

Commissioner of Customs Vs. Weston Electronics

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Sep-16-1999

Reported in : (2000)LC69Tri(Delhi)

Appellant : Commissioner of Customs

Respondent : Weston Electronics

Judgement :

1.1 The respondents herein are 100% EOU allegedly manufacturing Recorded Audio Compact Discs. They record music on magnetic tapes called as Analogue Master. The transfer of music from Analogue Master to the Compact Discs required conversion of analogue recording into digital recording by using converters through a process of interfaced synchronisation of recording facilities which the respondents did not have. The respondents, therefore, exported the Analogue Master to Korea where the music was transferred to the Compact Discs. The Compact Discs and Analogue Master were then imported. The respondents also imported Compact Discs Box and Tray.

1.2 They availed the benefit of Notification No. 13/81. Sl.No. 3 of the Notification was availed for the Compact Discs. Sl. No. 9 of the Notification was availed for the Compact Disc box and tray. The inlay cards were purchased locally.

1.3 The Compact Discs imported after recording of music were subjected to detailed processes of tests like listening test, track jumping test, surface scratch test etc. for ascertaining the quality of recording, extent of scratch etc. The

Compact Discs were then packed in the jewel box and exported.

1.4 The value addition at the stage of export of the Compact Discs was quite substantial which resulted in gain of foreign exchange.

2. The respondents had applied for grant of licence to manufacture recorded audio compact discs in their 100% EOU, vide their application dated 15-9-1989 wherein the respondents explained the processes that would be undertaken in the EOU.2.1 At this stage, it is appropriate to set out the process of manufacture given by the respondents in their application for 100% EOU for grant of licence, which is reproduced below :- "We propose to import professional Audio Magnetic Tape in reels for making Analogue Master from the normal Master. Analogue Master will be sent to Korea for processing and making compact Disc as there is no infrastructure available in India. Analogue Master will be exported and Korean party will transfer this Master to digital and make Compact Disc for us which will be reimported into India in paper back. The foreign party would send back the Master as well as the required number of Recorded Audio Compact Discs.

We would import polystyrene to manufacture Jewel Boxes. These Jewel Boxes will be manufactured in 100% EOU and we have infrastructure in India for this.

The printed paper cover and other printed material will be purchased from Domestic Tariff Area.

Recorded Audio Compact Discs will be packed in Jewel Box with relevant printed title of songs etc. and finally packed for export in export-worthy packing." 2.2 The specially constituted Board of Approval for 100% EOU which comprised inter alia of a representative from the Department of Revenue, Ministry of Finance approved the activity of the respondents and granted the licence. The respondents accordingly imported the Compact Discs and the jewel box after availing the benefit of the Notification as aforesaid. All these imports had taken place during the period April, 1991 to May, 1992 which are in question before us.

3. A show cause notice dated 4-5-1994 was issued to the respondents proposing to demand duty of Rs. 38,67,300/- on the imports of Compact Discs and jewel

boxes and trays on the ground that the activity undertaken by the respondents at the EOU did not amount to manufacture of goods. The longer period of limitation under Section 28 of the Customs Act, 1962 was also invoked.

3.1 On adjudication the concerned Commissioner of Customs dropped the proceedings. His findings are quite detailed. He has, briefly stating, come to the conclusion that the definition of manufacture as given in Section 2(f) of the Central Excise Act cannot be applied to the expression 'manufacture' employed in Notification No. 13/81. For this proposition, learned lower authority has relied upon the definition of manufacture in explanation to Rule 12 which states as follows :- "(i) 'manufacture' includes the process of blending of any goods or making alterations or any other operation thereon; (ii) 'materials' includes raw materials, consumables, components, semi-finished goods, assemblies, sub-assemblies, intermediate goods, accessories, parts and packaging materials required for manufacture of export goods but does not include capital goods used in the factory in or in relation to manufacture of export goods." We may state that Rule 12 relates to export of goods under rebate of Central Excise duty. It has also been pointed out in the impugned order that the entire activity of manufacture was disclosed by the respondents in their application to the concerned Ministry of Commerce for getting the licence. He has also recorded the finding that the Board of Approval granting licence consisted, inter alia, of a Member of the Central Board of Excise and Customs. He has, therefore, held that the activity undertaken by the respondents has been considered by the licence granting authority as an activity of manufacture in terms of said Notification 13/81. Therefore, it will not be correct to deny the benefit of the said Notification on this specious ground that no activity of manufacture has taken place in the present case.

3.2 Apart from that the lower appellate authority has also found that there being no suppression of facts by the respondents herein, the question of invoking longer period of 5 years for demand of duty does not arise. He has also, therefore, held that the demand is barred by time.

5. Learned JDR, Shri M.M. Dubey for the Revenue submits that Central Excise Act is a cognate and related Act to the Customs Act. Therefore, the definition of

manufacture means bringing into existence a new commodity having a different name, character and use. It should be taken into account for consideration whether the activity undertaken by the respondents herein can be considered an activity of manufacture. He submits that Notification exempts goods which are brought in for the purpose of manufacture of articles for export. Therefore, unless a manufacture takes place in the above sense, the benefit of Notification cannot be extended. He also points out that the activity undertaken by the respondents herein is merely placing of the recorded compact discs into a jewel box and nothing else has been done. He also points out that the so-called test checking said to have been performed by them is merely for the sake of saying and has not been carried out. This test checking, he further submits, is not part of the manufacture of the article for export. He, therefore, submits that the benefit of Notification 13/81 would not be available to the imported compact discs and the imported jewel box which have been brought in by the respondents herein and then re-exported in the same form by putting two things together.

5.1 On the question of suppression, learned JDR submits that the activity of manufacture as disclosed in the application has not been fully followed by the appellants as admitted to them. For example, the jewel boxes were stated to have been manufactured by them under import policy but they imported the jewel boxes and no manufacture of jewel boxes had taken place at the hands of the respondents. He, therefore, submits that the larger period of limitation of 5 years is also to be rightly invoked and consequently demand of duty of the aforesaid extent is sustainable. He also points out that the respondents herein have not disclosed the activity of job work being undertaken by a party outside the country. Although this appears to have been disclosed in annexure to the application but the learned JDR submits that the Import Policy does not permit undertaking of job work by a foreign party. By resorting to this method, the learned JDR submits that the Board of Approval believed that recorded compact discs would be imported free of charge and no foreign exchange would be spent on it. Believing that they gave the licence but this is not the true state of facts. The respondents herein have got the job work of transfer of music from Analogue Master to Compact Discs on payment of valuable foreign exchange. Therefore, there is clear violation of the import policy and against the terms of the licence and thereby the breach of Notification 13/81.

He, therefore, prays for setting aside the impugned order and allowing the appeal.

6. Opposing the contentions, learned Advocate submits that the activity undertaken by the respondents herein was fully disclosed to the authorities, that is, the authority granting the licence. It was also known to the officers of Customs because they were frequently visiting the 100% EOU located at Dharuhera. All their activities were under close supervision of the Customs Officers. They were making a declaration to the fact on the Bills of Entry by giving the warehousing bond number executed by them. They declared the goods correctly. The goods were exempted and only after examination of the goods the clearance was allowed by the customs authorities. He also supports the finding of the lower authority that the definition of manufacture as given in Section 2(f), as expounded by the Supreme Court in the Central Excise cases, would not apply to the expression "manufacture" occurring in Notification 13/81. He draws attention to explanation to Rule 12 as mentioned by the adjudicating authority in the impugned order. He also draws attention to the scope of the term "manufacture" in Notification No. 1/95-C.E. relating to a similar Notification for exemption on excisable goods brought inter alia, in 100% EOU. It has been held in the said Circular No. 314/30/97-CX., dated 6-5-1997 that "a broader view is called for in respect of the interpretation of the provisions of Notification No. 1/95-C.E. and the exemption may not be restricted only to cases where 'manufacture' under Section 2(f) of the Central Excise Act is involved. It is clarified that the exemption under Notification 1/95-C.E. will also be applicable to 100% EOU engaged in galvanising of black MS. Pipes." He, therefore, submits that keeping in view the object of the Notification, the expression 'manufacture' employed in the said Notification has to be considered in a broader meaning as has been done by the adjudicating authority. Consequently, he submits that on merits the benefit of the Notification cannot be denied.

7. He also points out that the Board of Approval granting the licence includes, inter alia, a Member of the CBEC as stated in Tribunal's judgment in the case of Tansukh Shah v. CC, Calcutta [1996 (64) ECR 651 (Para 17)]. In order to appreciate the submission of the learned Advocate, we reproduce Para 17 of the said judgment as below :- " It is now seen that paragraph 101 of the relevant policy

provided that the proposal for setting up of the industrial unit at either the EPZ or the EOU had to be granted by the Board of Approvals set up for this purpose by the Government of India, Ministry of Commerce or the Secretariat of Industrial Approvals, as the case may be.

Accordingly, as will be evident from the letter dated 2nd June, 1995 issued by the Joint Development Commissioner, EPZ, Calcutta, the permission for setting up of the industrial unit was granted by the Board of Approvals for Falta Export Processing Zone. The composition of the Boards for the different EPZs was notified by the Government of India, Ministry of Industries, Department of Industrial Development on 22nd September, 1984 in exercise of the powers conferred upon it by Rule: 101(2) of the Registration Licensing of Industrial Undertakings Rules, 1952. It is also seen from the composition of the Falta Export Processing Zone Board that the Board comprised of representatives of the Ministry of Commerce, Ministry of Industry, Directorate General of Technical Development, Chief Controller of Imports & Exports, Industrial Development Bank of India and the Ministry of Finance, Department of Economic Affairs as well as the Member (Customs), C.B.E.C., New Delhi. It is this high power Board after a detailed and proper scrutiny of the application submitted by the appellant, approved the setting up of the said industrial unit for carrying on the industrial activity as stated in paragraph 2 of the project profile which formed a part of the said application of the appellant-firm. The above-said Board while granting such approval duly considered and accepted the requirement or necessity of the machinery/equipments listed in the said project profile as being required in the appellant's industrial unit, as is evident from the letter dated 20-7-1994 issued by the Joint Development Commissioner, FEPZ and the application of the appellant dated 20-6-1994 was accordingly approved by the Ministry of Commerce. Therefore, in terms of the aforesaid approval the appellant was entitled to import surplus or rejected or outdated or soiled garments from the countries mentioned in paragraph 2 of the said project approval and take the same to the industrial unit at FEPZ. The appellant was also entitled to grade or assort or cut or iron or repack in poly bags or in cartons/bales of the same and thereupon export the processed goods to different countries. For carrying out the above-mentioned activities the appellant was entitled, in terms of the said approval of the Board to import bailer

machines, forklifts, rag cutters and electronic weighing scales." 8. On the limitation aspect also, he reiterates the finding of the adjudicating authority. He submits that nothing has been hidden from the department and everything was known to the Department. Therefore, question of invoking larger period of limitation, that is, 5 years in terms of Section 28 of the Customs Act would not apply.

9. We have carefully considered the pleas advanced from both sides. We have also gone through the impugned order in detail. We agree with the findings of the adjudicating authority. The object of the Notification is to promote exports and to earn valuable foreign exchange. As rightly pointed out by the adjudicating authority, the expression "manufacture" cannot be considered in a manner as the definition of 'manufacture' in terms of Section 2(f) has been considered by the courts. The purpose of the Central Excise Act is to collect duty on manufacture of goods in India whereas the purpose of the Notification is to promote export.

Therefore, a broader view has to be taken and we note that it has been taken by the CBEC in a similar worded Notification though issued subsequently, that is, Notification 1/95-C.E. Therefore, on the basis of the activities undertaken by the respondents herein, we are satisfied, as held by the adjudicating authority, that they have imported the goods for the purpose of manufacture of articles for export. They are, therefore, entitled to the benefit of Notification 13/81. On this finding, we need not to go in detail in the question of limitation whether the demand of duty is barred by time or not, although we may record in passing that there is no suppression of facts on any count by the respondents herein.

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