A.C. Exports and ors. Vs. Commissioner of Central Excise

A.C. Exports and ors. Vs. Commissioner of Central Excise

SooperKanoon Citation : sooperkanoon.com/45195

Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Mar-28-2007

Reported in : (2007)(119)ECC104

Judge : J Balasundaram, Vice, A T K.K.

Appellant : A.C. Exports and ors.

Respondent : Commissioner of Central Excise

Judgement :

1. The brief facts of the case are that one M/s A.C. Exports a proprietary concern of Shri Anil Chandak who his taken Central Excise Registration for manufacture of lay flat tubing and carry bags have purchased 1468.470 MTs of raw materials i.e. HDPE/PP Granules from M/s Haldia Petrochemicals Ltd., Calcutta during the period 01.04.2003 to 08.07.2003 and availed Cenvat credit of duty paid on such granules procured from M/s Haldia Petrochemicals Ltd., Calcutta and thereafter shown to have sent to various job workers to get lay flat tubing manufactured by them. Out of above quantity 1168.00 MTs of finished goods i.e. lay flat tubing in rolls was sold to M/s Hari Vishnu Packaging Ltd., Nagpur and 78.470 MTs of finished goods i.e. lay flat tubing in rolls was sold to various other parties on payment of duty, 190 MT of HDPE/PP Granules were sold as such by them to M/s Sunil Plastics, Thane on payment of duty and 32 MTs. Of waste was also sold on payment of duty.

2. In respect of 1168 MTs of finished goods i.e. lay flat tubing got manufactured from job worker and sold to M/s Hari Vishnu Packaging Ltd. it was found that they have fraudulently availed of Cenvat credit amounting to Rs. 27,14,880/- on 480 MT of HDPE/PP granules as the same was found to have been supplied to non existent job workers and received from them under job work challan. Enquiries at the end of job workers and the transporter who transported the raw materials and the finished goods revealed that the most of the job worker's unit were not in existence and no material was supplied to them and only a paper transaction was undertaken and consequently 447.410 MT of finished lay flat tubing said to have been manufactured from 480 MT of HDPE/PP granules and supplied to M/s Hari Vishnu Packaging Ltd. was never manufactured or received by M/s HVPL.

3. Simultaneous search was carried out at the premises of M/s HVPL and scrutiny of the records reveals that M/s HVPL have received 1168 MT of lay flat tubing and shown to have carried out the process of cutting and printing of such product without availing the Cenvat credit of duty paid on goods. These tubings were later on cleared to one M/s Abhirup under ARE-3A certificate on the basis of pre-authenticated CT-3 certificate under the provision of Notification 23/2003 dated 31.03.2003. M/s Abhirup is a 100% E.O.U. and as a result of search carried out at their premises, it was discovered that out of 1168 MTs of lay flat tubing said to have been received by them from M/s HVPL, 708 MTs of lay flat tubing after being cut to specific sizes was cleared by them to one M/s ATCOM Technologies, a DTA unit against payments to be made by them from the exchange earners foreign currency account. Statement of Directors of M/s ATCOM were recorded in which they stated that they did not have any commercial relationship whatsoever with M/s Abhirup Export Ltd. and that they have never purchased the goods viz. HDPE/PP lay flat tubing/cut length from M/s Abhirup Exports and the question of taking delivery of the goods does not arise as they do not have any godown at the address shown by M/s Abhirup. They further stated that no remittance or payments were made by M/s ATCOM to M/s Abhirup Export Pvt. Ltd. as no supply whatsoever was received by them. Statement recorded from the transporter also revealed that he has prepared lorry receipts as per directions received from M/s A.C. Exports, M/s HVPL and Abhirup export, but no goods have been transported from these premises in respect of above transactions.

In view of the above it was concluded that M/s Abhirup has diverted 708 MTs of lay flat tubing to the domestic market without payment of duty and the balance 460 MT was never received by them as it was neither manufactured by M/s A.C. Export on job work basis and therefore the receipt of it by M/s HVPL and M/s Abhirup does not arise and that M/s Abhirup had made false entries in its warehouse register showing the receipt of 1168 Mts. of lay flat tubing for which they M/s Abhirup itself the re-warehousing certificate.

4. As a sequel to the above investigation a show cause notice was issued to the appellants asking M/s A.C. Exports as to why Cenvat credit amounting to Rs. 27,14,880/- wrongly availed by them in respect of 480 MTs of HDPE/PP granules which was never used by them for manufacture of lay flat tubing should not be recovered and central excise duty amounting to Rs. 2,21,445/- in respect of 78.470 MTs.

Cleared by them during the month of June 2003 and July 2003 should not be recovered from them as the payment were not made by the prescribed date and amount of Cenvat credit of Rs. 10,74,640/- on clearance of 190 MTs of HDPE/PP granules cleared as such should not be recovered from them and why a penalty should not be imposed on them under Rule 25 of the Central Excise Rules, 2002, Rule 13 of the Cenvat Credit Rules, 2002 read with Section 11AC and interest of proportionate should not be demanded.

5. Similarly M/s Abhirup were asked to state as to why Central Excise duty amounting to Rs. 1,53,92,424/- on 708.773 MTs lay flat rolls (Printed polythene unsold bag of specific sizes) should not be demanded and penalty under Section 11AC and Rule 25 should not be imposed.

Penalty was also proposed on Shri Raj Kishore Maniyar, Director of M/s Abhirup for dealing with 708.773 MT of lay flat tubing for which there was reason to believe that they were liable to confiscation under the Central Excise Act and that M/s Abhirup has indulged in paper transaction without supplying any goods to M/s ATCOM. Similarly Shri Sandeep Maniyar, Director of M/s Abhirup Exports Pvt. Ltd. was also asked as to why penalty be not imposed him for dealing 708.773 MTs goods which he has reason to believe were liable to confiscation and for issuing bogus re-warehousing certificate in respect of 447.410 MTs of lay flat printed rolls received from M/s HVPL so as to avail and claim unlawful deemed exports benefit.

6. M/s HVPL was also asked to explain as to why penalty under Rule 26 should not be imposed on as he has abetted M/s Abhirup by raising bogus invoices on M/s Abhirup for clearances of 447.410. MT of lay flat rolls, mis-declaring the particulars on invoices and in various statutory records by manipulating bogus and fraudulent entry therein so as to claim unlawful deemed export benefits. Shri Brijkishor Maniyar, Director of M/s HVPL was also charged for abetting M/s Abhirup by raising bogus invoice in respect of 447.410 MTs of lay flat tubing roles. Shri Anil Chandak, power of attorney holder of M/s A.C. Export was also asked as to why penalty should not be imposed under Rule 26 of the Central Excise Rules, 2002 for clandestine removal of HDPE/PP granules without reversal of Modvat credit and for engaging in paper transaction without issuing any goods to M/s HVPL. The show cause notice was adjudicated by Commissioner and he confirmed the duty amount as demanded in the show cause notices both in respect of M/s A.C.Export as well as M/s Abhirup and imposed a penalty of Rs. 40,10,965/- under Rule 13 of the Cenvat Credit Rules read with Section 11AC and Rule 25 of the Central Excise Rules on M/s Abhirup Exports demanding interest on the duties from the two units, denied Modvat credit as stated in the show cause notice, imposed a penalty of Rs. 1,53,92,424/- on M/s Abhirup Rs. 5 Lakhs each on Shri Raj Kishore Maniyar and Sandeep Maniyar, Director of M/s Abhirup and penalty of Rs. 1 Lakh each on M/s Hari Vishnu Packaging Ltd. Shri Shri Brijkishore Maniyar, Director of M/s Hari Vishnu Packaging Pvt. Ltd. and Shri Anil Chandak, Power of Attorney Holder of M/s A.C. Export under Rule 26 of the Central Excise Rules, 2002.

7. The learned advocate for the appellants submitted that the department in show cause notice has first alleged that M/s A.C. Exports have done only paper transaction and no inputs were sent to the job worker and diverted the inputs in the local market without reversing the credit. However at the same it also alleges that the lay flat tubing manufactured by M/s A.C. Exports were received by M/s HVPL who after printing and cutting sold them to M/s Abhirup, which was again sold to M/s ATCOM and therefore these two statements contradicted each other as once

it is alleged that M/s A.C. Exports have not manufactured any lay flat tubing, the question of its receipt and sale by M/s HVPL, M/s Abhirup and M/s ATCOM does not arise.

8. It was submitted that the allegation against M/s A.C. Exports is that they have cleared 480 MTs of granules to job worker at Katangi and Balaghat for conversion into lay flat tubing mainly to two job workers, M/s MOR Enterprises, Katangi and M/s Yogesh Enterprises, Balaghat, who were not found in existence. In support thereof two panchnamas were drawn at these two places wherein the panchas stated that no such unit existed in those places and in fact there was no manufacturer of lay flat tubing in that area. Statements of the transporter has also been recorded who has stated that no material was transported by him from the premises of M/s A.C. Exports to the job workers and that only lorry receipts were prepared as per instructions of M/s A.C. Exports. They have however asked for cross examination of the panchas and the transporter which was not allowed and once the cross examination has been denied, the statements cannot be relied upon as they were contrary to the documentary evidence available on record which has to be preferred in comparison to statements which have undergone scrutiny of cross examination. Certain decisions of the Tribunal were cited to state that where statements of the witnesses have been recorded but are not produced for cross examination, such statements could not be relied upon to establish the case of clandestine removal. It is not clear whether the panchas have visited the entire city to find out the existence of unit and when representatives of the unit were available, they should have been examined by the adjudicating authority. So far as the transporter is concerned once he has issued the lorry receipts, he cannot dens the transport of the goods and if he has done so, he should also have been made one of the noticees, which has not been done and therefore his statement cannot be relied upon. If he has chosen to give wrong vehicle number, the mistake was entirely of his and the appellants cannot be considered responsible for the same. The show cause notice alleges that they have resorted to this modus operandi in order to make benefit of deemed exports available to M/s HVPL without establishing any nexus between them. There is no motive for them to do so. In view of this the charge of clandestine removal cannot be held out against them.

9. As regards removal of 190 MTs of granules as such they do not dispute the duty liability on the same and the same has already been paid by them. Similarly they admitted the duty liability in respect of 78.48 MT lay flat tubing cleared involving duty of Rs. 2,21,445/- which also they stated has been paid and could not be paid earlier because records were in possession of the department.

10. As regards M/s Abhirup, it was submitted that the allegation against them is that out of 1168 MT of lay flat tubing they have received only 708 MTs and have issued a false re-warehousing certificate in respect of the balance quantity which was never manufactured by M/s A.C. Exports and that the quantity of 708 MTs after printing and cutting was never cleared to M/s ATCOM as the Director of M/s ATCOM have denied the receipt of the same and that this 708 MTs of lay flat tubing cut to specific sizes, which is described by the department as unsealed printed polythene bags were diverted in the local market without payment of duty and without permission of the Development Commissioner for which the duty at the rate provided under proviso to Section 3 of the Central Excise Act has been demanded. It was submitted that so far as non receipt of 447 MT and lay flat tubing manufactured out of 480 MTs is concerned, their stand is the same as that in case of M/s A.C. Export viz. that these goods were very much manufactured and sold to M/s HVPL on payment of duty and the department's stand is based on statement of certain persons whose cross examination was not allowed and is therefore unsubstantiated.

11. As regards 708.773 MTs of lay flat rolls cleared by them to M/s ATCOM, it was submitted that the same was supplied to M/s ATCOM, but on account of some dispute between them M/s ATCOM has denied the receipt of the same and therefore they have asked for the cross examination of the two directors of M/s ATCOM but same has been denied alongwith the cross examination of the transporter who also has stated that he hap only transported the goods to M/s ATCOM that they have prepared the lorry receipts on the asking of M/s Abhirup and M/s ATCOM. These statements cannot therefore be relied upon to hold that no clearances were made to M/s ATCOM.12. It was submitted that the lay flat tubing supplied by M/s HVPL was duty paid and the process undertaken by M/s HVPL was that of printing and cutting some of them to various sizes, which activity

does not amounting to manufacture, as has been held by the Apex Court decision in the case of J.G. Glass Industries where printing of glass bottles was held as not amounting to manufacture and for determining whether an activity amounts to manufacture or not, the Apex Court laid down two-fold test first whether by the said process a different commercial commodity comes into existence or whether the identity of the original commodity ceases to exist and secondly, whether the commodity which was already in existence will serve no purpose or will be of no commercial use but for the said process. It was also submitted that the Tribunal in the case of Rajpurohit GMP India Ltd. v. Commissioner of Central Excise, Mumbai has held that cutting and slitting of hot-rolled sheets and plastic sheets does not amount to manufacture as no new and commercial different product emerged from the said activity. In the present case the lay flat tubing after cutting & printing is nothing but sheet of PP/HDPE fabric in roll form which is cut to length and by cutting no new commodity emerges nor is the identity of the same destroyed.

Therefore the activity cannot be considered to be that of manufacture.

In view of the same there was no requirement to obtain lay flat tubing from M/s HVPL under ARE-3 and CT-3 certificate as there was no requirement of further payment of duty by M/s HVPL. Similarly on lay flat tubing received in roll form or in cut length, they have further undertaken the activity of cutting into specific sizes and this activity also cannot be considered as that of manufacture and the Tribunal's decision relied upon by the Commissioner are not relevant as in those cases the duty was not paid at the initial stage itself.

Therefore once the activity undertaken by them does not amount to manufacture, the question of payment of duty even in respect of DTA clearances does not arise. They however admitted that the payment from M/s ATCOM was not received and that as per the provision of Exim policy, the payments were required to be made from EEFC account for being considered as deemed export and since the payment was not made from the EEFC account it cannot be considered as deemed exports. It was also submitted that on the one hand the department has alleged that the transaction between M/s HVPL and M/s Abhirup are bogus and on paper only, it has contradicted itself by say in para 19(i) of the show cause notice that they only supplied 708.773 MTs of lay flat rolls (printed polythene unsealed bags of specific sizes) to M/s ATCOM but has diverted the same into DTA which means that the appellants have not received any goods from M/s HVPL at all and therefore the allegation of diversion cannot survive at all.

13. Without prejudice to above it was submitted that once the goods have been supplied to M/s ATCOM the question of rejecting the transaction value and arriving value in terms of Rule 7 does not arise and the reliance placed by the Commissioner on the Larger Bench decision in the case of Himalaya International v. Commissioner is erroneous as the said decision has been set aside by the Hon'ble Supreme Court reported in 2001 (179) E.L.T. A100 and the matter was remanded back to the adjudicating authority for adjudication on all issues.

14. A plea has also been taken that as the supplies were made to M/s ATCOM in around May 2003, the notice which has been issued on 02.06.2004 is beyond period of one year and therefore the demand is time barred. In view of this no duty was payable by them nor any penalty is imposable on them under Section 11AC or Rule 25 of the Central Excise Rules.

15. As regards M/s HVPL it was submitted that the allegation is that they have not received 447 MTs of lay flat tubing as the same was not manufacture by M/s A.C. Export, it was submitted that the submissions made in respect of M/s A.C. Exports equally apply to M/s HVPL and it is their contention that the goods have been manufactured by M/s A.C.Exports and received by M/s HVPL and therefore no penalty is imposable on it.

16. As regards penalty imposed on Shri Anil Chandak, Shri Raj Kishore Maniyar and Shri Brijkishore Maniyar, it was submitted that since no clandestine removal has taken place and the goods have been supplied to M/s HVPL and M/s ATCOM and since no duty is admissible from them the question of imposition of fine and penalty does not arise.

17. The learned D.R. however reiterates the finding of the Commissioner and submits that it is being wrongly projected that the department is one the one hand alleging that no lay flat tubing has been manufactured at all while on the other

hand it is alleging that the same has been diverted in domestic tariff area and therefore once there is no manufacture, there can be no diversion in the domestic tariff area. It was submitted that the case of the department is M/s A.C. Exports have purchased 1468.40 MTs of raw material out of which 190 MTs was sold as such to M/s Sunil Plastic and 78.470 MTS of lay flat tubing was sold to various other parties on payment of duty. Out of the balance 1200 MTs, 32 MT was the wastage which was cleared on payment of duty and therefore what was left was 1168 MT. It is the department's contention that out of 1168 MTs around 447 MTs was never manufactured by M/s A.C.Exports as the job workers were found to be non-existent and only 721 MTs was manufactured and received by M/s HVPL. Out of the same 708 MTs was sold to M/s Abhirup and 13 MT was the wastage in printing and cutting undertaken by the two units. Therefore allegation in brief are that 447 MTs of lay flat tubing was never manufactured and therefore the corresponding credit availed on the same has been ordered to be recovered. For the balance 708 MTs since M/s Abhirup failed to account for the same and cleared the same in the domestic Tariff area, duty was demanded on the same and being clearance affected by 100% E.O.U.without permission from Development Commissioner into domestic tariff area, the duty has been demanded as per rate prescribed under proviso to Section 3A of the Central Excise Act.

18. As regards non manufacture of 447 MTs of lay flat tubing is concerned, it was submitted that the same is based on the statement of the panchas from the two places, who stated that the units were not in existence and the statement of the transport agency, who has stated that the goods were never transported. The vehicle numbers on which the goods are said to have been transported were found to be Motor Cycle, three wheeler and were not having the capacity to load the goods which was indicated on the challans. M/s A.C. Exports when confronted with this fact promised to revert back within a week which he never did and could not produce the representatives of the job worker's units as promised in their reply. The demand is therefore well founded.

19. As regards M/s Abhirup it was submitted that the two Directors of M/s ATCOM have admitted that they have no commercial dealing with M/s Abhirup, they have not received any goods nor do they have a godown as reflected in the invoices

and further they have not made any payment for the goods. The appellants have also admitted that the payments have not been received and that the goods were not exported. The clearances to DTA was obviously without permission from Development Commissioner and without achieving the net foreign exchange and therefore they have to be charged the duty. The activity undertaken by M/s Abhirup of converting lay flat tubing into printed unsealed polythene bag of specific sizes amounts to manufacture as a new and distinct commodity has come into existence as against the lay flat tubing which were cut to the sizes of unsealed bag, lose their character as a lay flat tubing. The dis-allowance of cross examination of the directors of M/s ATCOM and transporter has not affected the appellants in any way as they were given an opportunity to produce evidence regarding delivery and receipt of goods by M/s ATCOM which they failed to give. In any case they are accepting that the payments were not received and the goods were not exported as the payments were required to be made from EEFC account. In view of the same the duty has been rightly demanded and penalty imposed.

20. We have considered the submissions. As regards M/s A.C. Exports the charge against them is that their claim of issuing 480 MTs of HDPE/PP granules to job workers who manufactured 447.410 MTs of lay flat tubing which they claim to have cleared on payment of duty is bogus as the job workers to whom the material was sent for manufacture of lay flat tubing were not in existence, as per panchnama drawn at the two places and the statement of the transporter who stated that he has not delivered any material on behalf of M/s A.C. Export to the said job workers. The appellants have pleaded that as the panchas and the transporter were not allowed to be cross examined by him their statement cannot be relied upon. We, however, find M/s A.C. Exports when confronted with the statement of the panchas and the transporter sought a week's time to explain the discrepancy which they never explained. Further, there is a finding by the Commissioner that M/s A.C. Exports in their written submission dated 10.03.2005 claimed existence of units M/s MOR Enterprises and Yogesh Enterprises and promise to produce their representatives of these firms but never produce the same. Once the Revenue has confronted them with the statements of the panchas and the transporter which has not been retracted till today, the burden shifted on them to produce the representatives of the job workers, their Central Excise registration,

sales tax registration, Income Tax assessment or any other evidence to establish that they were very much in existence or even could have got physical verification of the premises done. In the absence of the same, it has to be concluded that the material was never supplied nor any goods were made as the job workers were not in existence. This is also fortified by the facts that the vehicle number on which the material is said to have been transported was in some cases found to be that of motor cycle or vehicle which do not have capacity to carry the declared weight. Accordingly the demand of Rs. 27,14,880/- relating to inadmissible credit is upheld.21. We further find that there is no dispute regarding demand of Cenvat credit amounting to Rs. 10,74,640/- in respect of 190 MTs of plastic granules cleared as such by M/s A.C. Exports and only dispute is delay in payment. This demand is therefore also upheld. Similarly there is no dispute regarding demand of Rs. 2,21,445/- on clearance of 78.470 MTs of lay flat tubing during the month of June 2003 and July 2003 which was not paid by the prescribed date. This demand is also upheld.Consequently the demand of interest under Section 11AB is also upheld.22. Since the inputs amounting to about 480 MTs have been removed without reversal of credit and duty has not been paid in respect of other two demands at the time of clearance or within the permissible period, imposition of penalty under Rule 13 of Cenvat Credit Rules read with Section 11AC of the Central Excise Act and Rule 25 of the Central Excise Rules, is also upheld. However taking into account that amount of Rs. 40,10,965/- was paid prior to issue of show cause notice, the same is reduced to Rs. 5 Lakhs only. Penalty of Rs. 1 Lakh on Shri Anil Chandak, Power of Attorney holder of M/s A.C. Exports, under Rule 26 is also upheld as he had a knowledge that 480 MTs of raw material have been cleared without payment of duty.

23. As regards M/s Abhirup Exports the allegation against them is that out of 1168 MTs of lay flat tubing, they have received only 708 MTs.

The balance 447.410 MTs of lay flat tubings manufactured out of 480 MTs of HDPE granules were never manufactured by M/s A.C. Export and therefore could not have been supplied to M/s H.V.P.L. Taking into account 13 MTs being the wastage, said to have occurred at the premises of M/s HVPL the total quantity received by M/s Abhirup could be only 708 MTs. Since we have already held that

447 MT of lay flat tubing was never got manufactured and supplied to M/s HVPL by M/s A.C. Exports, the allegation regarding non receipt of the material and issuing false re-warehousing certificate in respect of this quantity with a view to get deemed export benefit is therefore upheld.24. As regards balance 708 MTs, while appellant pleads that this lay flat tubing roles were cut by them to specific sizes and supplied to M/s ATCOM, the department has denied the same on the basis of statement of the directors of M/s ATCOM and the transporter. The fact however remains that the goods were never exported and cannot be adjusted against deemed export as the payment was not received from the EEC account. Ultimately these clearances will have to be considered as clearance for DTA and not for export and this is admitted by both parties and is not under dispute. There is also no dispute that no permission was taken from the Development Commissioner to sell the goods in DTA as M/s Abhirup have not earned the required net foreign exchange. The appellants have however taken a plea that the activity undertaken by M/s HVPL was merely that of printing and cutting and this activity does not amount to manufacturers lay flat tubing role did not undergo any change and retained their identity as lay flat tubing only.

In support thereof they have referred to the decision of the Apex Court in the case of J.G. Glass Industries cited supra, where printing of glass bottles of duty paid glass bottles was held as not amounting to manufacture and the two test laid therein that by printing no different new commodity comes into existence nor the identity of the original commodity ceased to exist and further it is not established that the commodity which was already in existence will serve no purpose or will be of no purpose and use but for the said process. Reference has also been invited to the Tribunal decision in the case of Rajpurohit GMP India Ltd. v. Commissioner of Central Excise, Mumbai where cutting and slitting of plastic sheets has been held as not amounting to manufacture. It was accordingly submitted that there was no requirement of payment of duty by M/s HVPL and CT-3 certificate was erroneously obtained by them under the mis-conception. It was submitted that in their own premises they have only undertaken an activity of cutting the printed rolls into specific sizes and the same have been cleared by them as cut length and since the activity undertaken by them does not amount to manufacture the payment of duty in respect of DTA clearance does not arise.

25. We find substance in the above plea of the appellants, that the activity of cutting undertaken by M/s HVPL on duty paid lay flat tubing does not amount to manufacture as what was cleared by them was lay flat tubing rolls only which fact is not denied by the department. The mere printing and cutting in some cases does not change the character of the product and they do not lose their identity as lay flat tubing merely because they have been printed as has been held by the Apex Court in J.G. Glass case. The twin test laid down by the Apex Court in J.G.Glass case to determine whether the activity amounts to manufacture or not i.e. they do not lose their character as lay flat tubing and no new commodity comes into existence and that was without printing, lay flat tubing has its own use are fully satisfied. The activity undertaken by them is akin to the one in the case of Rajpurohit case (cited supra), where also process of slitting and cutting was held as not amounting to manufacture. Similar observation will hold good for the activity undertaken by M/s Abhirup who also allegedly printed the rolls in some cases and cut the rolls to specific sizes. What was ultimately cleared by M/s Abhirup was cut lengths. Cut lengths is one of the final products for which the unit was registered as EOU as per the letter of permission. Cut length of lay flat tubing can never be considered to be a commodity different than the lay flat tubing. It may be an intermediate process for conversion of lay flat tubing into bags but cut length cannot be considered as a bag. When cut length is sealed from one side, it is only then that a bag will come into existence and it is then that a different product can be said to have emerged, as bags are known differently in the market as compared to lay flat tubing, Commissioner has referred to the decision of the Tribunal in the case of CCE v. Weston Electronics 2000 (116) E.L.T.(T-NB), Pet Plastics v. Commissioner, Central Excise, Thane-II 2006 (195) E.L.T.280 (Tri.-Mumbai), Board's Circular No. 314/30/97-CX dated 06.05.1997 wherein it has been clarified that the term 'manufacture' for the purpose of export has wider meaning than used in Section 2(f) of the Central Excise Act, 1944 and would encompass activities and process which are not in the normal course be covered under the definition of manufacture as provided for under Section 2(f) of the Central Excise Act, 1944. Reference has also been invited to the CEGAT decision in the case of S.T.L. Exports Limited v. Commissioner of Central Excise, Indore where galvanising of mild steel pipe was held to be manufacturing process for the

purpose of Notification 1/95-CE relating to 100% EOUs and the 100% EOU which has cleared the goods in DTA without payment of duty instead of exporting the same was held liable to pay the duty as Notification 1/95 was not applicable in respect of sales to DTA but only applied for sale to 100% EOU for the purpose of export. These cases are not relevant. The circular and the decisions only clarified that goods may be supplied to EOU without payment of duty even though the activity undertaken by 100% EOU may strictly not amount to manufacture as contemplated under Section 2(f).

However, when it comes to liability to duty, duty will be chargeable only if the goods have been brought by 100% E.O.U. without payment of duty for the purpose of export but were sold in D.T. Area without being exported. In the present case as we have held the activity undertaken by M/s HVPL did not amount to manufacture and therefore there was no requirement of payment of duty by M/s HVPL. The goods received by M/s Abhirup have to be treated as duty paid. As duty was paid M/s A.C.Exports when delivered to M/s HVPL, CT-3 certificate was not needed.

Once the goods were already duty paid, further requirement of paying duty will arise only if the activity undertaken by M/s Abhirup amounted to manufacture. As we have already held that this activity did not amount to manufacture, M/s Abhirup were not liable to pay duty even in respect of D.T.A. sales. They can only be charges for indulging in D.T.A. sales without permission from Development Commissioner for which penalties can be imposed for violation under different rules but duty as such is not demandable. We accordingly set aside the demand of duty amounting to Rs. 1,53,92,424/- alongwith interest from M/s Abhirup.

Since there is no evasion of duty, penalty under Section 11AC can not be imposed. However, since a common penalty has been imposed under Section 11AC and Rule 25 without quantifying the penalties separately imposable under the two provisions, the entire penalty is set aside.

26. As regards penalty imposed on Shri Rajkishore Maniyar and Shri Sandeep Maniyar, Director of M/s Abhirup Exports, we find that both of them were concerned in transporting, removing, depositing, keeping, concealing, selling

708.773 MTs cut length of lay flat tubing which could not have been cleared to D.T.A. and therefore they had reason to believe that the goods were liable to confiscation under Central Excise Act and in view of the same the imposition of penalty on them are upheld. However, since we have held that there had been no evasion of duty, penalties are reduced from Rs. 5 Lakhs to Rs. 2 Lakhs each.

27. As regards M/s H.V.P.L. and its director Shri Brijkishore Maniyar, we find that the case against them is that they have not received 447.10 MTs of lay flat tubing nor have they supplied them to M/s Abhirup Exports and have created false records to show their receipt and removal. However, penalty under Rule 26 can be levied on a person who acquires possession of or is in anyway concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing or in any other manner deals with in any excisable goods which he knows or has reason to believe that the goods are liable for confiscation. In the present case as the finding itself is that the invoices were bogus and no goods had at all been either received by M/s H.V.P.L. or supplied by them to M/s Abhirup no penalty under Rule 26 can be imposed on them. We accordingly set aside the penalties imposed on M/s H.V.P.L.

and its director Shri Brijkishore Maniyar.