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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Jun-10-2005

Reported in : (2005)(189)ELT114Tri(Mum.)bai

Judge : J Balasundaram, Vice-, A M Moheb

Appellant : isi Bars Ltd.

Respondent : Commissioner of Customs (Export)

Judgement :

1. The above appeals arise out of the order of the Commissioner of Customs, Mumbai, who confirmed the duty demand of Rs. 10,47,651/- against M/s. ISI Bars Limited in respect of 27 Metric Tones of Calcium Silicide under Section 28 of the Customs Act, 1962, imposed penalty of Rs. 5 lakhs on them, imposed penalty of Rs. 25,000/- on its Director and dropped the proceedings for recovery of balance duty amount against M/s. ISI Bars Limited and entire duty demand against M/s. India Steel International and M/s. India Steel International Private Limited, and proposal of penal action against the above mentioned 3 companies as well as their officers, supporting manufacturers/job workers and the transporter.

2. The Revenue has preferred appeals aggrieved by dropping of proceedings while M/s. ISI Bars Limited and its joint Managing Director Shri Sudhir Gupta are in appeal against the confirmation of part duty demand and imposition of penalties.

3. The brief facts of the case as made out in the Show Cause Notice dated 27-7-1995 read with Addendum dated 4-3-1996 issued by the Customs Authorities is that M/s. ISI Bars Limited, M/s. India Steel International and M/s. India Steel International Private Limited (hereinafter referred to as "Licence Holders") had discharged export obligations under various Value Based Advance Licence (VABAL) as well asl Quantity Based Advance Licence (QBAL) by exporting goods manufactured by them by availing Input Stage Credit under Rule 57A of the Central Excise Rules, 1944 in respect of export goods; that they have exported Stainless Steel Bright Bars by fraudulently misdeclaring the same as 'Stainless Steel Bars and Rods in order to wrongly import items appearing against Sr. No. 717 under heading "Engineering Products" of the Standard Input Output and value addition norms given in the Handbook Of Procedures 1992-97; that some of the materials imported duty free in terms of Customs Notification Nos. 203/92 and 204/92 were sold by the Licence Holders in the domestic market in contravention of the condition of the exemption Notification mentioned above and Provisions of EXIM Policy 1992-97; and that they had made some of their licences transferable, which were contrary to the conditions of the Customs Notification and EXIM policy. On the above basis, it was alleged that 3 Licence Holders were not entitled to duty free import under respective Notifications, and that customs duty was required to be paid by them on the entire quantity of input imported by them. Show Cause Notice proposed recovery of duty of Rs. 15,97,48,720/- from the 3 Licence Holders together with interest at the rate of 24% per annum, proposed confiscation of imported inputs and export goods.

Penal action was also proposed against the Licence Holders; on M/s.

Madhya Pradesh Iron & Steel Company, who sold the resultant products converted out of the said duty free Ferro Nickel sent to them by M/s.

ISI Bars Limited under Notification No. 214/86-C.E., dated 25-3-86 in the domestic market; on M/s. Panchamal Steel Limited, M/s. Viraj Alloys Limited, M/s. Ferro Alloys Corporation Limited, and M/s. Mukund Limited all 4 being supporting Manufactures/job workers of the Licence Holders, on M/s. Manohar Manek Alloys Pvt. Ltd., Transferee of Advance Licence and its Director, Shri Manohar P.

Kanungo, on Shri Jawahar P. Kanungo, proprietor of M/s. Manek Metal Corporation, who had purchased 27 Metric Tonnes of Calcium Silicide imported by M/s. ISI Bars Limited, on M/s.

Ashok Goods Transport Services who transported the exempted material, and on Shri Harbans Lal Gupta, Shri Ashwin Gupta and Shri Sudhir Gupta directors of M/s. ISI Bars Limited. The notice was adjudicated by the Commissioner, who dropped the charge of availment of Modvat credit contrary to condition of the Customs Notification No, 203/92, being satisfied that Licence Holders reversed Modvat Credit as per the formula laid down by the Government of India vide D.O.F. No.605/140/95-DBK, dated 3-1-97, he held that for the year 1993-94 as per the formula in the Circular, credit required to be reversed was Rs. 61.16 lakhs whereas Licence Holders reversed the credit of Rs. 66.21 lakhs and therefore, for the Value Based Advance Licences issued during the period, there is no breach of condition v(a) by Notification 203/92. Therefore, he set aside the demand for duty in respect of imported Ferro Silicon and Ferro Chrome made against such licences in the year 1993-94. For the year 1994-95, he accepted the submission of the Licence Holders that exports under Quantity Based Advance Licence are not required to be included in the total value of clearances for home consumption and left it to the competent authority to quantify and recover the correct amounts by reversal. However, he did not accept their contention of non contravention of the condition (v) of Notification No. 203/92 in respect of VABALs issued during the period 1994-95; he therefore, examined the question as to whether duty free material imported against VABALs issued during 1994-95 had been utilised in accordance with the Notification and on finding that there is no allegation regarding diversion or sale of any such duty free material imported against VABALs during 1994-95, held that demand for duty in respect of goods imported under VABALs during this period was not sustainable.

4. Regarding the issue of licences under Sr. No. 717 of Standard Input Output norms, he relied upon the clarification dated 3-12-1993 issued by the Directorate General of Foreign Trade in respect of Sr. No. 393 (corresponding to Sr. No. 717 of the EXIM Policy) to hold that Stainless Steel Bright Bars exported by the Licence Holders were covered under Sr. No. 717 as claimed by them and not

under Sr. No. 238 of EXIM Policy, as alleged by the Revenue.

5. The Commissioner has accepted the contention of the Licence Holders that they have not sold the imported inputs as such but had sent the inputs for conversion into bars and rods which in turn were received back by them and converted further into Stainless Steel Bright Bars, which they then exported, except in respect of 27 metric tones of Calcium Silicide imported by M/s. ISI Bars Limited, which was admittedly sent to M/s. Madhya Pradesh Iron & Steel Company, who used them in the manufacture of resultant products, which were sold in the domestic market. Therefore, he confirmed of Customs duty of Rs. 10,47,651 /- on M/s. ISI Bars Limited on this quantity, rejecting the argument that as per para 127 of Exim Policy only sale of input as such was not permissible under Notification No, 203/92, while they had not sold imported inputs as such but the sale was of resultant products made out of imported inputs which was not contrary to the condition of the Notification.

6. Regarding the charge of transfer of licences, he accepted the contention of the Licence Holders that they had not received any payment towards sale of licences to M/s. Viraj Alloys Limited except for licences transferred by DGFT, on the basis of Chartered Accountants certificate; that there was no evidence to show the sale of licence to M/s. Pachmahal Steel Limited, that both M/s Pachmahal Steel Limited and M/s. Viraj Alloys Limited are supporting manufacturers of the Licence Holders. He also held that there is no evidence of transfer of licences to any other person. Based on this finding, he dropped the demand for balance and also dropped proceedings for penalties against all the noticees except M/s. ISI Bars Limited and Joint Managing Director, Shri Sudhir Gupta. Hence these appeals.

7. We have heard both sides. First we take up the appeals of the Revenue for decision. The Revenue challenges the order of the Commissioner on the following grounds : (a) The Commissioner has failed to appreciate that the benefit under Advance Licencing Scheme extended to Licence Holders are substantial and particularly there is lot of flexibility provided in the matter of duty free imports of materials against value based advance. It was incumbent for the beneficiary of advance licence holder claiming the benefit of the Customs Notification No. 203/92

and 204/92 for the items permitted, duty-free to strictly comply with the various conditions and restrictions specified in the said notifications - both with regard to the import items for their utilization as well as certain conditions imposed in regard to the products exported for discharge of export obligations.

(b) The Commissioner has erred in not appreciating the seriousness and the nature of various irregularities, which have been detected during detailed investigations committed by M/s. ISI Bars and others, particularly in regard to the various value based advance licences. The Commissioner has failed to take serious note of the fact that for the goods exported for the discharge of export obligations during the years 1992 to 1994, they have availed the benefit of Modvat credit for various inputs under Rule 57A. This was clearly in contravention of the specific condition prescribed in the Notification No. 203/92 and as alleged in the so called notice, there was no other alternative but to take action for demanding duties in terms of the provisions laid down in the Customs Law for irregular claim of exemption. The party had tried to claim double benefit of huge amounts both by claiming the benefit of Modvat credit for the inputs used in the manufacture of stainless steel, bright bars exported suppressing the facts from the customs, and then had claimed the benefit of duty free imports for the similar kind of inputs permitted against the value based advance licences.

These irregularities came to light when detailed investigation had been taken up. No doubt in 1995 the three licence holders did make certain reversals of certain amounts claiming it to be the Modvat credit taken by them for the products exported against various valued based advance licences, the Commissioner has failed to appreciate that these reversals (which had not even been accepted by the concerned authorities to be equivalent to the total Modvat credit availed in the manufacture of the export products) in no way absolved the licence holders from the duty liability (under the Customs Law) as demanded and the penal action as proposed.

(c) The Commissioner has erred in taking the broad view and sighting the objection of DEEC Scheme and for not taking any serious action of the fraudulent practices and the irregularities noticed on the part of the 3 owners of VABAL licences. These were not merely technical breaches of omission of simple procedural requirements, but a clear attempt on the part of the licence holders to get away with double benefits of huge amounts at the cost of exchequer which warranted serious view as proposed in the show cause notice.

(d) The Commissioner has failed to appreciate the full and provisions of the Amnesty Scheme announced by the Government by their Circular dated 3rd January 1997, in the content of larger national interest for export promotion etc., the Government had laid down certain requirement to be completed with in general by such VABAL beneficiaries who had in the past availed the double benefit of Modvat credit as well as duty free imports of inputs as a special dispensation to get: immunity from the customs duty liabilities as well as penal action etc. These VABAL beneficiaries were to strictly abide by the conditions laid down in the circular which inter alia stipulated that the licence holders will ensure that the total Modvat credit taken from the inputs uses in the manufacture of the products exported against the value based advance licences is reversed to the satisfaction of the Assistant Commissioner of Excise concerned by 31st January, 1997; an interest at the rate of 20 per cent was also to be paid by such advance licence beneficiaries on the same date. No extension in this period was given by the Government. No doubt the 3 licence holders in the present case claimed that certain amount of Modvat credit was reversed during early 95 itself, but they have failed to take any steps to satisfy the Assistant Commissioner, Central Excise, concerned that this was the total Modvat credit which had been obtained on the various inputs used in the manufacture of export items. Further they have taken no steps to show to the adjudicating authority that the amount due for reversal as well as the total interest liable as provided in Amnesty Scheme had been reversed by 31st January, 1997 to the satisfaction of Central Excise authority and thus they are entitled to the immunity from the customs duty liability being demanded or the penal action proposed against them in terms of the Customs Law.

In the circumstance, the benefit of the Amnesty Scheme could not be also claimed and the Commissioner, therefore, clearly erred in not confirming the demand and appropriate penal action against this reverses for the various contraventions of the DEEC Scheme.

(e) The Commissioner has clearly erred in leaving the question of determination of the due amount reversal and the interest liability etc., to the central excise authorities and dropping further action in terms of the Custom Law. In fact the licence holders with no further action under Customs Law can refuse to take any further action for reversal of the Modvat credit or the interest consider the due - if it is so held by Commissioner has not appreciated the fact that the penal action and duty demand was possible against such fraudulent parties in terms of the customs provisions. Even additional amount held due is paid it will be much later than the 31st January, 1997 deadline and will not be in tune with special dispensation scheme notice was issued demanding certain custom duty for violation of the provisions of customs notifications. It was incumbent upon the commission as an adjudicating authority to decide whether the party clearly satisfied the provisions of the amnesty scheme and will be absolved of Customs duty and other penal liabilities.

(f) The reliance on the judgment of the Supreme Court in the case of Chandrapur Magnet, is mis-conceived and out of place. The said judgment was passed in the context of certain exemptions on Central Excise side and certain orders of the Board which provided for reversal of the Modvat credit initially taken on inputs used in the manufacture of exempt products provided the reversal was undertaken before goods were cleared from the factory.

The present case is clearly distinguishable. The Commissioner has also failed to appreciate the actual position in the present case inasmuch as the Modvat credit taken for the goods exported was never reversed before the clearances from the factory for exports. Some reversal was affected much later in early 95 when the abuses had been detected and investigations were started for taking appropriate action. As an exceptional case only the Government had announced a special scheme in January, 1997 mentioned earlier but the conditions of the circulars/instructions of the Board were not satisfied by the licence holders. Therefore, the Commissioner should have upheld the demands and taken suitable penal action instead of dropping proceedings for the irregularities noticed.

(g) Considering the totality of evidence brought out clearly with show cause notice, it is clearly established that the imported inputs were disposed off in contravention of the laid down provisions of Notification No. 203/92 and policy provisions and not only the duties demanded for the goods were liable to be confirmed, but penal action justified against there licence holders for who became parties for the various irregularities brought out in the show case notice.

8. From the above, it is clear that the Department does not either allege or find that the Licence Holders had not reversed any amount of credit taken by them or the amounts reversed fell short what was required to be reversed as per formula set out in Circular dated 3-1-1997. There is no challenge to the findings of the Commissioner that for the year 1993-94 the Licence Holders had reversed the credit in excess of what was required as per formula. As for the year 1994-95, although he has not satisfied himself as to whether the credit reversed was in accordance with the formula, he has however, left it open to the authority to recover the correct amount by reversal and therefore, the interests of revenue are safeguarded and no prejudice is caused to the Revenue. In fact, till date, i.e. 8 years down the line, the Assistant Commissioner has not quantified the short fall in the credit, if any.

Therefore, we see no substance in the Revenue's appeal relating to contravention of condition prescribed in Notification No. 203/92-Cus regarding non-availment of Modvat credit. Regarding the second charge of mis-declaration of final product, nowhere in the grounds of the appeal, has the finding of the Commissioner on this point been specifically challenged. Moreover, we see nothing wrong in the Commissioner's reliance upon the DGFT clarification dated 3-12-1993 for holding that the final products exported by the Licence Holders were covered by Sr. No. 717 of 1992-97 Exim Policy (corresponding to Sl. No.393 of earlier policy) and hence there was no misdeclaration.

9. Further, the Revenue has not established its case with regard to disposal of imported inputs as such in contravention of the terms of Notification No. 203/92 and the Exim Policy, beyond averring that the totality of evidence brought out in the show cause notice clearly establishes the disposal of imported inputs in

contravention of the Notification and Exim Policy. The Commissioner has given detailed findings as to how this charge did not stand proved on the basis of evidence of record. Therefore, his finding on this score cannot be faulted. The charge of transfer of licence by three Licence Holders has also been found not to be established and the Commissioner's findings on this issue do not stand specifically contravened in the appeals of the Revenue. Therefore, we see no reason to interfere with the order of the Commissioner in as far as it relates to dropping of the entire duty demand against M/s. India Steel International and M/s. India Steel International Pvt. Ltd. and part duty demand against M/s. ISI Bars Limited, and dropping penal proceedings against all the respondents and accordingly uphold the impugned order and reject the appeals of the Revenue. The cross objection filed by M/s. MP Iron & Steel Co is disposed of accordingly.

10. Now we take up the appeals of M/s. ISI Bars Limited and Shri Sudhir Gupta. M/s. ISI Bars Limited challenges the confirmation of duty of Rs. 10,47,651/- on the ground that 27 metric tones of imported Calcium Silicide, on which quantity the demand has been confirmed, was not sold as such, but converted into resultant products, which were in turn sold in the open market, and that it is only the sale of imported inputs as such that is prohibited under Notification No. 203/92. However, we cannot bring ourselves to agree with this submission for the reason that no permission was obtained from the Development Commissioner for disposal as per relevant provisions of para 127 Exim Policy. We also note that the Licence Holders had admitted the duty liability on these goods and paid customs duty thereon. We, therefore, uphold this demand.

However, having regard to the above, we reduce the penalty imposed upon the Licence Holder to Rs. 2,50,000/-. The appeal is thus partly allowed. The penalty imposed on Shri Sudhir Gupta, Joint Managing Director of the Licence Holder is sustainable, as admitted by, he was in charge of the company during the relevant period. We therefore, uphold the penalty imposed upon him, and reject his appeal.

11. In the result, the appeals of the Revenue are dismissed. The appeal of M/s. ISI Bars Limited is partly allowed by reduction in penalty and appeal of Shri Sudhir Gupta is dismissed.