

CASE NO.:
Appeal (civil) 1730 of 2008

PETITIONER:
Rexnord Electronics and Controls Ltd

RESPONDENT:
Union of India and others

DATE OF JUDGMENT: 04/03/2008

BENCH:
S.B. SINHA & V.S. SIRPURKAR

JUDGMENT:
J U D G M E N T

CIVIL APPEAL NO. 1730 OF 2008
(Arising out of SLP (C) No. 3934 of 2007)

S.B. SINHA, J.

1. Leave granted.

2. Interpretation of the provisions of Section 127A read with Section 127H of the Customs Act is involved in this appeal which arises out of a judgment and order dated 27th September, 2006 passed by the High Court of Judicature at Bombay in Writ Petition Nos. 6238 and 6242 of 2006

3. Appellant herein is an exporter. It was issued two licences under Export Promotion Capital Goods (EPCG) Scheme for CIF value of Rs.26,81,750/- and Rs.27,41,669/- respectively. It imported capital goods against the aforementioned licences availing the benefit of the Notification dated 20th April, 1992. It presented bills of entry at Mumbai Customs for there clearance. Pursuant to or in furtherance of the said licences the appellant was required to export goods worth US \$ 3,40,000 and US \$ 3,47,600 respectively within a period of five years from the date of issuance thereof. Appellant, however, could not meet its export liability and the value of the exports made by it was to the extent of US \$ 2,79,210 and US \$ 2,80,450.83 respectively. In terms of the aforementioned Notification the appellant was required to furnish a bond and undertaking before the Director General of Foreign Trade, an authority created under the Foreign Trade (Development and Regulation) Act, 1992. Appellant had also undertaken to pay interest on the differential amount.

4. On the appellant's failure to meet its export obligations in terms of the said licences as also the Scheme aforementioned, a demand notice was issued for payment of duty of 6,03,400/- and Rs.4,30,184/- respectively alongwith 15% interest per annum payable to the Revenue from the date of clearance of the capital goods till the date of payment of the duty demanded.

5. On receipt of the said notices, the appellant filed two applications before the Settlement Commission for settlement of its cases on 10th November, 2005 and 30th January, 2006. By an order dated 29th June, 2006 the case of the appellant was settled by the Settlement Commission with a direction to pay the total duty amount of Rs.2,16,610/- and Rs.3,41,493/- respectively together with interest @ 15% per annum while granting immunity from prosecution and penalty to the appellant.

6. Questioning the direction of the Settlement Commission to pay interest @ 15 % per annum, two writ petitions were filed by the appellant before the Bombay High Court which, by reason of the impugned judgment,

have been dismissed.

7. Mr. Jay Savla, learned counsel appearing on behalf of the appellant submitted that the order of the Settlement Commission was inconsistent/self-contradictory in so far as on the one hand payment of interest under the bond could not have been held to be contractual in nature and on the other, it will be subjected to any direction by the Court.

8. Since interest payable under the bond, Mr. Savla, would submit, have a direct nexus with the payment of excise duty, the Settlement Commission had the requisite jurisdiction to waive the whole or a part of interest payable under the bond also.

9. The learned Solicitor General, appearing on behalf of the respondents, on the other hand, urged that having regard to the Scheme of Settlement, the Settlement Commission had absolutely no jurisdiction in the matter.

10. The Customs Act, 1962 (the Act) was enacted to consolidate and amend the law relating to customs.

Indisputably on import of goods, customs duty is payable. The Central Government, however, issued a Notification bearing No.160/92-Cus. dated 20th April, 1992 in terms whereof an undertaking was required to be furnished before the Directorate General of Foreign Trade inter alia on the following terms :-

"(viii). That the payment of the amount demanded by the government under this agreement will not affect the liability of the party to any other action, including the initiation of legal proceedings for confiscation of the imported material and refusal of further licences, and all other liabilities, penalties and consequences under the provisions of the Foreign Trade (Development and Regulation) Act, 1992, and the Orders and Rules made thereunder, that may be decided by the Government.

(ix). That this agreement shall remain in full force until all the obligations of the party are fulfilled to the full and final satisfaction of the government as specified above and till such satisfaction is communicated to the party.

(x) That the party irrevocably undertakes that in the event of his default in meeting the aforesaid export obligation/conditions, they shall pay an amount equal to 24% interest per annum on the amount of customs duties saved from the date of import of the first consignment till the date of payment."

11. Indisputably the appellant could not meet its obligations in terms of the said undertaking. The customs duty, therefore, became payable. If customs duty is not paid, interest is payable in terms of Section 28AA of the Act, which reads thus :-

28AA. Interest on delayed payment of duty:

Subject to the provisions contained in section 28AB where a person, chargeable with the duty determined under sub-section (2) of section 28, fails to pay such duty within three months from the date of such determination, he shall pay in addition to the duty, interest at such rate not below ten percent and not exceeding thirty percent. per annum, as is for the time being fixed by the Board, on such duty from the date immediately after the expiry of the said period of three months till the date of payment of such duty: Provided that where a person chargeable with duty determined under sub-section (2) of section 28

before the date on which the Finance Bill, 1995 receives the assent of the President, fails to pay such duty within three months from such date, then, such person shall be liable to pay interest under this section from the date immediately after three months from such date, till the date of payment of such duty.

Explanation 1. -Where the duty determined to be payable is reduced by the Commissioner (Appeals), Appellate Tribunal or, as the case may be, the court, the date of such determination shall be the date on which an amount of duty is first determined to be payable.

Explanation 2. -Where the duty determined to be payable is increased or further increased by the Commissioner (Appeals), Appellate Tribunal or, as the case may be, the court, the date of such determination shall be. -

(a) for the amount of duty first determined to be payable, the date on which the duty is so determined;

(b) for the amount of increased duty, the date of order by which the increased amount of duty is first determined to be payable;

(c) for the amount of further increase of duty, the date of order on which the duty is so further increased.

(2) The provisions of sub-section (1) shall not apply to cases where the duty or the interest becomes payable or ought to be paid on and after the date on which the Finance Bill, 2001 receives the assent of the President."

12. For non-payment of duty, the interest, which would be payable in terms of Section 28AA of the Act, a proceeding may be initiated under Section 28 of the Act.

13. Bond has been executed by the appellant in favour of a different authority. In case interest is payable in terms of the said bond and not in terms of the statutory scheme, department would not be able to proceed in terms of Section 28 of the Act. Interest in terms of the provisions of the Act would be payable if the assessee or the importer fails to pay the amount of duty determined to be payable within a period of three months.

14. The statutory scheme envisaged under the aforementioned Notification dated 20th April, 1992 is, however, completely different.

15. Keeping in view the aforementioned back drop, we may notice the provisions governing settlement of cases.

Chapter XIVA of the Act provides for settlement of cases. It was inserted by Finance Act, 1998 (Act 21 of 1998). Section 127B of the Act provides for filing of an application for settlement of cases wherein a full and true disclosure of the applicant's duty liability which had not been disclosed before the proper officer, the manner in which such liability had been occurred, the additional amount of customs duty accepted to be payable by the applicant and such other particulars, as may be specified by rules including the particulars of such dutiable goods in respect of goods whereof

the applicant admits short levy on account of misclassification or otherwise of the goods before the Settlement Commissioner to have his cases settled. The procedures laid down therefor are required to be followed by the Settlement Commission. In the event, the Settlement Commission accepts the said application and passes an order thereupon, the applicant becomes entitled to immunity from prosecution and penalty as laid down in Section 127H of the said Act which reads as under:-

127H. Power of Settlement Commission to grant immunity from prosecution and penalty. - (1) The Settlement Commission may, if it is satisfied that any person who made the application for settlement under section 127B has co-operated with the Settlement Commission in the proceedings before it and has made a full and true disclosure of his duty liability, grant to such person, subject to such conditions as it may think fit to impose, immunity from prosecution for any offence under this Act or under the Indian Penal Code (45 of 1860) or under any other Central Act for the time being in force and also either wholly or in part from the imposition of any penalty, fine and interest under this Act, with respect to the case covered by the settlement: Provided that no such immunity shall be granted by the Settlement Commission in cases where the proceedings for the prosecution for any such offence have been instituted before the date of receipt of the application under section 127B.

(2) An immunity granted to a person under sub-section (1) shall stand withdrawn if such person, fails to pay any sum specified in the order of the settlement passed under sub-section (7) of section 125fC within the time specified in such order or within such further time as may be allowed by the Settlement Commission, or fails to comply with any other condition subject to which the immunity was granted and thereupon the provisions of this Act shall apply as if such immunity had not been granted.

(3) An immunity granted to a person under sub-section (1) may, at any time, be withdrawn by the Settlement Commission, if it is satisfied that such person had, in the course of the settlement proceedings, concealed any particulars, material to the settlement or had given false evidence, and thereupon such person may be tried for the offence with respect to which the immunity was granted or for any other offence of which he appears to have been guilty in connection with the settlement and shall also become liable to the imposition of any penalty under this Act to which such person would have been liable, had no such immunity been granted. "

16. The core question which, therefore, arises for consideration is as to whether the term "interest" used therein would include within its fold interest payable under the bond furnished by the appellant before the Director General of Foreign Trade.

17. The statutory scheme for the purpose of approaching the Settlement Commission and the mode and manner in which appropriate order is to be passed thereupon, are governed by Chapter XIVA of the Act. With a view to enable the Settlement Commission to pass an order, an applicant is required to make a full and true disclosure of his liability. As noticed hereinbefore, in the event his application is accepted, an immunity is granted from prosecution of any offence under the Customs Act or under the Indian Penal Code or under any other Central Act for the time being in force and also either wholly or in part from imposition of any penalty, fine and interest under the said Act, with respect to the cases covered by the settlement. The same has nothing to do with payment of any interest under any other Act. If any interest became payable under the Act, indisputably the Settlement

Commission, will have the requisite jurisdiction to grant immunity in respect thereof either wholly or in part. All penalties, fine and interest, it goes without saying, must, however, be enforceable under the Act. The Scheme for charging interest under the Act has been noticed by us hereinbefore. No other provision has been brought to our notice in terms whereof interest is payable under the Act.

17. We, therefore, agree with the High Court that interest payable under the bond is not an interest payable under the Act.

18. Mr. Savla has drawn our attention to a decision of the Bombay High Court in Pratibha Syntex Ltd. vs. Union of India : 2003 (157) E.L.T. 13 141 (Bom.). The fact involved therein is not similar to the one before us. There, the Commission, apart from directing the petitioner therein to deposit the amount, directed adjustment thereof from and out of the deposit made by the petitioner during the course of investigation. While, however, granting immunity a direction to pay interest @ 10 % on the amount of duty for not complying with the declaration given as per the Exemption Notification No.204/92 dated 19-5-1992 was issued. A contention was raised therein that the Customs Act does not make any provision for levy of interest on the duty amount payable in respect of goods cleared during the period 1994-1996. In was in the aforementioned situation, it was held :-

16. Exemption Notification No. 204/92 issued under Section 25 of the Customs Act clearly provides that before clearance of the imported goods, the petitioners shall produce proof of having executed a bond or a legal undertaking before the concerned Licensing Authority, for complying with conditions of the said Notification. Therefore, the terms and conditions of bond and legal undertaking executed before the Licensing authorities agreeing to pay customs duty with interest in case of breach, became part and parcel of the conditions of the exemption notification issued under Section 25 of the Customs Act, 1962. Since, there was breach of the terms of the Exemption Notification, the customs authorities were entitled to recover the duty with interest. Merely, because the Commission erroneously or otherwise had not levied interest in his order, it cannot be said that the Customs authorities had no jurisdiction to recover interest. If the petitioners were satisfied with the order of the Commissioner of Customs, there was no need for them to approach the Settlement Commission. Once the petitioners have voluntarily chosen the jurisdiction of the entire issue by the Settlement Commission afresh, in the light of the disclosure made by them it was open to the Settlement Commission to direct the petitioners to pay the customs duty with interest. Although the Settlement Commission has levied interest at a percentage, much less than what was agreed to pay by the petitioners in their bond and legal undertaking, the same being not an issue in this petition, we are not expressing any opinion in that behalf. Therefore, we have no hesitation in holding that once the petitioners committed breach of the terms of the exemption Notification No. 204/92, the Customs authorities were entitled to enforce the declaration with bond and legal undertaking given by the petitioners and recover customs duty with interest. If the customs authorities were entitled to recover duty with interest then no fault could be found with the Settlement Commission in directing the petitioners to pay customs duty with interest."

We are not concerned with such a case here.

19. We may, however, notice that a learned Single Judge of Calcutta High

Court in Commissioner of Customs (Port) vs. Settlement Commission, Customs & Central Excise : 2005 (179) E.L.T. 386 (Cal.) held :-

"21. As far as the third point is concerned I have carefully examined the provision of Section 127H of the Act and it appears to me the power of the Settlement Commission is relatable to waiver either partial or full amount of interest under the Act only. In this case the importer was and is under obligation to pay interest not under the provision of the Act, but under the bond at the rate of 24 per cent in terms of exemption notification. I am of the view though Bond furnished in terms of statutory decision, but then contractual character is not destroyed. I am unable to comprehend how the learned Commission could overlook the implication of bond in relation to payment of interest thereunder. It seems to me it has wrongly equated payability of interest under the bond with the expressed provision of the said Act. Unlike Civil Court the waiver either of full or of partial interest in contractual bargain cannot be granted by the Commission without consent of both the parties. To clarify the position had it been a case of chargeability or payability of interest under expressed provision of the Act the Commission would have jurisdiction. This point once was brought for decision before Bombay High Court in the case of Pratibha Syntex Ltd. v. Union of India [2003 (157) E.L.T. 141]. Their Lordships of the Division Bench however did not deal with the same as the facts and situation of the case did not warrant. In Paragraph 16 it was observed by their Lordships as follows :

".....although the Settlement Commission has levied interest at a percentage, much less than what was agreed to pay by the petitioners in their bond and legal undertaking, the same being not an issue in this petition, we are not expressing any opinion in that behalf."

Although the Calcutta High Court referred to Pratibha Syntex Ltd. (supra), the distinct feature of the said case has not been noticed.

20. We agree with the Calcutta High Court that the power of the Settlement Commission is relatable to waiver of partial or full amount of interest only under the Act.

21. We may notice that after the decision was rendered in the instant case, the same Division Bench in Tanu Healthcare Ltd. vs. Union of India : 2007 (207) E.L.T. 641 (Bom.) observed :-

"6. We had an occasion to refer to the Commerce Ministry Circular dated 22nd May, 2003 in another matter which came before us yesterday i.e. Writ Petition NO.6238 of 2006 with Writ Petition NO.6242 of 2006 on the Appellate side in the case of Rexford Electronics & Controls Ltd. v. the Union of India & others. We noted that apart from the Commerce Ministry circular, as far as the bond given by the party is concerned, there is a Judgment of the Calcutta High Court in the case of Commissioner of Customs (Port) v. Settlement Commission, Customs and Central Excise, reported in 2005 (179) E.L.T. 386 (Cal.). The High Court has held that payment of interest under the bond is a contractual obligation and the Settlement Commission has no power to grant immunity to interest covered by such bonds."

22. A special leave petition filed thereagainst, being SLP (C) No. 3159 of 2007 has been dismissed by this Court by an order dated 12th March, 2007.

23. We are, therefore, of the opinion that there is no infirmity in the impugned judgment.

24. Appellant having evaded from payment of duty was bound to pay the same and furthermore was bound to pay interest in terms of the bond executed by it. The Settlement Commission, therefore, could not have given any direction for deduction in regard thereto. As the Settlement Commission, did not have any jurisdiction to waive the amount of interest payable under the bond, we do not see that any jurisdictional error has been committed by it in directing the payment of the said amount which is otherwise payable. In any event the appellant is not prejudiced thereby as irrespective of such direction, the appellant was bound to pay the interest payable under the bond.

25. For the reasons abovementioned, there is no merit in this appeal, which is dismissed accordingly. Counsel fee Rs.10,000/-.