Opal Fabrics and ors. Vs. Commissioner of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Dec-08-2003

Reported in : (2004)(91)ECC526

Judge : S T Gowri, A Wadhwa

Appellant : Opal Fabrics and ors.

Respondent : Commissioner of Central Excise

Judgement :

1. This order seeks to dispose of eight appeals, two each by Opal Fabrics and Bhagatram Parmanand are against the common order of the Commissioner of Central Excise and Customs, Surat By this order, the Commissioner has demanded customs and excise duty on different goods form each of these appellants. He has imposed penalties under both the Customs and Central Excise Act on each of the appellants.

2. We shall first consider the appeal of Opal Fabrics. This appellant is a 100% export oriented unit at Sachin in Surat, licensed for the manufacture of grey fabrics. The unit was visited by the officers on 24.5.00 and the stock subjected to verification. This resulted in the shortage of 15990.200 kgs. of twisted yarn. Further investigation disclosed to the officers the fact that the twisted yarn has been supplied to this appellant by Bhagatram Parmanand another 100% export oriented unit, who had made it out of imported polyester yarn that it received without payment of duty and supplied to the appellant in terms of exemption 1/95.

the fact of such receipt was accepted by Om Prakash Agarwal, the proprietor of Bhagatram Parmanand and authorised signatory of Opal Fabrics. Agarwal accepted that the yarn was sold by Opal Fabrics to various persons without filing the proper document and without payment of duty. Some quantities of yarn was also recovered from Suman Traders, Harish Traders and others at Surat and seized.

3. In addition, the officers found that Opal Fabrics had cleared the grey fabrics manufactured by it rejects of such grey fabrics and waste of yarn that arises during the manufacture of the fabric to various buyers in the domestic tariff area at the rate of duty contained in notification 2/95 i.e. 50% of the aggregate of the customs duty payable on such material had it been imported. Opal Fabrics had not physically exported any of its yarn that it manufactured.

4. The notice issued to Opal Fabrics therefore demanded excise duty equal to the aggregate of customs duties leviable of Rs. 707195 on 15999.200 kgs. of twisted yarn that it received from Bhagatram Parmanand and disposed of, proposed confiscation under Rule 209 of the seized quantities of such yarn that were seized; demanded Central Excise duty equal to the aggregate of customs duty amounting to Rs. 3.38 crores approx. on the grey fabrics and yarn cleared to the domestic tariff area. It also proposed penalty and interest. In his order, the Commissioner has held this appellant liable to pay Customs duty of Rs. 701795 on the twisted yarn cleared by it, ordered confiscation of the yarn seized from three traders with an option to redeem it on payment of fine, confirmed the demand for excise duty and imposed penalty under the Customs Act of Rs. 701795.

5. The contention of the counsel for appellant in this regard are as follows. The Commissioner could not have confirmed the demand for customs duty of Rs. 701795 when the notice demanded excise duty. His order demanding customs duty is not maintainable.

6. As for the other demand he contends that the appellant was in possession of permission from the Development Commissioner, Kandla Free Trade Zone for clearance of grey fabrics in question. Therefore the benefit of the exemption contained in notification 2/95 was available to it. He relies upon the decision of the

Tribunal in Ginni International v. CCEShabnam Synthetics v. CCE 2002 (53) RLT 485. He further contends that Clause (c) of the third proviso under notification 2/95.

7. We shall consider separately the question as to the extent of eligibility to the exemption contained in notification 2/95 to the goods cleared by this appellant to the domestic tariff area. As to the aspect peculiar to the case of Opal Fabrics the contention that notice having been issued demanding excise duty under Section 11A of Rs. 701795 on goods cleared to the domestic tariff area, custom duty to this extent could not be confirmed by the Commissioner has to be accepted. The notice has correctly demanded excise duty on goods cleared from the factory to a buyer in India. The order of the Commissioner confirming the customs duty and imposing penalty under the Customs Act, 1962 to this extent is clearly incorrect, this part of the order is set aside. The Commissioner shall adjudicate on this aspect of the notice afresh.

8. The officers also visited on 24.5.2000 the premises of Bhagatram Parmanand another 100% export oriented unit licence for the manufacture of twisted yarn. They found a shortage of a little over 90,000 kg. in the stock of the polyester filament yarn which is raw material imported by it without payment of customs duty in terms of notification 53/97.

Notice issued to this appellant proposed recovery of customs duty of Rs. 35.68 lakhs approx. which had been paid on this quantity of yarn and also proposed to deny the benefit of the exemption contained in notification 2/95 for the quantities of twisted yarn and rejected waste cleared to the domestic tariff area on the ground that the appellant had not physically exported any quantity of twisted yarn.

9. The counsel for the appellant contends with regard to the demand for customs duty that verification of the stock by the officers has not resulted in a clear position that the duty was demanded only on the shortage of imported yarn. The appellant had in addition to importing such yarn had obtained such yarn locally.

10. We are not able to accept this contention. The Commissioner records the admission of Om Prakash Agarwal, the proprietor of Bhagatram Parmanand that

the shortage found in this premises was imported polyester filament yarn. His further view that the quantities of yarn shown as delivered in the kachcha delivery challan by the appellant tallied exactly with the shortage of imported yarn found during verification. Apart from this the appellant was required to keep separate accounts of imported indigenous goods without payment of duty and the identity of the goods fall short could clearly be established with reference to such accounts. It is not contended that these accounts were not kept or incorrectly kept. Therefore we find no ground to interfere with the Commissioner (Appeals)'s confirming the demanding duty of the imported yarn fall short, demanding interest on such goods and imposing penalty on this appellant. There being no absolutely no explanation for the removal we do not find the quantum of penalty incommensurate with the gravity of the offence.

11. We now take up the issue that remains in the appeals under the Central Excise Act of Opal Fabrics and Bhagatram Parmanand and the sole issue for consideration in the other appeals whether the benefit of the exemption contained in Notification No. 2/95 will be available in a case where the 100% EOU has not made any exports physically of its final products, and it has earned foreign exchange only by means of sales against payment in foreign exchange to buyers in India. Duty is demanded from Prime Furnishing and Angana Textiles on the rejects and waste of yam that they cleared to the domestic tariff area; from Bhagatram Parmanand and Opal Fabrics on the finished goods (yarn and fabrics respectively) and rejects and wastes and from Indian Polyfins limited on the waste.

12. The Commissioner has denied exemption to the clearance made in the domestic tariff area by each of the appellants on his finding, which is not disputed, that there have been no exports by the unit out of the country, and on his view that the notification will only apply to such sales in the domestic tariff area sales as constituted 50% by value of the FOB value of the goods physically exported.

13. The provisions of Clauses (a) and (b) of paragraph 9.9, and of paragraphs 9.10 and 9.20 of the Export Policy, and of notification 2/95, as they stood at the relevant time, which are required to be considered while dealing with this issue, are reproduced here below.

"9.9 The entire production of EOU/EPZ/EHTP/STP Units shall be exported subject to the following: (a) Unless specifically prohibited in the LOP/LOI, rejects may be sold in the domestic tariff area (DTA), on the basis of records maintained by the unit and on prior intimation to the customs authority. Such sale above 50% of the FOB value of exports shall be counted against DTA sale entitlement under paragraph 9.9(b) and (d) of the Policy. Sale of the rejects shall be subject to payment of applicable duties.

(b) DTA sale upto 50% of the FOB value of exports may be made subject to payment of applicable duties and fulfilment of minimum NFEP prescribed in Appendix I of the policy. In the case of EOU/EPZ units in toys, agriculture, including agro-processing, aquaculture, animal husbandry, biotechnology, floriculture, horticulture, poultry, viticulture and sericulture such sale may be subject to positive NFEP only. No DTA sale shall be permissible in respect of motor cars, alcoholic liquors and such other items as may be stipulated by Director General of Foreign Trade by a public Notice issued in this behalf." The following supplies in DTA shall be counted towards fulfilment of export performance and NFEP: (a) Supplies effected in DTA in terms of photograph 10.2 of the policy.

(c) Supplies to other EOU/EPZ/SEZ/EHTP/STP units provided that such goods are permissible for procurement in terms of paragraph 9.2 of the Policy.

(d) Supplies made to bonded warehouses set up under paragraph 11.14 of the Policy and/or under Section 65 of the Customs Act.

(e) Supply of goods against special entitlement of duty free import of goods.

(f) Supply of goods to defence and internal security forces, foreign mission/diplomats provided they are entitled for duty free imports of such items in terms of general exemption notification issued by Ministry of Finance.

An EOU/EPZ/EHTP/STP unit may export goods manufactured by it through a merchant exporter/status holder recognized under this policy or any other EOU/EPZ/EHTP/STP unit.

Scrap/waste/remnants arising out of production process OK in connection therewith may be sold or disposed of in the DTA on payment of applicable duties or exported. However, there shall be no duties/taxes on such scrap/waste/remnants in case the same are destroyed with the permission of Customs authority." 14. Paragraph 9.9 of the Policy contains the general provision that all the goods produced under 100% EOU shall be exported subject to the exceptions provided in it relating to sales of rejects and sales in the DTA of upto 50% of the value of exports. Paragraph 9.10 specifies the supplies to and supplies to other buyers in the DTA which count towards fulfillment of export performance.

15. In calculating the value of goods entitled for exemption in terms of Notification 2/95, we have to examine Clause (b) of the third proviso to it. This contains two conditions. The second condition, that the unit fulfils the minimum NFEP (net foreign exchange as a percentage of exports) as prescribed in Appendix - I, is not in dispute in these appeals and therefore need not detain us. It is the first condition that is the bone of contention. It provides that the value of the goods being cleared under paragraph 9.9 and 9.20 of the Export and Import Policy for home consumption from the unit does not exceed "50% of the free on board the value of exports made" during the financial year. The words "export made" occurring in the clause cannot, in our view, apply to goods other than the goods physically exported out of India. That is the natural and literal meaning of these words. Making of the export will not arise when the goods are not exported, but, by a provision of law, counted towards fulfillment foreign exchange earning of the unit.

Confusion appears to have been caused at least in part by the use of expression "deemed exporting paragraph 10.2 of the Policy. Such "deemed exports" are of significance only for the purposes of the benefits that accrue in respect of them specified in paragraph 10.3. There is nothing in the Policy or in the notification that could lead to one to conclude that the value of goods other than the goods exported should be taken into account in determining the 50% specified in Clause (b) of the proviso to the notification. To consider that value of such goods should be included would be contrary to the plain and simple meaning of the words of Clause (b) of the proviso. Further, it is settled law that the words of an exemption must be construed strictly.

16. In point of fact, the policy itself makes it clear that it is the value of goods that are exported that must be considered. Clause (b) of paragraph 9.9, which specifies "DTA sale upto 50% of the FOB value of exports" can clearly not be read to mean anything other than the value of goods exported.

17. The counsel for the appellants rely upon the words of Clause (c) of the proviso, but we do not see how they help their case. Clause (c) provides that the goods remaining of the production of the unit shall be exported out of India or disposed off in terms of paragraph 9.10.

Even in the absence of this clause, it appears to us that such goods will have to be disposed of either by way of export out of India or sales locally (in terms of paragraph 9.10, On the face of it therefore this clause is unnecessary and hence superfluous. It has however been included and it cannot be ignored on the ground that it is superfluous.

The result of the presence of the clause would therefore be that if any quantity of goods, either the finished product or rejects, waste, scrap or remnence is not exported out of India or disposed of in terms of paragraph 9.10 the benefit of notification will not be available. Where there has been any clandestine of any part of the goods therefore the benefit of the exemption contained in the notification will have to be denied.

18. Clause (b) of the proviso to the notification refers to goods cleared under paragraph 9.9 and 9.20. The latter paragraph of the policy deals with clearance of scrap/waste/remnence arising out of production process or connection therewith. The quantity of such goods cleared by a unit will also be included in the overall quantity of 50% referred to in Clause (b) of the FOB value of exports. Clause (a) of paragraph 9.9 of the policy provides that, unless specifically prohibited in the case of a unit, rejects may be sold in the DTA and, sale of such rejects above 5% of the FOB value of exports shall be counted against DTA sale entitlement under paragraph 9.9(b) (and in the case of electronic hardware 9(b). The relevant proviso of the notification refers to "the said goods, including software rejects, waste scrap or remenence". Since for the purposes of the exemption, it is the notification that has to be applied, and it is the Central Excise authorities that are

to be satisfied, it would follow that notwithstanding whatever the policy says, the 50% of the FOB value exports referred to in Clause (b) under the proviso will include not only the finished goods of prime quality, but rejects, scrap, waste and remnence.

19. Counsel for Angana Textiles P. Ltd. contends that if it is held that the clearances made are in excess of the permission granted by the Development Commissioner, the goods could not be said to have been allowed to have been sold in India. It would then follow that duty specified in the proviso under Sub-section (1) of Section 3 of the Central Excise Act, 1944 will not apply. The exemption contained in notification 125/84 will be available. Reliance is placed upon the judgment of the Supreme Court in SIV Industries Ltd v. CCE 2000 (117) ELT 281 a circular no. 618/9/2002 CX dated 13.2.2002 of the Board issued subsequent to the judgment and the decision of the Tribunal in Kuntal Granites (P) Ltd. v. CCE 20. This contention is not acceptable for more than one reason.

Firstly, the goods cleared by Angana Textiles were rejects and wastes.

There is no requirement in any of the paragraph of the policy for taking prior permission for clearing rejects and wastes to the domestic tariff area. Neither paragraph 9.9 which deals with rejects nor paragraph 9.20 which deals with waste requires any prior permission by the licensing authority. So far as these goods are concerned, therefore such good are clearly "allowed" to be sold in terms of the policy itself. Therefore, the proviso under Section 3(1) will clearly apply.

The benefit of the exemption contained in notification 2/95 will not apply in the case before us because there has been no physical exports thereof. The second answer is contained in the decision of the larger bench of the Tribunal in Himalaya International Ltd. v. CCE 2003 (154) ELT 580. In this decision, the larger bench of the Tribunal has on is view that the judgment of the Supreme Court in SIV Industries Ltd. v.CCE was not concerned with the cases of goods cleared from 100% EOU to the domestic tariff area which were not allowed to be sold, held the circular of the board not to be binding and said that the decision in Kuntal Granites is no good law. Hence even if it is concluded that the goods were not allowed to be sold in India, the proviso under Section 3(1) would apply.

21. To sum up, the position would be that the value of goods (including waste, scrap and remnant which will be entitled to the benefit of the exemption in Notification 2/95 would be 50% of the value of goods exported out of the country. Goods cleared beyond this value limit would be liable to duty as applicable without the benefit of the notification. A note of caution has to be founded here. The reference in Clause (b) to "free on board value" cannot be construed literally as to mean that the value of the goods exported other than in FOB terms (e.g. CIF, FOR, etc,) should not be counted. These words actually provide a uniform measure to calculate the value of goods which are exported. Thus, for example they must be so construed as to exclude cost and insurance component in case of CIF.22. It is now necessary to consider the decisions of the Tribunal that have been relied upon. In Virlon Textile Mills v. CC 2002 (139) ELT 371 the Tribunal was concerned with the question as to whether the benefit of the exemption contained in Notification 2/95 would be available to the goods to the buyers in India against payment in foreign exchange.

In the order impugned in appeal, the Commissioner had concluded that, since these goods were not being cleared in terms of paragraph 9.9, but paragraph 9.10, which clause did not figure in the notification, they would not be entitled for the exemption. The Tribunal on its view that clearance under, paragraph 9.9 would include all manner of clearance whether by way of exports, domestic supply and further noting that the payment for such goods would be in foreign exchange, and therefore held that the benefit of exemption could not be denied to such goods. The Tribunal, in that case, was not concerned with the question that arises here - what is proportionate in value terms, of the production of 100% EOU i.e. entitled to exemption in terms of the Notification? Therefore, the ratio of that decision will not apply to the facts now before us.In Ginni International v. CC , the Tribunal taking note of words of notification 8/97, concluded that in determining the extent of entitlement to exemption, it is the decision of the Development Commissioner that is determinative and the customs authorities did not have the power to question his decision. Notification 2/95 is not similarly worded as notification 8/97. On the other hand, the third proviso make it clear that it is the Deputy or Asst. Commissioner of Central Excise who has to be satisfied about the availability of the exemption. So far as this notification is concerned therefore, it is the Asst. or

the Deputy Commissioner of Central Excise who is required to be satisfied that the condition in the notification have been complied with, and the ratio of Ginni International will not apply in respect of such clearances.

24. The contention of the appellant having been dealt with, the conclusion of the Commissioner that there having been no exports by any of the appellants before us, the benefit of the exemption contained in notification 2/95 cannot be extended to clearances made to the domestic tariff area thus requires to be confirmed. We now turn to the question of the penalty imposed on the appellant. While the Commissioner has refrained from imposing penalty in this regard on Opal Fabrics and Bhagatram Parmanand on the ground that they had acted in pursuance of the clearance received by them from the Development Commissioner and also says that no case has been made out for imposition of penalty because of "ample scope for different interpretation", he has not extended this benefit to the other appellants. So far as the waste, remnants and rejects are concerned we are unable to see the requirement for any prior permission from the Development Commissioner for clearance of rejects waste and remnants. Paragraphs 9.9 and 9.20 which deal with these respectively do not provide for any such permission to be obtained. As for finished goods, if in the case of Opal Fabrics and Bhagatram Parmanand penalty was not imposable on the ground that there was scope for interpretation, the same benefit would have been extended to the other appellants. This setting aside of course will not apply to penalty imposed on Bhagatram Parmanand as discussed in paragraph above.