

Sterlite Optical Technologies Vs. Commissioner of Customs and

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Jun-17-2005

Reported in : (2005)(101)ECC241

Judge : J Balasundaram, Vice, A M Moheb

Appellant : Sterlite Optical Technologies

Respondent : Commissioner of Customs and

Judgement :

1. The issue in these appeals are somewhat intricate and complicated.

We heard the rival contentions for long hours, went through the written submissions and rather voluminous case laws relied upon.

2. We are thankful to both the counsels who took enormous pains during the course of hearings to put the issues in proper perspective.

3. M/s. SOTL has been manufacturing optical fibres in their domestic unit for some time. Success in India encouraged them to set up an Export Oriented Unit in March 2001 for the manufacture of same goods.

They imported capital goods worth Rs 122 crores and raw materials under notification 53/97-Cus. which allows duty free imports provided they are used in the manufacture of goods for export. The EOU unit is set up adjacent to the domestic unit. For convenience the domestic unit is referred to as E2 and the EOU

as E3.

4. The two units had connecting doors for easy movement of men and material from one to another. The machines in E2 and R3 required to manufacture optical fibres were so arranged that they all looked like one large happy family. The regulations in this regard are that there should be a strict segregation between domestic units and EOUs. The Revenue contends that the appellants never disclosed the existence of the connecting doors while seeking a warehouse licence for their E3 Unit. The counsel for the Revenue says that such non-disclosure is the first step the appellants have taken to perpetuate a fraud on the Revenue.

5. M/s. SOTL's intentions to export optical fibres received a setback in September 2001, according to them.

6. With monotonous regularity some miscreants crashed passenger planes into high rise buildings of New York on September 11, 2001. This type of activity created a slump in the export market for optical fibres, according to the appellants. The counsel for the Revenue is unconvinced. "September 11 and market for optical fibres!", he exclaims. These excuses are made only to make use of imported duty free capital goods in the production of optical fibres for local consumption, the counsel says.

7. Anyway, having been convinced that there is no future in export of optical fibres, after what happened in New York, the appellants approached the Board of Approval in the Commerce Ministry on 6.10.2001 to allow them to convert their EOU, set up in March 2001, into an EPCG unit. Such 'conversions' are permissible unlike others. There are schemes carefully crafted by the Commerce Ministry to promote exports.

Statistically speaking, they do.

8. Entire production of an EOU has to be exported according to the original scheme of things. Over the years this is diluted and the EOUs are allowed to clear goods worth 50% of the FOB value of goods exported, into domestic market

provided the EOU achieves NFEP prescribed. But an EPCG unit is required to export goods worth a particular percentage of the CIF value of the capital goods in every year, the rest of the goods produced therein could be sold in the DTA.⁹ Goods brought to any place in India from an EOU attract aggregate of customs duties leviable on like goods when imported, under proviso to Section 3(1) of the Central Excise Act. However, goods cleared to DTA by an EPCG unit attract normal excise duty like any other goods manufactured in India.

10. Central Excise duty is levied on domestic clearances from an EOU at the rates prescribed in the schedule to Customs Tariff Act. The value of such goods however is determined under the Customs Act. Three Acts come into play, Central Excise Act, Customs Tariff Act read with its schedule and the customs Act read with the Valuation Rules made thereunder. All this could result in endless litigation. But, from time immemorial fiscal laws are meant to be complicated so that they provide employment to those who sit in judgment over their interpretation and deliver learned judgments.

12. The Central Excise sleuths visited the E2 and E3 units of the appellants on 3.9.2002. They found that 3.35 lakhs kms. of optical fibres said to have been manufactured in the E3 unit lying in E2 unit.

No duty seemed to have been paid on them when they were removed from E3 (EOU). Some explanation were offered as to what the optical fibres were doing there. The officers seized the quantity. Further investigation revealed that the appellants removed some 6,35,626.7 kms of optical fibres from the EOU (E3) without payment of duty. It was also detected that the appellants removed 9913 kgs of pre-forms, an intermediate excisable product, manufactured in the EOU without payment of duty. It was also found that certain raw material imported duty free under notification 53/97-Cus were not used in the production of export goods.

13. The appellants maintains a rather meticulous computerised records which clearly indicate whether the optical fibres and pre-forms are manufactured in E2 and E3. These records and the statements made by responsible persons working in the company made the job of the investigating officers easy in identifying the alleged clandestine removals of finished products as well as intermediate products

from E3.

14. Investigations also revealed that the appellants adopt what is popularly known as hop step and jump while removing goods without payment of duty from their E3 unit. They first removed the goods from E3 to E2, allow them to cool off for a while, create evidence to indicate that the goods are actually manufactured in E2 itself and then remove them on payment of central excise duty applicable to goods manufactured in any domestic unit. The total quantity of optical fibers involved in this kind of operation is 6,35,626.7 kms. and the duty paid on it is Rs. 10,54,54,680/-. We may recall that the goods manufactured in an EOU when brought into India attract aggregate of customs duties read with any notifications issued.

15. These revelations led to the issue of two show cause notices one under the Customs Act and the other under the Central Excise Act. The Commissioner passed a common order in respect of both the notices.

16. In the impugned order, the Commissioner confiscated 3.25 lakhs kms of optical fibres found lying in the E2 unit, allowed them to be redeemed on payment of fine and duty (duty applicable to EOU clearances); demanded duty on 6,35,626.7 kms of optical fibres removed from EOU on which appropriate duty has not been paid; demanded central excise duty on the intermediate goods, i.e. pre-forms removed from the EOU without payment of duty; demanded interest under Section 11AB of the Central Excise Act; imposed penalty under Section 11AC on the appellant company; imposed penalties under Rule 26 of the Central Excise Rules on the person concerned; then demanded duty under notification 53/97-Cus on the raw material imported duty free which were not used in the manufacture of final products for export, and imposed penalties under Section 112(a).

17. For good measure he confiscated the capital goods used in the manufactured of goods clandestinely removed under Section 111(0) of the Customs Act.

19. The appellants in their appeal memorandum, during the course of hearing and in the written submissions, raised the following issues which have a bearing on the various demands, penalties and confiscation ordered by the Commissioner.

- a) The E3 unit is deemed to be an unit working under EPCG scheme from 6.10.2001, the date on which the appellants made an application for conversion to EPCG unit and therefore all clearances made from such an unit attract duty applicable to goods manufactured in DTA units.
- b) Alternatively, if the E3 unit is considered as an EOU during the period when goods were sold from there without permission, then all goods so cleared are completely exempt from the central excise duty under notification 125/84-CE.
- c) The Commissioner erred in computing the duty leviable on the clearances made from E3 as he failed to take into consideration the effective rates of duties leviable under the Central Excise and Customs Tariff Act.
- d) Value of the impugned goods has not been correctly arrived at while computing the demand.
- e) Duties cannot be demanded both under Customs Act and Central Excise Act.
- f) Duty ought not to have been demanded on pre-forms on the assumption that the entire quantity (9913 kgs) is manufactured in the EOU when some quantity out of this was in fact is manufactured in the domestic unit E2.
- g) Duty on raw material under notification 53/97-Cus is unsustainable as the imported raw material is properly accounted for.
- h) Penalties imposed under the Central Excise Rules and Customs Act on various persons and the company are unjustified, excessive and unreasonable.
- i) Capital goods are not liable to confiscation under Section 111(0) of the Customs Act.

20. Before we take up the various issues, we briefly deal with the process of manufacture of optical fibres. Raw material is first converted into core rods on MCVD lathes. The core rods are then allowed to pass through sleeving lathes or through a process called SOC (SOC process is available only in EOU) where the core rods are converted into pre-forms. The pre-forms are then taken to the draw towers where they are drawn into optical fibres. After testing the optical they are

spooled, packed etc. making them ready for despatch. All this may look simple but one needs machinery worth Rs 122 crores to convert raw material into optical fibres.

21. The various lathes and draw towers situated in the domestic unit and the EoU are serially numbered. Since both the units, the domestic as well as the EOU, manufacture the same type of goods, computerised date is maintained to track as to where the core rods, pre-forms and optical fibres are manufactured (E2 and E3). The appellant admit that there is free movement of material from one unit to other.

22. According to records maintained and the statements made, it appears the EoU started producing optical fibres from July 2001. The appellants claim that only trial production was started from July 2001 and their commercial production was started only in March 2002. Approximately 80,000 kms of optical fibres were exported during the impugned period, the impugned period being July 2001 to August 2002.

23. The appellants do not contest the allegation that 6,35,62.7 kms of optical fibres were manufactured in the E3. Nor do they seriously contest that 3.35 lakhs kms of optical fibres seized from their domestic unit were manufactured in their E3 unit.

24. We now examine each of the issues raised by the appellants. These issues have a direct bearing not only on the quantum of demand of duty but on the very leviability of duty on the impugned goods.

25. The appellants made an application to the Board of Approval in the Commerce Ministry for conversion from EOu to EPCG licence on 6.10.2001.

This authority gave in principle debonding permission on 13.12.2001 but asked the appellants to make a formal application for EPCG licence and the appellants did so in January 2002. The issue got bogged down in litigation till at last the appellants got an EPCG licence in 2003.

That then is the background insofar as the appellants' contention that the EOU unit set up in March 2001 is deemed to have been converted into EPCG w.e.f

6.10.2001. The appellants contended that if the unit (E3) is treated as EPCG unit w.e.f 6.10.2001, the demand for duty on 6,35,626 kms of optical fibres made under Section 11A does not survive as the appellants had already paid appropriate duty, under Section 3(1) of the Central Excise Act. The Commissioner however treated E3 as an EOU and held that the above said quantity was removed therefrom without payment of duty and demanded Rs. 51,65,35,050/- towards duty.

26. Reliance is placed on the decision of the Supreme Court in the case of State of Up and another V. Haji Ismail Noro Mohd. 1988 3 SCC in support of their contention. The Hon'ble Court held that a concession envisaged in a statute is available to an assessee even when the certificate necessary to be eligible for the concession is subsequently issued but is available at the time of assessment. In the case of MPV Engg. Industries 2003 153 ELT 485 the Supreme Court held that the benefit of SSI exemption 175/86-CE has to be extended to an assessee w.e.f the date on which an application for registration is made by him and not from the date of certificate of registration. In several other judgments the Supreme Court as well as the Tribunal took the same stand. The reasoning is simple. An assessee can only make an application for grant of a concession. He cannot be made to suffer simply because the Bureaucrats in the government take their sweet time to decide. It is argued that if the law laid down by the Supreme Court is applied, the demand does not survive as the appellants indeed paid duty on the goods manufactured in the E3 unit at the correct rate on 6,35,626 kms of optical fibres.

27. The Revenue contends that the ratio of the cases cited supra does not apply to the appellants' case. Neither the appellants' conduct nor their actions indicate that they entertained a belief that theirs was an EPCG unit w.e.f. 6.10.2001. They never disclosed to the authorities concerned that they were removing goods without payment of duty; that they never disclosed the fact that they started regular production in their EOU unit from July 2001 and that they were importing duty free raw materials under notification 53/97. An application which does not make full disclosure is no application at all and therefore the date of such application cannot be considered as the one made in the case of MPV Engg. case cited supra. It vitiates all (CCE V. Essar Oil Ltd. 2004 172 ELT 433 (SC)). It is argued, the appellants cannot take advantage of judgments delivered in a different context.

28. It could be at once seen that the appellants' claim for EPCG status from 6.10.2001 is farfetched. To be eligible to be called an EPCG unit, one has to have an EPCG licence. Neither the fact that the appellants formally made an application for such a licence in January 2002 at the instance of the licensing authorities nor the fact that in principle debonding permission was accorded on 13.12.2001 makes an EOU and EPCG unit. One cannot act as a licence holder simply because one has applied for one. The Supreme Court in the cases cited supra was dealing with cases where an assessee did what all he could to make himself eligible for a concession and it is the government's inaction that was taken advantage of by the authorities to deny a benefit of a concession which is otherwise available to an assessee. Even after making an application for conversion into EPCG scheme the appellants were importing duty free material under notification 53/97-Cus. which is available only to an EOU. We agree with the contention of the Revenue that an informal letter written on 6.10.2001 and an application for EPCG licence in January 2002 without full disclosure is no application at all. The Appellants' attempt to take advantage of such an application has to be discarded. It is only when it is detected that the appellants were removing goods from E3 without paying proper duty the appellants came out with the theory that removals from E3 should be treated as removals from an EPCG unit.

29. We therefore reject the contention that E3 is an EPCG unit from the date of application 6.10.2001. In fact it remained an EOU till an EPCG licence was accorded in 2003. All clearances effected from E3 during the period July 2001 to August 2002 should be considered as clearances made from an EOU attracting duty under proviso to Section 3(1) of the Central Excise Act. Duty on 6,35,626.7 kms of optical fibres had been rightly demanded treating them as the ones manufactured in an EOU and cleared therefrom without payment of appropriate duty.

30. The appellants then contend that in the event their E3 is considered as an EOU during the period July 2001 to August 2002 they are entitled to the benefit of notification 125/84-Cus on all clandestine clearances made from E3 during that period.

31. This plea appears to be even better than the first one (the unit should be considered as an EPCG unit from the day an application is made) from the point of view of the appellants. At least some duty is payable on goods removed from an EPCG whereas no duty is payable on goods clandestinely removed from EOU, under notification 125/84-CE.32. To understand this plea, we reproduce this vintage notification 125/84 which survived the ravages of time for 20 years till at last it was done to death in 2003.

"Exemption to goods produced in a hundred per cent export-oriented undertaking.
- In exercise of the powers conferred by sub-rule (1) of rule 8 of the Central Excise Rules, 1944, the Central Government hereby exempts all excisable goods produced or manufactured in a hundred per cent export-oriented undertaking from the whole of the duty of excise leviable thereon under Section 3 of the Central Excise and Salt Act, 1944 (1 of 1994); Provided that the exemption contained in this notification shall not apply to such goods if allowed to be sold in India.

Goods produced in an EOU are exempt from duty, except those which are allowed to be sold. So goods sold without being allowed to be sold are exempt from duty!!
34. In other words, all goods, produced in an EOU out of duty free capital goods and raw material, are exempt from payment of duty under notification 125/84 when removed without permission. But the goods which are allowed to be cleared by appropriate authorities have to suffer duty. If after this any EOU operator approached the authorities during the currency of this notification to seek permission to clear his good into domestic market he will have to have his head examined! 35. But the, the appellants rely on the following case law in support of their contentions :Suresh Synthetics V. CCE 36. We are unable to subscribe to the views expressed in these decisions at least for two reasons if not more. All these decisions do not constitute good law after the Larger Bench decision in Himalaya International 2003 154 ELT 580 = (2003-TIOL-155-CESTAT-DEL-LB) which interpreted the expression "allowed to be sold" occurring in the proviso to Section 3(1) of the Central Excise Act in the context of duty liability on goods unauthorisedly removed from an EOU. The Bench held that duty as prescribed in the proviso to Section 3(1) of the Central Excise Act is leviable on all goods manufactured in an EOU whether or not allowed to be sold. The expression used

in notification 125/84 is also "allowed to be sold". We are unable to persuade ourselves to give any interpretation to "allowed to be sold" other than what has been given by the Larger Bench. The appellant's contention that the Larger Bench decision is set aside by the Supreme Court is factually not correct. We also observe that the Larger Bench has distinguished the decision rendered by the Supreme Court in SIV Industries Case.

37. Secondly, notification 125/84 merely exempts goods manufactured in an EOU. It does not exempt goods which are allowed to be sold in India.

By some deductive logic, one cannot conclude that this notification exempts all goods removed from an EOU without being allowed to be sold in India.

38. It is true that the notification itself is deafeningly silent about the dutiability of goods removed from an EOU without being allowed to be sold. Such silence however cannot be interpreted to mean that all goods produced in an EOU and removed without permission are exempt from payment of duty. This is particularly so because the policy governing the EOU scheme stipulates the extent to which goods can be removed from an EOU either under a specific permission or general permission provided under the policy. The various notifications issued under the Central Excise Act are dove-tailed to these permissions. The policy does not allow clandestine removals from an EOU and so notification 125/84 cannot be exempting goods clandestinely removed.

39. Before parting with this aspect we feel it necessary to observe what the Hon'ble Supreme Court held in the case of British Airways relied upon by the Larger Bench in Himalaya International. The Bench observed while interpreting the statute the courts are required to keep in mind the consequences which are likely to follow upon the intended interpretation. It has also been observed therein that it is the duty of the court to give a harmonious construction of a statute and that such constitution shall suppress the mischief and advance the remedy'.

The Bench held that so long as a 100% EOU continues as an EOU it will be within the proviso to Section 3(1) of the Central Excise Act. Mere violation of the permission in the matter of sale to DTA will not take it outside the proviso to

Section 3(1) of Central Excise Act.

40. We reject the plea that the goods removed from an EOU without being allowed to be sold are exempt from payment of duty under notification No. 125/84.

41. Now that we hold that optical fibres cleared without permission from the appellant's unit (E3) are not exempt under notification No.125/84-CE from payment of duty we deal with the contention that the Commissioner erred in rejecting the benefit of Notification No. 2/95 Central Excise while determining the duty liability on such optical fibres. The contention is that while determining the duty on clandestinely removed goods the effective rate of duty should be applied. Case law cited in support of the contention.

42. There cannot be dispute on the proposition that effective rate of duty indicated in an exemption notification should be applied even to goods which are clandestinely removed. But this proposition is subject to the condition that the exemption notification itself does not have any strings attached. It is an accepted position that Notification No.2/95 provides for levy of 50% of the aggregate of Customs on goods brought into any place in India from an EOU w.e.f. 11.5.2001 provided that such goods are brought into India with the permission of the Development Commissioner and that NFEP is achieved. No such permission was taken or given. NFEP was also not achieved. The Tribunal in the case of Opal Fabrics 2004 104 ELT 70 rejected the contention that 2/95 is applicable even when conditions in that notification are not satisfied. We are therefore of the opinion that the standard rate of duty prescribed under proviso to Section 3(1) of the Central Excise Act is applicable to goods which do not satisfy the condition laid down in Notification No. 2/95.

43. The appellants contend that the Commissioner did not apply the effective customs duty on optical fibres under notifications 17/2001 and 21/2002 which provide for a rate of 15% ad valorem on optical fibres when imported into India and are used in the manufacture of telecommunication cables. The benefit of these notifications is available to optical fibres when imported into India by an importer who follows conditions laid down in Customs (Import of goods at Concessional Rate of Duty for manufacture of Excisable Goods) Rules 1996. The appellant's

contention is that concessional rate of duty applicable to optical fibres manufactured by them should have been considered as the optical fibres were ultimately used in the manufacture of optical fibres cables.

44. The revenue however contends that Notification No. 17/2001 and 21/2002 are not applicable as the said Notification are available only to those importers who satisfied the conditions in the above said Rules at the time of import.

45. The appellants strongly relied on the decision of the Apex Court in *Thermax Pvt. Ltd.* 1992 61 ELT 352 (SC). The Hon'ble Court was dealing with a case where the benefit of notification No. 63/85-CE was denied to an importer, while levying CVD, on the ground that it is available only to the manufacturer in India, who follows Chapter X Procedure of Central Excise Rules, and since an importer cannot follow that procedure he is not entitled to that benefit even though the imported goods are meant for the intended use specified in the Notification. The Court held that the benefit of exemption or concession should be granted to an importer wherever the intended use of the material can be established by him. In other words the benefit of an exemption based on an end use condition cannot be denied merely on the plea that an importer is incapable of following the procedure laid down in Chapter X. The appellants plead that this position is reiterated in *Goodyear India Ltd.* 1997 90 ELT 7 (SC). Applying the ratio laid down in the above decisions, the appellants argue that in the present case the optical fibres cleared from the EOU are used for the purpose of manufacturing the cables stated in the above said notification and therefore while calculating the aggregate duty of Customs leviable under proviso to Section 3(1) the effective rate applicable to optical fibres should have been applied and not the standard rate. It is argued that when an exemption substitutes the tariff rate, the reduced rate of duty is the only rate which is applicable.

46. We have considered these contentions carefully. In *Thermax* case an importer was denied the benefit of an exemption notification. The appellants are not the importers of optical fibres. What the appellants want is adoption of that rate which is applicable to an importer of optical fibres even when he had not followed the procedure laid down in Customs (Import of goods at Concessional Rate of Duty for

Manufacture of Excisable Goods) Rules 1996.

47. In Thermax case the Supreme Court observed that entitlement to the benefit of Notification No. 63/85 CE will depend on whether the purchaser of the imported goods is a holder of an L6 licence. This appears to be an important criteria laid down by the Hon'ble Supreme Court and therefore it is necessary to see whether the appellants can claim the benefit of notifications 17/2001 and 21/2002-Cus. even when the purchaser does not satisfy the conditions in the above said Rules.

It is a fact that the appellant company sold their optical fibres to an unit which manufactures optical fibre telecommunication cables. Thus, the end use condition stated in notifications 17/2001 and 21/2002 is satisfied.

48. The appellant's plea that the concessional rates specified in the above said notifications should be applied while calculating the aggregate of customs duties on optical fibres can be seriously considered only when we assume several things. We have to assume, that the factory at Silvassa (the receipt of optical fibres) is the importer and the appellants are exporters of optical fibres. Then we have to assume that the recipient is entitled to receive the optical fibres at concessional rate even when he has not satisfied the condition laid down in the Customs (Import of Goods at Concessional Rate of Duty for Duty for Manufacture of Excisable Goods) Rules, 1996. We have to further assume that Chapter X procedure is either similar or identical to the 1996 Rules. After we finish assuming things we can offer the concessional rate only to the recipient and not to the appellants.

Since there is no claim from the recipient of optical fibres for concessional rate of duty, we cannot be extending it under notifications 17/2001 and 21/2002-Cus to the appellants when the notification read with the conditions clearly say that an importer of goods alone can claim the concessional rate. The Supreme Court in the case of Indian Aluminium Company 1991 55 ELT held that non observance of even a procedural conditions are not to be condoned if such non observance is likely to facilitate commission of fraud and introduce administrative inconvenience. The Hon'ble Court went on to say that even if the importer is able to prove that the goods were used for the intended purpose subsequently, he cannot claim the benefit of a concession which is granted subject to fulfillment of certain condition at

the time of import. Benefit of a notification cannot be doled out assuming things and presuming events.

49. We reject the contention that the Commissioner ought to have applied the rates specified in Notification No. 17/2001 and 21/2002 while calculating the aggregate of customs duties leviable on optical fibres in this case.

50. The next contention pertains to valuation. We may recall that the appellants sold optical fibres manufactured in E3 under a central excise invoice as if they were made in E2. The Commissioner adopted this invoice value as transaction value and calculated the differential duty.

52. We have given our careful consideration to this aspect. Admittedly 6,35,626.7 kmg of optical fibres manufactured in E3 were sold from E2.

Simply because they were sold under E2 invoices they would not become goods manufactured in a domestic unit. Shorn of the subterfuges adopted by the appellants the transaction of these fibres is between an EOU and a domestic buyer. In such a transaction, value of the impugned goods has to be determined under Customs Valuation Rules. Normally the price at which goods are sold by an EOU becomes the transaction value under Rule 4 of the Customs Valuation Rules. The Commissioner adopted the price shown on the central excise invoice as transaction value for the purpose of computation of duty under proviso to Section 3(1) of the Central Excise Act. The appellants' plea that the Commissioner should have either adopted the FOB value, or a contemporaneous price at which similar goods are imported has to be rejected. These alternative ways of arriving at the value become irrelevant when transaction value is available. The appellant's plea that admissible deductions should be given on the price shown in central excise invoices has to be rejected.

Price paid or payable is the transaction value as per Customs Valuation Rules, 1988.

53. As per the contention that the show cause notice proposes a price of Rs. 1,193/- per km for the optical fibres seized from E2 but the Commissioner adopted

Rs. 1,493/- we observe that since the seized goods were not transacted, value of these goods had to be determined under the Customs Valuation Rules. The appellants themselves pleaded before the Commissioner that since the seized goods were removed from E3 on different dates, values prevailing on different dates have to be adopted. This exercise was done on the appellants own volition. Even when such an exercise is undertaken, the overall demand remained within the amount shown in the show cause notice. The appellants cannot make an issue out of it now after having pleaded before the Commissioner that the value indicated in the show cause notice remain the same through out the disputed period.

54. The appellants' reliance on Board's circular F.No. 268/85-CE dated 29.9.1994 on the aspect of valuation of goods removed from an EOU is misplaced. The circular does not say that FOB value of similar goods should be the basis for valuation of goods removed from an EOU. In fact the Board suggested that normally invoice value has to be accepted as transaction value.

55. Similarly reliance on Shri Chakra Tyres case 1999 108 ELT 361 is misdirected as in that case the issue pertained to valuation under Central Excise Valuation Rules.

56. We reject the contention that the value of 6,35,626 kms of optical fibres has been wrongly determined. We also reject a similar contention in regard to seized optical fibres. The Commissioner's findings in this regard are upheld. 57. Pre-forms, as we have earlier noted are intermediate goods in the manufacture of optical fibres. The Commissioner holds them to be excisable goods manufactured in the EOU. 58. The finding of the Commissioner in this regard is that the appellants during April 2001 to August 2002 Manufactured 9913 kgs of pre-forms in their E3 and cleared them to their E2 without payment of any duty. This findings is based on the statements of the Manager (Commercial), Plant Manger MCVD Section and Associate Production Officer who after going through the computerized production records stated that this quantity 9913 kgs of pre-forms was removed from E3 without payment of duty. The Commissioner demanded duty of Rs. 21,63,60,797/- on the pre-forms under Section 11A of the Central

Excise Duty. He levied duty applicable to EOU clearances under Proviso Section 3(1) of the said Act. He determined the value of the pre-form adopting the value at which similar pre-forms were imported by the appellants under Bill of Entry No. A4984 dated 17.04.2001. He did so because these pre-forms were not sold but were captively consumed in the E2 unit after their removal from E3. The Commissioner did not apply the concessional rate under notifications 17/2000 and 21/2002-Cus. on imported pre-forms while calculating the aggregate of customs duty. Several contentions are raised on this demand. It is argued that the Commissioner erred in holding that 9913 kgs of pre-forms were manufactured in the EOU; that in fact only 2583 kgs of this material were manufactured in EOU; that the balance quantity of 7330 kgs was manufactured in E2 out of the core rods manufactured in E3; that the Commissioner erred in demanding duty leviable under Proviso the Section 3(1) on the entire quantity; that the computerized records clearly point out that only 7330 kgs were manufactured in the DTA unit out of the core rods made in E3; that the Commissioner applied the standard rate of duty on pre-forms without extending the benefit of Notification No. 17/2001 and 21/2002 of Customs and that no duty is leviable on 7330 Kgs of pre-forms as they were manufactured in E2 (DTA Unit) and were consumed captively.

59. The Revenue contends that the concerned officers of the company who had access to the computerized records themselves have stated that 9913 kgs of Pre-forms were manufactured in E3. The appellant's attempt to interpret the same records in a different way before the Bench to say that only 2583 Kgs of Pre-forms were manufactured in E3 cannot be accepted. It is also submitted that the appellants contention that 7330kgs of Pre-forms were manufactured in DTA unit out of the core rods made in E3 is a new theory put in for the first time before the Tribunal. It is also argued that the value of the Pre-form is correctly arrived at and that the rate of duty applicable is the stands rate and not the concessional rate (5% ad valorem) indicated in Notification No.17/2001 and 21/2002 of Customs as the conditions specified in the notification are not satisfied.

60. We have examined the rival contentions. The appellants produced extracts of computerized records to argue that only 2583 kgs of pre-forms were manufactured in E3 and therefore at best duty is leviable under Section 3(1) proviso on this

quantity only and not on the entire quantity of 9913 kgs. We observe that the senior officers of the company clearly stated before the Central Excise authorities that 9913 kgs of pre-forms were made in E3 on the basis of computerised records maintained by them. We are not inclined to accept this new interpretation of these very same records before us. We may also mention that the plant manager (MCVD) and associate production officer stated before the investigating officers that 17474 kgs of pre-forms were manufactured in E3 and that 1 kg of pre-form can produce 37 Kmg of optical fibre. They have also stated that E2 manufactured 3,66,790 Kgm of optical fibres from the pre-forms removed from E3 unit. Applying the ratio of 1:37, we find that to manufacture 366790 kgm of optical fibres one needs 9913 kgs of pre-forms. Thus it appears that 9913 kgs of pre-forms were transferred to E2 and not 2583 Kgs as being argued by the appellants. The appellant's plea that core rods manufactured in E3 were transferred to E3 for manufacture of pre-forms is also contrary to their stand that core rods are not transportable from one plant to another. If they are not transportable it is not understood how they could be removed to sleeving lathe situated in E2 from the MCVD lathes in E3. We reject the contention that only 2583 kgs of pre-forms were manufactured in E3.

61. We also reject the contention of the appellants that the Commissioner erred in holding that 1 Kg of pre-form can produce 37 kms.

of optical fibres. The experts working with the appellant company gave this ratio. There is no reason to doubt their version.

62. We also reject the contention that the concessional customs duty envisaged in Notification No. 17/2001 and 21/2002 should have been applied while calculating the aggregate of customs duties leviable on the pre-forms for the same reason given by us elsewhere in this order while discussing the duty liability on 6,35,626 Kms of optical fibres.

Similarly, the benefit of Notification No. 2/95-CE also cannot be extended to goods, which were not allowed to be sold in India.

63. We observe that since no transaction value was available the Commissioner determined the value under Customs Valuation Rules. He adopted the price at which similar goods were transacted contemporaneously or the price indicated by the appellants themselves.

The appellants themselves imported pre-forms at a particular price. The Commissioner's reliance on the prices prevailing during the relevant time cannot be faulted.

Confiscation of optical fibres (3.35 lakhs kms) under Central Excise Act 64. The Commissioner confiscated approximately 3.35 lakh kms of Optical fiber found lying in E2 on the ground that they were removed without payment of duty from E3. The appellants contend that the said optical fibres were temporarily stored in E2 as there was no space in their EOU. The Commissioner observed that if that were to be so there was no need for the appellants to manipulate the records in E2 and E3 to make it appear that the optical fibres in question were manufactured in E2.

He also rejected the plea that these optical fibres were meant for export. People do not remove goods from their EOUs into domestic tariff area if they want to export them. The optical fibres in question are liable to confiscation under Rule 25(1) (a) (b) and (d) of Central Excise Rules 2002. The Commissioner imposed a redemption fine of Rs 10 crores. We uphold the contention that the goods in question are liable to confiscation.

65. It is urged that out of the seized stock of 3.35 lakhs kms of optical fibres some 20,543 kms have no ID and therefore cannot be identified as the ones manufactured in E3. We observe that the appellant cannot come out with this plea after one of their own officers admitted that this quantity 3.35 lakh kms was manufactured in E3 but was stored in E2 for lack of space in E3.

66. The appellants contend that since the case of the department is that 6,35,626 kms of optical fibres manufactured in E3 (EOU) were cleared on payment of duty calculated at 16% ad volorem, credit of such duty should have been given while demanding duty on this quantity and the differential duty (aggregate of customs duties minus 16% already paid) ought to have been demanded. Instead the

Commissioner ignored the duty already paid on the very same quantity and went on to demand Rs. 51,69,39,050/-.

67. We see a good deal of strength in this plea. After all the entire case of the department is that appropriate duty was not paid on 6,35,626.7 kms of optical fibres at the time of renewal. Once it is established that the goods in question suffered a part of the duty payable credit of that part has to be given. We reject the contention of the Revenue that credit of duty paid by one unit cannot be extended to another. It is not the government's intention to collect more duty than what is payable. It is specious to ask the appellants to claim the central excise duty paid on goods which were admittedly not manufactured in E2.

68. The appellants are entitled to the credit of duty of Rs. 10,54,54,680/- already paid on 6,35,626.7 kms of optical fibres. To this extent the demand on the said quantity of optical fibres comes down. We therefore hold that Rs. 41,14,84,370/- being the differential duty is payable on this account.

69. The Commissioner imposed a penalty of Rs. 94,87,92,687/- equivalent to the duty sought to be evaded (Rs. 21,54,92,842 + Rs. 51,69,39,050/- + Rs. 21,63,60,797/-). The amount of penalty is some Rs. 2/- more than the 100% of duty sought to be evaded 70. Some arguments are advanced to canvas that penalty is not imposable when an assessee acted on a bona fide belief that what he was doing was right. The plea was that the optical fibres were removed from E3 during the period when an application for debonding the EOU was pending before the authorities; that the appellants were under the bona fide belief that the E3 was an EPCG unit w.e.f 6.10.2001; that it is not a case where the appellants did not pay any duty on the optical fibres (6,35,626.7 kms); that the seized optical fibres (3.35 lakhs kms) were removed from E3 for the purpose of export; that 3.35 lakhs kms were temporarily stored in E2 after having been removed from E3; the pre-forms (9913 kgs) alleged to have been removed from E3 were not entirely manufactured in E3 and that in any case the penalty of Rs. 94,87,92,687/- is excessive.

72. Often the difference between an honest ambition and greed is thin.

Once cannot with any certainty, say when a person crossed the limits of honest ambition. But the line between bona fide belief and a mala fide intent is not so thin. It is easy to detect mala fides. Way back in 1984 in the case of APSEB 1984 16 ELT 579 it is held that Bona fide belief does not mean a blind belief. It would imply a belief which has been reached after a sincere attempt to understand an issue and examine it reasonably. Apply this test and find the appellants fall abysmally short of their claim that they entertained a bona fide belief that what they were doing was right.

73. If ever the appellants entertained a belief that theirs was an EPCG unit they would not have behaved and acted in the manner they did.

There was no need for them to suppress the fact from the licensing authorities that they commenced production in their E3 right from July 2001 if not from April 2001; there was no need for them to create an elaborate make believe that the optical fibres were produced in E2 when they were actually produced in E3; there was no need for them to manipulate the records in E3 and E2 to show that the impugned goods were produced in E2; there was no need for them to import duty free raw materials even after they applied for debonding; there was no need for them to remove the seized goods from E3 if they were really meant for export; there was no need for them to show the seized quantity as the one manufactured E2. We may go on listing several acts of commission and omission, which rendered the goods liable to confiscation. Suffice it to say that bona fides are conspicuously absent in this whole affair.

74. The appellants are a large industrial house. The captains as someone would call them. If the captains and the marshals were to engage themselves in such fraudulent activities the corporals and soldiers would not be far behind. Had the appellants paid appropriate duty on the optical fibres and pre-forms at a time when such duty became payable the govt. coffers would have been that much fuller. The appellants attempt to understate the implication of their actions by pleading that what was at stake was only the duty payable on raw material (Rs. 2.5 crores or is it Rs. 6.93 as the Commissioner holds) and the duty on capital goods applicable to EPCG imports (Rs. 6.14 crores) and not the astronomical figures alleged by the

Department, to say the least, in an understatement. The appellants did evade duty through subterfuge, careful planning and no small cunning. If there is any case which deserves a penalty under Section 11AC it is the appellants'. They made every attempt to qualify themselves for such visitation.

75. We have noted that the appellants paid Rs 10,54,54,680/- towards duty on Rs. 6,35,626.7 kmls. of optical fibres which clearing the said goods from there E2 unit. We have also held that they are entitled to credit of this amount of duty already paid on the same goods. This conclusion would have an effect on the total duty now payable on the above said quantity of optical fibres. We have kept this in mind while considering the quantum of penalty under Section 11AC.76. The Commissioner imposed a penalty of Rs. 1 crores under Rule 26 of Central Excise Rules on Shri Navin agarwal. At the material time he was the executive Director in the appellants company. In that capacity he allowed the EOU to make use of its facilities for the benefit of DTA unit. It appears he was also aware that goods manufactured in E3 were being removed without payment of duty. He however, pleads that he was not aware of the intricacies of excise procedures (nobody can be aware) and was under an honest impression that the goods manufactured in E3 were cleared on payment of Central Excise duty. The Commissioner is however of the opinion that Shri Navin Agrawal dealt with the goods which are liable to confiscation.

77. We have considered the rival contentions, Shri N. Agrawal was a paid employee, perhaps an expert in his own field and not in the nuances of proviso to section 3(1), Notification No. 53/97 Valuation Rules etc. The only thing that is coming out of the order is that he allowed the EOU facilities to be used for the benefit of the domestic unit. A benefit of doubt could be given to him with an observation that recipients of benefit of doubt need not be exactly proud of such awards. Some blame for all that happened could be fastened on to him.

But so small that it does not call for a penalty under Rule 26 of Central Excise Rules. We set aside the penalty on him.

78. A penalty of Rs. 5 lakhs was imposed on Shri L. Kumar under the same Rule. Some steep fall from Rs. 1 crore on Shri Navin Agrawal. He appears to be the one

who fixed target of production etc. The Commissioner says that he was also aware that the E3 facilities were being misused. Nothing much here, we set aside the penalty imposed on him.

79. Shri S.L. Bajaj was a Vice President (Finance). He sits in his office and not in the plant. He seemed to be aware that central excise duty was being paid on the finished goods. He however does not know whether full duty was paid on the removals from the E3. This is not a sufficient ground to impose a penalty on him. We therefore set it aside.

80. Shri Venkatesh Babu was Manager (Commercial). He was imposed a penalty of Rs. 5 lakhs under the same Rule. The Commissioner says that he was recording false figures of production in E3 at the instance of Shri S.L. Bajaj and know that the goods made in E3 were being sold. He is the one who helped the Department in identifying the goods made in E3 and quantifying the duty involved etc. Penalty on him is set aside.

81. We set aside the penalties on Shri Abhay Kelkar Chief Manager (Commercial) and Pramod Unde Coo (whatever that means) for the same reasons. In fact all the above persons should have been cited as witnesses rather than as accused.

82. The Commissioner seemed to be imposing penalties on the employees stating that they were aware of the fact that they were knowingly concerned with the goods liable to confiscation. Going by his logic every employee/worker can be accused of such knowledge, a greaser, a forklift truck operator etc. The point is that all these persons were not in a position to object to the decisions taken by the management.

And then we have this decision of the Bombay High Court in these case of R.R. Sule V. UOI 1990 48 ELT 343 in which the Hon'ble Court held that penalties cannot be imposed on person who sit in their main office. The appeals of these person therefore are allowed.

83. The appellants imported duty free raw material under Notification 53/97-Custom from time to time. Such raw materials amongst other consisted of pre-

forms as well. The Commissioner relies on the statement of one Shri Ajay Rajdan to quantify the raw material imported duty free used in the manufacture of optical fibres removed clandestinely. The duty liability on these raw materials is calculated by one Shri Venkatesh Babu. This quantification does not cover duty liability on 347.7 Kgs of pre-forms imported vide Bill of Entry No 4984 dated 07.04.2001 which were utilized in the manufacture of 84403 kms of optical fibre removed to the DTA unit clandestinely. Secondly, input out put norms seemed to have been applied by him to determine the exact quantity of raw material which has not been accounted for. The Commissioner imposed various penalties on the individual appellants under Section 112(b) for their various acts of commissions and omissions. The Commissioner demanded Rs. 6.93 crores being the duty on raw material under notification 53/97.

84. The appellants argued that the basis of computation of quantity of raw materials alleged to have been misutilised is faulty; that they have taken a plea before the Commissioner that the imported duty free raw materials can be accounted for if the raw materials contained in a) the optical fibres which were exported; b) the optical fibres lying in the EOU; c) the optical fibres admeasuring 3.35 lakh Kms found in the E2 premises and seized; and (d) the raw materials themselves lying in the EOU are taken into consideration. It is argued that the total raw material could be accounted for i the manner. At best only Rs. 2.5 crores is payable towards duty on the imported raw material, they contended.

85. We have considered the rival contentions. The Commissioner dealt with this aspect in paras 437 to 452 of his order. He did not give detailed finding on the contentions raised by the appellants before him. It is not known whether any raw materials were lying in the EOU as claimed by the appellants, whether the Commissioner considered the raw materials contained in the optical fibres lying in the EOU, whether the has taken into consideration the quantity of raw materials contained in the seized 3.35 lakh Kms of optical fibres, and finally whether he has considered the quantity of raw materials used in the exported optical fibers. We are not privy to the evidence placed before the Commissioner in support of these pleas. The Commissioner ought to have dealt with the plea, that some raw materials were still lying in the factory and given a finding. He also failed to give

any finding on the other pleas made before him in this regard. We observe that the Commissioner demanded Rs. 6.93 crores on the raw materials without proper justification. We set aside this demand and remand the matter to the Commissioner for a fresh decision after examining the contentions raised by the appellants.

86. In regard to penalty imposed under the customs Act, it is argued that the machinery imported duty free under Notification 53/97 has been used both the manufacturing export goods as well as those which are alleged to have been cleared for home consumption clandestinely.

Neither Notification No. 53/97 nor any provisions of the Customs Act provides that such machinery should be exclusively used for producing goods for export. In support, the appellants cite the Tribunal's decision in Indian Charge Chromes Ltd. 2001 138 ELT 69 and Karl Storz Endoscopy 2002 123 ELT 1071.

87. We see no merit in these propositions. We observe that penalty was imposed on the importer under Section 112(a) of the Customs Act, as the capital goods imported under notification No. 53/97 violated the conditions of that modification rendering them liable to confiscation under Section 111 (o) of the Customs Act. One of the conditions of the said notification is that the import exports out of India 100% or such other percentage as may be fixed by the Board of Approvals, of articles manufactured wholly or partly from the goods during the stipulated/extended period permitted by the Board. The main contention of the Department is that the importer has not exported goods in accordance with the policy except for a small quantity. This constitutes violation of the condition under which the capital goods were allowed to be cleared free of duty. An unit under EOU scheme can undertake job work for a domestic unit provided the goods so produced are exported. The scheme does not allow the capital goods imported under notification 53/97 to produce goods for domestic market. The importer by his acts of commission and omission rendered the goods liable to confiscation under Section 111(0) and therefore is liable to penalty under Section 112(a) of the Customs Act. We however hold that the quantum of penalty has to be redetermined in the light of our observations in para 85.

88. For the reasons cited above, the capital goods are liable to confiscation under Section 111(o) of the Customs Act. We uphold the confiscation of the capital goods. There is a clear violation of the condition of notification 53/97 under which the goods are allowed clearance. The capital goods were otherwise used as is evident from the foregoing discussions, rendering them liable to confiscation.

89. The Commissioner however did not demand duty on capital goods under notification 53/97 on the ground that the appellants executed a bond, in accordance with the directions of the Hon'ble Supreme Court binding themselves to pay the differential duty between the duty payable on the capital goods upon their debonding from EOU and the one already paid at the rate applicable to EPCG, in case it is adjudicated that the appellants obtained the EPCG licence wrongly. It is hoped that this matter would be adjudicated upon by the time the Plant and Machinery is ready to be redeemed as at that time (at the time of redemption) the appellants are required to pay the correct duty leviable on the capital goods.

90. For the reasons given by us while discussing the penalties under Central Excise Rules, we are inclined to set aside the penalties. The appellants are far removed from the act of importation of the capital goods and raw materials. These people cannot be said to have concerned themselves in dealing with goods which are liable to confiscation. In a vague sense they may be aware that the goods produced in the EOU are being removed to domestic unit. But such awareness itself is not enough to impose penalties under Section 112(b) of the customs Act. We set aside the penalties on the above mentioned persons.

91. The appellants prayed that this Tribunal should give appropriate directions to the authorities below to grant common registration in E2 and E2 units, so that several operational difficulties encountered are sorted out. Without expressing any view on this prayer we hope the authorities will take view in accordance with law. The two units, during the period of dispute, were acting like a large happy family albeit in contravention of the provisions of the Policy in this regard.

When such registration as pleaded is granted they would be legally united.

92. The contention that the show cause notice is issued without jurisdiction is rejected. The Commissioner having jurisdiction over the bounded warehouse can adjudicate upon the unauthorised removals from such bounded warehouse. The raw materials and the capital goods were warehouse in the bonded premises over which the Commissioner has jurisdiction. We also reject the contention that the Development Commissioner should have adjudicated the case. We reject the contention that show cause notice is premature. It is not necessary to wait for five years once unauthorised removals from an EOU are detected.

1. Central Excise duty under proviso to Section 3(1) of the Central Excise Act is payable on 6,35,626.7 kms of optical fibres is upheld subject to granting credit of duty already paid (Rs. 10,54,54,680) on this quantity when it was cleared in From E2.

2. Confiscation of 3,35,636 kms of optical fibres manufactured in E3 removed without payment of duty under Rule 25(1)(a), (b) and (d) is upheld. Redemption fine of Rs 10 crores is reduced to Rs 5 crores (five crores) if they are cleared for home consumption. If however these goods are exported, fine is reduced to Rs 50 lakhs (fifty lakhs). Duty on the said goods is payable under proviso to Section 3(1) of the Central Excise Act on redemption if the goods are cleared for home consumption. No duty if they are exported out of India on payment of fine (Rs. 50 lakhs).

3. Duty on pre-forms (9013 kgs) is held to be payable under proviso to Section 3(1) of the Central Excise Act as demanded.

5. Penalty under Section 11AC of the Central Excise Act is reduced to Rs 84,33,38,000/-.

6. Penalty under Rule 26 of the Central Excise Rules imposed on S/Shri Navin Agrawal, L. Ram Kumar, S.L. Bajaj, Abhay Kelkar, Venkatesan Babu and Pramod Unde are set aside thus allowing their appeals.

7. Confiscation of capital goods as mentioned in Annexure 47 to the show cause notice under Section 111(0) of the Customs Act for contravention of the provisions

of notification 53/97 Cus. upheld. Redemption fine is reduced to Rs 15 crores (fifteen crores).

8. Duty demanded on the raw material is set aside and the matter remanded to the adjudicating authority to redetermine the same after considering the submissions made by the appellants. Opportunity of being heard should be accorded along with an opportunity to furnish evidence if any in this regard.

9. Penalty of Rs. one crore imposed on the appellant company under Section 112(a) is set aside. The Commissioner will redetermine the quantum of penalty after ascertaining the extent to which raw materials imported under notification 53/97-Cus. are not accounted for. We may however make it clear that since the capital goods are held to be liable to confiscation under Section 111(o), penalty is imposable.

10. Penalties imposed on the various employees under Section 112(b) at sl. no. 6 above are set aside and appeals allowed.

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