the differential duty?
- b) In the factual matrix of this case, was the rejection of the declared RSP and redetermination of the additional duty of customs based on the RSP found in the loose labels and price lists recovered from the warehouse of the importer is justified?
- c) Consequently, can the confiscation of the goods under section 111(d) & 111(m) be sustained?
- d) Can the imposition of penalties be sustained?

15. We find that as per section 125 (2), if the goods are redeemed by the owner or the person from who they are seized, such person shall, in addition to the redemption fine, pay duty on the goods. Evidently, if they are not redeemed, payment of duty in addition to fine shall not apply. If the goods are not redeemed, on confiscation, the goods vest with the Central Government as per section 126 of the Act. Sections 125 and 126 read as follows:

"125. Option to pay fine in lieu of confiscation.—(1) Whenever confiscation of any goods is authorised 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.

126. On confiscation, property to vest in Central Government.—(1) When any goods are confiscated under this Act, such goods shall thereupon **vest in the Central Government.**

(2) The officer adjudging confiscation shall take and hold possession of the confiscated goods."

16. The charge of duty of customs is on the goods imported into India as per Section 12 and NOT on the person who imported the goods. This section further lays down that this charge will apply to goods owned by the Government as they apply to other goods. Section 12 reads as follows:

" Section 12. Dutiable goods. -

(1) Except as otherwise provided in this Act, or any other law for the time being in force, **duties of customs shall be levied** at such rates as may be specified under the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force, **on goods imported into, or exported from, India.**

(2) The provisions of sub-section (1) **shall apply in respect of all goods belonging to Government as they apply in respect of goods not belonging to Government.**

(emphasis supplied)"

17. Thus, even if the goods vest in the Government, duty has to be paid on them. Evidently, if the Government becomes the owner it has to pay the duty. A few illustrations will make this legal position clear.

- a) If goods are imported by the Government, it pays the Customs duty.
- b) If goods are imported and then the importer relinquishes its title to the goods, as per section 23(2) the importer does not have to pay duty. The title of the goods moves to the government and along with the liability to pay duty. This section reads as follows:

" Section 23. Remission of duty on lost, destroyed or abandoned goods. -

(1) Without prejudice to the provisions of section 13, where it is shown to the satisfaction of the Assistant Commissioner of

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Customs or Deputy Commissioner of Customs that any imported goods have been lost (otherwise than as a result of pilferage) or destroyed, at any time before clearance for home consumption, the Assistant Commissioner of Customs or Deputy Commissioner of Customs shall remit the duty on such goods.

- (2) **The owner of any imported goods may, at any time before an order for clearance of goods for home consumption under section 47 or an order for permitting the deposit of goods in a warehouse under section 60 has been made, relinquish his title to the goods and thereupon he shall not be liable to pay the duty thereon;**

Provided that the owner of any such imported goods shall not be allowed to relinquish his title to such goods regarding which an offence appears to have been committed under this Act or any other law for the time being in force.

(emphasis supplied)"

- c) If goods are imported but not cleared and are lying with the custodian for over 30 days, as per section 48, the Custodian can, with approval of proper officer, sell the goods. In such a case, the sale proceeds shall be dealt with as per section 150, which, inter alia, says that the duty is to be recovered from the sale proceeds. It is not charged separately from the importer. The importer need not pay the duty. Section 48 reads as follows:

" Section 48. Procedure in case of goods not cleared, warehoused, or transhipped within thirty days after unloading. -

If any goods brought into India from a place outside India are not cleared for home consumption or warehoused or transhipped within thirty days from the date of the unloading thereof at a customs station or within such further time as the proper officer may allow or if the title to any imported goods is relinquished, **such goods may, after notice to the importer and with the permission of the proper officer be sold by the person having the custody thereof:**

Provided that -

- (a) animals, perishable goods and hazardous goods, may, with the permission of the proper officer, be sold at any time;
- (b) arms and ammunition may be sold at such time and place and in such manner as the Central Government may direct.

Explanation. - In this section, "arms" and "ammunition" have the meanings respectively assigned to them in the Arms Act, 1959 (54 of 1959)."

18. The Central Board of Excise and Customs instructions on disposal of unclaimed or un-cleared cargo are contained in paragraph 3 of Chapter 20 of the Customs Manual 2018 and the portion related to application of sale proceeds and the corresponding section 150 are as follows:

" Customs Manual 2018

Chapter 20- Disposal of unclaimed or uncleared cargo

.....

3. Procedure for sale of unclaimed/uncleared goods:

...

3.3 The sale proceeds of the auction shall be disbursed as per Section 150 of the Customs Act 1962.

Section 150. Procedure for sale of goods and application of sale proceeds. -

(1) Where any goods not being confiscated goods are to be sold under any provisions of this Act, they shall, after notice to the owner thereof, be sold by public auction or by tender or with the consent of the owner in any other manner.

(2)The proceeds of any such sale shall be applied -

(a) firstly to the payment of the expenses of the sale,

(b) next to the payment of the freight and other charges, if any, payable in respect of the goods sold, to the carrier, if notice of such charges has been given to the person having custody of the goods,

(c) next to the payment of the duty, if any, on the goods sold,

(d) next to the payment of the charges in respect of the goods sold due to the person having the custody of the goods,

(e) next to the payment of any amount due from the owner of the goods to the Central Government under the provisions of this Act or any other law relating to customs, and the balance, if any, shall be paid to the owner of the goods:

Provided that where it is not possible to pay the balance of sale proceeds, if any, to the owner of the goods within a period of six months from the date of sale of such goods or such further period as the Principal Commissioner of Customs or Commissioner of Customs may allow, such balance of sale proceeds shall be paid to the Central Government.

(emphasis supplied)"

d) If the goods are confiscated by the government and sold, the buyer becomes the owner and has to pay the duties.

19. Therefore, the submission of the learned authorised representative that the duty has to be paid by the importer even if the goods are confiscated resulting in the title vesting with the Central Government and the importer is chargeable to duty is not correct. The charge under Section 12 is on the goods and not on the importer. When the title to the goods moves from the importer, the liability to pay duty moves along with it. If the importer relinquishes his title to the goods before clearance under section 28(2), he has no liability to pay duty. If the importer does not clear the goods and for that reason the goods are sold by the custodian under section 48, the duty is to be recovered from the sale proceeds as per section 150 and not from the importer. This has also been made clear by the Board in the Customs Manual. Similarly, if the goods are confiscated absolutely or the option of redemption has not been exercised by the importer, in terms of section 150, such goods must be sold and the duty has to be recovered from the sale proceeds. Thus, goods which are confiscated and which are not allowed to be redeemed or which have not been redeemed vest in the Central Government and the officer adjudicating the case has to take their possession. It has been held by the Supreme Court in **Fortis Hospital Limited vs. Commissioner of Customs, Import**¹⁴ as follows:

"14. Notwithstanding the aforesaid position, as pointed out above, the Department is taking shelter under the provisions of sub-section (2) of Section 125 of the Act. However, on a plain reading of the said provision, we are of the view that such a provision would not apply in case where option to pay fine in lieu of confiscation is not exercised by the importer. Trigger point is

the exercise of a positive option to pay the fine and redeem the confiscated goods. Only when this contingency is met, the duty becomes payable. In the present case, admittedly, such an option was not exercised and the confiscated machinery was not redeemed by the Institute. As a matter of fact, thus, no fine has been paid.

16. Indubitably, unless an option is exercised, fine does not become payable. Sub-section (2) of Section 125 uses the expression "imposed" by stating "where any fine in lieu of confiscation of goods is imposed". In Black law dictionary (Tenth edition), the word 'impose' is defined as "To levy or exact (a tax or duty)". Thus, it has to be a levy or exact which is become payable and has to be paid. Likewise, the word 'impose' is defined by Oxford English Dictionary, as relevant for the purpose of the present case, as "Lay or inflict (a tax, duty, charge, obligation, etc.) (on or upon), esp. forcibly; compel compliance with; force (oneself) on or upon the attention etc. of."

18. As already mentioned above, Section 124 deals with confiscation of goods and penalty and does not deal with payment of import duty. No doubt, such a payment of import duty becomes payable by virtue of sub-section (2) of Section 125 but only when condition stipulated in the said provision is fulfilled, namely, fine is paid in lieu of confiscation of goods. When the Department chose to take action under Section 124 of the Act, it should have been alive of the situation that the Noticee may not exercise the option and in such case, duty would not be payable automatically."

20. Learned authorised representative for the Revenue relied on **L. D. Textiles Industries Ltd.** to assert that redemption of goods and payment of duty are two different things and the importer is bound to pay the duty whether or not he has opted to redeem them. We find that this judgment of High Court of Gujarat was passed without considering **Fortis Hospital Ltd.** judgment of Supreme Court. Respectfully following the law laid down by Supreme Court, we hold that if the confiscated goods are not redeemed, no duty is payable on them.

21. The next question is whether in the factual matrix of this case, the demand of differential duty and confiscation of the goods and imposition of penalties are sustainable. These issues are inter-linked and all stem from the premise that the RSP was mis-declared in the Bills of Entry.

The basis for this finding in the impugned order that the RSP was mis-declared are as follows:

- a) Loose labels found in the warehouse;
- b) Price list found in the warehouse; and
- c) Statements of Shri P K Sood and Shri S K Kohli made before the officers under Section 108 of the Act.

22. The statements were retracted later. Section 138B of the Act explains the relevance of any statements made before officers of Customs under the Act. It reads as follows:

" Section 138B. Relevancy of statements under certain circumstances. -

(1) A statement made and signed by a person before any gazetted officer of customs during the course of any inquiry or proceeding under this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains, -

(a) when the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the court considers unreasonable; or

(b) when the person who made the statement is examined as a witness in the case before the court and the court is of opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice.

(2) The provisions of sub-section (1) shall, so far as may be, apply in relation to any proceeding under this Act, other than a proceeding before a court, as they apply in relation to a proceeding before a court."

23. Undisputedly, the process prescribed under section 138B was not followed by the Commissioner with respect to the statements. Therefore, the statements are not relevant to this case on this ground alone. Further, the statements have also been retracted later. Thus, if the statements are removed, what is left are the loose labels found in the

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warehouse and the price lists found in the warehouse. There is nothing on record to show that the price labels were affixed to the imported goods and sold in the market or offered for sale in the market at the higher prices or that the price list was sent to the buyers or dealers. In our considered view, this is not sufficient evidence to hold that the RSP was mis-declared before the Customs and that the loose labels found in the warehouse reflect the true RSP. Consequently, the rejection of RSP, redetermination of duty, confiscation of the goods and imposition of penalties cannot be sustained.

24. In view of the above, the impugned order is set aside and the appeals are allowed with consequential relief to the appellants.

[Order pronounced on **23.09.2022**]

(JUSTICE DILIP GUPTA)
PRESIDENT

(P V SUBBA RAO)
MEMBER (TECHNICAL)