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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Nov-21-1995

Reported in : (1997)LC767Tri(Delhi)

Appellant : Preet Chattons

Respondent : Collector of Customs

Judgement :
1. All these appeals have been filed against the various orders of Collector of Customs, Bombay [involving] a common factual background.

The appellants herein imported various consignments of metallic chains and brass fittings which were declared in the Bill of Entry as embellishments for use in the leather industries and the clearance of these consignments [was] allowed by the Customs House, Goa allowing the exemption under Notification No. 224/85. This notification exempted goods specified in the Table thereto when imported into India for use in leather industries from the whole of the additional duty of customs also granted exemption at the rate of 40% ad valorem on basic customs duty. Serial No. 10 of the Table to the notification described the specified goods as "Metallic embellishment other than zip fasteners".

In all these cases subsequent to the clearance of the goods notices were issued under Section 28 of the Customs Act, 1962 for recovery of the duty short levied on the ground that the exemption under Notification No. 224/85 was not available to the goods as there was no indication in the Bill of Entry that the goods imported

were for leather industry and the notices also mentioned that there was no conclusive proof in this regard. The appellants took the general defence that the goods were used in leather industries by them and then they further submitted that they hold SSI Registration Certificate showing leather goods as one of their manufactured product. In all these cases, the Assistant Collector held that mere SSI registration was not sufficient and the appellants should produce some conclusive proof to show that the goods imported by them were used in leather industry to justify the exemption since they did not produce any such conclusive proof, the Assistant Collector confirmed the demand. These orders of the Assistant Collector were all challenged before the Collector of Custom (Appeals). The Collector of Custom (Appeals) held that the goods were imported brass chains in running length and as such cannot be straightway be used as embellishment but have to be cut to size. This was not the condition in which the goods have been imported.

The Collector (Appeals) further found that though no end use condition was contained in the notification yet the appellants should have produced proof of the actual use of the goods in leather products as embellishment because they were capable of being used in product other than leather such as imitation jewellery which also the appellants manufactured. The Collector (Appeals) therefore, upheld the orders of the Assistant Collector.

2. Shri M.M. Mathur, learned advocate appeared for the appellants M./s.

Preet Chattons and Shri N.C. Sogani, learned Consultant appeared for M/s. G.K. International. Shri Mathur contended that the brass chains imported [were] only for decorative purposes of their final product, it had no functional use. The learned advocate pointed out at the time of original assessment goods have been exempted and samples of the product using the imported goods as embellishment had also been shown to the assessing Officer. Thereafter, only the goods have been cleared allowing the exemption under Notfication No. 224/85. The appellants hold SSI Registration Certificate for manufacture of leather goods. The learned advocate urged that the Collector (Appeals) in upholding the demand had taken certain grounds which were not at all mentioned in the notice for recovery of short

levy issued by Assistant Collector. The Collector (Appeals) also refers to certain orders of the Assistant Collector issued in respect of the other appellants about which appellants M/s. Preet Chattons were not put on notice. It was further argued that order of the clearance of the goods granted by the assessing officer after satisfying himself about the nature of the goods is an order under Section 47 of the Customs Act, 1962 and such an order can only be appealed against or the order should be reviewed by the Higher Authority but the same Assistant Collector cannot modify the assessment originally done and demand duty. The Delhi High Court judgment in the case of Jain Shudh Vanaspati Ltd. and Anr. v. Union of India and Ors. reported in 1982 (10) E.L.T. 43 (Delhi) and Bombay High Court judgment in the case of Union of India v. Popular Dyechem - 1987 (28) E.L.T. 63 (Bom.) were cited in this context. It was further argued by the learned Consultant that there was no requirement in the notification for production of end-use certificate. The learned Consultant referred to the wording of Notification No. 224/85 which grants the exemption to specified goods when imported into India for use in the leather industries. The term for use has been interpretated by the Supreme Court in the case of the State of Hanyana v. Dalmia Dadri Cement Ltd. reported in 1988 (14) ECR 292 (S.C.) wherein the Supreme Court held that the term would mean intended use and the Court held that in the context of such a wording in a notification, the exemption cannot be denied if some part of the goods is not actually used. Such an exemption cannot be interpretated to mean that it is available only on the actual use being established, held the Supreme Court. The Supreme Court decision has been followed by the Tribunal in a similar situation in the case of Asean Trading Agency v. Collector of Customs, reported in 1991 (55) E.L.T. 253 (Tribunal). While interpretating the very notification involved in this appeal namely Notification No. 224/85, the learned Consultant further argued that there is yet another similar [worded] [in] Notification No. 29/79 which also came up for consideration before the Tribunal in the case of Allibhoy Mohamed v. Collector of Customs, reported in 1989 (43) E.L.T.482 (Tribunal). The Tribunal held in that case that stamping [foils] in running lengths are embellishments for leather footwear - Entitled to the concessional rate of duty under Notification No. 29/79-Cus. The learned Consultant also relied upon the Tribunal decision in 1983 (13) E.L.T. 1103 (CEGAT) in the case of Andhra Patrika, Madras v. Collector of

Customs, Madras that there is no need to [prove] exclusive use of the material in similar worded notification where only the intended use in particular industries is to be seen. Shri N.C. Sogani, the learned Consultant adopting the above arguments of Shri Mathur further added that in the case of G.K International, the Collector (Appeals) has relied upon a ground regarding running length as a bar for exemption which is not set out in the show cause notice at all and this is not permissible. The learned Consultant also pointed out that the final product goods are used as embellishments order of a large variety and such a context, it is impracticable to place order for the import of embellishment cut to size has held by Collector (Appeals). The learned Consultant further urged that the notification does not require that the goods imported should be in ready to use form to qualify for the exemption.

3. Shri K.K. Jha, the learned Senior Departmental Representative contended that the terms of the Notification No. 224/85 are clear. It is available only when the goods imported are proved to be those which are for use in leather industry. Serial No. 10 of the Table described the exempted goods as Metallic embellishments. The goods imported on the other hand are brass chains in running length which do not answer the specified goods in the notification at Serial No. 10. The appellants apart from producing the SSI Cetificate have not led any evidence to satisfy the Department that the goods imported are used in leather industry. The learned Senior Departmental Representative relied upon the case law reported in 1986 (25) E.L.T. 114 (Tribunal) in the case of Ashish & Co. and Ors. v. Collector of Customs, Bombay by the Tribunal Larger Bench by [contending] in that case it was held that PVC leather cloth is not ordinarily used as embellishment and hence cannot be granted exemption against Serial No. 10 of Notification No. 29/79 which covered Buckles and other embellishment for footwear. The Tribunal emphasised when there [were] varied uses for the material, it has to be shown that the essential function is of embellishment that is to decorate. The learned Senior Departmental Representative further relied upon the Tribunal decision in the case of Collector of Customs v. Sha Maggaji Manoharmal, reported in 1991 (56) E.L.T. 634 (Tribunal) in which the Tribunal followed the Larger Bench decision while considering the same notification and that mere import of any goods is not included in the expression used in the leather industry. Reliance here also placed

by learned Senior Departmental Representative in this regard the case law reported in 1987 (27) E.L.T. 758 (Tribunal) in the case of Hiralal Gulabchand v. Collector of Customs, Bombay. The learned Senior Departmental Representative urged that the exemption must be directly applicable to the goods imported and not indirectly for which the learned Senior Departmental Representative cited the case of Shalimar Engineering Works Pvt. Ltd. v. Collector of Customs, reported in 1992 (61) E.L.T. 679 (Tribunal). It was urged that when the goods imported are brass chains in running length they cannot be considered as embellishment specified in the notification. The learned Senior Departmental Representative pointed out that subsequently the notification was amended by Notification No. 206/88, dated 29-6-1988 which specified the items to be exempted. This would support the Department's case that the goods on import should be ready for use as embellishment. The submissions have been carefully considered. The learned Senior Departmental Representative has relied on the Larger Bench decision of the Tribunal in the case of Ashish & Co. and Ors. v.Collector of Customs, Bombay (Supra) to urge that actual use of the imported goods embellishment in leather industry must be proved to earn the exemption under Notification No. 224/85. However, a perusal of the Larger Bench decision shows that the Tribunal therein was considering the scope of exemption Notification No. 29/79 which exempted the goods specified in the notification and used in the leather industry. The entry No. 12, "Buckles and other embellishments for footwear" fell for consideration. The appellants therein claimed the exemption against that serial number in respect of PVC/PU leather cloth/PVC flocking sheets imported by them. The Tribunal found that here was no evidence to shows that these are in fact used in the leather industry as embellishment for footwear. On the other hand, the Tribunal found that the goods are in nature of raw material out of which footwear can be made. The Tribunal further found that the evidence produced by the appellants therein by way of a Certificate from the officiating Regional Officer, Export Promotion Council for finished leather and Leather Manufactures, on scrutiny, failed to inspire confidence as a reliable [piece] of evidence. It is in these circumstances that the Tribunal held that PVC/PV leather cloth/PVC flocking as imported was not eligible for the exemption against entry Serial No. 12 because they were not used in the nature of embellishments (having no decorative function) for footwear in leather industry. It

could be seen that entry at Serial No. 12 of Notification No. 29/79 as above is narrower than entry at Serial No. 10 of Notification No. 224/85 covering "Metallic embellishments other than zip fasteners" imported into India for use in leather industry. Secondly, the supporting evidence produced by the appellants therein from the Officiating Regional Officer, Export Promotion Council was not found reliable whereas in the present case the Department has not questioned the reliability of the S.S.I.Registration Certificates produced by the appellants herein. Thirdy, it is also seen that the Supreme Court decision in the case of Dalmia Dadri Cement case (Supra);, laying down the scope of the expression, "for use", rendered in November, 1987 was not available before the Larger Bench whose decision was given earlier in March 1986. The later Supreme Court decision, we have seen, had been followed by the Tribunal while interpreting the very same Notification No. 224/85 in its decision in the case of Asean Trading Agency (Supra). Fourthly, it is noted that in the Larger Bench decision also the Tribunal distringuished and did not disagree with the decision of the Tribunal in AI-libhoy Mohamed case (Supra) which had held that stamping foils imported in running length can be considered as embellishments for footwear because importing of stamping foils in any other form would either be impractical or would be so prohibitively expensive as to make it impractical. Therefore, it is held that it would be more appropriate in the facts of the present case, and in the context of entry against Serial No. 10 of Table to Notification No. 224/85 with which we are concerned in the appeal to apply the ratio of the Tribunal decision in the case of Asean Trading Agency (Supra). Similarly the case of the Sha Maggaji Manoharmal (Supra) relied upon by the learned Departmental Representative is distinguishable as in that case the goods imported were snap fasteners which the tribunal found was a component part not having any decorative function and hence could not be considered as embellishment imparting beauty. So also in the Tribunal decision in the case of Hiralal Gulabchand (Supra) relied upon by the learned senior Departmental Representative, it has been held that exemption under Notification No. 29/79 meant for goods imported and used in leather industry cannot be extended to zip fasteners imported by readymade garment manufacturers under transferable import licences and the case on facts differs from those in the present appeal. The learned senior Departmental Representative however rightly

contended that there is no force in the appellants arguments that the Assistant Collector cannot recover duty short levied after the goods have been cleared because Section 28 of the Customs Act specifically empowers the Assistant Collector for this prupose.

4. The description of the goods specified for exemption under Notification No. 224/85 at Serial No. 10 of the Table thereof is "Metallic embellishments other than zip fasteners'. The question is whether the goods imported described as brass chain in running length can be granted this exemption. The copies of the Bill of Entry of both the parties which are on record show that at the time of initial assessment of the goods, the goods have been examined and thereafter, clearances have been granted allowing the exemption. The notices for short levy under Section 28 of the Customs Act in all these cases have been issued on the ground that conclusive proof of the actual use of the chains imported in leather industry has not been shown. The appellants have produced the S.S.I. Registration which shows that they have registered for the manufacture of leather goods. The Department's case is that the goods imported, are capable of being vised in finished product other than leather goods. However, the question will have to be determined with reference to the terms of the exemption notification.

The notification says that "the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the goods specified in the Column 2 of the Table hereto annexed, when impored into India for use in the leather industry". The expression 'for use' came up for interpretation by the Supreme Court in the case of The State, of Hanyana v. Dalmia Dadri Cement Ltd. wherein the Supreme Court held that the expression 'for use' should be construed to mean intended use and not actual use. It is further found that in interpretating the same Notification No. 224/85 in the case of Asean Trading Agency (Supra) the Tribunal followed the Supreme Court judgment. The Tribunal has done so while considering the claim of Glyoxal as tanning agent as being covered oy a description penetrators at Serial No. 1 of Notification No. 225/85. The Department had denied the exemption on the ground that they were neither penetrators nor were they for use in leather industry as appellants therein were traders and the goods were imported for stock and sale. It was also the contention of the

Department before the Tribunal in that case that since the notification extended exemption to goods intended for use in leather industry, the use must be proved particularly because the appellants therein were not engaged in leather industries but were traders. Even according to the Textile Authority Condensed Chemical Dictionary by Gessner G. Hawley, the Tribunal found Glyoxal have many uses one of them being leather tanning. In such a context, the Tribunal relied upon the Supreme Court decision in the case of Dalmia Dadri Cement (Supra) and concluded that proof of actual use is not a condition attached to the exemption and that if it were so, the notification would have been differently worded prescribing execution of a bond to ensure a proof of actual use. Para-15 and 16 of the Tribunal decision quoting the Supreme Court judgment inter alia are as follows :- "15. The learned D.R. has contended, as has the Additional Collector held, that the appellants are not actual users engaged in leather industry but are only stockists for sale and the notification, therefore, does not apply. We do not agree. For one thing, the subject notification, unlike a number of others, is not conditional on production of proof of end-use. There is nothing in the notification to suggest that it does not apply to imports effected by persons other than those engaged in leather industry. We are fortified in this view by the judgment of the Supreme Court in the State of Hanyana v. Dalmia Dadri Cement Ltd. -1988 (14) ECR 292 (SC). The Supreme Court was construing the following clause in Section 5(2)(a)(iv) of the Punjab General Sales Tax Act: "5(2). In this Act the expression 'taxable turnover' means that part of the dealer's gross turnover during any period which remains after deducting therefrom.

(iv) Sales to any undertaking supplying electrical energy to the public under a licence or sanction granted or deemed to have been granted under The Indian Electricity Act, 1910 (IX of 1910) of goods for use by it in the generation or distribution of such energy : The submission on behalf of the State of Haryana was that in order to get the benefit of the exemption, it was required that it should be established before the tax authorities that the cement supplied by the assessee was actually used by the Board (State Electricity Board) in an activity directly connected with the generation or distribution of electrical energy. Repelling this submission, the Court observed as follows in para 10 of the Report: "10. We are unable to accept the submission of Mr. Bana that, in order to get the exemption it

must be shown that the goods in question, namely, the cement supplied by the assessee in this case was actually used in the generation or distribution of electrical energy. It must be noted that the important words used in the relevant provisions are goods for use by it in the generation or distribution of such energy. On a plain reading of the relevant clause it is clear that the expression "for use" must mean "intended for use". If the intention of the legislature was to limit the exemption only to such goods sold as were actually used by the undertaking in the generation and distribution of electrical energy, the phraseology used in the exemption clause would have been different as, for example, "goods actually used" or "goods used"." 16. In the present instance, the notification permits exemption to penetrators imported for use in leather industry. It has been shown that the substance imported has use in leather industry as a penetrator. Proof of actual use is not a condition attached to the exemption. If it were so, the notification would have provided for execution of a bond obliging the importer to produce proof of actual use as is the case in many other notifications. We therefore do not agree with the Revenue's contention that the benefit of exemption would not be available to the appellants since they are not engaged in leather industry but are only stockists for sale." In the present case also the goods have been granted clearance apparently on examination and on screening the samples. In such a context, the fact that appellants herein hold an SSI Registration Certificate for manufacture of leather goods would support their case for the exemption because it is seen in the above decision of the Tribunal that even where goods with possible other uses imported by trade, the Tribunal found in favour of the importer going by interpretation of the word 'for use' employed in the notification and the case herein is on a better footing. The observations of the Tribunal while disposing of the stay application in this case are also relevant in this context. The Tribunal observed in Para 3 that the show cause notice cum demand appears improper and no investigations appear to have been made by the Department as to the actual use or alleged misuse of the imported goods. In the result, following the ratio of the Tribunal decision the Asean Trading Agency case (Supra), it is held that the goods imported are eligible for exemption under Notification No. 224/85 which was granted to them already at the time of original assessment and clearance of the goods. In view of the above conclusion, the

other argumerit addressed in respect of the jurisdiction of the Assistant Collector to issue demand for recovery of short levy does not arise for consideration and on this issue we note that West Regional Bench while disposing of the Stay applications in his Order No. 3-5/89, dated 24-2-1989 in the case of G.K. International has clearly held that provisions of Section 28 of the Customs Act are applicable even in the case of mistaken short levy. In the facts and circumstances of the case as discussed above, therefore, there is a lot of force in the contention of the appellants herein and accordingly the impugned orders are set aside and the appeals allowed.

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