

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST ZONAL BENCH : AHMEDABAD
REGIONAL BENCH - COURT NO. 3**

EXCISE Appeal No. 11401 of 2016-DB

[Arising out of Order-in-Original/Appeal No SIL-EXCUS-000-COM-058-15-16 dated 23.03.2016 passed by Commissioner of Central Excise and Service Tax-SILVASA]

K E C International Limited

.... Appellant

Plot No. 273/4,
Demni Road, Dadra,
SILVASSA
DADRA NAGAR HAVELI

VERSUS

Commissioner of Central Excise & ST, Silvassa

.... Respondent

4th floor, Adarsh Dham Building, Vapi Daman Road Vapi
Opp. Old Town Police Station, VAPI
Gujarat

WITH

EXCISE Appeal No. 11402 of 2016-DB

[Arising out of Order-in-Original/Appeal No SIL-EXCUS-000-COM-058-15-16 dated 23.03.2016 passed by Commissioner of Central Excise and Service Tax-SILVASA]

Shri D P Shrivastva

.... Appellant

C/o KEC International Limited Plot No. 273/4,
Demni Road, Dadra,
SILVASSA
DADRA NAGAR HAVELI

VERSUS

Commissioner of Central Excise & ST, Silvassa

.... Respondent

4th floor, Adarsh Dham Building, Vapi Daman Road
Vapi Opp. Old Town Police Station, VAPI
Gujarat

AND

EXCISE Appeal No. 11403 of 2016-DB

[Arising out of Order-in-Original/Appeal No SIL-EXCUS-000-COM-058-15-16 dated 23.03.2016 passed by Commissioner of Central Excise and Service Tax-SILVASA]

Shri Tarun Santra

.... Appellant

C/o KEC International Limited Plot No. 273/4,
Demni Road, Dadra,
SILVASSA
DADRA NAGAR HAVELI

VERSUS

Commissioner of Central Excise & ST, Silvassa

.... Respondent

4th floor, Adarsh Dham Building, Vapi Daman Road
Vapi Opp. Old Town Police Station, VAPI
Gujarat

APPEARANCE :

Shri Mehul Jivani, Chartered Accountant for the Appellant
Shri Rajesh Nathan, Assistant Commissioner, (AR) for the Respondent

CORAM: HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)
HON'BLE MR. C.L. MAHAR, MEMBER (TECHNICAL)

DATE OF HEARING : 12.02.2024

DATE OF DECISION: 07.06.2024

FINAL ORDER NO. 11181-11183/2024**C L MAHAR :**

The appellant is engaged in the manufacture of electric wires and cables. On the basis of audit of their records, a show cause notice dated 18.06.2014 was issued to them proposing to demand Central Excise duty totally amounting to Rs.4,42,30,084/- on the ground that the appellant had availed the benefit of (i) Sr no.91, 91A & 91B of the Notification no. 06/2006- dated 01.03.2006 as amended vide notification no. 46/2008 C.E., dated 14-8-2008 and 12/2010-C.E., dated 27-2-2010 (ii) Sr. No. 336 and 338 of Notification No. 12/2012-C.E., dated 17-3-2012 (iii) Notification no. 33/2005-CE dated 08.09.2005 (iv) notification no. 15/2010-CE dated 27.02.2010 (v) Notification no. 26/2012-C.E. dated 08-05-2012 but they had not given/ furnished any undertaking/ certificate/ intimation to the competent authority in terms of the said notifications and therefore, cleared the goods without payment of C. Ex. duty by wrongly availing the exemption of the aforesaid notification.

2. During reply to the impugned show cause notice, the appellant stated that they had availed the benefit under Sr. No. 91 & 91A of the Notification no. 06/2006- dated 01.03.2006 as amended and not under Sr. No. 91A & 91B of the notification. Further, it was stated that they had availed benefit of Sr. No. 336 of the Notification No. 12/2012-C.E., dated 17-3-2012 and not Sr. No. 337 of the notification. Further, they claimed that the benefit under all the impugned notifications no. 6/2006 as amended, notification 12/2012, notification no. 33/2205, notification no. 15/2010, and notification no. 26/2012 was correctly availed by them.

2.2 The Principal Commissioner vide the impugned order dated 23.03.2016 confirmed demand of Rs. 4,38,73,549/- in respect of Sr. No. 91& 91A of Notification no. 6/2006-CE dated 01.03.2006 as amended, Sr.no.336 of Notification no. 12/2012 CE dated 17.03.2012, Notification No. 15/2010-C.E., dated 27-2-2010 and 33/2005-C.E., dated 8-9-2005, however dropped the demand related to Sr.no.338 of Notification no. 12/2012 CE dated 17.03.2012 and imposed penalty under Section 11AC of the Central Excise Act, 1944. Further he also imposed personal penalty of Rs. 5,00,000/- each on their authorised signatories (employees) Shri D.P. Shrivastava and Shri Tarun Santra under Rule 26 of the Central Excise Rules, 2002.

2.3 The appellant has filed the present appeal against the impugned order dated 23.03.2016. Sh. Mehul Jivani, Chartered Accountant, appeared on behalf of the appellant and argued that the impugned demand was not sustainable as the appellant had substantially fulfilled the conditions prescribed under the relevant notifications.

2.4 The relevant provisions of different Notifications as applicable to the present case are as under :

Notification No.	Sr. No.	Chapter No.	Exempted goods	Conditions
6/2006 as amended	91	Any Chapter	All goods supplied against International Competitive Bidding	If the goods are exempted from the duties of customs leviable under the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) and the additional duty leviable under Section 3 of the said Customs Tariff Act when imported into India.
6/2006 as amended (inserted vide notification no. 46/2008)	91A	Any Chapter	Goods required for setting up of an ultra-mega power project based on super-critical coal-thermal technology, with installed capacity of 3960MW or above, from	If, - (a) such goods are exempted from the duties of customs leviable under the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) and the additional duty leviable under Section 3 of the said Customs Tariff Act when imported into India; (b) an officer not below the rank of Chief Engineer in the

			which power procurement has been tied up through tariff based competitive bidding.	Central Electricity Authority certifies that the said goods are required for the setting up of the said ultra mega power project under Government of India initiative, indicating the quantity, description, and specifications thereof; and (c) the Chief executive officer of the project furnishes an undertaking to the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, having jurisdiction, to the effect that - i. the said goods will be used only in the said project and not for any other use; and ii. in the event of noncompliance of sub-clause (i) above, the project developer will pay the duty which would have been leviable at the time of clearance of goods, but for this exemption."
12/2012	336	Any Chapter	All goods supplied against International Competitive Bidding	If the goods are exempted from the duties of customs leviable under the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) and the additional duty leviable under section 3 of the said Customs Tariff Act when imported into India.
33/2005 amended by Nof. 38/2005	-	Any Chapter	all items of machinery, including prime movers, instruments, apparatus and appliances, control gear and transmission equipment and auxiliary equipment (including those required for testing and quality control) and components, required for initial setting up of a project	before the clearance of the goods from the factory, the manufacturer produces to the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, a certificate, from an officer not below the rank of a Deputy Secretary to the Government of India in the Ministry of Non-Conventional Energy Sources recommending the grant of this exemption and the said officer certifies that the goods are required for initial setting up of a project for the generation of power using non-conventional materials, namely, agricultural, forestry, agro-industrial, industrial, municipal and urban waste, bio waste or poultry

			for the generation of power using non-conventional materials, namely, agricultural, forestry, agro-industrial, industrial, municipal and urban waste, bio waste or poultry litter	litter; and (ii) the manufacturer proves to the satisfaction of the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, that there is a valid power purchase agreement between the producer of power and the purchaser, for the sale and purchase of electricity generated using non-conventional materials, for a period of not less than ten years from the date of commissioning of the project
			all items of machinery, including prime movers, instruments, apparatus and appliances, control gear and transmission equipment and auxiliary equipment (including those required for testing and quality control) and components, required for initial setting up of a solar power generation project or facility	(i) before the clearance of the goods from the factory, the manufacturer produces to the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, a certificate, from an officer not below the rank of a Deputy Secretary to the Government of India in the Ministry of Non-Conventional Energy Sources recommending the grant of this exemption and the said officer certifies that the goods are required for initial setting up of a project for the generation of power using non-conventional materials, namely, agricultural, forestry, agro-industrial, industrial, municipal and urban waste, bio waste or poultry litter; and (ii) the manufacturer proves to the satisfaction of the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, that there is a valid power purchase agreement between the importer and the purchaser, for the sale and purchase of electricity generated using non-conventional materials, for a period of not less than ten years from the date of commissioning of the project.

15/2010	-	-	all items of machinery, including prime movers, instruments, apparatus and appliances, control gear and transmission equipment and auxiliary equipment (including those required for testing and quality control) and components, required for initial setting up of a solar power generation project or facility	before the clearance of the goods from the factory, the manufacturer produces to the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, a certificate, from an officer not below the rank of a Deputy Secretary to the Government of India in the Ministry of New and Renewable Energy recommending the grant of this exemption and the said officer certifies that the goods are required for initial setting up of a solar power generation project or facility; and (2) the manufacturer of such goods furnishes an undertaking to the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, having jurisdiction, to the effect that- (a) the said goods shall be used only in the said project or facility and not for any other use; and (b) in the event of failure to observe conditions above, the manufacturer shall pay the duty which would have been leviable at the time of clearance of goods, but for this exemption.".
15/2010 as amended by 26/2012			-Do-	Ministry of New and Renewable Energy recommends the grant of this exemption, indicating the quantity, description and specification thereof and certifies that the goods are required for initial setting up of a solar power generation project or facility; and (2) the Chief Executive Officer of the project furnishes an undertaking to the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, having jurisdiction

				over the factory of the manufacturer, to the effect that- (i) the said goods will be used only in the said project and not for any other use; and (ii) in the event of non-compliance of sub-clause (i), the Project Developer of such project shall pay the duty which would have been leviable at the time of clearance of goods, but for this exemption.”;
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Sr. No. 91 & 91A of notification no. 6/2006-CE and Notf. 6/2006 -CE amended vide Notf. 46/2008-CE respectively and Sr. No. 336 of the Notification no. 12/2012-CE

2.5 Learned Counsel of the appellants has argued that whereas SCN has alleged that appellant has not given/furnished any undertaking/certificate/intimation to the competent authority in terms of condition no. 26 & 28 (as given at Sr. No. 91A and 91B) of the Notification No. 6/2006-C.E., dated 1-3-2006 as amended vide Not. 46/2008 and 12/2010 respectively and condition no. 43 (as given at Sr. No. 337) of the Notification No. 12/2012-C.E., dated 17-3-2012, the Commissioner has confirmed demand under Sr. no. 91, 91A of Not. 6/2006 and 6/2006 amended by Notf. 46/2008 and Sr. No. 336 of notification no. 12/2012 on the additional ground that the appellant has not produced documentary evidence with respect to their eligibility under condition no. 29, 31 & 86 of the Sr. No. 214, 216 & 400 of the notification no. 21/2002 Cus dated 01.03.2002 on the like goods as prescribed under the Sr. No. 91,91A of notification no. 6/2006 CE and Notf. 6/2006-CE amended vide Notf. 46/2008-CE respectively and 336 of notification no. 12/2012-CE which is clearly beyond the scope of show cause notice. He relied upon case law in BALLARPUR INDUSTRIES LTD. 2007 (215) E.L.T. 489 (S.C.), RELIANCE PORTS AND TERMINALS LTD. 2016 (334) E.L.T. 630 (Guj.) and CCE v. Brindavan Beverages (P) Limited 2007 (213) E.L.T. 487 (S.C.) that order beyond the scope of show cause notice is not sustainable. H further argued that the commissioner also observed and accepted that when like goods are imported into India than same are exempted under sr.no.214, 216 & 400 of the Notification No. 21/2002-Cus dated 01/03/2002. With respect to non-observance of condition no. 29, 31 &

86 of the customs notification, he argued that the same pertains to import of goods only and is cannot be applied to them as they are not the importer.

2.6 He relied upon the case law of KENT INTROL PVT. LTD 2014 (301) E.L.T. 84 (Tri. - Mumbai), tribunal which has been upheld by the Bombay high court in the case of COMMISSIONER OF CENTRAL EXCISE, NASHIK v/s KENT INTROL PVT. LTD 2016 (331) E.L.T. 77 (Bom.), Sandvik Asia Ltd 2019 (5) TMI 869- CESTAT AHMEDABAD & JINDAL STEEL & POWER LTD 2015 (329) E.L.T. 595 (Tri. - Del.) where it has been held that these conditions under the customs notification no. 21/2002 are applicable to the importer only and could not be applied for allowing the benefit under notification 6/2006-CE and 12/2012-CE.

2.7 He has further argued that there was no requirement of producing any certificate or furnishing any undertaking under Sr. no. 91 of the Notification 6/2006-CE and Sr. no. 336 of notification no. 12/2012-CE. As regards non-observance of the condition (b) and (c) as discussed under Sr. no. 91A of notification no. 6/2006-CE as amended vide Notf. 46/2008-CE, he has argued that the Commissioner has called for a report on the issue from the Jurisdictional Assistant Commissioner who replied on the matter as discussed in para 6.11 of the impugned order as under :

"6.11 The JAC submitted point wise verification report vide letter F.No.V(Ch.85)38/Dem/2013 dated 26.02.2016, wherein it has been reported that:

(i) The genuineness of the quantum of the claim of the noticee under Sr. No. 91 of Notf No. 6/2006 CE dated 01.03.2006 and Sr. No. 336 Not. No.12/2012 CE dated 17.03.2012 as made under letter dated 25.01.2016 as shown in the Annexure attached to the letter dated 25.01.2016 is found correct as all the invoices as per the Annexure have been verified and found in accordance with the respective Project Certificate. Also, all the conditions are fulfilled related thereto on the basis of the documents and invoices provided by the assessee.

(ii) The genuineness of the quantum of the claim of the noticee under Sr. No. 91A of Not. No. 6/2006 CE did. 01.03.2006 and Sr. No. 338 Not. No. 12/2012 CE dated. 17.03.2012 as made under letter dated. 25.01.2016 as shown in the Annexure attached to the letter dated 25.01.2016 and satisfaction of the condition related thereto on the basis of the documents provided and concerned invoices, it is found that in all the Project Certificates available with the assessee, the copy has been marked to the jurisdictional Deputy/Assistant Commissioner, Central Excise, Silvassa as required in the above said Notification.

(iii) The genuineness of the quantum of the claim of the noticee listed above as shown in the Annexure attached to the letter dated 25.01.2016 and satisfaction of the

conditions related thereto on the basis of the documents provided and concerned invoices, it is to submit that on the basis of the documents and invoices provided by the assessee it is found that they have failed to submit the intimation prior to dispatch of the material but all the invoices as per the Annexure have been verified by this office and found in accordance with the respective Project Certificate.”

2.8 On the basis of above report Ld. Counsel for appellant has contended that though admittedly the appellant did not submit the requisite undertaking from the Chief executive officer of the project, nevertheless there was a substantial performance of the conditions of notification 6/2006-CE in as much as they were in possession of the certificate from Chief Engineer in the Central Electricity Authority, a copy of which was been marked to the jurisdictional Deputy/Assistant Commissioner and all the invoices as reported by the Jurisdictional Assistant Commissioner were in accordance with the provisions of the notifications 6/2006-CE and 12/2012-CE. He further stated that on same ground, the Principal Commissioner had dropped demand under Sr. No. 338 of notification 12/2012-CE which prescribed the same condition of submission of undertaking from the Chief Executive Officer of the project.

3. On the other hand the Learned Authorised representative of the Revenue has re-iterated the findings of the impugned order that the submission of the documentary evidence with respect to the availability of the Customs notification 21/2002 was necessary and the citation in the case of M/S KENT INTROL PVT. LTD were not applicable as the same had not been accepted by the department as per Instruction dated 20.10.2010 issued from file no. 390/Misc/163/2010-CE. He also re-iterated that the non-fulfillment of requisite condition under notification 6/2006-CE would disentitle the appellant from exemption under the notification.

4. We have carefully gone through the rival submissions of the Counsel of the appellant and the AR of the revenue. We are of the considered opinion that invoking of the provisions of the Customs notification No. 21/2002 at the adjudication stage which were not cited in the show cause notice was clearly beyond the scope of SCN as rightly contended by the Ld. Counsel of the appellant and further we agree with the argument of the Ld. Counsel that the provisions of the Custom notification no. 21/2002 cannot be applied to the appellant who is not the importer of the goods. Therefore, the benefit of Sr. No. 91 of Notification No. 6/2006-CE and Sr. No. 336 of notification

no. 12/2012-CE could not be denied to them as the goods were duly certified by the jurisdictional Assistant Commissioner to the effect that all the invoices were for the goods supplied against International Competitive Bidding.

5. As regards non-observance of the condition with respect to furnishing of undertaking by the Chief Executive Officer, in view of the categorical findings of the Jurisdictional Assistant Commissioner that the genuineness of the quantum of the claim of the appellant on the verification of the invoices is not disputed and the appellant was duly in possession of the requisite certificate from the Chief Engineer in the Central Electricity Authority, copy of which was also marked to the department, we find that the appellant had substantially complied with the provisions of the relevant notification and mere non-submission of undertaking was only a procedural infringement and substantial benefit cannot be decided merely for a bonafide procedural lapse whereas the provisions of the notification were otherwise fully complied substantially by the appellant.

6. In view of above findings we hold that no demand is sustainable against the appellant under Sr. No. 91 of Notification 6/2006-CE and Sr. No. 91A of Notf. 6/2006-CE as amended by Notf. 46/2008 as well as notification 12/2012-CE. Accordingly, we drop the demand on this issue.

Notification 33/2005-CE as amended vide Notf. 38/2005 and Notification No. 15/2010-CE as amended vide Notification No. 26/2012-CE

7. In this case the demanded has been confirmed by the Ld. Pr. Commissioner on the ground that the appellant has failed to produce the requisite certificate to the Deputy Commissioner of Central Excise issued by the Deputy Secretary to the Government of India in the Ministry of Non-Conventional Energy Sources/ Ministry of New and Renewable Energy as well as an undertaking that the goods will be used only in the said project and not for any other use. Ld. Counsel for the Appellant has argued that the requisite Certificate from the Ministry was endorsed directly to the Deputy Commissioner, therefore the necessary condition in this respect is satisfied.

He further argued that the Jurisdictional Assistant Commissioner in his report dated 26.02.2016 has stated that all the invoices as per Annexure has been verified and found as per the goods supplied for the project. Therefore, the requisite condition has been substantially satisfied. As the appellant has fulfilled the substantive condition of the notification, benefit of exemption Notification should not be denied by applying the ratio of the Supreme Court judgment in the case of Mangalore Chemicals & Fertilizers Ltd. v. Deputy Commissioner reported in 1991 (55) E.L.T. 437 (S.C.). Per Contra the Ld. AR has argued that Hon'ble Apex Court in the case of Commissioner of Central Excise, New Delhi vs. Hari Chand Shri Gopal and Ors.-2010 (260) ELT 0003 (S.C.) has held that *the law is well settled that a person who claims exemption or concession has to establish that he is entitled to that exemption or concession. A provision providing for an exemption, concession or exception, as the case may be, has to be construed strictly with certain exceptions depending upon the settings on which the provision has been placed in the Statute and the object and purpose to be achieved. If exemption is available on complying with certain conditions, the conditions have to be complied with. The mandatory requirements of those conditions must be obeyed or fulfilled exactly, though at times, some latitude can be shown, if there is a failure to comply with some requirements which are directory in nature, the non-compliance of which would not affect the essence or substance of the notification granting exemption. In Novopan Indian Ltd. (supra), this Court held that a person, invoking an exception or exemption provisions, to relieve him of tax liability must establish clearly that he is covered by the said provisions and, in case of doubt or ambiguity, the benefit of it must go to the State.*

8. We find that the copy of the requisite certificate has been supplied by the Ministry directly to the department this fact has not been disputed by the department. Further, it is also not disputed that the invoices were issued according to the project Certificate. Once these conditions are satisfied, merely that the requisite certificate was not furnished by the appellant is merely procedural. Further, the purpose of required undertaking was merely to ensure that the exemption is not being misused. Once the genuineness of the invoices has been verified and found to be justify the quantum of claim of the appellant as verified by the Jurisdictional assistant Commissioner, the non-submission of undertaking by the appellant is merely procedural and the

appellant should not be denied the substantial benefit merely for procedural lapse. Even the Hon'ble Supreme Court in the judgement in the case of Hari Chand Shri Gopa cited by the AR has made an exception to such procedural lapse where it is ascertained that the manufacturer was eligible to avail the exemption. The Hon'ble Apex Court in para 29 of the judgement has cited with approval that -

"In J.K. Synthetics (supra), the assessee was the manufacturer of polyester chips, staple fibre and tow from Mono-Ethylene Glycol (MEG). On importing those goods, they claimed exemption from payment of additional duty of customs thereon because MEG was exempted from the payment of excise duty by virtue of notification dated 4-5-1987 issued under Section 8 of the Tariff Act. In that case, the contention was raised by the Revenue that the assessee had not followed the conditions laid down in Chapter X of the Excise Rules. But the Tribunal, on facts, found that there had been substantial compliance of the procedure by the assessee, which was approved by this Court without laying down any principle as such which cannot be applied to the facts of the present case."

9. In view of the above discussion, we are of the considered view that there was a substantial compliance of the provisions of the exemption notifications under reference and the substantial benefit could not be denied merely for procedural lapse.

10. In view of the above findings, impugned order is set-aside and the appeals are allowed.

(Pronounced in the open court on 07.06.2024)

(Ramesh Nair)
Member (Judicial)

(C L Mahar)
Member (Technical)

KL