ANNEXURE-A

2017 (358) E.L.T. 588 (Tri. - Mumbai)

IN THE CESTAT, WEST ZONAL BENCH, MUMBAI

[COURT NO. I]

S/Shri M.V. Ravindran, Member (J) and C.J. Mathew, Member (T)

WHIRLPOOL OF INDIA LTD.

Versus

COMMISSIONER OF CUSTOMS (IMPORT), MUMBAI

Final Order No. A/87942/2017-WZB/CB, dated 12-6-2017 in Appeal No. C/186/2007-Mum

Project import - Shifting/relocation of imported machineries - Denial of classification as 'project import', and consequent benefit of concessional rate of duty - Eligibility of goods at time of import, compliance with project approval conditions and installation at permitted site not in dispute - Transfer of ownership or relocation of project after installation and meeting with project objectives, not to erase classification and assessment that prevailed at time of import - Classification as 'project import' and assessment thereof cannot be denied. - *An import governed by **Project Import** Regulations, 1986 specifies registration of contract and finalization within stipulated time. A natural consequence is that the machinery is required to be installed in accordance with the terms of the contract which is entered into for establishing a new unit or for substantial expansion of an existing unit. It would also appear that the importer is obliged to submit the stipulated documents within the prescribed time for finalization of assessment. Beyond these, no other restrictions have been included in the Regulations or in any of the connected notifications. It is not a condition of any import, whether assessed provisionally or finally, that the goods should retain the form, structure and ownership that existed at the time of import. [paras 6, 10, 11]*

Appeal allowed

CASES CITED

Commissioner v. Jagdish Cancer & Research Centre — 2001 (132) E.L.T. 257 (S.C.) — *Referred* [Para 9]
Commissioner v. N.R.B. Bearing — 2003 (159) E.L.T. 755 (Tribunal) — *Referred*..... [Para 2]
Commissioner v. Toyo Engineering India Ltd. — 2006 (201) E.L.T. 513 (S.C.) — *Referred* [Paras 3, 4, 8]
Jacsons Thevara v. Collector — 1992 (61) E.L.T. 343 (S.C.) — *Referred*..... [Paras 2, 7]
NOCIL v. Commissioner — 2017 (347) E.L.T. 173 (Tribunal) — *Referred*..... [Para 8]
Tata Steel Ltd. v. Commissioner — 2015 (320) E.L.T. 462 (Tribunal) — **Distinguished**... [Para 7]

REPRESENTED BY : S/Shri T. Vishwanathan, Advocate and N. Dave, Chartered Accountant, for the Appellant.
Shri Ahibaran, Additional Commissioner (AR), for the Respondent.

[Order per : C.J. Mathew, Member (T)]. - Commissioner of Customs (Import), New Custom House, Mumbai vide Order-in-Original No. 151/2006/CAC/CC(I)/AKP/ Contract Cell dated 30th November, 2006 denied M/s. Whirlpool of India Ltd. the benefit of concessional rate of duty applicable to project imports under heading 9801 of Customs Tariff Act, 1975 and re-classified the imported goods under heading 80477.40 and 80479.89 (sic); thereby differential duty of ₹ 30,22,361 was confirmed under Section 18(2) of Customs Act, 1962 besides confiscating the goods which were permitted to be redeemed on payment of fine of ₹ 10,00,000. A penalty of ₹ 5,00,000 was also imposed under Section 112 of Customs Act, 1962. Aggrieved by this order, the importer is in appeal before us.

2. Two machines, viz., 'ILLIG Vacuum Thermoforming machine with accessories and spare parts' and 'Unimax Microprocessor evacuation and oil and refrigerant charging station with spare parts', were imported by M/s. Kelvinator of India Ltd. (since taken over by the appellant company) against bills of entry No. 2667/6-12-1993 and 2123/23-12-1993 with a declared value of Rs. 1,10,75,219 on which duty of ₹ 38,76,326 was paid upon assessment under heading 9801 of Customs Tariff Act, 1975 applicable to 'project imports'. It was ascertained after submission of the prescribed reconciliation statement on 22nd July, 2004 that the first machine had been shifted to the Pune plant in 2000 and the other to NOIDA which is alleged to be in contravention of Regulation 5(3)(a) of Project Import Regulations, 1986. The impugned order has found that the

concessional rate of duty was conditional upon retention of the imported goods at the location specified and by the importer itself and for which reliance is placed upon the decision of the Hon'ble Supreme Court in *Jackson Thevara* v. *Collector* [1992 (61) E.L.T. 343 (S.C.)] and of the Tribunal in *NRB Bearing Ltd.* [2003 (159) E.L.T. 755 (Tribunal)].

3. It is the contention of the appellant that the imported goods were installed at the premises specified at the time of import and that there is no restriction in the Project Import Regulations, 1986 that imported machinery should not be moved or transferred. It is further contended that the reference to unit in heading 9801 of Customs Tariff Act, 1975 is to be read along with the definition in Regulation 3(c) of Project Import Regulations, 1986 and that Regulation 5 is similarly bereft of such restrictive clause. It is also contended that the decisions relied upon by the original authority are not applicable to the present circumstances. *Per contra* it is submitted that the decision of the Hon'ble Supreme Court in *Toyo Engineering* [2006 (201) E.L.T. 513 (S.C.)] was claimed to be in support of their contention. The denial of Notification No. 50/87-Cus., dated 1st March, 1987 following re-classification has also been assailed.

4. It is the contention of the appellant that the imported goods had been installed at the premises specified at the time of import and that there is no restriction in the Project Import Regulations, 1986 for relocation of imported machinery. It is further contended that the reference to unit in heading 9801 of Customs Tariff Act, 1975 is required to be read along with the definition in Regulation 3(c) of Project Import Regulations, 1986 and that Regulation 5 is bereft of restriction on relocation or transfer. It is also contended that the decisions relied upon by the original authority are not applicable to the present circumstances. *Per contra* it is submitted that the decision of the Hon'ble Supreme Court in *Toyo Engineering* [2006 (201) E.L.T. 513 (S.C.)] is in their favour.

5. We have heard learned Counsel for appellant and learned Authorised Representative. We take note that the contract is required to be registered, and the assessment of 'project imports' is required to be provisional and subject to final assessment within three months of the clearance of the last consignment in the contract. It is worthwhile extracting the relevant provisions of Project Import Regulations, 1986, viz.,

> **'5. Registration of contracts. -**
>
> (1) Every importer claiming assessment of goods falling under the said heading no. 9801, on or before their importation shall apply in writing to the proper officer at the port where the goods are to be imported or where the duty is to be paid for registration of the contract or contracts, as the case may be...
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> **7. Finalisation of contract. -**
>
> The importer shall within three months from the clearance for home consumption of the last consignment of goods or with such extended period as the proper officer may [allow] submit a statement indicating the details of goods imported together with necessary documents as proof regarding the value and quantity of the goods so imported in terms of this regulation and any other document that may be required by the proper officer for finalisation of the contract.'

6. From the above it would appear that an import governed by Project Import Regulations, 1986 specifies registration of contract and finalisation within a stipulated time. A natural consequence is that the machinery is required to be installed in accordance with the terms of the contract which is entered into for establishing a new unit or for substantial expansion of an existing unit. It would also appear that the importer is obliged to submit the stipulated documents within the prescribed time for finalisation of assessment. Beyond these, no other restrictions have been included in the Regulations or in any of the connected notifications.

7. Our attention has been drawn by learned Authorized Representative to the decision of the Tribunal in *Tata Steel Ltd.* v. *Commissioner of Customs (Import), Mumbai* [2015 (320) E.L.T. 462 (Tri.-Mumbai)] which he considered to be pertinent as that was rendered in the same circumstance of 'substantial expansion' and it was held by the majority that the facility of 'project imports' is liable to be denied if the imported goods did not yield substantial expansion. It is his contention that relocation precluded that desired outcome. We find from the records that the appellant has placed on record, in letter dated 26th October, 2004 addressed to the Assistant Commissioner of Customs, the circumstances of relocation and that the project had yielded substantial expansion as evident in the balance sheet for October, 1995 to December, 1996. It would, therefore, appear that the decision in re *Tata Steel Ltd.* is not applicable in the present instance. The decision in re *Jacsons Thevara* upheld the action taken against the importer for having sought assessment as 'project import' when an agreement had already been entered into that would render that claim of 'substantial expansion' to be non-implementable.

8. Learned Counsel places before us the decision of the Tribunal in *NOCIL* v. *Commissioner of Customs (I), Mumbai* [2016 VIL 788 CESTAT MUM CU = 2017 (347) E.L.T. 173 (Tri.-Mum.)] which, relying upon the decision of the Hon'ble Supreme Court in *Commissioner of Customs, Mumbai* v. *Toyo Engineering India Ltd.* [2006 (201) E.L.T. 513 (S.C.)], held that perpetual ownership and possession of the imported goods by the project authority was not a condition prescribed for eligibility.

9. It would appear that the impugned order has presumed a state of perpetual subjection to scrutiny for eligibility to the benefits of the assessment as 'project import' and the underlying assumption is that such imports are the beneficiaries of concessional rate of duty. That is the thrust of the contention of learned Authorized Representative. While a number of decisions of the Hon'ble Supreme Court such as in *Commissioner of Customs (Import), Mumbai* v. *M/s. Jagdish Cancer & Research Centre* [2001 (132) E.L.T. 257 (S.C.)] have held such perpetual liability to be a valid principle, we cannot ignore the predicating of such a liability to an exemption granted subject to conditions. Coverage as 'project imports', which may or may not be entitled to an effective rate of duty extended through a notification issued under Section 25 of Customs Act, 1962, is a consequence of classification under heading 9801 of the First Schedule to the Customs Tariff Act, 1975 and the dispute between Revenue and appellant is one of determination of classification under this head or the alternative of segregating the various components of the project under their respective classifications. The consequence of classification under 9801 of the First Schedule to the Customs Tariff Act, 1975 is the bundling of goods; and the conditions that are prescribed in the regulations are related to that bundling for increasing the production capacity of the economy. There is no condition other than import in that state for installation in that form. There is no allegation of disaggregation of the imported goods and, therefore, its possession by another entity does not detract from the principal objective of such bundled classification, i.e. capacity building.

10. It is also not a condition of any import - whether assessed provisionally or finally - that the goods should retain the form, structure and ownership that existed at the time of import. The transfer of ownership or relocation of the project after installation and meeting with the project objectives would not erase the classification and assessment that prevailed at the time of import.

11. Eligibility for such classification at the time of import, compliance with project approval conditions and installation at the permitted site are not in dispute here. Classification as 'project import' and assessment thereof cannot be denied.

12. For the above reasons, the appeal is allowed.

(Pronounced in Court on 12-6-2017)
