

Commissioner of C. Ex. Vs. Akash Polyester Pvt. Ltd.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Mar-24-2003

Reported in : (2003)(160)ELT383Tri(Mum.)bai

Judge : S T Gowri, G Srinivasan

Appellant : Commissioner of C. Ex.

Respondent : Akash Polyester Pvt. Ltd.

Judgement :

1. These appeals arise as a result of the amendment carried on 25-4-1994 to notification 1/93. On this date, notification 19/94 was issued, inserting in the table to the notification 1/93 goods in sub-headings 54.10 and 54.03 of the Tariff. As a result, manufacturers of crimped and textured yarn became entitled to the notification.

Various manufacturers of these products including among other respondents to these appeals by the Commissioner or the appellants themselves, filed declarations consequent on this notice signifying their intention to avail of the exemption. They thereafter proceeded to avail of the exemption. The declarations by the manufacturers were filed on date subsequent to 25-4-1998. Notices were issued by the department to all such manufacturers. The notices proceeded on the basis that the first clearance to the extent of first 30 lakhs which were completely exempted from duty and subsequently 20 lakhs which was partly exempted. The clearance made from 1st April, 1994 by these manufacturers should be taken into

account. The notice relied upon the expression "first clearance" occurring in paragraph 1 of the notification. The manufacturers filed their replies. They contended before the Assistant Commissioner that it is the duty from which they opted the notification that should apply. The Assistant Commissioner passed two orders holding that clearances made from 25th April should be included in determining the value of first clearances. He found that the notification was amended on 25th April. It is from the date that the manufacturer not to avail of the notification. He however confirmed the duty as alleged to be payable in the show cause notices.

2. The assessee appealed this order. They contended before the Commissioner (Appeals) that it is a date on which they opted for availing the exemption which in other case after the amendment made on 25-4-1994 from which the clearance should be computed. The Commissioner (Appeals) noted that the goods became entitled to Modvat credit only with effect from 20-5-1994 and were not entitled to it prior to this date. He found that the exemption contained in notification 1/93 could not really be given effect to until the manufacturer could avail of Modvat credit. The Commissioner (Appeals) found in his order dated 25-9-1996 that without being able to avail of the Modvat credit, the concession contained in paragraph 1(a)(i) was not available. He therefore held that clearances made prior to 20th May, 1994 cannot be included in the value of clearances for the purposes of notification.

He therefore allowed the appeals.

3. By another order passed on 11-4-1997, another Commissioner (Appeals), dealing with the same contentions, held that it is the date on which the goods were notified that would count for determining the clearances. The department has come up in appeal against the order dated 24th September, 1996 of the Commissioner (Appeals) and the assessee against the second.

4. The contention of the assessee is that it is a date on which they opted for the notification that should count for reckoning the clearance. They rely upon the following decisions of the Tribunal: -CCE v. VNK. Textiles & Paper Mills Ltd. 5. We have heard the submissions of the assessee and the departmental representative.

6. The assessees' contentions are based mainly upon the fact that in a series of decisions relating to the notification 1/93, it has been held that it is the date on which an assessee opts for a notification that should apply. These decisions rely upon the decision of the Tribunal in Watts Electronics v. CCE -1994 (70) E.L.T. 127. The reasoning behind the Watts Electronics and other decisions is that the notifications are beneficial piece of legislation to take care of special needs of the small scale sector. The term "first clearance in a financial year" has been put in the notification to indicate the order for purpose of availing full exemption or partial exemption as set out in paragraphs 16 and 19. In B.K. Rubber Industries v. UOI - 1993 (68) E.L.T. 575, the Madhya Pradesh High Court held that the intention of the Government is to clearly exempt from duty clearances in serial order up to value of Rs. 75/-. In Ramakrishna Engg. Works v. CCE - 1996 (83) E.L.T. 346, the Larger Bench of the Tribunal said that the stress in the notifications was on the reckoning of clearances on or after 1st April in any financial year. No doubt, the issue in these appeals related to clearances of more than one item. However the emphasis on the words "first clearances" commencing from clearances from 1st April in these decisions cannot be ignored. It is also to be noted that the notification takes effect from the date on which it is published in the Official Gazette. This is the ratio of the Supreme Court's judgment in UOI v. Ganesh Das Bhojraj - 2000 (116) E.L.T. 431. Therefore the amendment to the notification 1/93 became effective on the date on 25th April, 1994. Therefore in the absence of any other circumstances, the goods manufactured by the assessee became entitled to the notification from that date onwards and any clearances made by them from that date will count towards clearances.

7. We do not see how the fact that a small scale exemptions is beneficial legislation has any bearing upon this issue. Any notification, which either grants exemption or takes away the exemption, is effective from the date on which it is issued. Counsels for the assessees were not able to dispute the proposition put before them by the Bench, that applying the ratio of the judgment of the Supreme Court, it is the date from which the said notification was published in the Official Gazette that they will take effect, even if a manufacturer comes to know of this much later or avail of such notification. We do not see how a different yardstick should be applied to the notification under consideration. Another argument that

was sought to be raised was that till the date on which an assessee opted to avail of the exemption, the clearances by the assessee would not be clearances in terms of Sub-clause (a), (b) & (c). These sub-clauses provide for clearances up to Rs. 30 lakhs either under complete exemption or by Modvat credit which is availed of on partial exemption, a further Rs. 20 lakhs on partial exemption at a higher rate of duty and subsequently Rs. 25 lakhs at a still higher rate of duty. The argument is that since the clearances that were made on payment of full duty, they are not clearances in terms of this paragraph. This argument is clearly unacceptable. Let us consider an example. An exemption notification is published on 15th April. That notification comes to be known, and hence availed of, by a manufacturer of this commodity only on 25th April. Therefore the clearances that the manufacturer made between the 15th and 25th April are clearances at the full rate of duty; the manufacturer at that time had no idea that they were covered by exemption. Does it follow from this that the benefit of the exemption would not be available to the goods cleared between 15th & 25th April? The answer is clearly and emphatically in the negative. It is not the intention of the assessee to know whether the goods were exempted or not that decides the scope of the exemption. The fact that in the example given that there is an exemption and slab rates in the notification and there are different slab rates does not make any difference to the applicability of the principle.

8. The notification 1/93 contains a provision in paragraph 4. This reads as follows:
- "Notwithstanding the exemption contained in paragraph 1 of this notification, a manufacturer shall have an option for not availing of the benefit of the exemption contained in said paragraph and to pay duty of excise at the rate applicable to the specified goods but for the exemption contained in the said paragraph 1, subject to the condition that such manufacturer shall pay duty at the rate applicable but for aforesaid exemption on all subsequent clearances of specified goods made after availing such option, in a financial year in which such date of option falls." 9. It is clear from this that a manufacturer of specified goods can exercise an option not to avail of the notification. When he opts not to avail of the notification, he will clear the goods subsequently. It is to be noted that in the manner in which it is worded, this option does not provide the manufacturer with a choice at any time opting for or not opting the notification. It provides that he may exercise not to opt for the

exemption. Thus, the notification is binding upon a manufacturer till such time as he opts not to be covered by it. None of the notifications prior to this has considered this provision. In CCE, Coimbatore v. Nandi Spinning Mills Pvt. Ltd - 2002 (79) ECC 314, the Chennai Bench of the Tribunal approved, without any further reasoning, the view expressed by the Commissioner (Appeals) that in view of the clause for option, the manufacturer of cotton yarn could not have opted for availing of the notification on 25-4-1994, when that commodity became entitled to the exemption because he did not come to know of it.

The reasoning of the Commissioner (Appeals) fallaciously proceeds on the assumption that the manufacturer is required to avail of the notification before it is applicable. That is not the correct position.

10. For these several reasons, we are therefore of the view that the decisions cited by the assesseees will not be applicable to the facts before us. Therefore the benefit of the exemption will be available from the date on which the goods were cleared i.e. 25-4-1994. It was then pointed out by the counsel for the assesseees that since the adjudicating authority had confirmed the demand as proposed in the notice, although he had accepted partially the claim of the assessee, the duty needed to be requantified. We accept this view, and therefore setting aside the orders impugned in the appeals by the Commissioner and allowing the appeals, we remand the matter to the Commissioner.

Direction given in the order of the Commissioner (Appeals) by the assessee for requantification of the duty will apply.

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