

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT AHMEDABAD**

REGIONAL BENCH, COURT NO. 1

CUSTOMS APPEAL NO. 10553 OF 2020

[Arising out of OIO-AHM-CUSTM-000-COM-026-19-20 dated 21/05/2020 passed by
Commissioner of CUSTOMS-AHMEDABAD-I]

CHHAJED FOODS PVT LTD

2 Suraj Estate Near Plot No 3757 Gidc
Ahmedabad, Gujarat

.....Appellant

VERSUS

C.C.-AHMEDABAD

Custom House, Near All India Radio,
Navrangpura, Ahmedabad,
Gujarat

.....Respondent

APPEARANCE:

Shri. Sudhanshu Bissa, Advocate for the Appellant

Shri Satyapal Singh Vikal, Assistant Commissioner (AR) for the Respondent

CORAM:

HON'BLE MEMBER (TECHNICAL), MR. RAJU

HON'BLE MEMBER (JUDICIAL), MR. SOMESH ARORA

FINAL ORDER NO .A / 10503 /2024

DATE OF HEARING: 21.02.2024

DATE OF DECISION: 27.02.2024

SOMESH ARORA

The appellant has been denied the benefit of the exemption notification no. 45/2017-Cus dated 30.06.2017 and 46/2017-Cus dated 30.06.2017 on the ground that the appellant is not eligible to claim these notifications once the appellant has imported the goods by availing the

benefit of the Notification 158/95-cus dated 14.11.1995. Appellants have provided following brief of date of events.

SYNOPSIS OF DATES, EVENTS AND PROPOSITIONS

Sr. No.	Date	Event
1.		The appellant is engaged in manufacture of "Potato Pallet Sea Shell". The appellant is selling these goods in the domestic market as well as in foreign countries.
2.		The appellant had imported certain capital goods for manufacture of finished goods under EPCG licences.
3.	December. 2016 to June, 2017	The appellant had received an order from M/s. Pepsi- Cola (Thai) Trading Co. Ltd., Thailand for export of 2.89.296 Kgs of Lays Shell Pellet. The goods were exported by the appellant under 13 Shipping Bills.
4.	September, 2017. January, 2018 and February, 2018	Certain quantity out of the above exported goods was rejected by the Thai customer in view of certain quality issues; and accordingly, a quantity aggregating to 1,30,734.44 Kgs of Lays Shell Pellet had to be brought back by the appellant. The goods were imported under Four Bills of Entry.
5.		Under these 4 Bills of Entry, the appellant had mentioned Notification No.158/95-Cus. dated 14.11.1995 as well as Notification No.45/2017- Cus & Notification No.46/2017-Cus. However, EDI System for filing B/E electronically was incapable of accepting such document with details of multiple notifications; and therefore, Notfn. No.158/95 was recorded on the front page of the bills of entry whereas Notfn. No. 45/2017 was recorded on the subsequent pages.
6.	28.7.2018	A quantity of 424 Kgs was again exported to M/s. Pepsi-Cola (Thai) Pvt. Ltd. of Thailand vide shipping bill No.6522294. Due commercial exigencies and also because the rest of the quantity of re-imported goods could not be reprocessed for achieving the quality standards required for export, the appellant

		could not re-export the balance quantity of 1.30.310.44 Kgs of Lays Shell Pellets.
7.	25.11.2019	A show cause notice was issued proposing to recover Rs.91.63,943/- being custom duties not recovered on the left out quantity of 1,30,310.44 Kgs not re-exported by the appellant. It was alleged that the appellant has availed the benefit of Notification No. 158/95-Cus. at the time of import and one of the condition of the notification that re-imported goods should be re-exported within the stipulated period was not fulfilled by the appellant.
8.	28.1.2020 and 13.2.2020	The appellant filed two replies and submitted that re-import was permissible under Notification Nos. 45/2017-Cus. and 46/2017-Cus., both dated 30.6.2017, and the benefit of Notification No. 158/95- Cus was claimed while filing the bills of entry inadvertently and erroneously. The appellant also submitted that the claim of export benefits in respect of EPCG licences was given up since the above quantity of goods was not ultimately exported, and accordingly the condition of Notification Nos. 45/2017-Cus. as well as 46/2017-Cus. that benefits of the goods exported under any of the duty exemption schemes like EPCG should not be availed had been satisfied in the present case. A certificate of no incentive claim issued by Jt. DGFT dated 23.01.2020 was also submitted.
9.	21.5.2020	The Principal Commissioner of Customs, Ahmedabad has passed OIO and held that the appellant had no option to switch over to the benefits of Notification Nos. 45/2017-Cus. and 46/2017-Cus. when the appellant had re-imported the goods under Notification No. 158/95-Cus, and conditions of this Notification were not fulfilled.

Aggrieved by the aforesaid order of the Principal Commissioner of Customs, Ahmedabad as mentioned at Sr.No (9) above, appellant has filed the present appeal.

2. The appellant submits that the Principal Commissioner has committed a grave jurisdictional error in denying benefit of Notification Nos. 45/2017-Cus and 46/2017-Cus only on the ground that the appellant had no option to switch over to the benefit of these Notifications: and thus the Principal Commissioner has effectively held that the appellant was not allowed to claim benefit of such Notifications even though the benefits were otherwise admissible, because the appellant had opted for benefit of another Notification No. 158/95-Cus.

2.1 It is settled law that where more than one Notifications are applicable for the goods, or to the concerned transactions, attracting levy of any duty or tax, it is the choice and the option of the citizen/assessee to claim benefit of a Notification that suits him; and it is also permissible to the citizen/assessee to claim benefit of any Notification at a later stage notwithstanding the fact that the citizen/assessee claimed benefit of another Notification at the initial stage. In this regard, the appellant relies upon the following decisions;

- M/s. Share Medical Care V/s. Union of India (2007) 4 Supreme Court Cases Page 5723
- HCL Limited vs. Collector of Customs-2001 (130) ELT 405 (SC)
- c) Collector of Central Excise vs. Indian Petro Chemicals - 1997 (92) ELT 13 (SC)
- Olam Agro India vs. CC Ahmedabad - 2024 (2) TMI 317 CESTAT Ahmedabad.
- Commissioner of Customs (import) Nhava Sheva vs. SK Weaving Pvt. Limited-2018 (361) ELT 383 (Tri-Mum.)
- Rallis India Limited vs. Commissioner of Customs. Mumbai 2017 (358) ELT 285 (Tri-Mum.)

- Commissioner of Central Excise, Ahmedabad vs. Suresh C. Nayi - 2010 (262) ELT 1116 (Tri-Ahmedabad)
- Commissioner of Customs, Chennai vs. Kankai Imports - 2008 (223) ELT 62 (Tri-Chennai)

2.2 In view of this settled legal position, the Principal Commissioner had no jurisdiction to deny benefit of Notification Nos. 45/2017-Cus and 46/2017- Cus in the present case only because the appellant had claimed benefit of Notification No. 158/95-Cus also by furnishing Bonds under such Notification.

3. The Adjudicating Authority has wrongly rejected the benefit of the Notification Nos. 45/2017-Cus and 46/2017-Cus by referring the decision of Indian Rayon & Industries 2008(229) ELT 3 (SC) because the said decision was not at all applicable in the facts of the present case. In the said case, three consignments were re-imported out of which 1 (One) was earlier exported under claim of DEEC scheme while the other 2 (two) were exported under the claim of DEPB scheme. The assessee executed a Bond in terms of Notification No.158/95-Cus; and since the assessee could not re-export such goods within the time limit specified under such Notification, duty was demanded from the said assessee. The assessee lodged an alternative claim of Notification No.94/96-Cus; and the Commissioner of Customs allowed such benefit for one consignment which was earlier exported under the claim of DEEC scheme, but denied the benefit of this Notification No.94/96-Cus for the other two consignments which were earlier exported under the claim of DEPB scheme. The Hon'ble Tribunal however held that benefit of Notification No.94/96-Cus was admissible to all the three consignments, and therefore the Revenue filed a Civil Appeal before the Hon'ble Supreme Court. The Hon'ble Supreme Court has then examined the scheme of Notification

No.94/96-Cus and held that benefit of duty free re-import of goods was allowed under this Notification for the goods exported under DEEC and EPCG schemes, but not for imports initially made under DEPB scheme. Since two out of three consignments were initially exported by the assessee M / s Indian Rayon & Industries Ltd. claiming benefit of DEPB scheme, the Hon'ble Supreme Court has held that Notification No.94/96- Cus was not applicable because two consignments were exported under DEPB scheme for which benefit of Notification No.94/96-Cus was not admissible. Thus, in this case also, the alternative claim of the assessee for benefit of Notification No.94/96-Cus was allowed for one consignment, which was initially exported under DEEC scheme because the goods exported under DEEC scheme were covered under Sl.No.(1)(e) of Table to Notification No.94/96-Cus; and the alternative claim was denied for the other two consignments because they were not covered under the scheme of the Notification.

3.1 Thus, the Hon'ble Supreme Court in case of M / s Indian Rayon & Industries Ltd. (supra), by virtue of this judgment also allows such alternative benefit to the concerned assessee for one of the three consignments for which conditions of the alternative Notification had been fulfilled, and the alternative benefit of Notification No.94/96-Cus stands disallowed in this case for the other two consignments only because conditions of the alternative Notifications were not fulfilled in respect of such consignments of goods initially exported under DEPB scheme.

3.2 The adjudicating authority has wrongly held that the appellant had not claimed benefit of Notification No.45/2017-Cus while filing the Bills of Entry. The appellant has in fact declared in the bills of entry that the goods were imported back under Notification No.45/2017-Cus. Only because Notification No.158/95-Cus had also been mentioned in the Bills of Entry and

a Bond with reference to Notification No.158/95 - Cus had been executed by the appellant for each of the four Bills of Entry, the Principal Commissioner had no jurisdiction in concluding that the appellant had not claimed benefit of any other Notification for re-importing the goods in question without payment of import duty.

3.3 The appellant has, while filing all the four Bills of Entry, referred to Notification Nos. 45/2017-Cus also, and the claim for duty free re-import under Notification No.45/2017-Cus is lodged by the appellant for all the goods brought back from Thailand. In view of the typical way of documentation under the Customs EDI system, it was not possible to mention and declare two or more Notifications while referring to the details like description of the goods, Customs classification, value of the goods etc. on the front page of a Bill of Entry; and therefore the appellant had no alternative but to mention and declare Notification No.45/2017-Cus. on the subsequent pages of the Bills of Entry. But in all the four Bills of Entry, the appellant has referred to and declared Notification 45/2017-Cus also with reference to SI.No.(1) (e) of the said Notification; thereby signifying that the goods were exported under duty exemption scheme and such goods were brought back. Therefore, the finding recorded in the impugned order that the appellant had not claimed benefit of any Notification other than Notification No. 158/95 - CUs is ex-facie incorrect and not maintainable.

3.4 The appellant during the adjudication proceedings, had submitted before the Principal Commissioner a "No Incentive Certificate" issued by the office of the Joint DGFT, Ahmedabad in respect of all the 13 shipping bills under which the goods were initially exported to Thailand under claim of EPCG scheme. Now this No Incentive Certificate was the evidence establishing fulfillment of the condition laid down under Col.3 of Table to Notification No.45/2017-Cus, and it stood proved on record before the

Principal Commissioner that the appellant had not only claimed benefit of Notification No.45/2017-Cus by referring to SI.No.(1)(e) of the Notification while filing Bills of Entry for the goods brought back from Thailand, but the conditions of this Notification had been fulfilled and the evidence thereof was also available on record before the Principal Commissioner in this case. In this view of the matter, the benefit of duty free re-import could not be denied when the export incentives claimed by the appellant initially had been foregone, and the licensing authority has also confirmed and certified that no incentive was availed by the appellant for the goods initially exported under 13 shipping bills.

3.5 The appellant submits that Imposition of penalty on the appellant is also illegal and without justification because no such penalty could have been imposed on the appellant in the facts of this case. Section 117 of the Customs Act is invoked for imposing penalty on the appellant but penalty thereunder can be imposed only when any person contravened any provisions of the Customs Act or abetted any such contravention or who failed to comply with any provisions of the Customs Act with which it was his duty to comply. In the present case, it is not shown by the Revenue as to which provision of the Customs Act was contravened by the appellant or which contravention was abetted by the appellant or which was the provision that the appellant was duty bound to comply but still failed to comply with. Even otherwise, none of these three conditions is satisfied in the present case and therefore ingredients of Section 117 of the Act were not satisfied for imposing any penalty on the appellant. The appellant therefore, prayed for allowing benefit as prayed by them.

4. As against this, the department through AR submits as follows:

4.1 The Noticee had exported during the period from 12.12.2016 to 14.08.2017 289296.00 kgs of Lays Shell Pellet to M/s Pepsi-Cola (Thai) Trading Co. Ltd., Thailand (M/s Pepsico, Thailand) out of which 130734.44 kgs was rejected by M / s Pepsico, Thailand on account of quality issues and re-imported by the Noticee at ICD-Sanand under four BES under Notification No. 158/95 - Cus dated 14.11.1995. The Noticee could re-export 424 kgs of Lays Shell Pellet only thereby leaving balance of 130734.44 kgs. Since, they could not export the entire re-imported quantity of Lays Shell Pellet within the stipulated period. they breached the conditions of the Bond and thereby contravened the conditions of Notification No. 158/95-Customs dated 14.11.1995 and became liable to pay Customs duty of Rs. 91,63,943/- along with interest. The nonpayment of Customs duty and interest resulted in issuance of the present Show Cause Notice.

4.2 That the notification No. 158/95-Cus dated 14.11.95 has following conditions inbuilt in it.

- a. Such re-importation needs to take place within 3 years from the date of exportation.
- b. Goods are re-exported within six months of the date of re-importation or such extended period not exceeding a further period of six months as the Principal Commissioner or Commissioner of Customs may allow
- c. The Assistant Commissioner of Customs or Deputy Commissioner of Customs is satisfied about identity of the goods;
- d. The importers at the time of importation executes a bond undertaking to-

i. export the goods after repairs or reconditioning within the period as stipulated:

ii. pay, on demand, in the event of his failure to comply with any of the aforesaid conditions, an amount equal to the difference

between the duty levied at the time of re-import and the duty leviable on such goods at the time of importation but for the exemption contained herein

4.3 It is evident that to be eligible for the benefit under Notification No. 158/95, the importation should take place within three years from the date of original exportation, goods are re-exported within a maximum of twelve months from the date of re importation and when such re-exportation is not effected as per the conditions of the notification, the differential duty liability on account of availment of Notification No 158/95- Cus. at re-importation is liable to paid up by the importer. There is no ambiguity, whatsoever, in the Notification issued by the Central Government. The Notification stipulates to export the goods after repairs or reconditioning within the period as stipulated and pay, on demand, in the event of his failure to comply with any of the aforesaid conditions, an amount equal to the difference between the duty levied at the time of re-import and the duty leviable on such goods at the time of importation but for the exemption contained therein.

4.4 The notifications are required to be interpreted in the light of the words employed therein and not on any other basis. There cannot be any addition or subtraction from the notification for the reason the exemption notification requires to be strictly construed by the Courts. The wordings of the exemption notification have to be given its natural meaning, when the wordings are simple, clear and unambiguous, In Commissioner of Customs, Kolkata v Rupa & Co Ltd., (2004) 6 SCC 408, the Hon'ble Supreme Court observed that the exemption notification has to be given strict interpretation by giving effect to the clear and unambiguous wordings used in the notification. This Court has held as under:-

"7. However, if the interpretation given by the Board and the Ministry is clearly erroneous then this Court cannot endorse that view. An

exemption notification has to be construed strictly but that does not mean that the object and purpose of the notification is to be lost sight of and the wording used therein ignored. Where the wording of the notification is clear and unambiguous, it has to be given effect to, Exemption cannot be denied by giving a construction not justified by the wording of the notification"

4.5 That the conditions of Notification No. 158/95-Cus are clear and unambiguous and require the duty forgone to be paid up in case of default. Notification No. 158/95-Cus is for the benefit of exporters, whose goods are rejected/sent back by foreign buyers and require repairs/reconditioning, to facilitate the said re-import without the added cost on payment of import duty thereon, as would have been applicable in the case of similar imported goods. This is facilitation for exporters to carry out repairs/reconditioning on the goods returned for that purpose. The conditions of the notification reveal that the legislature has sought to prevent its misuse. The condition that such goods are re-imported not beyond the period of three years from the date of their export is to serve this purpose. Similarly, to prevent misuse of these provisions by way of retention of goods in India, the notification also requires that after reconditioning/repair, the re-import of goods shall have to be re-exported within a maximum period of 12 months from the date of such re-import. The time limits prescribed for re-importation as well as for re-exportation, are substantive conditions and not merely procedural. The Hon'ble Apex Court in the case of Mangalore Fertilizers & Chemicals reported as 1991 (55) ELT 437 (SC) = 2002-TIOL-234-SC-CX, has held that non-observation of a procedural condition of a technical nature is condonable, while that of a substantive condition is not, since it would otherwise facilitate commission of fraud and introduce administrative conveniences. The relevant portion of this judgment of the Hon'ble Apex Court is reproduced below:

"11.....The consequence which Shri Narasimhamurthy suggests should flow from the non-compliance would, indeed, be the result if the condition was a substantive one and one fundamental to the policy underlying the exemption. Its stringency and mandatory nature must be justified by the purpose intended to be served. The mere fact that it is statutory does not matter one way or the other. There are conditions and conditions. Some may be substantive, mandatory and based on considerations of policy and some others may merely belong to the area of procedure. It will be erroneous to attach equal importance to the non-observance of all conditions irrespective of the purposes they were intended to serve.

In Kedarnath's case itself this Court pointed out that the stringency of the provisions and the mandatory character imparted to them were matters of important policy. The Court observed:

".....The object of S. 5(2)(a)(ii) of the Act and the rules made thereunder is self-evident. While they are obviously intended to give exemption to a dealer in respect of sales to registered dealers of specified classes of goods, it seeks also to prevent fraud and collusion in an attempt to evade tax. In the nature of things, in view of innumerable transactions that may be entered into between dealers, it will wellnigh be impossible for the taxing authorities to ascertain in each case whether a dealer has sold the specified goods to another for the purposes mentioned in the section Therefore, presumably to achieve the two fold object, namely, prevention of fraud and facilitating administrative efficiency, the exemption given is made subject to a condition that the person claiming the exemption shall furnish a declaration form in the manner prescribed under the section The liberal construction suggested will facilitate the commission of fraud and introduce administrative inconveniences, both of which the provisions of the said clause seek to avoid."

(Emphasis Supplied)

Thus, once the substantive post-importation condition of Notification No. 158/95-Cus. is not satisfied or complied with, the importer will have no other option but to pay an amount equal to the difference between duty

levied at the time of re-import and the duty leviable on such goods at the time of importation, but for the exemption contained in Notification No. 158/95-Cus.

5. Coming to the issue as to whether the importer has an option to switch over to the benefits of Notification No. 45/2017-Customs and 46/2017-Customs both dated 30 6 2017 when they had re-imported the goods under Notification No. 158/95-Cus dated 14 11.1995 and could not fulfill the conditions levied therein.

5.1 It was submitted that the Notification No. 158/95- Cus dated 14.11.1995 and Notification Nos 45/2017-Customs & 46/2017-Customs both dated 30.6.2017 were issued for different situations and different reasons. Notification Nos. 45/2017-Customs & 46/2017-Customs both dated 30.6.2017 does not require that the re-importation is for the purposes of repair or reconditioning. There is also no requirement in that notification mandating re-export of the goods of the re-imported goods in other words. Notification Nos. 45/2017-Customs & 46/2017-Customs both dated 30.6.2017 seek to cover only those situations where the importer does not have any declared intent to immediately re-export the re-imported goods, as long as the duty liability specified in the notifications are discharged The importer can leave the goods undisturbed e.g in their factory or premises, without any pressing need for their re-export That however is not the case with Notification No. 158/95-Cus which seeks to cover a situation where the goods are re-imported within 3 years, only for repair or reconditioning and proximate re-export thereafter. Precisely for this reason, the importer enjoys full exemption from customs duty at the time of their re-importation. That import governed by conditionalities and requirements and beneficial exemption of one particular notification cannot be transposed into another notification with different conditions. In this regard, reliance was placed on

the ratio laid down A by the Hon'ble Apex Court in the case of Indian Rayon and Industries 2008 (229) ELT 3 (SC) wherein the Apex Court ruled that having availed the benefit of Notification No 158/95-Cus the importer has necessarily to comply with the condition of Notification and it is not open for him to contend that conditions in the said notification need not be fulfilled, be it on the ground that benefit under another notification is available to him or otherwise. The relevant portion of the judgment of the Hon'ble Apex Court is reproduced herein below for ready reference :

"11. By Notification No. 158/95-Cus, dated 14th November, 1995. goods manufactured in India and re-imported in India for repairs or for reconditioning, are exempted from whole of the duty of customs leviable on them as well as additional duty subject to the condition, inter alia, that the goods are re-exported within six months of the date of re-importation or any extended period as may be allowed and a bond is executed at the time of importation to export within the said period and in the event of failure to do so, pay an amount equal to the difference between the duty levied at the time of re-import and the duty leviable on such goods at the time of importation. The assessee executed a bond with the President of India, complying with the aforesaid condition of notification and undertook to pay, on demand in the event of its failure to comply with any of the conditions of notification, an amount equal to the difference between the duty levied and leviable on such goods in respect of each of the Bills of Entry, separate bonds were executed indicating Bill of Entry No, description of goods country of origin, CIF Value, the assessable value and the bond value

12. The Revenue contends that the assessee could not avail the benefit under Notification No. 94/96-Cus and that it could not change its option. According to the assessee, the assessee could change its option even at a later stage and it could avail of the benefit under Notification No. 94/96-Cus. which was in force at that time.

13. We do not find any substance in this submission advanced on behalf of the assessee The only notification which was available to the assessee at the time of import which granted the assessee the right to import duty free goods was Notification No 158/95-Cus Having availed of the benefit of notification, the assessee has necessarily to comply

with the conditions of the notification it goes without saying that the assessee cannot approbate and reprobate."

(Emphasis Supplied)

6. In view of the above, It was submitted that the Noticee has no option to switch over to the benefits of Notification No. 45/2017-Customs and 46/2017-Customs both dated 30.6.2017 when they had re- imported the goods under Notification No. 158/95 Cus dated 14.11.1995 and could not fulfill the conditions levied therein. Accordingly, the learned AR justified demand of duty and penalty ect.

7. In rebuttal, the learned Advocate submitted that both the notification claimed by them i.e. 45/2017-Cus in existence at the time when re-export took place, therefore the decision of M/s. Indian Rayon and Industries-2008 (229) ELT 3 (S.C.) has been incorrectly applied by the adjudicating authority and that as per the decision relied upon by them including of this bench as reported in 2024 (2) TMI 317 CESTAT Ahmedabad Olam Agro Inda vs. CC Ahmedabad alternative exemption notification as against Notification No. 158/95-Cus was permissible even if one failed to re-export the goods within the stipulated period, till the alternative exemption notification i.e exemption Notification No. 94/2006-Cus (in that case) was beneficial to the appellant.

8. Considered. We find that the above decision of Olam Agro Inda vs. CC Ahmedabad was not available to the learned adjudicating authority, when his order was passed. We have also considered the contours of the decision of M/s. Indian Rayon and Industries (cited supra) which while dealing with the Notification No. 158/95-Cus held that once the benefit of Notification No. 158/95-Cus is taken the conditions are required to be fulfilled of the same notification. However, it is also noted that Notification No. 158/95-Cus was the only notification available at the time of re-import for most of the period. We, therefore, direct the learned Commissioner may consider the

benefit of Notification No. 45/2017-Cus and 46/2017-Cus dated 30.06.2017, for the period, when they were available, and if otherwise applicable. We also find that breach of notification 158/95-Cus dated 14.11.1995 under which re-import was done, was committed. The interest and penal consequences therefore have to follow. However, if another beneficial notification to the appellant was available and they are eligible for the same, then as far as duty is concerned, they can legitimately take the benefit of the same. Any other beneficial notification can be claimed at any stage by the party.

9. With these directions, we remand the matter for re-consideration by the adjudicating authority in terms of above principles.

(Pronounced in the open Court on 27.02.2024)

(RAJU)
MEMBER (TECHNICAL)

(SOMESH ARORA)
MEMBER (JUDICIAL)

Prachi