Roche Products Limited vs Collector Of Customs And Another on 19 October, 1989

Equivalent citations: 1989 SCR, SUPL. (1) 495 1989 SCC SUPL. (2) 532, AIRONLINE 1989 SC 45, 1989 SCC (SUPP) 532, (1990) 1 SCJ 186, (1989) 44 ELT 194, 1989 SCC (SUPP) 2 532, 1990 CRI LR (SC&MP) 157

Author: M.M. Dutt

Bench: M.M. Dutt, S.R. Pandian

PETITIONER:
ROCHE PRODUCTS LIMITED

Vs.

RESPONDENT:
COLLECTOR OF CUSTOMS AND ANOTHER

DATE OF JUDGMENT19/10/1989

BENCH:
DUTT, M.M. (J)
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DUTT, M.M. (J)
PANDIAN, S.R. (J)

CITATION:
1989 SCR Supl. (1) 495 1989 SCC Supl. (2) 532
JT 1989 Supl. 273 1989 SCALE (2)830

ACT:
Customs Act, 1962: Sections 122, 124, 128--Collector of Customs setting aside order of Customs Officer--Ordering confiscation and imposing penalty--Held appellant has right of appeal against such order.
Actual user must not be debarred from utilising the imported material under its industrial licence.
Administrative Law: Authority has power to do a certain act--Does the act but refers to wrong provisions of law--Such order mere irregularity and would not vitiate such act.

HEADNOTE:
The appellant is engaged in the business of manufacture of various pharmaceutical products including sulphamethoxa-

zole which is also known as 'SMX'. One of the important ingredients or raw materials for the manufacture of SMX is a chemical known as 'isoxamine'.

On April 23, 1974 the Ministry of Industrial Development of the Government of India issued to the appellant an industrial licence enabling it to manufacture 18 tonnes of SMX per year. Under one of the conditions of the industrial licence, the appellant was permitted to import the material, isoxamine, for a period of two years only from the date of licence, and thereafter the product SMX was to be manufactured from indigenous materials. The appellant's request for permission to import isoxamine till the middle of 1979 was not acceded to by the Government and the appellant was asked to manufacture SMX from indigenous materials. In the meantime, the appellant had placed orders for the import of isoxamine under an import licence issued on October 13, 1976, and between March and June 1979 got the goods cleared after giving a declaration that the appellant was an Actual User, and that its registration had not been cancelled or withdrawn or otherwise made inoperative.

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The Collector of Customs, Bombay, issued show-cause notice on the appellant for confiscation of goods and imposition of penalty, inter alia, on the ground that it had made a false statement that its registration had not been cancelled, withdrawn or otherwise made inoperative for the manufacture of SMX by using imported material, that is, isoxamine, inasmuch as the industrial licence had ceased to be valid for the manufacture of SMX with imported material after April 22, 1976.

The Collector of Customs, after bearing the appellant, held that the appellant was not an Actual User (Industrial) in respect of the said imported raw material, isoxamine, after April 22, 1976, and that since the industrial licence was invalid for manufacture of SMX with imported material the importation of the raw material, namely, isoxamine, was impermissible. The Collector also held that the appellant had furnished a false declaration on the basis of which it got the goods cleared by the Custom Officer. The Collector, therefore, set aside the decision of the Custom Officer allowing clearance of the goods. The Collector of Customs further directed confiscation of the goods imported by the appellant and also imposed a penalty. The appellant's writ petition was dismissed by the learned Single Judge of the High Court, and appeal against his judgment was dismissed by the Division Bench.

Before this Court it was contended on behalf of the appellant that the goods, namely, isoxamine, having been imported under a valid Open General Licence (OGL), the customs authorities had no jurisdiction to confiscate the same; that the appellant having secured the OGL for the import of isoxamine for its own use and not for business or trade in it, the appellant should be held to be an Actual

User; that the Collector of Customs could not, in exercise of his revisional jurisdiction under section 130(2) of the Customs Act, 1962, as it stood then, for the first time confiscate the goods and impose penalty on the appellant; and that as the goods have been confiscated and the penalty has been imposed by the Collector of Customs in exercise of his revisional jurisdiction, the appellant has been deprived of his right to prefer an appeal before the Central Board of Excise and Customs under Section 128(a) of the Customs Act.

While dismissing the appeal, this Court,

HELD: (1) There can be no doubt that the definition of "Actual User (Industrial)", as contained in clause (3) of paragraph 5 of chapter 2 of Import Policy 1978-79 should be read with the definition of "Actual

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User" in clause (1) of paragraph 5. So read, it is clear that an "Actual User (Industrial)" means an industrial undertaking which is entitled to utilise the imported goods "in the manufacturing process or operations conducted within its authorised premises. In other words, the importer must not be debarred from utilising the imported goods under the terms of the industrial licence. [504C-D]

(2) The declaration of the appellant that it is an Actual User, and that its registration has not been otherwise made inoperative is a false declaration, as rightly held by the Collector of Customs. When the industrial licence granted to the appellant does not permit the use of the imported goods for the manufacture of SMX, the importation of the goods under the OGL is illegal and could not be allowed to be cleared by the appellant. [505A-B]

(3) In view of the provisions of section 122 read with section 124 of the Customs Act, the Collector of Customs has the jurisdiction to confiscate goods or impose penalty after issuing show cause notice. He has, therefore, both the original jurisdiction as also revisional jurisdiction. In exercise of his revisional jurisdiction under section 130(2) of the Act, he set aside the order of the Customs Officer allowing the goods to be cleared by the appellant and, thereafter, in exercise of his original jurisdiction under section 122 read with section 124 of the Act, he issued a show cause notice on the appellant and, after hearing the appellant, confiscated the goods and imposed penalty on the appellant. [506E-F]

(4) It appears, however, that the confiscation was made and the penalties imposed by the Collector of Customs in exercise of his revisional power under section 130(2) of the act. This is a mere irregularity not affecting the order. When an authority has the power to do a certain act and in exercise of such power he does the same, but refers to a wrong provision of the law, that would be a mere irregularity and would not vitiate such act. [506G-H; 507A]

Addl. Commissioner of Income Tax v. J.K. D'Costa, [1982] 133 ITR 7, distinguished.

(5) In the order of the Collector it has been specifically stated at the very outset that an appeal against the order lies to the Central Board of Excise and Customs. It cannot, therefore, be said that the appellant was misled, as the order was purported to have been passed by the Collector of Customs in exercise of his revisional jurisdiction.
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JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 4407(NM) of 1989.

From the Judgment and Order dated 28.7.1989 of the Maharashtra High Court in Appeal No. 360 of 1984. Anil B. Divan, A.J. Rana, S. Ganesh, Ravinder Narain, P.K. Ram, Ms. Amrita Mittar, M.P. Bakshi and D.N. Mishra for the Appellant.

V.C. Mahajan, Hemant Sharma and P. Parmeshwaran for the Respondents.

The Judgment of the Court was delivered by DUTT, J. This special leave petition has been heard at length and both parties have made elaborate submissions on the merits of their respective cases and, accordingly, we proceed to dispose of the special leave petition after granting leave.

The appellant, Roche Products Limited, a public limited company has, by this appeal, challenged the propriety of the decision of the Division Bench of the Bombay High Court dismissing the appeal preferred by the appellant against the judgment of a learned Single Judge dismissing the writ petition of the appellant. In the writ petition, the appel- lant challenged the order of the Collector of Customs passed in exercise of his revisional jurisdiction under section 130(2) of the Customs Act, 1962, hereinafter referred to as 'the Act', directing confiscation of the goods imported by the appellant, but giving to the appellant an option to pay in lieu of such confiscation. a fine of Rs. 19,00,000 and further imposing on the appellant a penalty of Rs.5,00,000. The appellant is engaged in the business of manufacture of various pharmaceutical products including sulphamethoxa- zole which is also known as 'SMX'. One of the important ingredients or raw materials for the manufacture of SMX is a chemical known as 'isoxamine', which is also known as '3-amino-5-mithyl-isoxazole'.

On April 23, 1974, the Ministry of Industrial Develop- ment of the Government of India issued to the appellant an industrial licence enabling it to manufacture 18 tomes of SMX per year. Clause 4 of the industrial licence enjoins that the manufacture of "new articles" shall be completed and commercial production established within a period of two years from the date of issue of the industrial licence. The industrial licence also contains some addition- al conditions of which the condition contained in clause 5(iv) is relevant for our purpose. Clause 5(iv) provides as follows:

> "5. The industrial licence will also be sub- ject to the conditions stipulated in Annexure I. It will be further subject to the following additional conditions:

(i) .....

(ii) .....

(iii).....

(iv) The undertaking should base the manufacture of sulphamethaxazole on M.A.I. (5-methyl-3-Amino in sale). From the third year onwards, the manufacture of drugs will be based on T. Butyl alcohol hydroxylamine acid T. Butyl alcohol hydrexylamine said sulphates and methyl formulate. The manufacture of formulations should be based on their own production of sulphamethaxazole and import of Tricathopria will be considered only for one year. There after, it should be based on locally produced materials."

Clause 10 provides that the industrial licence will be valid only for a period of two years within which commercial production is to be established.

It is apparent from the conditions of the industrial licence that the appellant was permitted to import the material, isoxamine, for a period of two years only from the date of the licence, that is to say, up to April 23, 1976 and that, thereafter, the product SMX was to be manufactured from indigenous materials.

On October 13, 1967, the Import Control Authority issued to the appellant an import licence for the import of various raw materials up to an aggregate value of Rs.53,31,000 including isoxamine. The licence was valid for a period of 24 months from the date of issue of the same. It, however, contained a condition that all the goods that would be imported under it should only be used in the factory of the appellant.

By its letter dated September 20, 1978, addressed to the Under Secretary, Government of India, Ministry of Petroleum, Chemicals and Fertilisers, the appellant stated their diffi- culties in manufacturing SMX from indigenous materials and made a request that it might be allowed to import isoxamine until the middle of 1979. The appellant also wrote another letter dated September 29, 1978 to the said Under Secretary, again pointing out to him, inter alia, the difficulties which the appellant had to face in developing the manufac- ture of isoxamine from locally produced materials, indige- nous articles and ingredients and the delays which has occurred as a consequence.

Although the appellant did not get any reply to its representation from the Government permitting it to import isoxamine until the middle of 1979, yet it placed an order on Hoffmann-La Roche Limited, Basle, Switzerland, for supply of isoxamine and opened an irrevocable letter of credit in favour of the said Hoffmann-La Roche Limited. Before the goods ordered by the appellant had reached India from Switz- erland, the Under Secretary to the Government of India, Ministry of Petroleum, Chemicals and Fertilisers, by his letter dated January 20, 1979 informed the appellant that its request for permission to import isoxamine till the middle of 1979 could not be acceded to and the appellant was asked to manufacture SMX from indigenous materials.

Between March and June, 1979, consignments of isoxamine reached the Bombay Port pursuant to the order placed by the appellant to the said Hoffmann-La Roche Limited. The appel- lant also gave a declaration that it was an Actual User, and that its registration had not been cancelled or withdrawn or otherwise made inoperative, as required to be given under paragraph 6 of Appendix-10 of the Import Policy, 1978-79 and got the goods cleared upon such declaration by the Customs Officers.

On September 7, 1979, the appellant received from the Collector of Customs, Bombay, a notice issued under section 130(2) of the Act calling upon the appellant to show cause why the goods imported by the appellant should not be con- fiscated under section 3 of the Imports and Exports (Con- trol) Act, 1947 and why a penalty of Rs.7,00,000 should not be imposed on the appellant under section 112(1,) of Act.

In the said notice to show cause, it was stated inter alia that the industrial licence granted to the appellant stipulated that after a period of two years the production of SMX should be based on indigenous materials and, accordingly, the appellant was not allowed to use imported materials in the production of SMX after the expiry of two years, that is, after April 22, 1976. It was also stated that the appellant was not an Actual User of the imported material, that is, isoxamine, after April 22, 1976 inasmuch as the industrial licence had ceased to be valid for the manufacture of SMX with imported materials. Further, it was stated that the declaration given by the appellant in terms of paragraph 6 of Appendix 10 of the Import Policy 1978-79, contained a false statement, namely, that the registration of the appellant had not been cancelled, with- drawn or otherwise made inoperative for the manufacture of SMX and, accordingly, the goods, namely, isoxamine, had been imported by the appellant in contravention of the Import Trade Control Order issued under section 3 of the Imports and Exports (Control) Act. In the circumstances, the Collec- tor of Customs proposed to review the said unauthorised clearance of the goods.

The appellant submitted its reply to the show cause notice contending, inter alia, that the industrial licence dated April 23, 1974 granted to it for the manufacture of SMX was still valid and operative.

The Collector of Customs, after hearing the appellant and after considering the facts and circumstances of the case, by his order dated November 14, 1979, held that the appellant was not an Actual User (Industrial) in respect of the said imported raw material, isoxamine, after April 22, 1976, that is to say, after the expiry of two years from the date of issue of the industrial licence to the appellant, and that since the industrial licence was invalid for manu- facture of SMX the importation of the raw material, namely, isoxamine, was impermissible. It was also held by the Col- lector of Customs that the appellant had furnished a false declaration on the basis of which it got the goods cleared by the Customs Officers. Accordingly, the Collector of Customs ordered as follows:

> "In exercise of powers conferred upon me under Section 130(1) of the Customs Act, 1962, I therefore, review the order of clearance allowing storage in warehouse, the goods shall be confiscated under Section 111(d) of the Customs Act, 1962 read with Section 3 of the Imports and Exports (Control) Act, 1947. I, however, allow under Section 125 of the Cus- toms Act, 1962, an option to pay in lieu of such confiscation a

fine of Rs. 19,00,000 (Rupees nineteen lakhs only) and clear the goods into town. This option should be exer- cised within a month from the date of this order or within such extended period as may be allowed on good and sufficient cause being shown to the satisfaction of the Adjudication authority. I also impose a penalty of Rs.5,00,000 (Rupee five lakhs only) on the importers under Section 112, of Customs Act, 1962 which is to be paid forthwith".

Being aggrieved by the said order of the Collector of Customs, the appellant challenged the same by filing a writ petition before the Bombay High Court. A learned Single Judge of the High Court, who heard the writ petition, dis- missed the same by his judgment dated April 11, 1984. The appellant preferred an appeal against the judgment of the learned Single Judge to a Division Bench of the High Court which, as stated already, dismissed the same. Hence this appeal by special leave.

It is not disputed that the industrial licence granted to the appellant clearly stipulated that after the expiry of two years the appellant would not be entitled to manufacture SMX with the imported material, isoxamine. Such manufacture of SMX could be made by the appellant from indigenous mate- rials. It has been strenuously urged by Mr. Anil Divan, learned Counsel appearing on behalf of the appellant, that the goods, namely, isoxamine, having been imported under a valid Open General Licence (OGL), the customs authorities have no jurisdiction to confiscate the same. It is submitted that the only thing that can be looked into by the customs authorities is whether the particular goods have been im- ported under a valid licence or not. As soon it is found that it has been so imported under a valid licence, the customs authorities will have no other alternative than to clear the goods.

We are unable to accept this contention of the appel- lant. It is true that the goods have been imported under OGL. If that had been the only condition for clearance of the goods then, of course, the customs authorities could not confiscate the goods. But, that was not the only condition to be fulfilled by the appellant. Another conditions that has to be fulfilled by the appellant is that contained in paragraph (6) of Appendix 10 of the Import Policy 1978-79 which is as follows:

"(6). All Actual Users, at the time of clear-

ance of goods shall furnish to the customs authorities a declaration giving particulars of their registration as an Actual User with the concerned authorities and affirming that such registration has not been cancelled or withdrawn or other- wise made inoperative. In case, where separate registration number is not allotted by the sponsoring authority concerned, the importers shall produce other evidence to the satisfac- tion of the customs authorities that they are registered as industrial units. Actual Users (non-Industrial) shall, at the time of clear- ance of the goods furnish to the customs authorities the original or a photostat copy of the (currently valid) Registration Certificate held by them under the Shops and Estab-

lishments Act, Cinematographic Act,or con- cerned local statute."

Thus, under paragraph (6), the Actual User has to fur- nish a declaration affirming that the registration as an Actual User has not been cancelled or withdrawn or otherwise made inoperative.

If there be no separate registration number, as in the case of the appellant, importers shall produce evidence to the satisfaction of the customs 'author- ities that they are registered as industrial units. The appellant has, admittedly, been registered as an industrial unit which is evidenced by the grant of the industrial licence. As stated already, the appellant furnished a decla- ration that its registration had not been cancelled or withdrawn or otherwise made inoperative. The appellant also claimed that it was an Actual User. It is urged on behalf of the appellant that as soon as it is proved that it is an Actual User, and that its registration has not been can- celled, the declaration that has been furnished by the appellant must be held to be a correct one and the customs authorities had rightly allowed the appellant to clear the goods.

Clauses (1) and (3) of Paragraph 5 of Chapter 2 of Import Policy 1978-79 define "Actual User" and "Actual User (Industrial)" respectively, as follows:

> "(1) "Actual User" means a person who applies for/ secures a licence for the import of any item or an allotment of a canalised item required for his own use, and not for business or trade in it. Thus, in the case of an indus-

trial undertaking, the item concerned shall be utilised for the manufacturing processes or operations conducted within its authorised premises (or made available to jobbing units outside only as part of such production ef-

fort). In the nonindustrial category, such as hospitals, research and development or any other institutions, commercial estab-

lishments and individuals, the concerned item shall be utilised for its/his own use i.e. for the purpose for which the item was sought for import.

(3) "Actual User (Industrial)" shall mean an industrial undertaking, be it in the large scale, small scale or cottage industries sector, engaged in the manufacture of any goods for which it holds a licence or Regis-

tration Certificate from the appropriate Government authority, wherever applicable." There can be no doubt and it is also conceded to on behalf of the appellant that the definition of "Actual User (Industrial)", as contained in clause (3) of paragraph 5 should be read with the definition of "Actual User" in clause (1) of paragraph 5. So read, it is clear that an "Actual User (Industrial)" means an industrial undertaking which is entitled to utilise the imported goods "in the manufacturing process or operations conducted within its authorised premises". Much emphasis has been laid by the learned Counsel for the appellant on the first sentence of clause (1) of paragraph 5--"Actual User" means a person who applies for/secures a licence for the import of any item or an allotment of a canalised item required for his own use, and not for business or trade in it. It is submitted on behalf of the appellant that the appellant having secured the OGL for the import of isoxamine for its own use and not for business or trade in it, the appellant should be held to be an Actual User. We do not find any substance in the contention made on behalf of the appellant. The appellant is not entitled under the industrial licence to utilise the imported goods for its own use for the manufacture of

SMX. Even otherwise, the latter part of clause (1) makes it very clear that the imported goods have to be utilised for the manufacturing process or operations conducted within the authorised premises of the industrial undertaking which the appellant is debarred from doing under the terms of the industrial licence after the expiry of the period of two years on April 22, 1976. The appellant, therefore, does not satisfy the first condition of paragraph (6) of Appendix 10 of the Import Policy 1978-79, namely, the importer has to be an Actual User. In other words, the importer must not be debarred from utilising, but must be entitled to utilise the imported goods under the terms of the industrial licence. The appellant also does not fulfil the other condition under paragraph (6) that the registration has not been made otherwise invalid. It may be that the industrial licence is operative for the manufacture of SMX with indigenous materials but, surely, it is inoperative for the manufacture of the said product with imported materials after the expiry of two years from the date of the issuance of the licence. The declaration of the appellant that it is an Actual User, and that its registra- tion has not been otherwise made inoperative is a false declaration, as rightly held by the Collector of Customs in the impugned order. When the industrial licence granted to the appellant does not permit the user of the imported goods for the manufacture of SMX, the importation of the goods under the OGL is illegal and could not be allowed to be cleared by the appellant. There is, therefore, no substance in the contention made on behalf of the appellant that on a demurer at the highest, the appellant can only be said to have infringed a condition of its industrial licence and such infringement does not constitute a prohibition on import which is imposed by any law. This submission com- pletely overlooks the provision of paragraph (6) of Appendix 10 of the Import Policy 1978-79. After the expiry of two years from the date of issuance of the industrial licence, the appellant had no right to import isoxamine under the OGL. Accordingly, the importation of isoxamine after the expiry of two years from the date of the issuance of the industrial licence was illegal.

It is next contended on behalf of the appellant that even if the appellant's declaration is considered to be wrong, it would not render the importation invalid, but the only consequence would be that the clearance of the goods would not be permitted and that in such situation, the respondents would only take recourse to clause 10-C(1) of the Imports (Control) Order. Clause 10-C(1) provides that where, on the importation of any goods or at any time there- after, the Chief Controller of Imports and Exports is satis- fied, after giving a reasonable opportunity to the licensee of being heard in the matter, that such goods cannot be utilised for the purpose for which they were imported he may, by order, direct the licensee or any other person having possession or control of such goods to sell such goods to such persons, within such time, at such price and in such manner as may be specified in the direction. The appellant cannot, in our opinion, take resort to the provi- sion of clause 10-C(1). That provision is not meant for granting relief to an importer who on the basis of a false declaration gets his goods cleared, nor does it apply to any import which is in violation of the conditions of an indus- trial licence. Clause 10-C(1) will apply to a case where the goods have been validly imported, but cannot be utilised for some reason or the other. The contention of the appellant is unsound and is rejected.

Next contention of the appellant is that the Collector of Customs cannot, in exercise of his revisional jurisdic- tion under section 130(2) of the Act, as it stood then, for the first time confiscate the goods and impose penalty on the appellant. It is submitted that a revisional authority, as the Collector of

Customs is under section 130(2) of the Act, can set aside the decision or order of an officer of customs subordinate to him, but cannot either confiscate the goods or impose penalty. It is contended that in the instant case, the Collector of Customs could set aside the decision of the Customs Officer allowing clearance of the goods and direct issuance of a show cause notice under section 124 of the Act for the confiscation of the goods. The grievance of the appellant is that if such a show cause notice was issued and there was an adjudication of confiscation and penalty under section 122 of the Act, in that case, the appellant could challenge the same by way of an appeal as provided in section 128 of the Act. The Collector of Customs, it is urged, having himself confiscated the goods and imposed a penalty, has deprived the appellant of its right of appeal under section 128 and, accordingly, the impunged order of the Collector of Customs confiscating the goods and imposing the penalty on the appellant should be quashed. We may first consider whether the Collector of Customs had exceeded his jurisdiction in confiscating the goods and imposing penalty for the first time in exercise of his revisional jurisdiction under section 130(2) of the Act. In view of the provisions of section 122 read with section 124 of the Act, the Collector of Customs has the jurisdiction to confiscate goods or impose penalty after issuing show cause notice on the person concerned. He has, therefore, both the original jurisdiction as also revisional jurisdiction. In exercise of his revisional jurisdiction under section 130(2) of the Act, he set aside the order of the Customs Officer allowing the goods to be cleared by the appellant and, thereafter, in exercise of his original jurisdiction under section 122 read with section 124 of the Act, he issued a show cause notice on the appellant and, after hearing the appellant, confiscated the goods and imposed penalty on the appellant. It, however, appears from the impugned order dated November 14, 1979 that the confiscation was made and the penalties imposed by the Collector of Customs in exer- cise of his revisional power under section 130(2) of the Act. This, in our opinion, is a mere irregularity not affecting the order. Admittedly, the Collector of Customs had the power to confiscate the goods and impose penalty under section 122 read with section 124 of the Act. When an au- thority has the power to do a certain act and in exercise of such power he does the same, but refers to a wrong provision of the law, that would be a mere irregularity and would not vitiate such act. In the instant case also, the Collector of Customs had admittedly the power to confiscate goods and impose penalty and even though in the impugned order it is stated that the confiscation of the goods was made and the penalty was imposed in the exercise of his power under section 130(2) of the Act, that would not be fatal and vitiate the order.

The decision of the Delhi High Court in Addl. Commis- sioner of Income Tax v. J.K. D'Costa, [1982] 133 ITR 7, strongly relied upon by the appellant, does not apply to the facts and circumstances of the instant case. In that case, the Addl. Commissioner of Income Tax came to the conclusion, inter alia, that the failure of the Income Tax Officer to initiate penalty proceedings for both the assessment years, namely, 1964-65 and 1965-1966 under section 271(1)(a) and for the assessment year 1965-66 under section 273(b) of the Income Tax Act, 1961, was erroneous and prejudicial to the interest of the revenue. In that view of the matter, he passed orders setting aside the assessment orders and directed the Income Tax Officer to make fresh assessments in accordance with law. It has been observed by the Delhi High Court that there is no identity between the assessment proceedings and the penalty proceedings; the latter are separate proceedings, that may, in some cases, follow as a consequence of the assessment proceedings. Further, it has been observed that the penalty proceedings do not form part of the assessment proceedings and that the failure of the Income Tax

Officer to record in the assessment order, his satisfaction or the lack of it in regard to the leviability of penalty cannot be said to be a factor vitiating the assessment order in any respect. In that case, as the Income Tax Officer did not impose a penalty, the Addl. Commissioner set aside the assessment order. The omission to initiate penalty proceedings by the Income Tax Officer will not vitiate an assessment order which is otherwise valid and it has been rightly observed by the Delhi High Court that the Addl. Commissioner was not justified in setting aside the assessment order on that ground.

In the instant case, the facts are completely different. The Collector of Customs set aside the order of the Customs Officer allowing the appellant to clear the goods on a false declaration and also confiscated the goods and imposed penalty. The Collector of Customs had, as noticed above, the power to confiscate the goods and impose penalty and he did the same after issuing a show cause notice and hearing the appellant. In D'Costa's case (supra) the Addl. Commissioner of Income Tax had no power to initiate penalty proceedings under section 271(1)(a) or section 273(b) of the Income Tax Act, 1961. Be that as it may, that decision has no manner of application to the facts and circumstances of the instant case.

The appellant has complained that as the goods have been confiscated and the penalty has been imposed by the Collec- tor of Customs in exercise of his revisional jurisdiction, the appellant has been deprived of his right to prefer an appeal before the Central Board of Excise and Customs under section 128(a) of the Act. When the Collector of Customs could confiscate the goods and impose penalties only in exercise of his original jurisdiction under section 122 read with section 124 of the Act, surely, the appellant had a right of appeal against such confiscation and imposition of penalty. At this stage, we may notice a very significant fact that in the impugned order of the Collector dated November 14, 1979, it has been specifically stated at the very outset that an appeal against the order lies to the Central Board of Excise and Customs, New Delhi, within three months from the date of its despatch. It cannot, therefore, be said that the appellant was misled, as the order was purported to have been passed by the Collector of Customs in exercise of his revisional jurisdiction. The appellant, however, did not avail itself of its right of appeal under section 128(a) of the Act and, accordingly, its complaint in that regard is not justified.

Before we part with this appeal, we may dispose of two other minor contentions of the appellant. Counsel for the appellant submits that as the appellant has been found not entitled to use the imported material in the production of SMX, it is curious that by the impugned order the appellant has been given an option to pay in lieu of the confiscation of the imported materials a fine of Rs. 19,00,000 and clear the goods into the town. Counsel submits that this shows that the appellant is entitled to use the imported material for the production of SMX. This contention is devoid of merit and is fit to be rejected on the face of it. The appellant may have been allowed to clear the goods on pay- ment of a fine in lieu of confiscation, but that does not mean that the appellant would be entitled to use the goods for the manufacture of SMX in violation of the industrial licence. The appellant may sell the goods to some other person but, surely, it cannot use it in its factory for the manufacture of SMX.

The other contention of the appellant is that as the capacity of the appellant to manufacture SMX has been raised from 18 tomes to 45 tonnes per annum, there is no sense in confiscating the

imported goods. This contention is equally devoid of merit. It may be that the manufacturing capacity of the appellant has been increased, but there is nothing to show that the Central Government has permitted the appellant to manufacture SMX with imported isoxamine. The appellant may go on manufacturing SMX from indigenous materials and the manufacturing capacity of the appellant may have been increased from 18 tonnes to 45 tonnes for the manufacture of SMX from indigenous materials, but these facts are quite irrelevant and have no bearing on the question with which we are concerned. The contention is rejected. No other points have been urged on behalf of the appellant.

For the reasons aforesaid, the appeal is dismissed. There will, however, be no order as to costs in this appeal.

R.S.S. Appeal dismissed.