

Commissioner of Customs, Vs. A. Shankar Rao and ors.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Sep-27-2001

Reported in : (2002)(149)ELT387Tri(Mum.)bai

Judge : J Balasundaram, J T J.H.

Appellant : Commissioner of Customs,

Respondent : A. Shankar Rao and ors.

Judgement :

1. All the above appeals involve common issues arising out of the single order passed by the Commissioner of Customs and are hence heard together and disposed of by this common order.

2. The brief facts of the case are that M/s. Visakhapatnam Steel Plant (hereinafter referred to as VSP) exported pig iron and non alloy steel products on provisional basis against application for advance licence for import of inputs for use in the manufacture of the export products.

On completion of the export obligation, VSP was issued with 10 different advance licences details of which are found herein below: The licence at sr.no. 5 above was a quantity based advance licence while the remaining 9 advance licences were value based advance licences. These 10 licences were sold by VSP to M/s. Rupali Agencies Pvt. Ltd. (herein after called RAPL) vide contract dated 20.11.1993.

VSP and RAPL moved certain amendment applications before DGFT so as to enlarge the scope of duty free benefits and the licences were amended by addition of non-coking coal and copper wire bars/rods in the licences. In view of the flexibility provision these licences were ultimately used mainly for import of the two items added by way of amendment. Statement of various persons as well as the evidence in the form of internal noting exchanged between various departments of VSP appears to establish that VSP knowingly and wilfully furnished wrong declaration to Customs and DGFT by stating that no modvat credit on inputs was availed by them and further investigation revealed that copper wire bars were not the requisite raw materials for manufacture of pig iron or alloy steel products as copper is not used as an additive in any form in steel making process and that non-coking coal was also not used in the manufacture of steel. Therefore, the department was of the view that the imports made in respect of these transferable licences were not eligible for duty free clearances for contravention of condition (v) and (vi) of Notification 203/92-Cus (applicable in the case of value based advance licence) and Notification No. 204/92-Cus (applicable in the case of quantity based advance licence) respectively. The goods were also found to be liable for confiscation under Section 111(d) and 111(o) of the Customs Act read with relevant provisions of Foreign Trade (Development & Regulation) Act 1992. Accordingly, show cause notices were issued for recovery of duty under Section 28(1) of the Customs Act 1962 along with interest (SIC) 24% from the date of assessment and for confiscation of goods and penal action for mis-statement of facts in Shipping Bills for availment of modvat benefit. The show cause notices also proposed confiscation of goods under Section 113(d) of the Customs Act and penalty under Section 114 of the Customs Act.

3. Particulars of goods proposed to be confiscated and duty demanded in these

Show	Cause	Notices	were	as
under:-----Sl. F.No. of				
Show	Issued by	Particulars of goods	Amount of duty	No. Cause Notice proposed to
be demanded alongwith confiscated interest (in Rs.)1.				

S/16-Misc-295/95 C.C. Bombay Copper Wire Rods 10,05,68,202 Gr.VII(Pt.VI)
5,70,29,871-----2.

S/16-Misc-295/95 -do- -do- 33,83,614 Gr.VII(Pt.V)3.

S/16-Misc-295/95 -do- -do- 88,24,482 Gr.VII(Pt.II)
34,28,099-----4.

S/16-Misc-295/95 -do- -do- 49,26,487 Gr.VII(Pt.I)5.

S/16-Misc-295/95 -do- M.S. Billets 4,75,80,472 Gr.VII(Pt.IV)6.

S/16-Misc-295/95 -do- -do- 54,12,914 Gr.VII(Pt.III)7.

S/10-65/95 Gr.IV C.C. Nhava Copper Wire Bars 52,51,872 Sheva8.

S/10-64/95 Gr.IV -do- -do-
6,47,72,328-----9.

S/10-34/95 Gr.IV -do- Copper wire rods
6,42,87,400-----10. S/10-

67/95 Gr.IV -do- Copper wire bars
2,07,33,772-----11. S/10-

66/95 Gr.IV -do- Copper wire Rods
1,22,71,530-----12. S/10-

43/95 Gr.IV -do- -do-
28,55,729-----13. VII/10-

20/ CC(P) Low Ash Met.

1,16,67,184 Commr/95 Ahmedabad coke +
Cess-----14. VIII/10-15

CC(P) Low Ash met.

82,25,590 Commr/95 Ahmedabad coke & pig iron + Cess 95,18,72915. S/10-
319/95-Adj CC Kandla Copper wire bars 20,06,25,851 (Appg.VII)16. S/99-49/95
Ap.

CC Goa Low Ash Met coke
58,67,746-----17.

S/23/81/94-Ap.

CC Vizag Lime stone, 7,19,15,944 (Pt.II) coking coal, 48,85,698 copper plate special 33,97,73,90318.

VIII/10/19/95 CC Trichy Steam coal 1,03,89,094 81,89,54619.

S.59/DEEC/Mis/5 CC Madras Steam coal 1,01,78,760 27/95 Gr.7 1,84,42,379
S/8/460/95 79,71,644-----
20.

VIII/10-21/ CC Steam coal 3,08,76,292 Commr/95 Ahmedabad 2,85,09,143
2,92,31,48221.

VIII/10-24/Commr/95 -do- Thermal coal
1,78,14,675-----22.

VIII/10-23/Collr/95 Steam coal 64,27,919 1,48,83,54223.

VII/10-22/Commr/95 -do- Lime stone
62,14,424-----24.

S/23/81/94- CC Vizag Lime stone, 4,23,15,143 Ap. (Pt.IIa)(for Monoblock
1,27,45,640 Qabal Licences) stoppers, submerged Nozzles, cocking coal25.

DRI.F.No. 338/XVII ADG, DRI Copper Wire 6,70,26,816 /10/95 Bombay bars
43,88,013 BZU F.No.DRI/ 4. The Central Board of Excise & Customs appointed
Commissioner of Customs I, Mumbai to adjudicate notices at sr.no.(1) to 924)
issued by the different Commissionerates while the Bombay High Court vide its
order dated 11.10.1996 directed transfer of proceedings in show cause notice at
sr.no.(25) above pending before Commissioner of Customs, Nhava-Sheva to
Commissioner of Customs. I, Mumbai.

5. In response to the notices, VSP contended interalia that Customs authorities
have no jurisdiction and that they are bound to clear the imported raw materials
duty free if they conform to the description in the Advance Licences, DGFT alone
is the appropriate authority to act in the event of any contravention in the licence,
goods are not liable for confiscation under Section 111(o) as modvat condition is a
post-import contravention and that the declaration made in the Shipping Bill

regarding non availment of modvat credit had no legal effect in view of subsequent reversal of credit. The transferee of the licence who had effected imports contended that condition No. (v) of the Notification 203/92 Cus regarding non availment of input stage credit was not applicable in their case, that condition No. (vii) of the Notification prevails over condition No. (v), that the benefit of Notification was available to them as they were bonafide transferees and that the notices were barred by limitation in the absence of any willful mis-statement or suppression of facts.

6. After considering various submissions, the adjudicating authority dropped the proceedings against the respondents in respect of 4 show cause notices issued by Commissioner of Customs, Ahmedabad and one each by Commissioner of Customs, Trichy and Madras on the ground that no input stage credit had been obtained on exports of pig iron which was the resultant product in respect of goods covered by these 6 notices. In respect of balance 2 show cause notices issued by the Commissioner of Customs, Ahmedabad, he held that the same were not sustainable since the assessments in these cases were provisional and in coming to this conclusion, he relied upon the judgment of the Hon'ble Mumbai High Court in the case of M/s. Godrej & Boyce Ltd. (1989 (43) ELT 22. He held that 3 show cause notices issued by the Asstt. Commissioner of Customs invoking the extended period of limitation under the proviso to Section 28(1) of the Customs Act were without jurisdiction. In respect of 4 show cause notices issued by the Commissioner of Customs, JCH invoking the extended period of limitation on which Asstt. Commissioner of Customs had already issued demand show cause notices, the adjudicating authority held that subsequent issue of show cause notice by the Commissioner improving upon the show cause notice and invoking the proviso to Section 28(1) of the Customs Act were not permissible.

In respect of one show cause notice issued by the Commissioner of Customs, Vizag, he held that since the date of assessments was not given in the show cause notice and the extended period clause was not invoked even though the notice was issued beyond the period of six months from the dates of import (11.2.93 to 18.11.94), the same could not be decided and he kept the adjudication proceedings in respect of this notice in abeyance and subsequently decided by the

addendum dated 2.7.1997. In respect of show cause notice dated 7.4.1995, he held that not only was this notice without jurisdiction but also that it could not be considered by him as the proper officer for finalizing the provisional assessment is the Asstt. Commissioner. In respect of the remaining notices, he held that the demands are barred by limitation, since no willful mis-statement or suppression was established on the part of the transferee importers. Hence, these appeals by the Revenue.

7. We have heard Id. Departmental representative and Id. counsels for the respondents and record our findings on the various issues herein below.

8. We note that M/s. VSP reversed modvat credit in terms of Amnesty Scheme along with interest prior to 31.3.97 and the certificate issued by the Excise Department certifying the reversal of credit pertaining to licences mentioned at Sr.Nos. 1 to 4 and 6 to 8 enumerated in paragraph 2 of this order is on record. Amnesty Scheme dated 3.1.97 was introduced by the Government in the wake of a large number of cases wherein the manufacturers availed input stage credit in respect of export product. This scheme provided that if the exporters reversed modvat credit availed by them, along with interest, on or before 31.1.97, no penal action or prosecution would be initiated against the licence holder. By circular dated 10.1.97, the Government prescribed the formula for reversal of the modvat credit. The relevant portion of the Amnesty Scheme is reproduced below: "If reversal of Modvat credit and payment of interest as contemplated in condition (a) is completed by 31st January, 1997 and thereupon no demand of Customs duty leviable on goods imported against the Value Based Advance Licence in question shall be payable." Since VSP has reversed modvat credit, they are entitled to the benefit of Amnesty Scheme and hence the benefit of duty free import under Notification No. 203/92 is available to goods imported by them. This is the ratio laid down by the Tribunal in the case of Commissioner of Customs v. Kantilal Manilal Co. Pvt.(Tri) and Kitply Industries Ltd. v. Commissioner of Customs, Kandla [2001(130) ELT 236(Tri)]. In respect of licences at Sr. Nos. 9 and 10 set out in paragraph 2 of this order, the export product was pig iron, the raw material for which was iron ore, which was not covered under the modvat scheme. Hence, the question of availing modvat credit on the exports of pig iron does not arise and this

fact has also been confirmed by the department in the certificate at page 361 of the Paper Book. In respect of QBAL, we find that VSP had utilised the licence value partially and the licence for the balance value was transferred. However, VSP had reversed modvat credit in respect of the export of final product under QBAL in question along with interest. The principle laid down by the Apex Court in the case of Chandrapur Magnet [1996(81)ELT 3 (SC)] will apply to reversal of modvat credit against exports made under QBAL. The ratio laid down by the Supreme Court in this case was followed by the Larger Bench of the Tribunal in the case of Franco Italian Co. Ltd. v.CCE [2000(40) RLT 295] and in view of the above, the decision of the Tribunal in the case of Commissioner of Customs v. Bharat Pulvarising Mills relied upon by the Id. DR is distinguishable since in that case the Tribunal had not considered the Amnesty Scheme. Therefore, even in respect of the licence at Sr.No.5 enumerated in paragraph 2 of the order, the benefit of exemption under Notification No. 204/92 is available to M/s. VSP. At this stage we also note that initially DGFT cancelled the 10 licences in question issued to VSP in view of the controversy over the transfer of licences by VSP to M/s. Rupali Agencies Pvt. Ltd. and further sale of the licences; VSP filed an appeal against the cancellation order to the Appellate Committee Cell which by the order dated 11.9.97 remanded the matter for denovo consideration and on remand the Additional DGFT vide his order held that the order cancelling the licences was not correct and revoked the order of cancellation. While doing so, the DGFT took into account the Amnesty Scheme and the reversal of the modvat credit by VSP in items of the Amnesty scheme.

9. Now let us examine the objection raised in the appeal against the amendments made to the licence so as to permit import of non-coking coal, lime and copper bars and rods, on the ground that these are not raw materials required for the manufacture of final products and hence not entitled to exemption under Notification No. 203/92 and 204/92. The DGFT has considered the amended licence permitting import of these items. Therefore, it is reasonable to conclude that the items added by way of amendment are "raw materials" required for the manufacture of the export products. The Customs authorities cannot deny the exemption on the ground that these are not raw materials required for the manufacture of export products, once the licence has been amended so as to

include these items. In the case of *Garware Wall Ropes v. Commissioner of Customs, Sheva* [1998(102)ELT 504], the Tribunal held that the DGFT has full discretion to issue licences which are not in conformity with the Policy and thus not to apply the norms prescribed in the import-export output norms and it is not permissible for the Customs authorities to go beyond the terms of the licence. In coming to this conclusion, the Tribunal relied upon the decision of the Hon'ble Mumbai High Court in the case of *Lokash Chemicals v. Collector* [1981(8) ELT (Bom)].

10. In the case of *Rama News Prints & Paper Ltd. v. CC, Kandla* [2000(122) E.L.T. 473(Tri)], the Tribunal held that the Licensing authority has the jurisdiction and power to relax the conditions of the Policy and amend the licence and it is not open to Customs authorities to question the licensing authority's discretion exercised in issuing or amending a licence by contending that it is not in accordance with the Policy. The Tribunal held that since the amended licence was valid to cover the goods already imported, confiscation of the goods imported and the penalty imposed are not sustainable. *Sanwah Micro System Pvt. Ltd. v. CC, Madras* [2000(118) E.L.T. 294] the Larger Bench of the Tribunal has set aside confiscation and penalties since imports were permissible under the licence. Reliance placed by the Id. D.R. on the decision of the Hon'ble Delhi High Court in the case of *Exports Apparel Group Ltd. v. UOI* [1997(91) E.L.T. 307 (Del.)] does not advance the case of the Revenue - according to this judgment, the Customs department is entitled to examine whether the goods have been imported in terms of the licence, and nowhere in this judgment has it been held that in respect of imports made by the importers against a transferred licence the Customs authorities can examine whether such imported goods are 'raw materials' for the purpose of exemption Notification. In any event, the Commissioner has independently examined the question as to whether items included by way of amendment of licence are raw materials for the purpose of Notification 203/92 and 204/92 and has held that non-coking coal and copper wire bars and rods are raw materials relying upon the technical material for manufacture of pig iron and upon the decision of the Apex Court in the case of *IFFCO v. CC* [1996(87)ELT 177 (S.C.)]. The Commissioner has relied upon the explanation given by Shri B.P. Singh, General Manager (Works) of VSP regarding use of coal. Shri Singh has

explained that for producing metallurgical coking coal, coking coal will be heated in the absence of air in the coke oven batteries, that metallurgical coal is a principal fuel input to convert iron ore into liquid iron, non coking coal is used to generate steam which drives Turbo generator to produce power/electricity production and blower to give cold blast which is fed to blast furnace for producing hot metal.

It is significant to note that the department has not challenged the explanation of Shri Singh. Regarding copper wires/bars and rods, the Commissioner has accepted the explanation of VSP that fresh materials will go into the manufacture of copper plates of 99.9% purity and thus would be covered as intermediate products mentioned in the explanation to the relevant notifications and this explanation has not been challenged. What, however, the department projects in the appeal is that such items are not directly required for the manufacture of export product and hence not covered within the definition of 'raw materials' given in the explanation to the Notification. We do not accept the contention of the Revenue that only those items which are directly used in the manufacture of export products can be considered as 'raw materials' within the meaning of the Notifications. In the case of *Oblum Electrical Industries Pvt. Ltd. v. Collr. of Cus, Bombay* [1997(94)E.L.T. 449(S.C.)], the Supreme Court has held while interpreting the expression "raw materials" occurring in Clause (viii) of the Explanation to the Notification No. 116/88 Cus dated 30.3.1988 that the wordings in the Notification have to be construed keeping in view the object and purpose of the exemption and the exemption must be given its natural meaning to include materials that are required in order to manufacture the resultant product and that the exemption cannot be confined to materials which are actually used in the manufacture of the resultant product but would also include materials which though not used in the manufacture of the resultant product are required to manufacture the resultant product. In that case, the benefit of Notification was extended to crystal beams required for fitting inside of the kilns for the purpose of manufacture of porcelain insulators for lightening arrestors. Applying the ratio of the above decision, we have no hesitation in holding that non-coking coal and copper bars and rods are raw materials required for the purpose of manufacture of export products.

12. As regards the penalty imposed on M/s. VSP, we find that Section 112A of the Customs Act has been invoked in the show cause notice for alleged misrepresentation by VSP before the DGFT and the alleged collusion with M/s. Roopali Agencies in obtaining amendments that were not proper. Admittedly, VSP was not the importer against transferred licence. The cause for demand of duty against the transferee importers was that the goods imported by them were not 'materials required for the export goods' and hence not covered by Notification No. 203/92.

This is purely a question of interpretation of Notification and cannot give rise to imposition of penalty, particularly, when the order cancelling the licences issued to VSP by DGFT was revoked. We further hold that since the charge that VSP availed input stage credit in respect of final products exported, which is contrary to the condition of Notifications in question no longer survives in view of the reversal of the credit by VSP under the Amnesty Scheme, penalty cannot be imposed on M/s. VSP.

13. As far as transferees of advance licences are concerned, it is well settled that they do not have to establish nexus or co-relation between the export goods and the input imported duty free. In the case of Commissioner of Customs v. Salem Stainless Steel [2001(131) E.L.T. 30 (Mad.)], the Hon'ble Madras High Court has held that the purchaser of the advance licences, after the discharge of the obligation of export, is not required to establish nexus. In coming to the conclusion, the Court relied upon the Bombay High Court decision in the case of Bussa Overseas and Properties Pvt. Ltd. v. UOI [1991(53)E.L.T. 165 (Bom)]. The same view has been expressed by the Tribunal in the case of CC v. Hindustan Lever Ltd. [2001(121)ELT 485.] We also note that in the case of Goodluck Industries v. CC, Calcutta [1999(108) E.L.T. 818 (Tri)] the Tribunal has held that nexus between the imported material and the export product is not required to be proved afresh by a transferee licensee and which has been upheld by the Hon'ble Supreme Court as reported in 2001(120) ELT A 66. This position was in the context of Notification No. 203/92 which is the very same Notification with which we are concerned in the present batch of appeals. The same decision in the case of Goodluck Industries also dealt with condition No. (v)(a) of Notification No. 203/92 relating to input stage credit as not applicable to the transferee of the Value Based Advance Licence. Since the transferee of advance licence is only required

to satisfy condition No. (vii) of the above mentioned Notification and such condition has been satisfied as the licences were duly endorsed as transferable, no case has been made out against the transferee licensees by the department.

14. We further hold that the proviso to Section 28 of the Customs Act 1962 cannot be invoked against the transferee of the advance licence who had not knowledge about the availment of modvat credit of duty paid on inputs used in the export products by the transfers and it is pertinent to note that even the show cause notice does not allege suppression of facts or willful mis-statement on the part of the transferees. In these circumstances, the decision of the Tribunal in the case of Purulax Electric Pvt. Ltd. v. CC, Mumbai [2001(46)RLT97] in which it has been held that the proviso to Section 28(1) of the Customs Act is attracted only when mis-statement or suppression is by the importer, that is, the person chargeable to duty, is applicable to all fours. Therefore, we hold that the demand against the importers who have made imports against the transferred licences are barred by limitation.

15. One other ground on which the show cause notices were discharged was that the show cause notices issued invoking the extended period of limitation by the DRI is without jurisdiction. In the impugned order, the Commissioner has followed the Tribunal's decision in the case of Poona Roller -- [1997(89) ELT 604] to hold that under proviso to Section 28(1) of the Customs Act, Commissioner of Customs is the only proper officer to issue the shoe cause notice and not the DRI. The Tribunal's decision has been followed in the case of Bakemans Home Products [1997(95) ELT 278] which has also considered the CBEC circular dated 14.5.92 on assigning of functions of proper officer. In the present case, except the show cause notice dated 7.4.95 issued to M/s.

Indo Zinc Ltd. all other notices were issued by DRI invoking the proviso to Section 28(1). Therefore, following the ratio of the Tribunal's decision cited supra, we hold that the show cause notices issued by the DRI fail for want of jurisdiction.

16. As regards the notice issued to M/s. Indo Zinc Ltd. relating to the import of lime stone under transferred licence, the allegations are not relevant since no credit was taken by the exporters and the goods are permissible for import under the

relevant policy licence.

17. In the light of the above discussion, we hold that there is no legal infirmity in the order of the Commissioner and uphold the same and reject the appeals.

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