

|WITEM NO.101
Part-heard

COURT NO.3

SECTION III

SUPREME COURT OF INDIA
RECORD OF PROCEEDINGS

CIVIL APPEAL NO.2466 OF 2002

M.M.T.C. LTD.

Appellant (s)

VERSUS

COMMNR. OF CUSTOMS, NEW DELHI

Respondent(s)

(with appln(s) for directions and permission to file additional documents and with office report)

Date: 29/01/2008 This Appeal was called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE ASHOK BHAN
HON'BLE MR. JUSTICE DALVEER BHANDARI

For Appellant(s) Mr. S.K. Bagaria, Sr. Adv.

Mr. S.Ganesh, Sr. Adv.
Mr. Sanjay Grover, Adv.
Mr. Ashok Sharma, Adv.
Mr. K.S.Mahadevan, Adv.for
Mr. Rajesh Kumar, Adv.

For Respondent(s)

Mr. V. Shekhar, Sr. Adv.
Mr. Rajindra Singhvi, Adv.
Ms. Alka Sharma, Adv. for
Mr. B. Krishna Prasad, Adv.

UPON hearing counsel the Court made the following
ORDER

The Appeal is allowed in terms of the signed order.
(Parveen Kr. Chawla) (Kanwal Singh)
Court Master Court Master
[Signed Order is placed on the File]

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 2466 OF 2002

M.M.T.C. Limited

..Appellant

versus

Commissioner of Customs, New Delhi

..Respondent

ORDER

Appellant is a Public Sector Undertaking of the Government of India.
Under the Export and Import Policy of the Government, as framed from time
to time, Schemes were formulated whereby jewellery manufacturing units
were permitted to import primary gold of 0.995 fineness for the purpose of

manufacture and export of gold jewelery, subject to certain value addition norms. Such units were permitted to set up manufacturing facilities within the specified Export Processing Zones (for short "EPZ") or in Special Export Oriented Complexes subject to these units being 100% Export Oriented Units (in short "EOUs").

Pursuant to the above Scheme, a number of manufacturers/exporters set up units in the Noida EPZ. Under the Scheme, appellant was a nominated agency which could also import goods including gold for supply of the same to exporting units of the EPZ for manufacture and export as per terms and conditions of the EXIM Policy and as per notification No.177/94 which granted exemption from payment of duty on goods such as raw materials, components, etc. imported into India by Gem and Jewellery units for manufacture of Gem and Jewellery for export out of India or for the promotion of export of gems and jewellery, subject to certain conditions. Notification was also made applicable to silver and gold imported by the appellant and State Bank of India for being supplied to gem and jewellery units in EPZ under the Scheme for export of gold and silver jewellery and articles. Appellant filed bills of entry for import of gold which was issued to four units approved for manufacture and export of gold jewellery namely M/s. Amit Jewellers, M/s. Goldex, M/s. Zavart Overseas and M/s. Unique Jewellery. The gold imported by the appellant and supplied to the above mentioned four units was not utilised for manufacture and export of jewellery/articles which was in contravention of the conditions of Notification No.177/94 and the EXIM Policy and the bond executed both by the appellant as well as by the individual units. Similar zone was set up in Jhandewalan as well.

Show cause notices were issued proposing recovery of customs duty from the appellant, imposition of penalty as well as penal action against the four units. For the years 1991-96, the gold was imported for EPZ at Jhandewalan and 1996-98 for the EPZ at Noida.

The Commissioner of Excise and Customs confirmed the demand for the gold imported in the year 1992-97 at Rs.34,80,000/-, Rs.29,61,750/-, Rs.36,74,598.35 p. and Rs.29,00,000/- relating to the gold supplied to M/s.

Amit Jewellers, M/s Goldex, M/s. Zavarat Overseas and M/s. Unique Jewellers respectively. Four separate adjudication orders were passed and Commissioner also imposed penalty of Rs.5,00,000/-, Rs.2,00,000/-, Rs.10,00,000/- and Rs.2,00,000/- respectively. For Jhandewalan EPZ, the duty demand of Rs.7,07,01,428/- was dropped by the Commissioner, against which the department filed appeal before the Tribunal. Appellant also preferred four appeals before the Tribunal relating to Noida EPZ for which the demand was confirmed.

Tribunal consolidated the five appeals and disposed them of by a common order. Appeals filed by assessee were dismissed. The appeal filed by the revenue against dropping of demand of Rs.7,07,01,428/- was accepted and in addition penalty of Rs.25 lacs was imposed.

Appellant, being aggrieved, filed a Reference application in the High Court under Section 130(A)(i) of the Customs Act, 1962 (for short 'the Act') which requires the High Court, on being satisfied that a question of law arises from the order of the Tribunal, to direct the Tribunal to refer the questions of law raised within 120 days from the receipt of such direction after drawing up a statement of the case. Appellant filed a consolidated reference application raising the following questions of law:

"Whether the liability for payment of customs duty can at all be on MMTC which is a canalizing agency, even though the conditions of fulfilment of export under the Customs Notification No.177/94 and 3/88, chapter 8 of the Exim Policy and Procedure, PEP Circular No.22/88, and the Customs Circular Nos. 10/88 and 2/92, all require the Gem and Jewellery unit located in the EOU/EPZ, to fulfil the export obligation, and upon their failure to do so, to pay/suffer, duties, fines and penalties.

Whether, as a consequence of the appointment of MMTC as canalizing agency for the import of gold, MMTC can be made liable for payment of customs duty in the event the unit commits a breach of its obligation to export the jewellery made from such gold, and thereby allow all such defaulting units to escape scot free of any liabilities.

Whether the findings by the Hon'ble Tribunal that "the scheme provides for issuing of gold by M/s MMTC to the unit only on the strength of Bill of Entry filed by the unit and duly assessed", does not lead to the conclusion that once the gold is issued to a unit, the liability for payment of duty in the event of default gets automatically transferred to the unit to whom the said gold is issued.

Whether there can be any requirement read into the REP Circular No.22/98, as held so by the Hon'ble Tribunal, namely that "MMTC has a responsibility/continuing obligation to monitor the activities of the exporting unit and to ensure export of gold/jewellery within a stipulated period of time

following which M/s. MMTC has to inform the customs authorities and to levy penalty on the unit for extension of period on expiry", when, in fact there is no such requirement laid down in the REP Circular itself.

Whether the finding by the Hon'ble Tribunal that "M/s. MMTC had also executed bond with NEPZ Customs under the Warehousing provisions of the Customs Act, and had undertaken to satisfy the customs authorities that the gold imported by them will be utilized for export as per scheme of export of gold jewellery by units in the EPZ and they were also under an obligation to pay the Customs duty and penalty chargeable on such goods, together with interest", is sustainable when in fact no such warehousing bond was before the Tribunal as part of record of the present case, and in fact no such condition can be prescribed in a warehousing bond in view of Section 59(3) of the customs Act, 1962, which provides that where any goods are transferred by the owner of a bonded warehouse to another person, the authorities shall obtain a bond for the transferred goods from the transferee, and thereupon the bond executed by the transferor shall stand discharged to the extent of the goods transferred out of his charge.

Whether any penalty could be imposed upon M/s MMTC in the absence of any evidence implicating MMTC with the breach of the scheme or the conditions of the notification, and in the absence of any finding that the import of gold was made pursuant to a conspiracy to illegally divert the gold.

Whether in the facts of the present case, any penalty could at all be imposed, in view of the decision of the Hon'ble Supreme Court in Indian Oil Corporation Ltd. vs. Chief Inspector of Factories (1999 (113) ELT 761), wherein it was held that TOCL, which was wholly owned and controlled by the government was not "likely to evade" the law, while being engaged in the supply and distribution of petroleum and petroleum products, in order to ensure an effective and efficient supply system, Mutatis Mutandis, the same legal position should apply to the facts of the present case where, as a matter of governmental policy, it was decided to arrange the import of gold through M/s MMTC, apparently with a view to ensure an effective and efficient supply system."

The High Court, instead of proceeding in terms of provisions of Section 130A of the Act, confirmed the order of the Tribunal as if it is deciding the appeal/case finally on merits.

Counsel for the appellant contends that the High Court has erred in not proceeding in accordance with the provisions of Section 130A of the Act in

requiring the Tribunal to make a reference to the High Court on such questions which the High Court opined to be the questions of law. Counsel appearing for the revenue does not dispute this proposition.

As the contention raised by the appellant is not disputed by the revenue, we accept this appeal, set aside the impugned order of the High Court and remit the same to the High Court for a fresh decision in accordance with law. We would request the High Court to dispose of the reference application expeditiously.

.....J.
[ASHOK BHAN]

NEW DELHI;
JANUARY 29, 2008. [DALVEER BHANDARI]

.....J.