

Commissioner of Customs Vs. Alfa Exim

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : May-20-1997

Reported in : (1997)(95)ELT366Tri(Mum.)bai

Appellant : Commissioner of Customs

Respondent : Alfa Exim

Judgement :

1. Two Appeals are being disposed of by this common order. M/s. Sandeep Impex Limited imported two consignments of polyester fibre and acrylic yarn. It claimed clearance of these goods in terms of quantity based advanced licences which had been transferred to it and also claimed exemption from duty in terms of Notification No. 80 of 1995 and No. 204 of 1992. M/s. Alpha Exim, Appellant in Appeal No. C/29 imported a consignment of polyester fabrics and claimed clearance against a transferable licence and exemption of duty in terms of Notification No.80 of 1995.

2. The Customs at Nhava Sheva Port were of the view, after examination of the goods that the material is imported, that its denierage differed from that of the material which required for making the goods which had been exported. Notices were therefore, issued to both importers proposing confiscation of the goods and denial of the benefit of the notification. The importers resisted the notices, taking the stand that the licences had been transferred to them after export had taken place, and that they were not once again required to establish nexus between imported goods and goods exported. The Assistant Commissioner however did not agree that these contentions, and passed orders to assess the goods to duty,

without the benefits of the Notification. In Appeal, the Commissioner (Appeals) accepted the contention of the appellants that the Director General of Foreign Trade had discharged the export obligation, and that the licences had been validly transferred to the appellants, and that therefore, they could not be asked to establish once again the nexus between goods which they had imported and the Export product. The Department has come up for Appeal against this Appellant.

3. The Departmental Representative contends that a duty is cast upon the Customs to satisfy itself that the import goods are entitled for the benefits of notification; any person who claims benefits of notification has to satisfy the authorities that he is entitled to the benefits of the notification. He contend that the transferee of the licence has stepped into the shoes of the original licence holder, and whatever the original licensee is required to do will have to be done by the Transferee. He relates on the decision in *Jain Exports v. U.O.I.*- 1987 (29) E.L.T. 753; *Shashank Sea Foods v. U.O.I.* - 1996 (88) E.L.T.626 (S.C.); *Zenith Tin Work v. C.C.* -1995 (75) E.L.T. 865 (Tribunal) and the unreported decision of this Tribunal in *Garment Craft v. C.C.*-Order No. 2960 of 1996. The Advocate for the respondents contends that once the export obligation has been fulfilled and the licence is permitted to be transferred, the Customs cannot once again ask a person who makes an import under such a licence to establish the nexus that the original licensee is required to be established. He seeks to distinguish a decision of the Tribunal of *Garment Craft* on the ground that it dealt with Notification No. 117 of 1988, which is differently worded from the notification presently under consideration. He relies upon the decision of this Tribunal in *NITCO Marbles and Grannite Private Limited v. C.C.* -1996 (63) ECR 111.

4. Notification No. 80 of 1995 exempts from payment of duty raw materials, components, intermediates, consumerables, computer software and parts required for manufacture of export products. It is the Department's contention that it is therefore, only those materials which are actually required for manufacture of the exported products which will get the benefit of the notification. Hence the reasoning in the appeal proceeds, the goods imported by the respondent, which do not tally in respect of denierage with the goods used in the exported material will not get the benefit of the Notification. We have to note the distinction between

the phraseology used in the Notification No. 80 of 1995 and that used in Notification No. 47 of 1988. The latter Notification granted exemption to goods which tally in quality, description and technical characteristics with the goods used in the export products. The Commissioners of Customs had considered the question of verification of the nexus between the exported and imported goods at a conference in October, 1995. They noted that in regard to the applicability of the Notification 202 of 1992, Board had issued Circulars Nos. 4 of 1993 and 4 of 1995, which stipulated that the goods imported should be those which could have been used in the export products i.e. "The goods of a kind which are commercially known to be used for export products and are covered by the description inputs in the licences." It also stated that the Customs should not think of going into minute details of the inputs used in the export details, and that flexibility can be provided in respect of denierage of yarn upto the level where there is no change in the basic and additional goods.

The Circular No. 4 of 1993, dated 4th March, 1993, of the Board provided that where licences had been transferred by the Office of the Director General, Foreign Trade, a close nexus should not be sought to be established with reference to quality and specification of the inputs vis-a-vis export products. The same reasoning finds expression in the decision in NITCO Marbles and Grannite. The Bench held in Paragraph 4, that when the export is made under a DEC, the documents are first scrutinised by the Customs who after being satisfied make necessary entries relating to export. Subsequently after audit of this part of the book by the Customs, the PGFT, on being satisfied, makes an endorsement regarding the transferability of the licence. It is on the basis of this endorsement that the licence is permitted to be transferred and the transferee of the licence entitled to duty free import. Hence the conclusion that once a licence and eligibility to export has been examined twice, by different authorities, the Importer cannot be required to prove once again eligibility to duty free of the import of the permitted goods.

5. In both these cases, the Assistant Commissioner has not found that the licence were not valid for the import of the goods. His order is limited to denying the benefits of exemption. The goods have not been ordered to be confiscated on the

grounds of unauthorised import. In other words, the Assistant Commissioner has found that the licences produced were valid for import of the goods. Licence No. 1533080 which Sandeep Impex produced, contained a condition on its face that "Only such raw material as was used in the export product will be allowed for import". It contained another condition on the reverse that "Type and specification of the fabric should confirm both exports and imports".

If, therefore, the Assistant Commissioner accepted that the goods were covered by this licence for import, he accepted that the imported goods were of the type which were used in the exported products. If that is the case for the licence, it would equally be the case of benefit of the Notification.

6. The Departmental Representative cited various decision in support of the appeal. In Jain Export v. U.O.I., the Court held that his letter of authority holder cannot have greater rights than the licensee. A letter of authority holder, in terms of the provisions of the policy which then existed, was permitted to place orders, open letters of credit, and carry out other specified activities in respect of the licence for which he had authority, to facilitate import of the goods. However the policy expressly provided that the letter of authority holder was to carry out these activities on behalf of the licensee and to pass on the goods to the licensee. The letter of authority holder was in the nature of an agent of the licensee. He has to be distinguished from a transferee, who is in a very different position. The Supreme Court's decision in Shashank Sea Food v. U.O.I. held that the Customs authorities had the Power to investigate diversion of goods imported under duty free licences and under the relevant exemption notification.

That decision does not provide authority for the proposition made in the Department's appeal. The decision in Zenith Tin Works was to the effect that the tin sheets which were imported could not avail of the benefit of licence, being of different thickness than those used in export. That decision however related to an earlier notification. The decision in Raj Export v. National Aluminium Company Limited - 1996 (87) E.L.T. 349 was to the effect that the condition of the Notification No. 203 of 1992 that duty free import of replenishment material would not be allowed if Modavat credit had been taken of the duty paid on the goods

used to make the exported materials would not become available referring the credit policy. It has no relevance to the present issue. The decision in Garment Craft has with regard to a licence issued under the earlier policy, governed by a different notification which emphasised that goods sought for import should be those actually required for manufacture of the export products. The decision in NITCO Marble/Granite and the decision of its conference of Collectors of Customs and of the Board which may be considered to be contemporaneous exposition of the notification, in the sense that it is how it was understood by the department were subsequent to this decision, and therefore, could not have been cited before the bench which passed the said order.

7. It would, therefore, follow that the Customs were not entitled to ask the respondents to establish the nexus between the goods imported and those which were used for manufacturing export products. We decline to interfere with the order of the Commissioner.

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