

Commissioner of Customs Vs. Special Steels Ltd. and Indian

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Sep-24-2003

Reported in : (2004)(91)ECC330

Judge : K Kumar, S T C.

Appellant : Commissioner of Customs

Respondent : Special Steels Ltd. and Indian

Judgement :

1. Heard both sides, Shri Sanjay Singhal, learned J.D.R. appearing for the department states that the impugned order has been passed by the Commissioner allowing duty exemption Notification No. 204/92-CUS dated 19.5-1992 and without imposing any penalty even though it is a clear case where the input duty credit has been taken by the exporter, and hence, there is a clear violation of the conditions of the said notification. He also cites the Review Order No. 39-R/98 dated 06.02.1998 passed by the Board pointing out that the licensee deliberately suppressed the fact of having taken modvat credit under Rule 57A and willfully made a wrong declaration to the licensing authority to obtain endorsement of transferability. He further states that the original licence holder, having availed of the modvat credit in respect of the goods exported, was not eligible for duty exemption under Notification No. 204/92 and therefore, the transfer of the licence was illegal and in any case, the transferee can not get duty exemption which was not available to the original licence holder. Shri Singhal, also places reliance on Tribunal's earlier decision in the case of CC., Mumbai vs. Bharat Pulverising Mills

Ltd. - 1999 (111) ELT 193 (Tri.) under which it has been held that exemption under Notification No. 204/92 is not available if export goods have availed credit even if licensing authority has allowed transfer of advance licence. Shri A. R. Shinde, learned Manager (Accountant) of the 1st respondent company states that they are not at fault as they had bought the transferred licence and they are not responsible for the mis-declaration made by the original licence holder.

2. After hearing both sides and perusal of case records; we find that even in a case where the credit taken was reversed, the Tribunal has distinguished the decision of the Apex Court in the case of Chandrapur Magnet Wires Pvt. Ltd. vs. Collector - 1996 (81) ELT 3 (S.C), and relying on the decision of the Honourable Orrisa High Court decision in the case of Raj Exporters vs. National Aluminium Co. Ltd. - 1996 (87) ELT 349, has come to a conclusion that duty exemption can not be allowed in such a case vide CC, Mumbai vs. Bharat Pulverising Mills Ltd. (Supra). In the present case, the duty free import by the 1st respondents against transferred licences had taken place earlier on 25.10.1994. Subsequently, the duty credit taken was reversed by the 2nd respondent on 10.3.1995 but a refund against the same has been taken on 15.2.1996. As such, the Department's case is on a better footing in this case than in the case of Bharat Pulverising Mills (Supra), since in view of the refund taken, the credit is as good as not reversed.

3. we also find that the demand notice has been issued invoking the first proviso to Section 28(1) of the Customs Act, 1962 which refers to "collusion or any wilful mis-statement or suppression of fact by the importer or exporter or agent or employee of importer or exporter." The plain reading of the said provision makes it clear that duty demand is sustainable even if mis-statement or suppression has been done by the exporter. We observe that the Commissioner has dropped the duty demand as well as the notice for imposition of penalty on the ground that the mis-statement and suppression by the licence holder has been made before the licensing authority and not before the customs authority. We find that Section 28 speaks of non-levy/short-levy by reason of collusion, mis-statement, suppression etc. It is in material before which authority mis-statement/suppression was made: Since that has led to non-levy/short-levy, application of extended period under Section 28 can not be ruled out.

4. The Commissioner has also invoked the legal maxim LEX NON COGIT AD IMPOSSIBILIA' to say that the importer being a transferee can not be expected to fulfill the condition of the Notification which is impossible for him to comply with, We are of the view that on such ground duty benefit of Rs. 2,94,300/- can not be allowed as input duty credit has been availed on the exporter products by the licence holder clearly making the imported goods ineligible for the duty exemption under Notification No. 204/92. Once the conditions laid down under an exemption notification issued in public interest is not furthered the imported goods can not be allowed duty exemption. Secondly, if the licence holder himself was not eligible for duty exemption under a licence, the transferee can not avail of the duty exemption under such a licence. In any case, the legal maxim "Lex non cogit ad impossibilities" (Black's Law dictionary, 6th Edition). It is no one's case that the Quantity Based Advance Licence Scheme operating under Notification No. 204/94 is either a compulsory scheme or that it compels anyone to do the impossible. First of all, the scheme is optional and anyone who wants to avail of the same must subject himself to the conditionalities thereof which have a valid public purpose. The scheme is designed to make available duty free inputs for the export product. The condition ensures that a person who has already taken credit of input duty does not avail of a second benefit by import of duty free goods. The fact that majority of exporters have availed of the scheme fulfilling the conditions under the scheme also goes to show that the conditions attached to the scheme are not impossible to comply with.

5. Moreover, in this case fraudulent mis-declaration and suppression of facts before public authorities have been resorted to in order to make the licence transferable. Such blatant illegality can not be an excuse for the purchaser of the licence to get a bounty from the public exchequer in the form of duty exemption, when the conditions of exemption notification have been contravened. We have, therefore, no hesitation in coming to the conclusion that the impugned order passed by the Commissioner allowing duty exemption and dropping the show cause notice without imposing any penalty on the licence-holder is not sustainable in law.

6. In view of our finding as above, we set aside the impugned order and hold that the duty at applicable rate and in addition interest at applicable rate are payable on the impugned goods as the exemption under Notification NO. 204/92-CUS dated 19.5.1992 is not applicable in respect of the impugned goods. For quantification of the same and for determination of appropriate penalty, we remand the matter to the successor Commissioner to take a fresh decision after affording a reasonable opportunity of hearing to the respondents. However, while determining the penalty, the role of each of the respondents, particularly the submissions of the transferee that he had no role in the suppression and mis-statement, may be kept in view. Department's appeal is allowed in the above terms.

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