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

REGIONAL BENCH - COURT NO. 3

EXCISE Appeal No. 11500 of 2017-DB

[Arising out of Order-in-Original/Appeal No SUR-EXCUS-002-COM-095-16-17 dated 29.03.2017 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-SURAT-II]

Opal Fabrics **.... Appellant**
2nd Floor, Vishwakarma Chambers, Majura Gate,
Ring Road, SURAT, GUJARAT

VERSUS

Commissioner of Central Excise & ST, Surat-ii **.... Respondent**
New C.Ex Building, Opp. Gandhi Baug,
Chowk Bazar, Surat, Gujarat -395001

AND

EXCISE Appeal No. 11501 of 2017-DB

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APPEARANCE :

Shri Willingdon Christian, Advocate for the Appellant
Shri Sanjay Kumar, Superintendent (AR) for the Respondent

CORAM: HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)
HON'BLE MR. RAJU, MEMBER (TECHNICAL)

DATE OF HEARING : 27.06.2024
DATE OF DECISION: 25.07.2024

FINAL ORDER NO. 11642-11643/2024

RAMESH NAIR :

The brief facts of this case are that Appellant is a 100% EOU set up under the permission letter granted by Development Commissioner, KFTZ, Kandla. Appellant cleared their finished goods namely Grey Fabrics including rejects and also waste of textured/twisted/PFY yarn in DTA on payment of duty in terms of either Notification No. 2/95 –CE dated 04.01.95 or No. 8/97-CE dated 01.03.97 or No. 13/98-CE dated 02.06.98. The contention of the department is that the Appellant had made clearances of their finished goods including rejects and wastes for DTA sales on the basis of 50% of the deemed export including rejects and waste for DTA sale on the basis of 50% of the deemed export value instead of 50% of the FOB value of actual physical exports. As per the department the deemed exports made under para 9.10 of the EXIM Policy are not at par with physical exports and, therefore, for calculating the entitlement for DTA sale under Para 9.9(b) and 9.20, the deemed export value should not be counted. Appellant company wrongly continued to clear their goods including rejects and wastes at concessional rate of duty, by calculating the DTA sale entitlement on the basis of deemed exports. As a result, Appellant was issued show cause notice dated 04.04.2001 and dated 03.07.2001 purports to deny the benefit of concessional rate of duty and to demand duty of excise equal to the aggregate of custom duty on the finished goods including rejects and wastes and also at the same time additional/ further demand of customs duty leviable on the raw materials viz. textured/twisted yarn and PFY procured and consumed of the aforesaid finished goods. Subsequently the said show cause notices were adjudicated by the Ld. Commissioner vide OIO dated 20.06.2003 and dated 09.07.2003 thereby passing order. Against this order, the department and appellant filed an appeal before the Tribunal. Tribunal vide its Order No. A/927-928/WZB/2005-C-III dated 15.06.2005 and Order No. A/518-519/WZB/AHD/2008 dated 24.03.2008 set aside the OIOs and remanded the matter to Learned Commissioner for fresh decisions .

2. In the *denovo* adjudication, vide impugned OIO No. SUR-EXCUS-002-COM-094-16-17 dated29.03.2017 and SUR-EXCUS-002-COM-095-16-17 dated 29.03.2017 the adjudicating authority held that deemed export is par with the physical export for computation of the value upto which the

appellant was entitled for DTA sales. Also 'deemed export' shall be counted towards fulfillment of export performance and Net Foreign Exchange earnings as a Percentage of Export. He allowed the benefit of Notification No. 2/95-CE and 13/98-CE by considering deemed exports as DTA sales. However he found that the Appellant has not paid the applicable duty in accordance with the Notification No. 13/98-CE. Therefore confirmed the differential duty amounting to Rs. 6,52,469/- and 10,11,593/- along with interest and penalty. He dropped the demand of customs duty demanded on raw materials used in the manufacture of subject finished goods cleared into DTA. Hence, the present appeals are before us.

3. Shri Willingdon Christian, Ld. Advocate appearing for the Appellant through video conferencing submits that in the denovo proceeding in pursuance of Tribunal's order dated 15.06.2005 the Ld. Commissioner has demanded differential duty by applying Notification No. 13/98-CE. This Notification prescribed payment of concessional duty @30% of duty of customs subject to two conditions, namely, that (i) the finished goods are manufactured wholly out of indigenous raw materials, and (ii) that the finished goods are chargeable to Nil rate of duty if manufactured and cleared by DTA unit. Appellant have fully satisfied the condition of Notification No. 20/98-CE inasmuch as there is no dispute about the fact that the finished goods are manufactured wholly out of indigenous raw materials and that the finished goods fall under Chapter 52 and 54 as specified in the said Notification. When there are two exemption Notification that cover the goods in question, the appellant is entitled to the benefit of that exemption Notification which gives him better relief. He placed reliance on judgment of Hon'ble Supreme Court in case of HCL Limited Vs. CC reported in 2001 (130) ELT 405 (SC).

4. He also argued that the Ld. Commissioner has committed a grave error by ordering imposition of penalty equivalent to the duty amount under Rule 209 of the Central Excise Rules, 1944. The show cause notices was issued within normal limitation period and the clearances were made under official Central Excise Invoices by claiming Notification benefit as per the best understanding of the appellant. Monthly returns were also filed and assessed. Moreover, there are no goods ordered to be liable to confiscation under Rule 209. Therefore none of the ingredients of the Rule 209 stands

satisfied and hence, there is no justification for imposition of penalty under Rule 209.

5. Shri Sanjay Kumar, Ld. Superintendent (A.R.) appearing on behalf of the Revenue reiterated the finding of the impugned order.

6. We have carefully considered the submissions made by both sides. We find that the short issue to be decided in this matter is whether the appellant is eligible for benefit of exemption Notification No. 20/98 –CE as claimed by them or they were required to pay higher rate of duty under Notification No. 13/98-CE as held by Ld. Commissioner. For appreciating the respective contentions of both the sides, it would be beneficial to refer firstly to the relevant Notifications relied upon by both the sides

Notification No. 20/98-C.E., dated 18-7-1998: -

Concessional Rate of duty for Fabrics of cotton and man-made fibres not subjected to any process etc — Exemption

In the exercise of powers conferred by sub-section (1) of section 5A of the Central Excise Act, 1944 (1 of 1944), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the goods of the description specified in column (2) of the Table below and falling under the Chapter No. of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) specified in the corresponding entry in column (3) of the said Table, produced or manufactured, in a hundred per cent export-oriented undertaking or a free trade zone wholly from the raw materials produced or manufactured in India, and allowed to be sold in India, under and in accordance with, the provisions of sub-paragraph (a), (b), (c), (d) or (f) of paragraph 9.9 or of paragraph 9.20 of the Export and Import Policy, 1 April, 1997-31 March, 2002, from so much of the duty of excise leviable thereon under section 3 of the said Central Excise Act, as is in excess of the rate specified in the corresponding entry in column (4) of the said Table :-

TABLE

S. No.	Description of goods	Chapter No.	Rate of Duty
(1)	(2)	(3)	(4)
1.	Fabrics of cotton (not containing any other textile material), not subjected to any process.	52	50% of duty specified in the First Schedule to the said Central Excise Tariff Act.
2.	Fabrics of - (i) cotton (containing any other textile material), (ii) man-made fibres, not subjected to any process	52, 54 or 55	50% of duty specified in the First Schedule to the said Central Excise Tariff Act.

Explanation. - For the purposes of this notification, the value of the goods shall be as determined in terms of section 4 of the Central Excise Act, 1944 (1 of 1944).

[Notification No. 20/98-C.E., dated 18-7-1998 as amended by Notification No. 11/2000-CE dated 01.03.2000]

Notification No. 13/98-CE dated 02.06.1998 as amended by Notification No. 38/99-CE dated 16.09.1999 and No. 11/2000-CE dated 01.03.2000

Effective rate of excise duty on specified goods manufactured in EOU's and EPZ

In exercise of the powers conferred by sub-section (1) of section 5A of the Central Excise Act, 1944 (1 of 1944), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the finished products, rejects and waste or scrap specified in the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), produced or manufactured, in a hundred per cent. export-oriented undertaking or a free trade zone wholly from the raw materials produced or manufactured in India, from so much of the duty of excise leviable thereon under section 3 of the said Central Excise Act, as is in excess of the amount calculated at the rate of thirty per cent. of each of the duties of customs, which would be leviable under section 12 of the Customs Act, 1962 (52 of 1962) read with any other notification for the time being in force issued under sub-section (1) of section 25 of the said Customs Act, on the like goods produced or manufactured outside India if imported into India, subject to the following conditions, namely :-

(a) such finished products, if manufactured and cleared by a unit other than a hundred per cent. export-oriented undertaking or a unit in a free trade zone, are wholly exempt from the duties of excise or are chargeable to Nil rate of duty; and

(b) the finished products, rejects and waste or scrap are allowed to be sold in India under and in accordance with the provisions of sub-paragraphs (a), (b), (c), (d) or (f) of paragraph 9.9 or of paragraph 9.20 of the Export and Import Policy, 1 April, 1997 - 31 March, 2002.

[Notification No. 13/98-C.E., dated 2-6-1998]

7. We find that the Notification No. 20/98-CE covered DTA clearances effected by the EOU in terms of para 9, 9(a), (b), (c), (d) or (f) of para 9.9. or para 9.20 of the Import Export Policy. Further this Notification fixes the effective rate of duty at 50% of Central Excise Tariff Rate, subject to the condition that the finished goods are manufactured by 100% EOU wholly out of indigenous raw materials and the finished goods are chargeable to Nil rate of duty if manufactured and cleared by DTA unit. We find that the Appellant during the period October 2000 to January 2001 had cleared rejects of Polyester Grey Fabrics classifiable under Chapter 52 of the CETA on payment of duty @50% of duty specified in the first schedule to the Central Excise Tariff Act, there is no dispute about the facts that the finished goods are

manufactured wholly out of the indigenous raw materials and that the finished goods fall under chapter 52 and 54 as specified in the above Notification. Therefore, we do not find any irregularity in Appellant's claim related to exemption notification.

8. The Department, however, took the view that Notification No. 13/98, dated 2-6-1998 is applicable, as per which, the Appellant was liable to pay duty at the rate of 30 per cent as this product was manufactured by 100% EOU and cleared in DTA and demanded differential duty.

9. We also find that where there are multiple Notifications operating simultaneously in respect of the same commodity and extending different benefits, an option must be given to the assessee to choose the Notification that would be most beneficial to it. We are of the view that the assessee has to be permitted to elect and choose the Notification of its choice and the Department cannot thrust a Notification of its choice upon the assessee. Our this view is supported by two judgments of the Supreme Court in the case of *H.C.L. Limited* v. *Collector of Customs, New Delhi*, [2001 (130) E.L.T. 405 (S.C.)] and *Collector of Central Excise, Baroda* v. *Indian Petro Chemicals* [1997 (92) E.L.T. 13 (S.C.)] where the Full Bench and Division Bench of the Supreme Court respectively have categorically confirmed the position that the option to select the benefits provided under Notification is clearly within the realm of choice of an assessee.

10. In view of the cited case law and our findings above, we find that the appellant are entitled to the exemption under Notification 20/98-CE. We set aside the impugned orders and allow the appeals with consequential benefit to the appellant, as per law.

(Pronounced in the open court on 25.07.2024*)*

(Ramesh Nair)
Member (Judicial)

(Raju)
Member (Technical)

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