

EY Tax Alert

Bombay HC holds interest and penalty not leviable on delayed payment of customs surcharge, CVD and SAD

Tax Alerts cover significant tax news, developments and changes in legislation that affect Indian businesses. They act as technical summaries to keep you on top of the latest tax issues. For more information, please contact your EY advisor.

Executive summary

This Tax Alert summarizes a recent ruling¹ of the Bombay High Court (HC). The issue involved in the writ petition is imposition of interest and penalty on short/delayed payment of certain duties other than basic customs duty (BCD), viz., customs surcharge, additional duty of customs (CVD) and special additional duty (SAD).

Petitioner contended that section 90 of the Finance Act, 2000 relating to customs surcharge, section 3 of the Customs Tariff Act, 1975 (CTA) relating to CVD, and section 3A of the CTA relating to SAD are the charging sections for the said duties and none of these provisions contemplated imposition of interest or penalty on such duty.

Revenue contended that customs surcharge, CVD, and SAD, though charged under different statutes, are duties of customs and covered under section 12 of Customs Act, 1962. Further, these duties are part of total customs duty and are calculated by considering the value of goods and basic customs duty. The petitioner had misstated the assessable value by undervaluing the imported goods. Hence, interest and penalty are to be levied on delayed payments of customs surcharge, CVD, and SAD.

Bombay HC held that interest and penalty could be levied only on BCD and not on customs surcharge, CVD, and SAD, as there was no power under the law to impose interest or penalty on the said duties.

¹ TS-446-HC-2022(BOM)

Background

- ▶ The assessee (petitioner) is a company engaged in manufacturing vehicles in India. Show cause notices (SCNs) alleging short declaration of the amount payable in connection with imported goods were served on the petitioner for which it filed applications before the Settlement Commission (STC).
- ▶ STC passed orders that the customs duty liability as proposed in the SCN was payable along with interest and penalty.
- ▶ Consequently, the petitioner filed writ petitions before the Bombay High Court (HC) against the said orders.
- ▶ HC set aside the orders in so far as they related to the imposition of penalty and interest on customs duty other than the basic customs duty (BCD) and remanded the matter back to pass fresh orders on merits.
- ▶ STC confirmed its earlier orders by giving reasons as to why such orders were correct.
- ▶ Aggrieved, the petitioner again filed the writ petitions before the HC.

Petitioner's contentions

- ▶ Section 90 of the Finance Act, 2000 relating to customs surcharge, section 3 of the Customs Tariff Act, 1975 (CTA) relating to an additional duty of customs (CVD), and section 3A of the CTA relating to special additional duty (SAD) of customs does not provide for imposition of penalty or interest on the chargeable duty.
- ▶ Any provision made in a statute for charging or levying interest on delayed payment of tax must be construed as substantive law and not adjectival law. Thus interest can be levied and charged on such delays only if the statute levying the tax makes a substantive provision. Reliance was placed on the ruling of the Supreme Court (SC) in the case of J K Synthetics Ltd.² and India Carbon Ltd.³
- ▶ As per section 28AB of the Customs Act, 1962 (the Act), interest on delayed payment of duty is applicable only for customs duty leviable under section 12 of the Act.
- ▶ Customs surcharge, CVD, and SAD are levied under section 90(1) of the Finance Act, 2000, section 3(1) and section 3A of CTA and not under section 12 of the Act. Reliance was placed on the SC ruling in the case of Hyderabad Industries Ltd.⁴
- ▶ In the case of Khemka and Co (Agencies) Pvt Ltd⁵, SC held that a penalty is in addition to tax and statutory liability. Hence, there must be specific provision to levy a penalty.
- ▶ Similar view was taken by SC in case of Orient Fabrics Pvt Ltd⁶, Delhi HC in the case of Pioneer Silk Mills Pvt

Ltd⁷, and Gujarat HC in the case of Ukai Pradesh Sahakari Khand Udyog Mandli Ltd⁸.

- ▶ Since the charging sections of customs surcharge, CVD and SAD do not borrow interest and penalty provisions from the Act, the same cannot be made applicable.
- ▶ The Bombay High court took a similar view in the case of Valecha Engineering Ltd⁹ and Indo Swiss Embroidery Industries Ltd.¹⁰

Revenue's contentions

- ▶ Customs surcharge, CVD, and SAD though charged under different statutes, are duties of customs and, therefore, section 28AB of the Act (as then prevailing) is applicable.
- ▶ These duties are part of the total customs duty and are calculated by considering the value of goods and BCD. The petitioner had misstated the assessable value by undervaluing the imported goods. Therefore, interest and penalty are to be levied for such misstatement.
- ▶ Under section 127C of the Act, STC had the inherent authority or power to determine the terms of the settlement covering not only the amount of duty but also interest and penalty.
- ▶ The charging section for the imposition of customs surcharge, CVD and SAD is section 12 of the Act. Therefore, imposing interest under section 28AB of the Act for customs surcharge, CVD and SAD would be correct in law.

High Court ruling

- ▶ When a statute levies a tax, it does so by inserting a charging section by which a liability is created and then proceeds to provide the machinery to make the liability effective. It also provides the mode for the recovery and collection of tax, including penal provisions meant to deal with defaulters.
- ▶ Section 28AB of the Act is a taxing provision which creates and fastens the liability on a party. The provision must be strictly construed and governed by the language employed in the section.
- ▶ As held by the SC in the matter of J K Synthetics Ltd and India Carbon Ltd (*supra*), any provision made in a statute for charging or levying interest on delayed payment of tax must be construed as substantive law and not adjectival law.
- ▶ Therefore, where there is no substantive provision requiring the payment of interest, the authorities cannot, to collect and enforce tax payment, charge interest thereon.
- ▶ In Khemka and Co (Agencies) Pvt Ltd (*supra*), SC held that a penalty is a statutory liability and is in addition to tax and liability under the Act. There must be a specific

² 1994 SCC (4) 276 (SC)

³ 1997 (6) SCC 479 (SC)

⁴ 1999 (108) ELT 321 (SC)

⁵ 1995 (76) E.L.T. 235 (G.O.I.)

⁶ 2003 (158) E.L.T. 545 (SC)

⁷ 1995 (80) E.L.T. 507 (Del.)

⁸ 2011 (271) E.L.T. 32 (Guj.)

⁹ 2010 (249) E.L.T. 167 (Bom.)

¹⁰ 2017 (356) E.L.T. 226 (Bom.)

provision to create liability. Section 3 and section 3A of CTA creates liability for levy of CVD and SAD but do not provide for penalty.

- ▶ The mere fact that there is machinery for assessment, collection, and enforcement of tax and penalty under the Act does not mean that the penalty and interest provisions in the Act would apply for penalty and interest under the CTA.
- ▶ Section 3(6), section 3A(4) of CTA, and section 90 of Finance Act, 2000, refer to the procedural aspects and machinery provisions under the Act. There is no provision in the aforementioned sections that creates a charge in the nature of penalty or interest.
- ▶ Section 9A of the CTA, prior to amendment, did not include interest and penalties. By Section 76 of Finance (No.2) Act, 2004, the words in section 9A(8) of CTA *"relating to non-levy, short levy, refunds and appeals"* were replaced with *"relating to, the date for determination of rate of duty, non-levy, short levy, refunds, interest, appeals, offences and penalties"*.

No such amendment was made in section 3(6), section 3A(4) of CTA, and section 90 of Finance Act, 2000 to include interest and penalty.
- ▶ Therefore, the intention of the legislature was clear that it wanted to include interest and penalties only with regard to anti-dumping duty on dumped articles and not for customs surcharge, CVD, and SAD.
- ▶ Section 28 of the Act provides for recovery of dues, and section 28AB of the Act provides for interest on delayed payment of duty. Both are separate provisions and would apply only to the duty leviable under the Act.
- ▶ As held by the SC in case of Hyderabad Industries Ltd (*supra*) customs surcharge, CVD and SAD are not levied under section 12 of the Act but under the provisions of Section 90(1) of Finance Act, section 3(1) and section 3A(1) of CTA respectively and hence provisions of section 28 and section 28AB are not applicable.
- ▶ HC thus concluded that imposing interest and penalty on the portion of the demand on customs surcharge, CVD, and SAD is incorrect and without jurisdiction.

Comments

- a. HC ruling is likely to benefit all importers facing disputes under customs w.r.t surcharge, CVD, and SAD demands.
- b. As per the settled principle, the decision of the High court, unless overruled or in the absence of any contrary rulings, shall have a binding effect across jurisdictions in India.
- c. Applicability of the HC judgment to other levies under Customs, such as, Integrated Goods and Services Tax (IGST), Compensation Cess on import of goods, etc., may need to be evaluated.
- d. It is quite likely that the ruling may be challenged before the Supreme Court, considering the revenue implications.
- e. Taxpayers who paid interest and penalty on CVD, SAD, and surcharge in the past may explore the possibility of claiming refund.

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