

Hi-tech Engineers Vs. Union of India (Uoi) and ors.

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Court : Mumbai

Decided On : Jul-28-2003

Reported in : 2004(1)BomCR776

Judge : V.C. Daga and ; J.P. Devadhar, JJ.

Acts : [Customs Act, 1962](#) - Sections 28, 72, 88, 88A, 90 and 124

Appeal No. : Writ Petition No. 479 of 2003

Appellant : Hi-tech Engineers

Respondent : Union of India (Uoi) and ors.

Advocate for Def. : A.J. Rana, Sr. Adv., ;P.S. Jetly and K.R. Chaudhari, Advs.,
i/b., T.C. Kaushik and Co.

Advocate for Pet/Ap. : V.S. Nankani, ;N.S. Thakkar and ;H. Modh, Advs.

Disposition : Writ petition dismissed

Judgement :

J.P. Devadhar, J.

1. Mainly two issues are raised in this petition and they are firstly, whether the petitioners who fraudulently obtained duty free clearance of imported Dracone Barges under section 90 of the [Customs Act, 1962](#) can file an application before

the Settlement Commission and contend that even if the duty free clearance under section 90 cannot be sustained, no duty is payable on the said barges in view of Exemption Notification No. 291/84-Cus dated 28th December, 1984 and secondly, even if it is held that the customs duty is payable on the said Dracone Barges, in the absence of any statutory power, whether the Settlement Commission is justified in holding that the customs duty is recoverable with interest at the rate of 10% per annum from the date of removal of the barges from the warehouse till payment.

2. The petitioners are engaged in the business of supply of ship stores, spare parts etc. to various parties including Indian Navy and Indian Coast Guards. The petitioners had inter alia imported two dracone barges and filed two bills of entries on 18th December, 1992 and 28th January, 1993 for warehousing. The said barges were collapsible barges and form essential part of any oil pollution control package. The said barges are generally carried by rolling up on the Deck of the skimming vessel to the disaster area to collect the oil spillage in the sea. The said barges are also carried in cargo nets below the helicopter and dropped at the centre of the operational area, for collecting the oil spillage in the sea.

3. The petitioners cleared the barges from the warehouse, by filing pink shipping bills showing 'SSK Controller of Procurement, Naval Dock, Lion Gate, Bombay' as the consignee of the said barges. On the basis of the declaration made on the shipping bills to the effect that the barges are to be supplied to the Indian Navy, the said barges were assessed and allowed to be cleared without payment of duty under section 90 of the Customs Act.

4. Sometime in October, 1997, the Officers of the Directorate of Revenue Intelligence, Bombay (DRI) on investigation noticed that the barges imported and cleared by the petitioners without payment of duty were not at all supplied to the Indian Navy. On completion of the investigation, a Show Cause Notice dated 19th December, 1997 was issued to the petitioners under section 124 read with section 28 of the Customs Act, calling upon them to show cause as to why duty amount of Rs. 83,18,742/- should not be demanded and recovered from the petitioners under section 72 read with section 28(1) of the Customs Act. By the said notice, the

petitioners were also called upon to show cause as to why penalty should not be levied upon under various provisions of the Act and the deposit of Rs. 59,35,455/- made by the petitioners during the investigation should not be adjusted against the demand. By their reply letter dated 11th May, 1999 the petitioners admitted that the imported barges were not supplied to the Indian Navy but were supplied to Indian Coast Guard. It was stated that the petitioners were under the bona fide belief that the Indian Coast Guard is nothing but a part of Indian Navy and, therefore, the requirement of section 90 of the Customs Act are complied with. It was contended that assuming that the Coast Guard vessels are not Naval Vessels or that the Indian Coast Guard is not a part of Indian Navy, even then, no duty is payable on the said barges because the case is covered under section 88(a) of the [Customs Act, 1962](#).

5. Before the said show cause notice could be adjudicated upon, the petitioners on 9th February, 2001 filed an application before the Settlement Commission under section 127(B) of the Customs Act admitting duty liability of Rs. 9,22,280/- in respect of the goods (other than barges) mentioned at Serial No. 3 of Annexure to the show cause notice dated 19th December, 1997. On receiving report from the Commissioner of Customs, the commission by an interim order dated 27th April, 2001 allowed the application to be proceeded with after the adjustment of the admitted duty liability of Rs. 9,22,280/-, out of the amount of Rs. 59,35,455/- deposited by the petitioners. Thereafter, the matter was heard and by a final order dated 8th January, 2003 the commission settled the case for duty amount of Rs. 83,18,742/- and after adjusting the deposit of Rs. 59,35,455/- directed the petitioners to pay the balance amount of Rs. 23,83,287/-. The commission levied Rs. 10,00,000/- towards penalty and granted immunity from fine. The commission also imposed simple interest at the rate of 10% per annum on the duty evaded from the date of removal of the warehoused goods till the date of deposit of duty and on the balance amount of Rs. 23,83,287/- till the date of payment. Challenging the said order, the petitioners have approached this Court by way of present petition.

6. Mr. Nankani, learned Counsel appearing on behalf of the petitioners, though not strongly, but feebly contended that the clearance of the goods under section 90 of

the Customs Act was in accordance with law because according to him Indian Coast Guard is a part of Indian Navy and, therefore, supply of barges to the Indian Coast Guard should be considered as supply to the Indian Navy. At this stage, we may point out that in a letter dated 11th September, 2002 (Exhibit 'U' to the petition) the Coast Guard Head Quarters, New Delhi has clarified that the Indian Coast Guard is not a part of Indian Navy and that the Coast Guard is an armed force of the Union, under the Ministry of Defence, and is governed by the Coast Guard Act, 1978.

7. Mr. Nankani, however, strongly urged that on realising the mistake committed by the petitioners in obtaining clearance of the goods under section 90 of the Customs Act on the basis of misdeclaration in the shipping bills, they have approached the Settlement Commission seeking settlement of the dispute. Mr. Nankani submitted that although the barges were wrongly assessed under section 90 of the Act on account of the petitioners misdeclaration of the consignee in the shipping bills, it is open to the petitioners to admit their mistake before the Settlement Commission and contend that in view of Notification No. 291/84, no duty is payable on barges imported and supplied to the Indian Coast Guard. Mr. Nankani submitted that under Notification No. 291/84-Cus, whole of the duty of customs and additional duty of customs leviable on barges is exempted when imported into India.

(i) by the Government of India, or

(ii) by a person authorised by that Government, or

(iii) shipped on the order of a department of the Government of India and appropriated under such order at the time of shipment.

He submitted that the case of the petitioners fell under the (ii) category i.e. 'by a person authorised by the Government' and, therefore, in view of Notification No. 291/84-Cus no duty is recoverable on the barges imported and supplied to the Indian Coast Guard.

8. In order to substantiate his contention that the said barges were imported by the petitioners on the authority of the Indian Coast Guard, the Counsel for the petitioners referred to the letter dated 5th April, 1991 issued by the Coast Guard wherein the petitioners were called upon to give their quotations for supply of various items including barges. Accordingly, the petitioners by letter dated 10th November, 1991 gave their offer to supply various items including heavy duty barges. The Counsel referred to the letter dated 26th June, 1992 issued by the Ministry of Defence, Government of India, New Delhi wherein sanction was granted to the Indian Coast Guard to purchase several items pertaining to the pollution control equipment including three heavy duty barges (100 cubic meters) with accessories, x Dunlop, UK. In the light of the aforesaid sanction by the Government of India, Coast Guard Authorities by a letter dated 10th July, 1992 had placed an order with the petitioners for supply of various items including three heavy duty barges. On the basis of these facts on record, Mr. Nankani submitted that it is evident that right from inception, the import was for and on behalf of Indian Coast Guard and the same is corroborated by the fact the imported barges have been actually supplied to the Indian Coast Guard. Since the identity of the imported goods and its supply to the Government agency is established, the Counsel submitted that even though there is no letter expressly authorising the petitioners to import, the notification has to be interpreted liberally and in the facts of the present case since the goods have been imported and supplied to the Indian Coast Guard the benefit of Exemption Notification No. 291/84-Cus cannot be denied. Mr. Nankani submitted that the Exemption Notification cannot be construed narrowly and once it is established that the import was in furtherance of an order placed by a Government enterprise and on import, the same is actually supplied to the Government enterprise, then the benefit of exemption notification must be given to the petitioners. Mr. Nankani submitted that the fact that the Coast Guard Authorities reserved their right to reject the goods on inspection, has no bearing in granting exemption when admittedly the goods have been imported for Indian Coast Guard. He submitted that a person who authorities import can refuse to take delivery of the goods only if the goods do not conform to the specifications. It was submitted that as long as the petitioners had an authority at the time of import, even if the authority granted was conditions, the benefit of the exemption

notification cannot be denied.

9. Mr. Nankani referred to the decision of the Apex Court in the case of Mangalore Chemicals & Fertilizers Limited v. Deputy Commissioner, reported in : 1993ECR23(SC) , and submitted that the condition set out in the notification should not be construed rigidly and insist that there should be an actual letter of authority authorising that a person to import for and on behalf of the Government Enterprises and if on facts it can be established that the import was for and on behalf of the Government Enterprise, then, the benefit of the notification should not be denied. He submitted that the conditions set out in the notification were procedural and technical nature and not observance of it was condonable.

10. Mr. Nankani referred to the decision of the Apex Court in the case of Thermax Private Limited v. Collector of Customs, reported in : 1992(61)ELT352(SC) , and submitted that when in substance the condition of the notification is complied with and in fact the barges were imported and supplied to the Indian Coast Guard, it must be held that the conditions of the notification are satisfied and the benefit of the notification is available to the petitioner. Mr. Nankani referred to the decision of the Apex Court in the case of Hansraj Gordhandas v. H.H. Dave, reported in : [1969]2SCR253 , and submitted that if the assessee is within the plain terms of the exemption then the benefit cannot be denied. Mr. Nankani further referred to two decision of the Apex Court in the case of Belapur Sugar & Allied Industries Limited v. Collector of Central Excise, reported in : 1999(108)ELT9(SC) and Oblem Electrical Industries Private Limited v. Collector of Customs, Bombay, reported in : 1997ECR535(SC) , and submitted that the wordings in the notification have to be construed keeping in view the object and the purpose of the exemption and if there are two possible interpretation, then the interpretation which subserve the object and purpose should be accepted. Accordingly, it was submitted that the import of barges were for Indian Coast Guard and in fact the barges have been supplied to the Indian Coast Guard and, therefore, Notification No. 291/84/Cus was applicable to the imports and the goods were liable to be cleared without payment of duty.

11. It was next contended that assuming that the benefit of Notification No. 291/84-Cus is not available and the customs duty is payable in respect of barges

imported by the petitioners, then and in that event the interest could not be levied from the date of clearance of the goods from the warehouse because at the relevant time there was no provision to levy interest on the duty amount under the Customs Act. Mr. Nankani submitted that section 72 of the Customs Act is not a charging section and section 72 does not empower the authorities to levy interest on the customs duty found payable. He submitted that interest under section 61 of the Customs Act could be levied only if the goods are not cleared within the warehousing period. He submitted that in the present case, the barges were cleared within the warehousing period and hence no interest could be levied on the barges imported by the petitioners. Accordingly, it was submitted that in the absence of any provision for levy of interest the order of the Settlement Commission to that extent is liable to be quashed and set aside.

12. Mr. Rana, learned Senior Counsel appearing on behalf of the respondents, on the other hand, submitted that the petitioners had obtained duty free clearance of the goods by making a false declaration in the shipping bills that the same are imported for and on behalf of the Indian Navy. The admitted facts in the present case are that the said barges were neither imported nor supplied to the Indian Navy and as such the assessment made under section 90 of the Customs Act for duty free clearance of the goods based on false declaration of the petitioners was liable to be quashed and set aside. On investigation and recording statement of the concerned parties, when the customs authorities issued show cause notice, the petitioners, even before the said show cause notice could be adjudicated upon, approached the Settlement Commission seeking settlement of the dispute. Mr. Rana submitted that for the first time before the Settlement Commission the petitioners contended that the customs duty on the imported barges were exempted under Exemption Notification No. 291/84-Cus dated 28th December, 1984. Mr. Rana submitted that from the documents annexed to the petition and the affidavit in reply, it was abundantly clear that the order placed by the Indian Coast Guard with the petitioners was for local supply of goods and there was no authority of any nature whatsoever given to the petitioners to import the barges for and on behalf of the Coast Guard. Mr. Rana submitted that the price quoted by the petitioners to the Coast Guard was inclusive of all taxes. It was submitted that under the contract, the petitioners were to arrange for inspection of the barges in

their factory and on inspection, if approved and accepted then only the barges were to be delivered to the Coast Guard. Mr. Rana submitted that under the contract while acquiring the barges if the petitioners were required to pay sales tax then the Coast Guard was to reimburse the amount of sales tax. Mr. Rana further submitted that when there was option to reject the goods on inspection of the barges at the petitioners factory, it could not be said that the import was on the authority of the Coast Guard. Mr. Rana further submitted that the sanction order issued by the Central Government clearly shows that in respect of the items to be imported, free foreign exchange was sanctioned and in respect of local purchases such as barges no foreign exchange was sanctioned. It was submitted that in view of overwhelming evidence on record, it is clear that the import was not under the authority of Coast Guard and, therefore, the benefit of exemption notification was not available to the petitioners and the duty demand is in accordance with law.

13. As regards the levy of interest on the duty amount, Mr. Rana submitted that section 72 read with section 61(2) of the Customs Act makes it clear that if the warehoused goods are removed improperly then the interest is payable on the duty amount. In the instant case, on account of false declaration made on the shipping bills, the barges were removed from the warehouse without payment of duty and once it is held that the clearance is improper, then it would mean that the goods are improperly removed from the warehouse and, therefore, duty is payable on the said barges with interest from the date of improper clearance of the goods till payment. Mr. Rana relied upon the decision of the Apex Court in the case of National Insurance Company v. Life Insurance Corporation, reported in : AIR 1963 SC1171 , and submitted that even if it is held that the statute does not contain any express provision for grant of interest, equity interest is deemed payable. Mr. Rana submitted that the provisions relating to settlement of cases form a separate code and under section 129-C(9) of the Customs Act, the commission is empowered to levy interest on the duty amount. Mr. Rana relied upon the decision of this Court in the case of the State of Bombay v. Morarji Cooverji, reported in 1959(61) Bom.L.R. 318, and submitted that in a writ petition, the party who fails to satisfy the Court that the justice lies on his side cannot get any relief from the Court and the petition must be summarily dismissed.

14. Mr. Nankani in rejoinder, submitted that the decision of this Court reported in 61 Bom.L.R. 319 (supra) is distinguishable on facts. He submitted that what is challenged in the present petition is the judicial propriety of the order passed by the Settlement Commission. He submitted that because the petitioner at the time of clearance of the barges had done something which is not clean, he had approached the Settlement Commission. Therefore, there was a fundamental distinction between a party approaching the Court seeking justice with clean hands and the party approaching the Settlement Commission admitting that initially it has done something which is not clean. He submitted that the commission has to settle the dispute judicially within the frame work of law and where the power is exercised by the commission on irrelevant considerations and beyond the powers vested in it, then the order is rendered without jurisdiction and in such cases judicial review of such order is permissible under Article 226 of the Constitution. He submitted that the commission has denied benefit of Notification No. 291/84-Cus on the ground that there is no procurement certificate issued by Coast Guard in favour of the petitioners. He submitted that issuance of such a certificate was not contemplated under the said notification. He submitted that when the import was pursuant to the order placed by Coast Guard and on importation the barges were supplied to the Coast Guard, the benefit of the notification could not be denied to the petitioners. Mr. Nankani further submitted that the decision of the Apex Court in the case of National Insurance Company (supra) is also distinguishable on facts as the said decision is based on the concession of the Counsel. As regards levy of interest, Mr. Nankani submitted that in the show cause notice, the petitioners were not specifically called upon to show cause as to why interest should not levied upon the petitioners. He submitted that in the present case section 72(1)(a) of the Customs Act was not applicable because the goods were cleared on assessment and, therefore, it cannot be said that the goods were improperly removed from the warehouse and consequently no interest could be levied.

15. We have carefully analysed the submissions made by Counsel on both sides. In the present case it is the case of the petitioners that on account of their misdeclaration in the shipping bill that the consignee is Indian Navy, the goods were allowed to be cleared without payment of duty under section 90 of the

Customs Act and, therefore, they have approached the Settlement Commission seeking settlement of the dispute. In fact, apart from the above false declaration made in the shipping bill showing the consignee as 'SSK Controller of Procurement, Naval Dock, Lion Gate, Mumbai', the petitioners have connived with a store keeper incharge of the Indian Navy who admittedly at the instance of the petitioners made false endorsement on the shipping bills as follows: 'Certified that stores meant for Indian Naval Ship Only'. The Controller of Procurement, Indian Navy in his statement recorded under section 108 of the Customs Act stated that in the Indian Navy, there was no person having designation as SSK Controller of Procurement and that the store keeper in charge in the Indian Navy, who is a civilian employee is not authorised to sign shipping bill and that the shipping bills are always signed by the Controller of Procurement, personally. Therefore, it is clear that this is not a simple case of misdeclaration but it is a case of fraudulent claim made with intention to evade the customs duty payable on the imported goods. When the fraud committed by the petitioner in connivance with a store keeper of the Indian Navy was detected by the customs authorities and a show cause notice was issued for recovery of duty on the imported goods under section 72 of the Customs Act, the petitioners approached the Settlement Commission admitting that the barges have not been supplied to the Indian Navy, but the same have been supplied to the Indian Coast Guard.

16. There can be no dispute that Indian Coast Guard is not a part of Indian Navy and it is an armed force under the Ministry of Defence. Customs duty exemption under section 90 is available only if the goods are imported as stores and supplied to the Indian Navy. Therefore, the imported barges supplied by the petitioners to the Indian Coast Guard and not to the Indian Navy, could not be assessed and cleared under section 90 of the Customs Act. Admittedly, before the customs authorities, the petitioners did not claim benefit of Exemption Notification No. 291/84-Cus dated 28th December, 1984 which grants total exemption to those goods which are mentioned in the notification, when imported into India by a person authorised by Coast Guard. Once the fraud is detected and a suit cause notice is issued, whether, during the pendency of the show cause notice, the petitioners could approach the Settlement Commission, and for the first time claim before the commission benefit of Exemption Notification No. 291/84-Cus dated

28th December, 1984, is an issue raised in this petition. In view of the fact that the settlement proceedings have been enacted with a view to allow the parties to come clean by fully and truly disclosing the commission or omission on their part and settle the entire dispute by granting immunity wherever found justified, we proceed on the footing that the petitioners are entitled to seek benefit of Notification No. 291/84-Cus for the first time before the commission. Therefore, the question to be considered is, in the facts of the present case whether the petitioners are entitled to the benefit of Notification No. 291/84?

17. Exemption Notification No. 291/84-Cus dated 28th December, 1984 is issued by the Central Government under section 25 of the [Customs Act, 1962](#) exempting whole of basic customs duty and whole of additional duty payable on Machinery, equipment, components, raw materials required for construction of or fitment to the ships of the Coast Guard, when imported into India by

- a) the Government of India, or
- b) by a person authorised by that Government, or
- c) shipped on the order of a Department of the Government of India and appropriated under such order at the time of shipment.

The petitioners claim that the barges imported by the petitioners fall under category (b) set out hereinabove. To fall within the scope of Notification No. 291/84-Cus, the petitioners must establish that they were authorised by the Indian Coast Guard to import the barges.

18. On perusal of the documents placed before us the following facts emerge, which clearly establish that there was no authority of any nature whatsoever given by the Indian Coast Guard to the petitioners to import barges.

- a) In the letter dated 1st November, 1991 the price quoted by the petitioners to supply goods including barges was inclusive of all taxes, octroi and sales tax. If goods were to be imported duty free for and on behalf of Coast Guard then in the price quotation, the petitioners would not agreed to bear all taxes, octroi and sales tax, etc.

b) In the revised offer given vide letter dated 25th March, 1992, the petitioners agreed to supply barges at Rs. 52 lakh per barge and maintained that all other terms and conditions given in the original offer shall remain. Therefore, even in the revised quotation it was confirmed by the petitioners that the price quoted is inclusive of all taxes, octroi, and sales tax.

c) In the letter dated 26th June, 1992, the Government of India while sanctioning funds for procurement of pollution control equipment of Indian Coast Guard, released foreign exchange in respect of the goods which are to be imported and in respect of the barge to be purchased from the petitioners no such foreign exchange was released, which clearly shows that the Coast Guard was not permitted to import barges and consequently the Coast Guard authorising the petitioners to import barges did not arise at all.

d) In the supply order of the Coast Guard dated 10th July, 1992 nowhere it is stated that the petitioners are authorised to import barges. On the contrary, it is stated that the goods are to be made available by the petitioners in their factory premises and only on inspection and if approved, the barges will be accepted. The supply order further provides in Clause 21 that sales tax, if legally levied and actually paid will be paid extra on the petitioners furnishing a certificate that the sales tax charges has not been exempted under the Sales Tax Act. The supply order further reserved the right of the Coast Guard to reject the barges which are offered by the petitioners for inspection. All these conditions set out in the supply order of the Coast Guard clearly show that there was no authority granted to the petitioners to import. On the contrary the supply order clearly shows that the petitioners could acquire barges locally and supply it to the Coast Guard and in that process if the petitioners were required to pay sales tax, then the Coast Guard had agreed to reimburse the sales tax. Therefore, it cannot be said that duty free import of barges was contemplated by Coast Guard.

e) Shri Kirit Kamdar, partner of the petitioners in his settlement recorded under section 108 of the [Customs Act, 1962](#) has admitted that the imported goods have been disposed off in the open market. If the barges were imported for Coast Guard, then it could not be sold locally. Therefore, it cannot be said that the import

was on the authority of Coast Guard.

f) From the inspection note (Exhibit: E-1, pages 55 of the petition), it appears that the barges supplied to the Coast Guard are those barges which were inspected at Coast Guard Stores Depot, Mankhurd, Bombay and those barges, were not cleared on shipping bills (page 56 of the petition); whereas the imported barges were cleared from the warehouse on shipping bills. Therefore, it cannot be said that the very same imported goods were supplied by the petitioners to the Coast Guard.

g) Admittedly, no letter of authority has been issued in favour of the petitioners authorising them to import barges for and on behalf of Coast Guard.

From the aforesaid facts it is abundantly clear that the Coast Guard had not authorised the petitioners to import the barges. In fact, the Coast Guard itself was not authorised to import barges and, therefore, the Coast Guard authorising the petitioners to import barges did not arise at all. The terms of the contract entered into by and between the petitioners and Coast Guard do not deal with the aspect as to how the petitioners should acquire the barges. The contract merely provides that all taxes payable on the barges will be borne by the petitioners and if any sales tax is required to be paid by the petitioners on the barges supplied on inspection, then subject to the certificate that the sales tax is actually paid and is not exempted, the Coast Guard was to reimburse the sales tax. Therefore, to supply barges to the Coast Guard, the petitioners could either import it on their own, clear the same on payment of duty and offer it for inspection or, could purchase barges locally and offer it for inspection. If on inspection the barges are approved and accepted, then the Coast Guard was to reimburse sales tax if paid by the petitioners on the barges, subject to the conditions stated above. Thus, neither from the terms of the contract nor from the conduct of the petitioners it can be said that the petitioners were authorised to import barges for Coast Guard and seek duty free clearance. In the light of the statement made by the partner of the petitioners under section 108 of the Customs Act (which has evidentiary value) that the imported barges have been sold in the open market, it is clear that there is no linkage between the barges imported and the barges supplied by the

petitioners to the Coast Guard. In any event, the fact remains that there was no authority given by the cost guard to the petitioners to import barges and if the petitioners on their own imported barges with a view to supply the same to the Coast Guard, then they are liable to pay customs duty and benefit of Notification No. 291 of 1984 will not be available to the petitioners.

19. Even if the petitioners had imported the barges with a view to supply to the Coast Guard, that fact itself will not make the import for and on behalf of the Coast Guard, because under the contract, acceptance of the barges by the Coast Guard was dependent on inspection and approval and not on important. On inspection the Coast Guard could reject the barges and in that event the petitioners were entitled to sell the said barges to any other purchaser. Therefore, the duty liability on the imported barges payable at the time of clearance cannot be said to be dependent upon the acceptance of the barges by the Coast Guard after clearance and on inspection. Therefore, in the present case, merely because the Coast Guard happened to purchase some barges from the petitioners, it cannot be said that the barges imported by the petitioners were for and on behalf of Coast Guard.

20. It is also important to note that if the barges were imported for and on behalf of the Coast Guard, then the petitioners would not have fraudulently stated in the shipping bill that the consignee is 'SSK Controller of Procurement, Naval Dockyard, Bombay' especially when the supply order clearly provides the consignee to be 'The officer---in charge, Coast Guard Stores Dept, Mankhurd, Bombay 400 088' and the petitioners would not have connived with an employee of the Indian Navy and make him to endorse on the shipping bill 'Certified that stores meant for Indian Naval Ship only'. Therefore, the modus operandi adopted by the petitioners to import the barges as ship stores and in connivance of an employee of the Indian Navy clear the goods without payment of duty and sell the goods in the open market, clearly shows that the important was not on the authority of Coast Guard.

21. In the present case, since the Coast Guard has purchased some barges, the petitioners as an after thought are trying to connect the import as if made for and on behalf of Coast Guard, when in fact the goods were imported by the petitioners

themselves for local sales. None of the letters/documents produced by the petitioners even remotely suggest that the petitioners were authorised by the Coast Guard to import barges. Therefore, the contention of Mr. Nankani that right from the inception the import was for and on behalf of Coast Guard cannot be accepted. Similarly, the contention of Mr. Nankani that the identity of the imported barges and the supply of barges to Coast Guard is established cannot be accepted in view of the statement of the partners of the petitioners under section 108 of the Customs Act that the imported goods have been sold locally. It is not correct to say that the notification has been construed narrowly to deny benefit of exemption. There is a distinction between a party importing goods for local sales and a party importing goods for and on behalf of an authority. The contract itself did not authorise import and that the supply was on local sale basis is evident from the fact that the Coast Guard was to reimburse the sales tax if paid by the petitioners. Therefore, the benefit of Notification No. 291/84-Cus is not available to the petitioners. The contention of the petitioners that even if the authority granted to import is conditional, the benefit of notification cannot be denied is also without any merit because, as stated above, there is no authority whatsoever given by Coast Guard to the petitioners to import barges. All that the contract provides is that the petitioners shall arrange for inspection of the barges within the stipulated time and on inspection if approved and accepted, the Coast Guard will buy the barges at the agreed rate and if the petitioners were required to pay any taxes for the said barges, the same will be borne by the petitioners and if sales tax was paid, the same was to be reimbursed by the Coast Guard. In this view of the matter, it cannot be said that the barges imported by the petitioners were for and on behalf of Indian Coast Guard and accordingly benefit of Notification No. 291/84-Cus cannot be extended to the barges imported by the petitioners.

22. Now let us turn to the authorities cited by the Counsel for the petitioners. Mr. Nankani relied upon the decision of the Apex Court in the case of Mangalore Chemicals and Fertilisers (*supra*) and contended that the conditions set out in the notification should not be construed rigidly and if it is established that the imported goods were supplied to the Government then the benefit of notification should not be denied. In the above case before the Apex Court admittedly the assessee was entitled to the benefit of the sales tax exemption and in fact for one year, the

benefit of exemption was granted to the assessee. However, while wrongfully withholding permission for three years, sales tax authorities declined to grant benefit of exemption for the said three years on the ground that prior permission was not obtained. In that context, the Apex Court held that while withholding permission without any justification it was not open to the sales tax authorities to deny the benefit of exemption and, accordingly the authorities were directed to issue permission from the date of application, so as to enable the assessee to avail the benefit of the notification. In the present case neither the assessee has applied for nor secured any permission to import barges for and on behalf of the Coast Guard. Moreover, in respect of the items to be imported, the Government of India had sanctioned foreign exchange, whereas in respect of barges no such foreign exchange was sanctioned. Apart from that, in the present case, it was clearly represented by the petitioners to the Coast Guard, that if any taxes are to be paid on barges, the same will be borne by the petitioners. Therefore, the decision of the Apex Court relied upon by the petitioners is wholly distinguishable on facts. The ratio laid down by the Apex Court in the case of *Thermax Private Limited* (supra) is also not applicable to the facts of the present case, because in the present case, there is no linkage between the imported barges and the barges supplied to the Coast Guard. In fact, the partner of the petitioners has admitted that the imported goods have been sold in the open market. Therefore, it cannot be said that the conditions of the notification are complied with. Similarly, other decisions relied upon by the petitioners are also distinguishable on facts. Therefore, in the present case it cannot be said that the object and purpose of the notification has been complied with. In this view of the matter, we hold that the Settlement Commission was justified in holding that the barges imported by the petitioners are not covered by the Exemption Notification No. 291/84-Cus and the customs duty is payable on the barges imported by the petitioners.

23. The next issue to be considered is, whether, the commission had jurisdiction to grant interest on the duty amount payable on the barges from the date of clearance of the barges from the warehouse till payment. According to Mr. Nankani there is no provision under the Customs Act which empowers the Settlement Commission to levy interest on the duty amount found payable in respect of the goods cleared on assessment in the year 1993. In other words,

according to Mr. Nankani section 28-AB of the Customs Act which came into force with effect from 28-9-1998 is not applicable to the present case because the barges were cleared on assessment prior to that section was enacted. Similarly section 72 read with section 61 of the Customs Act is also not applicable because the goods were in fact cleared on assessment without payment of duty and, therefore, it cannot be said that the goods were improperly removed from the warehouse. There is no merit in this contention. Section 72 of the Customs Act provides that where the goods are improperly removed from the warehouse, then the proper officer is entitled to demand the full amount of duty together with interest and other charges payable in respect of such goods. In the present case, the barges were assessed for duty free clearance under section 90 of the Customs Act in view of the false declaration made by the petitioners in the shipping bills that the barges in question are to be supplied to Indian Navy. Once the assessment made under section 90 of the Act is set aside on the ground that the goods have not been supplied to Indian Navy, then the clearance of goods based on such assessment becomes improper clearance. Therefore, on re-assessment duty if is found payable, on such improperly cleared goods then, under section 72 of the Customs Act, duty becomes payable with interest and other charges. The Apex Court in the case of *Pratibha Processors v. Union of India*, reported in : 1996(88)ELT12(SC) has held as follows:

'It is implicit from the language of section 61(2) of the Act that the interest shall be payable on the amount of duty 'payable or due' on the warehoused goods for the period from the expiry of period specified or granted till the date of clearance of the goods from the warehouse. In this case, on the date of clearance of the goods, no duty is payable. The goods are not exigible to duty at that time. Calculation of interest is always on the principal amount. The 'interest' payable under section 61(1), (2) of the Act is a mere 'accessory' of the principal and if the principal is not recoverable/payable, so is the interest on it. This is a basic principle based on common sense and also flowing from the language of section 61(1), (2) of the Act. The principal amount herein is the amount of duty payable on clearance of goods. When such principal amount is nil because of the exemption, a fortiori, interest payable is also nil. In other words, we are clear in our mind that the interest is necessarily linked to the duty payable. The interest provided under section 61(2)

has no independent or separate existence. When the goods are wholly exempted from the payment of duty on removal from the warehouse, one cannot be saddled with the liability to pay interest on a non-existing duty. Payment of interest under section 61(2) is solely dependent upon the exigibility or factual liability to pay the principal amount, that is, the duty on the warehoused goods at the time of delivery.'

In the present case duty was payable on the barges at the time of removal from the warehouse but, because of the false statement made by the petitioners, the goods were improperly cleared without payment of duty. Once the duty is found payable on such improperly cleared goods, then under section 72 read with section 61 of the Customs Act, the duty is recoverable with interest. Therefore, the Settlement Commission was justified in directing the petitioners to pay the with interest. There is no controversy regarding the rate of interest awarded by the commission.

24. For all the aforesaid reasons, we upheld the order passed by the Settlement Commission. Accordingly, the writ petition fails and the same is dismissed with costs.