IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHENNAI

REGIONAL BENCH – COURT NO. III

Customs Appeal No.40701 & 40702 of 2013

(Arising out of Order-in-Appeal C.Cus.No.1559 & 1560/2012 dated 28.12.2012 passed by the Commissioner of Customs (Appeals), No.60, Rajaji Salai, Custom House, Chennai 600 001)

Commissioner of Customs (Exports), **... Appellant**
Custom House,
60, Rajaji Salai,
Chennai – 600 001.

Versus

Mr. Kailash Kumar Kishorpuria, **... Respondent**
Proprietor of M/s.K.K. Impex,
Poddar Point, 6th Floor, 113, Park Street,
Kolkatta 700 016.

APPEARANCE:

Ms. Anandalakshmi Ganeshram, Supdt. (A.R)
For the Appellant

None
For the Respondent

CORAM:

HON'BLE MS. SULEKHA BEEVI C.S., MEMBER (JUDICIAL)
HON'BLE MR. M. AJIT KUMAR, MEMBER (TECHNICAL)

DATE OF HEARING : 12.04.2023

DATE OF PRONOUNCEMENT: 18.04.2023

FINAL ORDER No.40279-40280/2023

Per : SULEKHA BEEVI C.S

The issue involved in both these appeals being the same, they were heard together and are disposed of by this common order.

2. Brief facts are that the respondents namely Mr.Kailash Kumar Kishorpuria, Proprietor of M/s. K.K.Impex had imported silk fabrics vide 2 Bills of Entry and claimed the benefit of CVD @ 8% under Notification No.30/2004-CE dated 09.07.2004. The original authority vide orders of assessment dated 24.02.2010 and 25.02.2010 denied benefit of Notification No.30/2004-CE on the imported goods. Against such order the respondent filed appeal before the Commissioner (Appeals). The order passed by original authority was set aside by the Commissioner (Appeals) vide the order impugned herein and held that the respondent is eligible for the benefit of notification. Against such order, the department is now before the Tribunal.

3. Ld. A.R Ms. Anandalakshmi Ganeshram appeared for the department. She submitted that respondent is not eligible for the benefit of notification as they have not fulfilled the condition of the notification. There is a condition attached to the notification that the benefit would not be available if cenvat credit has been availed on the duty paid on inputs. In the present case, the respondent has not paid any duty on the inputs and has not availed cenvat credit When the inputs have not suffered duty, the benefit of Notification

No.30/2004-C.Ex. cannot be availed by the respondent. Ld. A.R explained that Additional Duty (CVD) is imposed on the imported goods to counter-balance the Central Excise duty leviable on like articles made indigenously. This is a notification intended to safeguard the interest of the manufacturers in India. During the relevant period, no duty was payable on silk yarn either indigenously procured or imported. Thus, indigenous silk fabrics were not subjected to Central Excise duty. Without suffering duty, the respondent is not able to avail the cenvat credit. For this reason, the condition in the notification cannot be said to be satisfied when the inputs have not suffered duty. It is argued by the Ld. A.R that in the case of *Commissioner of Customs (Exports), Chennai Vs Prashray Overseas Pvt. Ltd.* - 2016 (368) ELT 44 (Mad.) the very same issue came up for consideration against an order passed by Tribunal. The Tribunal in the said case had allowed the appeal filed by the assessee-importer observing that they are eligible for the benefit of notification. The jurisdictional High Court observed that the benefit of concessional rate of CVD is not eligible if the inputs have not suffered duty. She prayed that the appeal may be allowed.

4. None appeared for the respondent. The matter is taken up for disposal after hearing the Ld. A.R and also perusal of records.

5. The issue to be considered is whether the respondent is eligible for claiming the CVD exemption under Notification No.30/2004-CE dated 09.07.2004. Ld. A.R has stressed that the exemption granted

under the notification is conditional in as much as there is a proviso in the notification which reads as under :

> "Provided that nothing contained in this Notification shall apply to the goods in respect of which credit of duty vide Corrigendum F. No. 334/3/2004-TRU (PT.I), dated 9-7-2004 on inputs goods has been taken under the provisions of the Cenvat Credit Rules, 2002".

6. It is argued by the A.R that the benefit of notification will be available only if the goods that are used as inputs in the products manufactured by him, have already suffered duty of excise and the assessee has not availed credit of such duty on the inputs under the provisions of Cenvat Credit Rules, 2004. The imported goods has not suffered duty of excise and credit has not been availed.

7. Be that it may, the very same issue came up for consideration before the Hon'ble Apex Court in the case of *SRF Ltd. Vs CC, Chennai* - 2015 (318) ELT 607 (SC) and it was held that the assessee would be eligible for the benefit of notification. The Hon'ble Apex Court opined that the benefit of notification cannot be denied if the condition is such that it is practically impossible to satisfy the condition. The discussion in the case of *SRF Ltd.* (supra) is as under :

> **"4.** As per the aforesaid entry, the rate of duty is nil. Condition No. 20 of this Notification, which was relied upon by the authorities below in denying the exemption from payment of CVD, is to the following effect :
>
> > "20. If no credit under Rule 3 or Rule 11 of the Cenvat Credit Rules, 2002, has been taken in respect of the inputs or capital goods used in the manufacture of these goods."

5. The aforesaid condition is to the effect that the importer should not have availed credit under Rule 3 or Rule 11 of the Cenvat Credit Rules, 2002, in respect of the capital goods used for the manufacture of these goods.

6. In the present case, admitted position is that no such Cenvat credit is availed by the appellant. However, the reason for denying the benefit of the aforesaid Notification is that in the case of the appellant, no such credit is admissible under the Cenvat Rules. On this basis, the CEGAT has come to the conclusion that when the credit under the Cenvat Rules is not admissible to the appellant, question of fulfilling the aforesaid condition does not arise. In holding so, it followed the judgment of the Bombay High Court in the case of '*Ashok Traders* v. *Union of India*' [1987 (32) E.L.T. 262], wherein the Bombay High Court had held that "it is impossible to imagine a case where in respect of raw nephtha used in HDPE in the foreign country, Central Excise duty leviable under the Indian Law can be levied or paid." Thus, the CEGAT found that only those conditions could be satisfied which were possible of satisfaction and the condition which was not possible of satisfaction had to be treated as not satisfied.

7. We are of the opinion that the aforesaid reasoning is no longer good law after the judgment of this Court in *'Thermax Private Limited* v. *Collector of Customs (Bombay), New Customs House'* [1992 (4) SCC 440 = 1992 (61) E.L.T. 352 (S.C.)] which was affirmed by the Constitution Bench in the case of *'Hyderabad Industries Limited* v. *Union of India'* [1999 (5) SCC 15 = 1999 (108) E.L.T. 321 (S.C.)]. In a recent judgment pronounced by this very Bench in the case of *'AIDEK Tourism Services Private Limited* v. *Commissioner of Customs, New Delhi'* [Civil Appeal No. 2616 of 2001 - 2015 (318) E.L.T. 3 (S.C.)], the principle which was laid down in *Thermax Private Limited* and *Hyderabad Industries Limited* was summarised in the following manner :-

> "15. The ratio of the aforesaid judgment in *Thermax Private Limited* (supra) was relied upon by this Court in *Hyderabad Industries Ltd.* (supra) while interpreting Section 3(1) of the Tariff Act itself; albeit in somewhat different context. However, the manner in which the issue was dealt with lends support to the case of the assessee herein. In that case, the Court noted that Section 3(1) of the Tariff Act provides for levy of an additional duty. The duty is, in other words, in addition to the Customs duty leviable under Section 12 of the Customs Act read with Section 2 of the Tariff Act. The explanation to Section 3 has two limbs. The first limb clarifies that the duty chargeable under Section 3(1) would be the Excise duty for the time being leviable on a like article if produced or manufactured in India. The condition precedent for levy of additional duty thus contemplated by the explanation deals with the situation where 'a like article is not so produced or manufactured'. The use of the word 'so' implies that the production or manufacture referred to in the second limb is relatable to the use of that expression in the first limb which is of a like article being produced or manufactured in India. The words 'if produced or manufactured in India' do not mean that the like article should be actually produced or manufactured in India. As per the explanation if an imported article is one which has been manufactured or produced, then it must be presumed, for the

> purpose of Section 3(1), that such an article can likewise be manufactured or produced in India. *For the purpose of attracting additional duty under Section 3 on the import of a manufactured or produced article the actual manufacture or production of a like article in India is not necessary. For quantification of additional duty in such a case, it has to be imagined that the article imported had been manufactured or produced in India and then to see what amount of Excise duty was leviable thereon."*
>
> (Emphasis supplied)
>
> **8.** We are of the opinion that on the facts of these cases, these appeals are squarely covered by the aforesaid judgments. We accordingly hold that appellants were entitled to exemption from payment of CVD in terms of Notification No. 6/2002. The appeals are allowed and the demand of CVD raised by the respondents-authorities is set aside."

8. Consequent to the above decision, the Central Government issued two amendments to exemption notification No.30/2004-CE dated 09.07.2004. By the first amendment issued under Notification No.34/2005 dated 17.07.2015, the proviso to the original notification was amended and reads as under :

> "Provided that the said excisable goods are manufactured from inputs, on which, appropriate duty of excise leviable under the First Schedule to the Central Excise Tariff Act or additional duty of customs under Section 3 of the Customs Tariff Act, 1975 (51 of 1975) has been paid and no credit of such excise duty or additional duty of customs on inputs has been taken by the manufacturer of such goods (and not the buyer of such goods), under the provisions of Cenvat Credit Rules, 2004."

9. The jurisdictional High Court in the case of *Prashray Overseas Pvt. Ltd.* (supra) had analysed the issue after the date of amendment. In para-15, the Hon'ble High Court also took notice of the fact that the review petition filed by department against the decision of the Supreme Court in *SRF Ltd.* is pending. The decision of the Hon'ble jurisdictional High Court in the case of *Prashray*

Overseas Pvt. Ltd. (supra) came to be passed on 28.03.2016. This Bench therefore in the assessee's own case had followed the said decision in the case of *Prashray Overseas Pvt. Ltd. Vs CC (Sea), Chennai* vide Final Order No.40231/2020 as reported in 2020-TIOL-444-CESTAT-MAD. The said decision has now been relied by the Ld. A.R to argue that when the inputs have not suffered duty and the respondent has not availed cenvat credit the condition in notification No.30/2004-CE has not been fulfilled; that therefore the respondent is not eligible for the benefit of notification.

10. It is now noticed by us that the Review Petition (C) No.2440 of 2015 filed by the Department in the case of *SRF Ltd.* before the Supreme Court was dismissed on 15.07.2016 thus maintaining and affirming the judgment passed by the Supreme Court in the case of *SRF Ltd.* The Tribunal in the case of *Artex Textiles Pvt. Ltd. Vs CC New Delhi* - 2018 (359) ELT 561 (Tri.-Del.) had considered the judgment of the Hon'ble jurisdictional High Court in *Prashray Overseas Pvt. Ltd.* (supra) . It was observed in para-8 that the said judgment was passed by the Hon'ble High Court when the review petition filed by the department was pending. The Delhi Bench followed the judgment in the case of *SRF Ltd.* as affirmed by dismissal of the review petition and held that the benefit of Notification No.30/2004-CE dated 09.07.2004 would be available to the assessee therein. In the case on hand, the period of dispute is prior to 17.07.2015.

11. From the foregoing, we hold that the decision in the case of *Prashray Overseas Pvt. Ltd.* (supra) is not applicable to the facts and material placed before us. The decision of the Apex Court in the case of *SRF Ltd.* would be applicable. Following the same, we find no grounds to interfere with the order passed by the Commissioner (Appeals). Impugned orders are sustained. Appeals filed by the department are dismissed.

(Pronounced in the open court on 18.04.2023)

Sd/-
(M. AJIT KUMAR)
MEMBER (TECHNICAL)

Sd/-
(SULEKHA BEEVI C.S.)
MEMBER (JUDICIAL)

gs