

Modern Suiting Vs. the Commissioner of Customs

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Jun-25-2004

Reported in : (2005)(179)ELT168Tri(Mum.)bai

Judge : S T S.S., T Anjaneyulu

Appellant : Modern Suiting

Respondent : The Commissioner of Customs

Judgement :

1. Pursuant to intelligence that the appellants (hereinafter referred to as M/s MS who imported under EPCG scheme import of capital goods under exemption notification 110/95, Customs dated 5.6.95 had failed to meet the requirements of the said notification were visited by the officer who caused on enquiry and a show cause notice dated 27.11.2000 issued, as it appeared:- The importers availed of the concessional rate of Custom duty under Notification No. 110/95-Cus dated 5.6.95. However, the importers do not appear to have complied with the conditions of the Notification subject to which clearance of the goods was allowed under the exemption Notification. The exports do not also appear to be have been made by the use of the goods imported against the EPCG licence in question as laid down in paragraph 41(1) of Chapter VI of the EXIM Policy 1992-97 and explanation (v) of the Notification No. 110/95 Cus dated 5.6.95. Admittedly there does not appear to be any legal and valid evidence on record to show that the goods exported have been manufactured out of the capital goods imported against the EPCG licence in question. The importers therefore, do not appear to be entitled to avail of the

exemption of duty under the said Notification. They appear to be liable to pay full custom duty (including CVD) and also interest on Customs duty.

The importers, therefore, appear to be liable to pay custom duty in terms of the Notification No. 110/95 Cus dated 5.6.95 and in terms of undertaking executed by the importers at the time of clearance of the goods. Besides the Importers have not fulfilled the export obligation in accordance with the conditions of the licence and EXIM policy 1992-97. The goods are therefore liable for confiscation under Section 111(d) & 111(0) of the Custom Act 1962 read with Section 3 (2) & 3(3) of the Foreign Trade (Development & Regulation) Act, 1992. The importers also appear to be liable to penalty under Section 112(a) and/or 112 (b) of the Custom Act 1962.

(a) The goods valued at Rs. 4,17,84,620.00 (CIF) 8 Rs. 4,22,02,466.00 (Rupees Four Crores Twenty Two thousand four sixty six only) (assessable) imported by them against the said Licence No. P/CG/2134298 dated 30.5.95 and as per details given in the Panchanama should not be confiscated under Section 111 (d) & 111 (e) of the Customs Act, 1962.

(b) Custom duty and CVD amounting to Rs. 96,03,687.00 (Rupees Ninety Six Lakhs Three Thousand Six Hundred Eighty Seven only) as per Annexure 15 should not be paid and collected from them and interest @ 24% per annum from the date of clearance to actual payment of duty should not be paid by them and collected from them.

(c) Penalty should not be imposed upon them under Section 112(a) and/or 112(b) of the Custom Act, 1962.

(d) Without prejudice to above, why legal undertaking and Bank Guarantee executed by them should not be enforced.

(e) Without prejudice to above, in case they fail to pay the amount of duty indicated above and the interest due why it should not be recovered from them along with penalties under Section 142 of the Customs Act 1962.

Along with noticee, Shri P.L. Sarwagi Vice-President of appellants Co.

Shri Agarwal & Shri Ravinder Shah, CA were also called upon to show cause why penalties under Section 112 (a) & 112(b) of the Customs Act 1962 not be imposed on them.

(a) Accordingly the allegations in the SCN are found to be substantiated in respect of "12 i) that the there is no evidence that goods said to have been exported under the discharge of obligation under EPCG were actually manufactured by the use of the machines imported, ii) that the export obligation under EPCG shown to have been discharged is only 21.25% resulting in shortfall of 78.75%. However taking into consideration that it is not possible to segregate and correlate the goods exported with that produced by the imported machines, it would be reasonable to adopt the principle that the exports should be accounted first towards average export performance i.e. \$9,37,837 and the surplus towards discharge of EO under EPCG licence. In this view the position would be as follows-

SI						
Period Exports made	Required Exports under	No US \$ discharge of EO	EPCG US			
\$						1
30.5.95	to	15,27,378.35	Nil	+	9,37,887	5,89,491.35
29.5.96						
30.5.96	to	13,48,058.79	10%	+	9,37,887	4,10,171.79
29.5.97						
30.5.97	to	07,51,044.88	20%	+	9,37,887	Nil
29.5.98						
30.5.98	to	05,77,134.46	30%		+9,37,887	Nil
29.5.99						
30.5.99	to	02,85,105.30	40%		+9,37,887	Nil
29.5.00						

44,89,058.98 47,04,192 9,99,663.14 +46,89,435 Since EO has not been discharged for three consecutive years 30.5.97 to 29.5.00 and the importer MS has not been able to furnish export obligation discharge certificates, this breach will engage condition No. 5 of the notification rendering MS liable to pay the entire amount of duty foregone together with interest @ 15% form the of clearance of the goods in terms of the notification and the Bond /LUT executed before the Customs".

And demanded a sum of Rs. 96,03,687/- plus interest and ordered the same to be recovered as per Section 142 of the Custom Act 1962.

b. As regards liability to confiscation of the goods detained on 19.7.2000, failure to fulfil the export obligation and resultant contravention of notification 110/95 in terms of Section 111(O) he found:- "The next question is whether the imported goods detained on 19.7.00 are liable for confiscation on account of failure to fulfil the export obligation and resultant contravention of Notification 110/95 in terms of Section 11(O). The party's contention is that as the DGFT has given extension of 1 year for fulfilment of EO the breach of the condition has been approved by the proper officer. It is observed that as indicated above in paragraph 10, M/s MS have misrepresented the position of their exports in Appendix 10C submitted to the DGFT falsely claiming without any evidence to support bifurcation, that quantum of goods exported were in discharge of the EO under EPCG. Since they have reported fulfilment of EO to the extent of 95.42% in the 5-year period to the DGFT, there is no sanction for shortfall in EO to the extent of; 78.75%.

DGFT can exercise powers to condone or extend the period of fulfilment of EO only in cases where the shortfall does not exceed 5%. There is therefore no sanction for the breach of the condition to export four times the cif value of imports of capital goods. As a result the capital goods with the assessable value of Rs. 4,22,02,466/- are liable for confiscation under Section 111(O).

Accordingly I order their confiscation under Section 111(O). However a redemption Fine of Rs. One crore in lieu of confiscation is offered which should be exercised within 6 weeks of receipt of this order. Further M/s MS having rendered the imported capital goods cleared at concessional duty subject to their satisfying post importation conditions under Notfn. 110/95 dated 5.6.95, liable for confiscation under Section 111(O), are liable to a penalty under Section 112 of the Customs Act. Accordingly I impose a penalty of Rs. Fifty lakhs on M/s Modern Suitings under Section 112 of the Customs Act".

C. did not found any liability of penalty on M/s P.L. Sarawagi, Ravindra Shah and S.L. Agarwal.

3. After hearing both sides and considering the issues involved, after waiver of pre deposit the appeal is taken up for disposal. It is found:- i) The assessee has not proved that the products exported under EPCG scheme were made with the use of capital goods imported under the scheme. Therefore explanation (v) of notification No. 110/95-Cus is not fulfilled.

ii) Export obligation of US\$ 47, 04,19 not fulfilled in as much as assessee did not maintain/achieve annual export required under condition (3) of Annexure A to the licence under para 41 (v) of the policy.

b. There is a conflict between the findings arrived in paragraph 12(i) & 12(ii) of the impugned order. While under paragraph 12(i) a clear-cut finding is arrived of no evidence being available to conclude that goods said to have been exported under scheme of EPCG obligation were actually manufactured by the use of the machines imported under the scheme, under paragraph 12 (ii) the adjudicator concludes "..... taking into consideration that it is not possible to segregate and correlate the goods exported with that produced by the imported machineries..." that would indicate that there is force in the Ld. Advocates submissions that the charges in the Show Cause Notice, as confirmed per finding in para 12(i) are deemed to be given a go by by the adjudicator.

c. from the order in original of the predecessor Commissioner who adjudicated an other case of similar nature of an EPCG importer viz.

M/s Rajasthan Spinning & Weaving Mills Ltd... and held in paragraph 5 of the order No. CA)/192/2001/CHC/CCRS dated 28.05.01) as follows:- "5. As regards one to one correlation between the capital goods imported and the exported product. It is not in dispute that the goods exported can not be manufactured by the imported capital goods. The allegation is only that the importer has not established the correlation in the form of documentation. It is neither in the Exim Policy nor in the Notification 160/92 Cus. That they should maintain any record to this effect. In circumstance it may not be appropriate to seek such documentation/records to ascertain co-relation between export goods and imported capital goods.

5/95 To 5/96 NIL 15,27,378.35 2nd 939362.7 13,48,058.79 5/96 to 5/97 10% 3rd 1878725.4 07,51,044.88 5/97 to 5/98 20% 4th 2818088.1 05,77,134.46 5/98 to 5/99 30% 5th 37577450.8 (sic) 2,85,105.30 5/1999 to 5/2000 40% If the excess in the first 2 years hereinabove are shifted to later years, as provided by clause to condition in paragraph No. 3 of the notification, it is apparent that the performance for the first three years would be met. It is on record that Director General of Foreign Trade vide letter dated 30.6.2000 had extended the "period" under export by one year. Therefore the short falls in the 4th & 5th year will have to be recalculated & the provision of condition in paragraph No. 3 of the notification 110/95 need not be adhered in the amended extended period. Since the power to grant extension and refix norms is also a part of the notification grant of such extension imply the deemed waiver of the condition of the notification and application of the new condition under which the extension were granted. No such infringement of the new stipulated condition, if any, has been brought out. In any case, since for three consequent years there is no default & in the 4th year the exports level do not go below 25% condition No. 5 of the notification 110/95 Cus would come into play and has to be reckoned for the purposes of duty determination, if called for. This condition is as under.

"(5) The importer shall, if he fails to discharge a minimum of 25% of Export obligation prescribed for any particular year, for three years consecutive years be liable to pay forthwith the whole of the duty of custom leviable on the goods imported but for the exemption contained in this notification by other with interest at the rate of 15% per annum from the date of clearance of the goods." Therefore, there being no failure to meet the level of exports for 3 consecutive years, in this case, the whole of duty forgone i.e.

Rs. 96,03,687/- & interest at 15% as arrived at by the learned Commissioner in the impugned order cannot be upheld. The duty and interest demand order is required to be set aside.

g. Since the appellants request for further extension of export period being BIFR Company is under consideration by the DGFT the plea of the demands of duty being premature is to be upheld. The demands, if any will have to be worked out

on a prorated basis as per notification condition read with further extension period obligation/limitation levels as to be prescribed. For this purpose the order is to be set aside and remitted to the Commissioner to re-adjudicate the matter after DGFT decision is known.

h. The liability for confiscation and penalty under Section 112 (O) is also to be set aside, and the same is required to be redetermined after the demands of duty, if any, could be arrived in the de novo proceedings now being ordered.

4. Appeal consequently allowed as remand for De novo determination in above term.

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