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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jan-21-2003

Reported in : (2003)(153)ELT627TriDel

Judge : S Kang, a T V.K.

Appellant : Panacea Biotec Ltd.

Respondent : Commissioner of Customs

Judgement :

1. M/s. Panacea Biotec Ltd. have filed this appeal being aggrieved with the Adjudication Order No. 5/2002, dated 20-5-2002 passed by Commissioner of Customs demanding customs duty, imposing penalty and confiscating the goods imported by them.

2. Shri V. Lakshmi Kumaran, learned Advocate, submitted that no Appellants manufacture P or P medicaments; that they also get the goods manufactured from other manufacturers of P or P medicaments on loan licence basis which is permitted under the provisions of Drugs and Cosmetics Act and is prevalent on large scale in pharmaceutical industry; that they imported two consignments of bulk drugs for the manufacture of life saving drugs and availed exemption from payment of duty under Notification No. 23/98-Cus., dated 2-6-98 (Serial No. 46B); that the said Notification exempts duty if the imported goods are used in the manufacture of life saving drugs or medicaments specified in List 2 subject to the condition that they follow the procedure set out in the Customs (Import of goods at

Concessional of Rate Duty for Manufacture of Excisable Goods) Rules, 1996; that in terms of Rule 3 of the said Rules, they got a certificate of Registration from the Assistant Commissioner of Central Excise on 14-7-98 and executed at bond; intimated the fact of receipt of the goods in the factory to the Superintendent of Central Excise concerned on 31-7-88; that as the Appellants did not have enough production capacity in their factory, they obtained loan licence on M/s. GMP Pharmaceuticals (P) Ltd. and M/s. Omega Laboratories Ltd. and were getting part of the products manufactured by them on loan basis; that in terms of Rule 57F (3) of the Central Excise Rules, they intimated to the Assistant Commissioner in letter dated 31-7-98 their intention to remove the imported raw material on payment of duty equivalent to the credit availed for manufacture of excisable goods on loan licence basis; that the life saving medicaments, so manufactured, were cleared on payment of Central Excise duty. He mentioned that the Commissioner, under the impugned order has confirmed the demand of duty, etc., on the ground that the intended purpose is confined only to the manufacturing taking place within the factory of the Appellants which has been registered under Rule 3 of the said Rules of 1996 and the imported goods did not go into the manufacturing by them in their factory.

3.1 The learned Counsel, further, submitted that the impugned order has been passed for contravention of the Provisions of 1996 Rules as the manufacturing has not been undertaken within their factory premises; that since in the present matter, the finished goods have been manufactured out of the imported materials, in some other factory, recovery of duty under Rule 8 cannot be made inasmuch as it would not amount to misusing or mis-utilising the imported goods for any other purpose other than the intended purpose; that further the concept of manufacture on loan licence basis is an accepted principles of pharmaceutical industry; that the concept of loan licence manufacturer is also recognised under the provisions of Central Excise Act; that Section 2(f) of the Central Excise Act defines 'manufacturer' which shall include not only a person who employs a hired labour in the production or manufacture of excisable goods but also any person who engages in their production on his own account; that thus definition of 'manufacture' covers all those who engage in production on their own account, may be at any place; that the place of manufacture is not relevant for deciding as to whether such person

can be treated as manufacturer; that the Appellants are manufacturer in the factory of their job workers; that the term 'his factory' will include the factory leased to them; that it can, therefore, be not claimed that the finished goods were not manufactured in their factory.

3.2 The learned Advocate also contended that in terms of Rule 8 of 1996 Rules, the Assistant/Deputy Commissioner of Central Excise having jurisdiction over the factory of the importer manufacturer should raise the duty demand; that since the show cause notice has been issued by the Commissioner of Customs, the entire proceeding is without jurisdiction; that this is also evident from the Budget Instructions issued under F. No, 334/14/95-TRU, dated 22-7-1996 wherein it has been mentioned that with effect from 1-9-96, "the monitoring of end use exemption will be done by the Assistant Commissioner of Central Excise in charge of the factory of the importer..... Once the acknowledgement of the goods having been received in the factory of the importer is received in the Customs House, no further action will be required to be taken by the Customs House regarding the end use. It will be the responsibility of the Assistant Commissioner, Central Excise to ensure that the imported goods received at the concessional rate are used for the intended purpose. If they have not been so used necessary action will be taken by the Assistant Commissioner of Central Excise to recover the differential duty." He mentioned that 1996 Rules is a complete code in itself, it is not open to the Commissioner of Customs having jurisdiction over the port of import to issue show cause notice.

He relied upon the decision in the case of Samtel Color Ltd v. CCE, Meerut - 2000 (126) E.L.T. 1250 (T) wherein it has been held "the Assistant Commissioner of Central Excise had jurisdiction to issue notice for recovery of differential duty".

3.3 Finally the learned Advocate submitted that Section 111 of the Customs Act cannot be invoked in this case as none of the stipulations in the Section have been contravened as confiscation could be resorted to only to the improperly imported goods; that the goods have been properly imported and utilised for intended purpose of manufacturing life saving drugs; that thus confiscation is bad in law; that penalty cannot be imposed under Section 112 of the Act as the goods were

not available for confiscation.

4. Countering the arguments, Shri V. Valte, learned SDR, submitted that the exemption under Notification No. 23/98-Cus. is available subject to the condition that the importer follows the procedure set out in the Rules, 1996; that as per the said Rules goods are for use in his factory; that the benefit of the said Notification is not available to the appellants as they had admittedly taken the goods imported by them outside the factory for which there is no provision made in 1996 Rules.

The learned SDR also submitted that as the benefit of exemption Notification was extended to them by the Customs Authorities, the said Authority is entitled to take action in case of non-fulfilment of the condition. He relied upon the decision in the case of Union of India v. Ram Narain Bishwanath - 1997 (96) E.L.T. 224 (S.C.) wherein in respect of goods cleared from Paradip Port but seized in West Bengal, it has been held by the Supreme Court that "it was for the Customs Authorities at Paradip to initiate proceedings against the respondents on the ground that the goods had been imported on fictitious licences and not for the Customs Authorities in West Bengal to do so". He finally submitted that as the goods were not used in their factory, the imported goods are liable for confiscation for mis-statement and penalty is imposable on the Appellants.

5.1 We have considered the submissions of both sides. The admitted facts are that the goods were imported by the Appellants which were cleared availing the benefit of Notification No. 23/98-Cus. (Serial No.46B). This Serial Number exempts customs duty on import of "Bulk drugs used in the manufacture of life saving drugs or medicines at (A) above" (i.e. the life saving drugs or medicines specified in List 2) subject to the condition No. 5 of the Notification which reads as under : "If the importer follows the procedure set out in the Customs (Import of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 1996." 5.2 A perusal of the various provisions of the said Rules, 1996 reveals that a manufacturer intending to avail the benefit of exemption Notification shall obtain a registration from the Assistant Commissioner of Central Excise having jurisdiction over his factory.

The Registration shall contain particulars about the name and address of the manufacturer, the excisable goods produced in his factory, the nature and description of imported goods. A manufacturer has to make an application to the Assistant Commissioner of Central Excise indicating the estimated quantity and value of goods to be imported and the port of import, etc. Such application shall be countersigned by the Assistant Commissioner who shall certify that manufacturer is registered in his office and has executed a bond to his satisfaction in respect of end use of the imported goods in the manufacturer's factory and indicate the particulars of such bond. It is also not in dispute that the imported goods availing the benefit of the Notification were sent to other manufacturers for manufacturing the medicines. The Appellants have claimed that the medicines were got manufactured under loan licence system which is even recognised under the Central Excise Act and words "his factory" need not mean the factory owned by the manufacturer and it can be factory taken on lease by them. We do not find any substance in these arguments. It goes without saying that the factory where the goods were manufactured out of the imported material was not the factory of the Appellants. They have had an arrangement to get the medicines manufactured therein. It is settled law that the supplier of raw material is not the manufacturer. Moreover, we observe from the Application given by them under the 1996 Rules to the Assistant Commissioner of Central Excise, that they have undertaken to use the imported goods at the factory premises at Delhi, namely B-1/E 12, Mohan Cooperative Industrial Estate, Mathura Road, New Delhi-44.

Thus it cannot be claimed by the Appellants that they have fulfilled the condition specified in the Notification. Non-fulfilment of the condition makes the goods liable for confiscation, the Appellants liable for penalty and for denial of the benefit of Notification and consequently the Appellants become liable to pay the duty of customs.

6. The other contention raised by the learned Advocate is that the show cause notice issued by the Commissioner is without jurisdiction as Rule 8 empowers the Assistant Commissioner of Central Excise to take action to recover the amount and the show cause notice alleges that duty demand is made in terms of Rule 18 of the 1996 Rules. We find ourselves unable to agree with the submissions of the

learned Advocate. Rule 8 only empowers the Assistant Commissioner, Central Excise, who has to ensure that the goods imported are used by the manufacturer for intended purpose to recover the amount equal to the difference between the duty leviable on such goods but for exemption and that already paid at the time of importation. The show cause notice has been issued to the Appellants for demanding duty under Section 28 of the Customs Act and for imposition of penalty under Section 112(a) of the Act on account of mis-statement made by them at the time of import. Section 28 of the Act empowers the proper officer to demand duty which has not been levied or charged or which has been short-levied or short-paid.

Section 112(a) of the Customs Act provides for the imposition of penalty on a person who, in relation to any goods, does or omits to do any act which act or omission would render the goods liable to confiscation under Section 111. The said 1996 Rules does not take away the right of the Customs Authority at the port of importation to demand duty and/or impose penalty on importer who has not complied with the conditions specified in the Notification and order confiscation of the goods in relation to which an offence has been committed. We are of the view that Rule 8 of 1996 Rules only empowers Assistant Commissioner of Central Excise to recover duty in addition to the Customs Authorities who are otherwise competent to recover the duty and impose penalty. The decision in Samtel Color Ltd. is not applicable as in that case the contention of the Appellants was that the Assistant Commissioner of Central Excise has no jurisdiction under Rule 8 to recover differential duty and if the Revenue denied exemption at the initial stage for non-inclusion of the items in the Registration Certificate, then only the Assistant Commissioner of Customs at the port of importation would have jurisdiction. The Tribunal has held that "in view of our finding that the imported goods were not used for the intended purpose.....

We hold that the Assistant Commissioner of Central Excise had jurisdiction to issue notice for recovery of differential duty". It is thus apparent that the Tribunal has only held in Samtel Color that Asstt. Commissioner of Central Excise has the jurisdiction and it has not held that Customs Authority at Port of importation of goods does not have the jurisdiction. However, we observe from the show cause notice that the Appellants were not called upon to show cause as to why goods

should not be confiscated. Moreover, no goods were available for confiscation also. We, therefore, set aside the order of confiscation and consequently the redemption fine also. In the facts and circumstances of the case, the penalty imposed is on the higher side.

Accordingly, we reduce the penalty to Rs. 10,000/- only.

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