

2013 (4) ECS (179) (Tri – Ahd)

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL  
WEST ZONAL BENCH AT AHMEDABAD**

**Ojaswi Marble & Granite Pvt Ltd.**

**Vs.**

**Commissioner of Customs, Kandla**

Appeal No. C/409 & 410 of 2007

Arising out of: OIO Nos. KDL/Commr./33/2007 dated 06.08.2007 and  
KDL/Commr/35/2007, dt 07.08.2007 Passed by Commissioner of Customs, Kandla

Represented by :

P. V. Sheth, Adv.  
Shri S. K. Mall, (A.R.)

For the appellant  
For the respondent

**CORAM:**

**MR. H.K. THAKUR, HON'BLE MEMBER (Technical)**

Date of Hearing: 04.10.2013

Date of Decision: 11.10.2013

ORDER No. A/11319-11320/WZB/AHD/2013, dt 11.10.2013

**“MOP will vary from time to time and also depend upon the country of origin of goods. It is seen that, in the relied upon case, the Rough Marble block imported were of Iranian origin and in the present case, the blocks are of Vietnam origin, Secondly, the imports in the relied upon case were made in 2003 and in the present appeals imports are made in 2007. Therefore, quantum of redemption fine and penalties decided for 2003 period may not be applicable to the imports made in 2007.” [Para 5]**

**“In view of the above observations there is no case for modification of the quantum of redemption fine and penalties imposed by the adjudicating authority. Accordingly, appeals filed by the appellants are rejected.” [Para 6]**

**Per : H.K. Thakur, Mr. :**

1. Following appeals have been filed by the appellants on the same issue hence these are being taken up for disposal under a common order:

Sr. No.	Appeal No.	Appellant Name	OIO No and Date
1	C/409/2007	M/s Marvellous Marble & Granite	KDL/COMMR/35/2007 dated 07.08.2007
2	C/410/2007	M/s Ojaswi Marbles & Granite Pvt. Ltd	KDL/COMMR/33/2007 dated 06.08.2007

2. Brief facts of the appeals are that appellants imported rough marble blocks falling under CTH 2525 1210 of the first schedule to the Customs Tariff Act, 1975 and filed Bills of Entry for clearance of the same. It appeared to the Revenue that as per DGFT Notification No. 23/2005 – 2009 dated 31.08.2005, read with Circular No. 24 (RE - 05) 2004 – 2009 dated 30.08.2005, import of goods covered under CTH (HS) 2515 1210 are restricted and needed a valid import licence. Appellants waived issue of show cause notice and requirement of personal hearing and requested for a lenient view while imposing redemption fine and penalty, as they were earning profits of only 3.01% to 10.5% as per the Chartered Accountant's Certificate furnished to the Adjudicating Authority and due to the fact that appellants are incurring heavy demurrage and port related charges. The cases were adjudicated and allowed redemption by imposing nearly 50% of assessable value as redemption fine and about 15 to 20% as penalty under Section 125 & Section 112 (a) respectively of the Customs Act, 1962.
3. Shri P. V. Sheth (Advocate) appearing on behalf of the appellants argued that imposition of redemption fine and penalty is very high and as per judgment of CESTAT Mumbai in the case of Sophisticated Marble & Granite Industries vs. Commissioner of Customs, Mumbai [2004 (165) ELT 353 (Tri. Mumbai)], a redemption fine of 20% of CIF value and 5% of CIF value as penalty was sufficient in the present imports. It was thus his case to reduce the quantum of redemption fine and penalty.
4. Shri S K Mall (AR) appearing on behalf of the Revenue argued that margin of profit and quantum of redemption fine and penalty applicable to the imports of Iranian Marble in 2003 in the case of Sophisticated Marble & Granite Industries vs. Commissioner of Customs (supra) can not be made applicable to the present imports from Vietnam made in 2007. It was also his case that appellants have not brought any evidence before the adjudicating authority as to how much demurrage etc. they will be incurring in the present consignments. He also argued that redemption fine and penalties imposed depends upon the prevailing MOP in the case of Rough Marble Slabs and has no link with the profit earned by the appellants in their business activities as the same may vary from person to person at the same point of time.

5. Heard both side and perused the case records. Appellants have not agitated confiscation on merits but have only tried to make out their case that quantum of redemption fine and penalties imposed by the adjudicating authority are on the higher side. It was argued on behalf of the appellants that as per CESTAT's order in the case of Sophisticated Marble & Granit Industries vs. Commissioner of Customs, Mumbai [2004 (165) 353 (Tri Mumbai)] redemption fine should be 20% of CIF value and penalty 5% of the CIF value. In this regard, it has been rightly argued by the learned AR that MOP will vary from time to time and also depend upon the country of origin of goods. It is seen that, in the relied upon case, the Rough Marble block imported were of Iranian origin and in the present case, the blocks are of Vietnam origin, Secondly, the imports in the relied upon case were made in 2003 and in the present appeals imports are made in 2007. Therefore, quantum of redemption fine and penalties decided for 2003 period may not be applicable to the imports made in 2007. Further, the reduced quantum of redemption fine and penalty in the relied upon case law was opined by Member (Judicial) which on difference of opinion was referred to the third Member.

5.1. Hon'ble third Member did not agree with the quantum of redemption fine and penalties proposed by Member (Judicial) and passed the following order : -

“18. One factor is obviously of great significance. It is to be noted that there have continuing and a large number of imports of marble by various persons without import licence. That is clear from the large number of orders that has been referred to in these proceedings. If the fine of 20 % was sufficient to wipe out the margin of profit, how would such imports contrary to law continue unabated? No group of business would continue to import goods to sell them in the domestic market with the full knowledge that there would be no profit and propose to incur loss and keep doing so for quite a long while. There may perhaps be exceptions as in the cases of branded goods where a person may temporarily suffer loss in order to keep the brand name alive in the market. Marble blocks clearly do not fall in this category. It is clear from these facts that the quantum of fine determined earlier has been insufficient to eliminate the profitability of import. The fines determined in the past have thus failed to give effect to the provisions of law prohibiting import of the goods without a license. It is possible that, as a result of the fines that were earlier fixed, the market price has increased, leading to a continuation of import. If that is what has happened, it is clear that the market situation has changed, resulting in the earlier levels of fine being lower than the current margin of profit. In the case, too, a higher fine would be called for to cater to the changed situation. The present appellant has himself earlier imported goods six

times earlier in 2001 – 2002 and was permitted to clear them presumably on the basis of penalty lower than that imposed now. It is thus clear that the fine imposed earlier has not acted as deterrent to further import by nullifying any gain made from illegal imports. The same consideration the fact that the previous levels of penalty have failed to deter the appellant from continuing to import goods despite being conscious that the import was contrary to law justifies a higher penalty.

19. I also do not find it possible to agree with the contention of the Counsel for the appellant that the difference in the conclusion of the two members of the Bench has only occurred because the Member (Technical) had gone by the incorrect figures of fine and penalty contained in the order of the Member (Judicial). While his order touches upon this aspect a reading of it makes it clear that he has been guided solely by these figures. I am unable to say whether or not the demurrage incurred by the appellant justifies the lower fine. No evidence has been produced before me in support. There is no reference to this claim in the orders of the members of the Bench that heard the appeal. The memorandum of appeal does not refer to any such expenses, or contain a ground based upon them.

20. As a result of these discussions, I am the view that the fine and penalty determined by the Commissioner require to be upheld and agree with the Member (Technical).”

5.2. The above majority decision passed by CESTAT was taken up to Bombay High Court by the appellant where the following order was passé by Hon’ble High Court, reported at [2004 (166) ELT 318 (Bom)], the relevant portion of the order is reproduced as under: -

“3. In the past similar consignments were imported by the petitioners and in spite of levy of fine and penalty the petitioners continued to import marble without any licence. In other words, penalty and fine did not get as deterrent to stop further illegal import. In other words, petitioners continued to indulge in illegal import of marble without licence and litigation ensued there from was used to get fine and penalty reduced on technical legal pleas. This petition is product of such illegal activities of the petitioners. An act constituting import of marble without licence has given rise to the present litigation which reached up to the Tribunal. The Tribunal was pleased to allow the release of goods subject to imposition of duly, redemption fine and penalty as determined by the adjudicating authority. The Tribunal has specifically observed in the order that it is clear from the

facts that the fine imposed earlier did not act as deterrent to stop further illegal imports.

4. It is thus clear, that the petitioners who are in the business of marble and have become a habitual importer of goods in spite of the fact that they are very well aware of the law that the imports have to be backed by a valid licence. In spite of this, if the petitioners are repeatedly including in importing marbles, without licence, or subsequently obtain licence to cover up illegal imports then it would be a duty of writ Court, to arrest such tendency prevailing amongst the importers of the goods. The Apex Court in the case of Her Shankar and Ors. v. Deputy Excise and Taxation Commissioner and Ors. ruled that the writ jurisdiction of High Court under Article 226 of the Constitution of India is not intended to facilitate avoidance of legal obligation and to commit breach of law for the lime being in force. The extraordinary jurisdiction of the High Court under Article 226, which is of a discretionary nature and is to be exercised only to advance the interest of the justice, cannot certainly be employed in aid of such persons; who have no respect for the law of land and who are deliberately indulging in committing breach thereof. This Court would not be justified in invoking writ jurisdiction in favour of such persons. Writ jurisdiction is available to further the cause of regime of law, not to abrogate the same. In the facts of this case the consignments confiscated by the Customs authorities cannot be allowed to be released on the licence which were sought to be produced by the petitioners. The importers who are importing goods without licence and then seek to validate the import by obtaining subsequent licence or licences cannot be allowed to take advantage of their own wrong. The petitioners are one of them.”

The Hon'ble Supreme Court also, by its order dated 15.3.2004, reported as [2004 (166) ELT 318 (Bom)], dismissed the SLP filed by Sophisticated marble & Granite Industries.

6. In view of the above background of Marble block imports before the appellants affected the present imports, it is evident that imposition of lower fines and penalties have not deterred the marble traders from importing the sensitive commodity which may affect indigenous industry. No contemporary imports of rough marble slabs have been brought on record by the appellants where lesser redemption fine and penalties were imposed. There is also no evidence produced by the appellants that they had to pay huge demurrage charges in the detention and clearance of the impugned consignments. In view of the above observations there is no case for modification of the quantum of redemption fine

and penalties imposed by the adjudicating authority. Accordingly, appeals filed by the appellants are rejected.

(Pronounced in the Court in 11.10.2013)