

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE
TRIBUNAL
WEST ZONAL BENCH, MUMBAI
COURT NO. I**

Appeal Nos. C/794-796,874/2010

Arising out of Order-in-Original No. 65/2010/CAC/CC(I)/SHA Gr.VA,
Dated: 30.7.2010

Passed by Commissioner of Customs (Imports), Mumbai

**Date of Hearing: 18.04.2018
Date of Decision: 08.06.2018**

**APCO INFRATECH PVT LTD
ANIL KUMAR SINGH**

Vs

**COMMISSIONER OF CUSTOMS (I)
MUMBAI**

Appellant Rep by: Shri Anil Mishra, Adv.

Respondent Rep by: Ms P Vinitha Shekhar, Joint Commissioner
(AR)

CORAM: Ramesh Nair, Member (J)
Raju, Member (T)

Cus - The assessee had imported "Hot mix plant" under Notfn 21/2002-Cus. - The plant was never utilized as provided under the conditions of notfn - The contention of assessee that they were eligible for multiple road construction contract issued by Govt. of U.P. for different road construction sites does not mean that the condition of notification has been followed - In fact the plant was never used for such contracts as canvassed by assessee during the importation of goods and claiming exemption - The assessee has not adduced single evidence that they have followed the conditions of notification - They declared that they had contracts awarded by state of U.P. wherein the imported plant would be used - However, they never used the said imported equipments in state of U.P. for construction of road - Instead

they used the plant as a sub-contractor in state of Rajasthan and Tamilnadu, but even in these cases also they were not named as sub-contractor in the contract awarded for construction of road - As per the conditions of exemption notification, an importer can claim the benefit of exemption provided they are named as sub-contractor for construction of road - Even this condition was not satisfied - It clearly shows that the assessee never complied with the conditions of the exemption notification and has knowingly violated the conditions - Since the conditions of notfn were not complied with and it is very clear that the same were never intended to be complied with, the impugned order confirming demand, penalties and confiscation of goods has been rightly passed - The officers had handed over the plant for safe custody after seizure and the same could not have been used without permission from the department - Shri Anil Singh, Managing Director was fully aware about the benefits likely to accrue by availing ineligible notification and use of machine and therefore in such case his complicity in deliberate violation of the condition of notification is apparent - However in case of Shri V. S. Rao, Chief Manager (F & A), he was only concerned with the taxation matter to the extent of availing benefit of exemption notification and was not concerned/ connected with the decision to use machine and his role in violation of condition is also not visible - Therefore, he cannot be burdened with penalty - Resultantly, the impugned order is upheld in as much as it has confirmed demand, confiscation of goods and penalties against M/s Apco and Shri Anil Singh - However, the penalty imposed upon Shri V. S. Rao is set aside - The impugned order is modified to said extent - The appeals filed by M/s Apco Infratech and Shri Anil Kumar Singh is rejected and the appeal filed by Shri S.V. Rao is allowed: CESTAT

Appeals partly allowed

Case laws cited:

Patel Engineering Ltd V/s C.C (IMPORT) Mumbai - 2012-TIOL-2027-CESTAT-MUM ... Para 5

Patel Engineering Ltd V/s Commissioner-2016 (338) ELT A35(SC)... Para 5

**Rajhoo Barot V/s CC, Mumbai – 2015-TIOL-244-CESTAT-MUM ...
Para 5**

**Gammon India Ltd V/S CC,MUMBAI - 2011-TIOL-60-SC-CUS ...
Para 5**

**Bombay Hospital Trust V/s. Commissioner of Customs (ACC),
Mumbai - 2006-TIOL-170-HC-MUM-CUS ... Para 5**

**Grant Medical Foundation V/s. Commissioner -2015 (315)
ELT.A26 (SC)... Para 5**

FINAL ORDER NOS. A/86750-86753/2018

Per: Ramesh Nair:

Out of the four appeals before us, three Appeals have been filed against OIO dated 30.07.2010 passed by Commissioner (Imports) of Customs, Mumbai-I by M/s Apco Infratech Ltd. (formerly known as M/s Apco Constructions Pvt. Ltd.), it's Director Shri Anil Kumar Singh and Shri V.S. Rao, Chief Manager (F & A). The remaining one Appeal No. C/874/2010 has been filed by the revenue. The brief facts of the case are that M/s APCO had imported one "Asphalt Hot Mix Plant" through Mumbai port vide Bills of Entry No. 676500 dated 19.05.2006. They availed conditional duty exemption under Sr. No.230 of Notification No.21/2002-Cus dated 01.03.2002. The said Sr. No. under exemption notification is as under :

Table

Sr.No.	Chapter or heading or subheading No.	Description of goods	Standard rate	Additional duty rate	Condition No.
1	2	3	4	5	6
230	84 or any other chapter	Goods specified in List 18 required for construction	Nil	Nil	40

		of roads			
--	--	----------	--	--	--

ANNEXURE

Condition No.	Condition
40	<p>If,-</p> <p>(a) the goods are imported by -</p> <p>(i) the Ministry of Surface Transport, or</p> <p>(ii) a person who has been awarded a contract for the construction of roads in India by or on behalf of the Ministry of Surface Transport, by the National Highway Authority of India, by the Public Works Department of a State Government or by a road construction corporation under the control of the Government of a State or Union Territory; or</p> <p>(iii) a person who has been named as a sub-contractor in the contract referred to in (ii) above for the construction of roads in India by or on behalf of the Ministry of Surface Transport, by the National Highway Authority of India, by Public Works Department of a State Government or by a road construction corporation under the control of the Government of a State or Union Territory;</p> <p>(b) the importer, at the time of importation, furnishes an undertaking to the Deputy Commissioner of Customs or the Assistant Commissioner of Customs, as the case may be, to the effect that he shall use the imported goods exclusively for the construction of roads and that he shall not sell or otherwise dispose of the said goods, in any manner, for a period of five years from the date of their importation; and</p> <p>(c) in case of goods of serial no. 12 and 13 of List</p>

	18, the importer, at the time of importation of such goods, also produces to the Deputy Commissioner of Customs or the Assistant Commissioner of Customs, as the case may be, a certificate from an officer not below the rank of a Deputy Secretary to the Government of India in the Ministry of Surface Transport (Roads Wing), or an officer not below the rank of Chief Engineer of the National Highways Authority of India, to the effect that the imported goods are required for construction of roads in India.
--	---

2. The Appellant, in order to avail such exemption produced acceptance letter from the Superintendent Engineer, Rural Engineering Service, Lucknow stating that the appellant's bids for construction and maintenance of PMGSY Road in Raibareli and Barabanki district in the state of Uttar Pradesh has been accepted. They also submitted a copy of contract bond dated 31.03.2005 from Executive Engineer, Construction division No.2, LNV, Faridabad wherein the said appellant was mentioned as contractor for construction of Milkipur – Amanganj lane length 17.5 kilometers in the state of U.P. In accordance with the condition they also executed a bond binding themselves that the said plant shall be used exclusively in the construction of road and they shall not sell or dispose of the goods in any manner for the period of 5 years from the date of import. During investigation towards verification of compliance of condition, it was found that the imported plant was not used for construction of roads in the state of U.P. but was diverted to Rajasthan for construction of road as a sub-contractor of M/s. Punj Lloyd Ltd. and thereafter it was shifted to Tamilnadu for carrying construction of road as subcontractor of M/s Oriental Structures Pvt. Ltd. Since the goods were found to have been used in violation of terms and the conditions of the exemption notification, hence the goods were seized and were released provisionally for safe custody. However it was found that the plant continued to be remain in use inspite of being seized. The Show Cause Notice dated 16.11.2009 was issued demanding duty in terms of Section 28 of Customs Act, 1962 along with interest. It was also

proposed to confiscate the goods under the provisions of Section 111(o) and to impose penalty under Section 112(a) & (b) and/or 114A of Customs Act. A penalty under Section 117 of Customs Act was also proposed for using the equipments even after the same was seized and was handed over to appellants for safe custody. Penalty was also proposed against the Managing Director of the Company Shri Anil Singh, V. S. Rao Chief Manager (F & A), Santosh Kumar Singh Dy. Project Manager and Ram Gopal Rana Sr. project Manager.

3. Vide impugned order dated 30.03.2010 the demands and penalties against all the Appellants were ordered. Hence the three appeals by M/s Apco, Shri Anil Kumar Singh and Shri V.S. Rao. The revenue is also aggrieved with the impugned order to the extent that the penalty under section 114A has not been ordered to be imposed upon the interest on demand arising due to confirmation of demand against M/s Apco.

4. Ld. Counsel Shri Anil Mishra appearing for the Appellants submits that the goods were used for construction of road in any state or national highways and not necessarily at sites, contracts of which were presented before the Customs. The exemption is not site specific. The appellants as a sub-contractor of M/s Punj Lloyd also had a road construction contract for construction of highway in Rajasthan and the plant was taken to Rajasthan under a belief that such plant can be used for construction of road in any state or national highway. As the appellant was not having said contracts directly in their name, they filed eligibility documents award of road contract by U.P. State Govt. The goods were also used in Tamilnadu as a subcontractor for construction of road and hence they are eligible for exemption under the notification. He also relies upon TRU Circular No.334/1/2010-TRU dated 26.02.2010 that it is permissible to re-locate or re-deploy the machinery imported under exemption to another road construction project. He submits that the goods has been used for intended purpose hence the demand has been wrongly made and penalties were also wrongly imposed.

5. Ms. P. Vinitha Sekhar, Ld. JC(AR) appearing for the revenue submits that as apparent from the facts of the case, the imported

goods were used in violation of the conditions of the exemption and even at the time of importation the appellants had produced the awards of construction which were never executed by the appellants. She submits that in same set of facts the Tribunal has upheld the demand and penalties. She relies upon judgments in case of:

(i) *Patel Engineering Ltd V/s C.C (IMPORT) Mumbai- 2013 (295) ELT.243 (Tri.Mumbai) = 2012-TIOL-2027-CESTAT-MUM*

(ii) *Patel Engineering Ltd V/s Commissioner-2016 (338) ELT A35(SC).*

(iii) *Rajhoo Barot V/s CC, Mumbai – 2017 (348) ELT562 (Tri.Mumbai) = 2015-TIOL-244-CESTAT-MUM*

(iv) *Gammon India Ltd V/S CC,MUMBAI -2011 (269) ELT 289 (SC) = 2011-TIOL-60-SC-CUS*

(v) *Bombay Hospital Trust V/s. Commissioner of Customs (ACC), Mumbai – 2006 (201) ELT.555 (Bom) = 2006-TIOL-170-HC-MUM-CUS*

(vi) *Grant Medical Foundation V/s. Commissioner -2015 (315) ELT.A26 (SC).*

6. In case of appeal filed by the revenue she submits that the penalty under section 114A should also have been imposed upon interest on demand.

7. Heard both the sides and perused the records of the case. We find that the Appellant M/s Apco had imported the "Hot mix plant" under Notification No. 21/2002-Cus. Sr. No.230. It is apparent from the facts of the case that the plant was never utilized as provided under the conditions of the notification. The contention of the appellant that they were eligible for multiple road construction contract issued by Govt. of U.P. for different road construction sites does not mean that the condition of the notification has been followed. In fact the plant was never used for such contracts as canvassed by the Appellant during the importation of goods and claiming exemption. The Appellant has not adduced single evidence that they have followed the conditions of the notification. They declared that they had contracts awarded by the state of U.P. wherein the imported plant would be used. However they

never used the said imported equipments in state of U.P. for construction of road. Instead they used the plant as a sub-contractor in state of Rajasthan and Tamilnadu, but even in these cases also they were not named as sub-contractor in the contract awarded for construction of road. As per the conditions of the exemption notification, an importer can claim the benefit of exemption provided they are named as sub-contractor for construction of road. Even this condition was not satisfied. It clearly shows that the appellant never complied with the conditions of the exemption notification and has knowingly violated the conditions. We also find that since the conditions of the notification were not complied with and from the facts of the case it is very clear that the same were never intended to be complied with, we hold that the impugned order confirming demand, penalties and confiscation of goods has been rightly passed. We also find that the officers had handed over the plant for safe custody after seizure and the same could not have been used without permission from the department. Having violated the conditions of Section 110 safe keeping by using the plant even after seizure makes the Appellant liable for penalty under Section 117 of C.A.1962. Further we find that Shri Anil Singh, Managing Director was fully aware about the benefits likely to accrue by availing ineligible notification and use of machine and therefore in such case his complicity in deliberate violation of the condition of notification is apparent. However in case of Shri V. S. Rao, Chief Manager (F & A), we find that he was only concerned with the taxation matter to the extent of availing benefit of exemption notification and was not concerned/ connected with the decision to use machine and his role in violation of condition is also not visible. We are therefore of the view that he cannot be burdened with penalty. Resultantly, in view of our above findings, we uphold the impugned order in as much as it has confirmed demand, confiscation of goods and penalties against M/s Apco and Shri Anil Singh. However the penalty imposed upon Shri V. S. Rao is set aside. The impugned order is modified to the above extent. The Appeals filed by M/s Apco Infratech and Shri Anil Kumar Singh is rejected and the appeal filed by Shri S.V. Rao is allowed.

8. As regard appeal filed by the revenue we find that the issue of penalty u/s 114A on interest arising due to confirmation of demand

has not been addressed by the adjudicating authority while imposing penalty u/s 114A. We therefore deem it appropriate to remand back the matter of imposition of penalty on interest under section 114A to the adjudicating authority. The appeal filed by the revenue is remanded back to the adjudicating authority. All the appeals are disposed off as above.

(Pronounced in court on 08.06.2018)