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

REGIONAL BENCH - COURT NO. 3

EXCISE Appeal No. 11701 of 2017-DB

[Arising out of Order-in-Original/Appeal No SUR-EXCUS-002-COM-090-091-16-17 dated 29.03.2017 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-SURAT-II]

Kaybee Tex Spin Pvt Limited .... **Appellant**
2nd Floor,vishwakarma Chambers, Majura Gate, Ring Road,
SURAT, GUJARAT -395002

VERSUS

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

APPEARANCE :

Shri Mayur Shroff, Advocate for the Appellant
Shri Ajay Kumar Samota, Superintendent (AR) for the Respondent

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

DATE OF HEARING : 12.06.2024
DATE OF DECISION: 25.07.2024

FINAL ORDER NO. 11638/2024

RAMESH NAIR :

The brief facts of the case are that the appellant is 100% EOU engaged in the manufacture of Texturising Yarn. On checking & scrutiny of relevant records maintained and returns submitted by the Appellant it appeared that Appellant had procured imported & indigenous raw material i.e. PFY for manufacturing of Texturising Yarn. During the period 16.11.99 to 27.04.2000 appellant cleared Texturising Yarn for home consumption in to the DTA market. Appellant had availed the benefit of DTA sale under paragraph 9.9(b) of the EXIM POLICY against supplies effected in DTA under para 9.10 of the Policy i.e. Deemed Export Category. However, vide amendment dated 31.03.99 of the EXIM POLICY the provision of para 9.9(b) of the said policy has been changed and in place of the words "25% of the production in value term" the words "DTA sale upto50% of FOB value of Export" has been substituted from 01.04.99. Therefore, the DTA sale entitlement of EOU unit would be upto 50% of the FOB value of exports i.e. Physical/Actual Exports only. The Development Commissioner, Kandla has granted the required permission for advance DTA sales to the Appellant. Since, such DTA sale entitlement would be up to 50% of the FOB value of export of Physical/Actual Export only, and since, no physical/actual exports has been taken place except deemed export from the unit. The DTA sales made by the Appellant appeared to be incorrect as the DTA sales had been made against Deemed Export and not against the physical/actual exports hence, the said DTA clearances were not in accordance with the EXIM POLICY. Therefore, all sales towards DTA effected during the disputed period would not be eligible for payment of concessional rate of duty 50% of each of Customs Duty in terms of Notification No. 2/95 CE dated 04.01.95 or under any other relevant Notification and the duty liability on the above DTA sale will be of the 100% Customs Duties leviable on procurement of duty free materials in terms of section 65(2)(b) of the Customs Act, 1962. Further it was contended that Appellant has also violated the condition No.12 of the LOP and condition No. 2 of the licence issued by Assistant Commissioner of Central Excise, Surat read with Section 65 of the Customs Act,1962

2. It also further appeared that the average price indicated by the Appellant that the invoices related to the clearances effected in to DTA is neither the assessable value nor the transaction value. The correct valuation of the goods, have not been taken into account by the Appellant. Further, it was also contended that Notification No. 53/97-Cus. dated 03.06.97 as amended from time to time clearly stipulates that duty free imported raw material can be procured for the purpose of manufacture of articles for exports out of India. Since the Appellant has procured the imported raw materials and not exported goods/ articles made out of so procured raw material has violated the condition of procurement read with section 65(2)(b) of the Customs Act, 1962 and has not fulfilled the conditions as laid down. The Appellant has not fulfilled the export obligation. Hence, the duty exemption on procurement of raw materials under the above notification will not be admissible to the Appellant, therefore appellant is also liable to pay duty payable on the raw materials procured. Accordingly appellant was issued two show cause notices dated 04.05.2000 and dated 03.04.2000 along with addendum dated 05.05.2000 and 04.04.2000 proposing duty demands along with interest and penalty. In adjudication Learned Commissioner vide impugned order dated 29.03.2017 passed the order as under :

A. In respect of SCN dated 04.05.2000 and addendum dated 05.05.2000

(i) Since I have already held that 'deemed export' effected by the noticee is at par with the physical export' in terms of Para 9.9(b) of the said Exim Policy 1997-2002, as discussed in foregoing paras; the benefit of Notification No. 2/95-CE dated 04.01.1995 is extendable to the noticee. I confirm the demand of the differential Central Excise duty amounting to Rs. 46,03,738/- equal to 50% of aggregate of all the Customs duties leviable on clearance their finished aggregate of all Customs duties leviable on clearance their finished goods i.e. Texturising Yarn made in DTA during the period from 24.02.2000 to 27.04.2000, under Section 11A(2) [Now Section 11A(10)] of the Central Excise Act 1994 and erstwhile Rule 9 (2) of Central Excise Rules, 1944; and order for its recovery from M/s Kaybee Tex Spin Pvt. Ltd. (100% EOU), Surat.

(ii) I impose Penalty of Rs. 46,03,738/- on them under Section -11AC(C) of the Central Excise Act, 1944. However as per sub-section (e)of Section -11AC of the Central Excise Act, 1944, such penalty shall be 25% of the duty amount confirmed at (i) above, subject to the condition that the duty determined in (i) above and applicable interest thereon as per (iv) below along with such reduced penalty are paid within 30 days from the date of receipts of this order.

(iii) I also impose penalty of Rs. 4,55,88,132/- on them under erstwhile Rule 173-Q of the Central Excise Rules, 1944.

(iv) I order to recover interest at the applicable rate, on the amount confirmed at Sr. No. (i) above, under the provisions of erstwhile Section -11AB of the Central Excise Act, 1944 from them.

(v) I order to drop the demand of Customs duty amounting to Rs. 1,05,06,607/- on duty free raw materials which were imported/procured indigenously and were subsequently consumed in the manufacture of finished goods cleared in DTA from them.

(vi) I order to drop demand of interest under Section 72 of Customs Act, 1962 read with Section 28AB of Customs Act, 1962 from them.

B. In respect of SCN dated 03.04.2000 and addendum dated 04.04.2000

(i) Similarly, since I have already held that 'deemed export' effected by the noticee is at par with the physical export' in terms of Para 9.9(b) of the said Exim Policy 1997-2002, as discussed in foregoing paras; the benefit of Notification No. 2/95-CE dated 04.01.1995 is extendable to the noticee. I confirm the demand of the differential Central Excise duty amounting to Rs. 6,27,839/- equal to 50% of aggregate of all the Customs duties leviable on clearance their finished goods i.e Texturing Yarn made in DTA during the period from 16.11.99 to 04.01.2000, under Section 11A(2) [Now Section 11A(10)] of the Central Excise Act 1994 and erstwhile Rule 9 (2) of Central Excise Rules, 1944; and order for its recovery from M/s Kaybee Tex Spin Pvt. Ltd. (100% EOU), Surat.

(ii) I impose Penalty of Rs. 6,27,839/- on them under Section -11AC(C) of the Central Excise Act, 1944. However as per sub-section (e)of Section -11AC of the Central Excise Act, 1944, such penalty shall be 25% of the duty amount confirmed at (i) above, subject to the condition that the duty determined in (i) above and applicable interest thereon as per (iv) below along with such reduced penalty are paid within 30 days from the date of receipts of this order.

(iii) I also impose penalty of Rs. 97,18,740/- on them under erstwhile Rule 173-Q of the Central Excise Rules, 1944.

(iv) I order to recover interest at the applicable rate, on the amount confirmed at Sr. No. (i) above, under the provisions of erstwhile Section -11AB of the Central Excise Act, 1944 from them.

(v) I order to drop the demand of Customs duty amounting to Rs. 21,61,328/- on duty free raw materials which were imported/procured indigenously and were subsequently consumed in the manufacture of finished goods cleared in DTA from them.

(vi) I order to drop demand of interest under Section 72 of Customs Act, 1962 read with Section 28AB of Customs Act, 1962 from them.

Aggrieved by the above order, the appellant is before us.

3. Shri Mayur Shroff, Learned Advocate appeared for the appellant and submits that the impugned order is unsustainable as there has been an abnormal delay of 17 years in adjudication of the impugned show cause notices. As per the settled law adjudication has to be done within a reasonable time. Since the adjudication was not done with reasonable time the proceedings deserved to be dropped. He placed reliance on the following judgments.

(i) Meghmani Organics Ltd. Vs. Union of India – 2019 (368) ELT 433 (Guj.)
(ii) Apollo Tyres Ltd. Vs. Union of India -2020 (372) ELT 52 (Guj.)
(iii) Union of India Vs. ATA Freight (I) Pvt. Ltd. -2023 (73) GSTL 581 (SC)
(iv) Nanu Ram Goyal Vs. Commissioner of CGST and Central Excise, Delhi -2023 (74) GSTL 17 (Del.)
(v) Commissioner of Central Excise, Bolpur Vs. Unnayak Prop- 2009 (243) ELT 212 (Tri. Kolkata)
(vi) Collector of Cus., Mumbai Vs. Merzario Shipping Agencies Pvt. Ltd. -2000 (118) ELT 774 (Tribunal)
(vii) Lanvin Synthetics Pvt. Ltd. Vs. Union of India -2018 (322) ELT 168 (Bom)
(viii) J.M. Baxi & Co. Vs. Government of India -2016 (336) ELT 285 (Mad.)

5. He also submits that the differential duty demand of Rs. 46,03,738/- and of Rs. 6,27,839/- has been wrongly foisted vide impugned order. The impugned show cause notices wrongly proposed the demand duty in excess of the transaction value at which the goods were cleared in the DTA. The DTA sales were made by the Appellants to several independent buyers on

principal to principal basis and based on competitive market condition. There was no allegation of any financial flow back or receipt of any extra consideration from the buyers. The impugned notices also did not allege that the sale price of the DTA sales was depressed or suppressed or manipulated. In such circumstances there was no basis for jettisoning the transaction value and adopting a hypothetical and arbitrary value for raising a differential duty liability.

6. He further submits that the impugned notices sought to enhance the transaction value by comparison of actual price at which the goods were sold by the Appellants with the arbitrarily calculated average price. The so called average value was arbitrary and baseless. As per the mandatory requirement of Rule 3 of the Customs Valuation (Determination of Price of Imported Goods) Rules 1988 the subject goods had to be valued at transaction value and the actual price had to be accepted as the sales were to independent buyers and not to related persons. Further there was no contrary evidence available to show that the payment received from thee buyers were influenced by circumstances enumerated in Rule 4(2) of the Customs Valuation (Determination of Price of Imported Goods) Rules 1988. In such circumstances there was no basis to discard the transaction value.

7. The adjudicating authority has held adversely against the appellant on the basis of his finding that the Appellant had undervalued their finished goods cleared into DTA by deliberately showing less value of their finished goods cleared into DTA by deliberately showing less value of their finished goods in their statutory records with malafide intention to evade payment of duty. The said findings are patently erroneous and extraneous to the impugned show cause notices. The impugned notices did not anywhere allege that the Appellant resorted to undervaluation with malafide intent to evade duty. The adjudicating authority has accepted the fact that the SCN has not brought forward any flow back of money. Thus the impugned order is patently unsustainable and bad in law as the adjudicating authority has traversed beyond the scope and ambit of the show cause notice and made out a new case against the Appellant at the adjudication stage. He placed reliance on the following judgments.

(i) Commissioner Vs. Ballarpur Industries Ltd. – 2007 (215) ELT 489 (SC)

(ii) Commissioner Vs. Champdany Industries Ltd. -2009 (241) ELT 481 (SC)

(iii) Reckitt and Colman of India Ltd. Vs. Collector -1996 (88) ELT 641 (SC)

(iv) Prince Khadi Woolen Handloom Prod. Coop. Indl. Society Vs. CCE-1996 (88) ELT 637 (SC)

8. He also argued that even otherwise the adjudicating authority has erroneously resorted to the provisions of Rule 8 and Rule 7A of the Customs Valuation (Determination of Price of Imported Goods) Rules 1988 for valuation of the subject DTA sales. In the very first place the adjudicating authority has erred in taking recourse to Rule 8 for valuing the subject goods on the basis of arbitrarily calculated average prices reflected in the show cause notices. Rule 8(2) of the Customs Valuation Rules specifically states that no value shall be determined under the provision of the rule on the basis of arbitrary or fictitious values. Thus the impugned order is patently erroneous and unsustainable. Furthermore; the provisions of Rule 7A have also been wrongly invoked in the present case in view of the fact that there was no allegation in the impugned notices that the transaction between the buyer and the appellant was not genuine. In the present case the sale transactions were at arm’s length and to independent buyers. Further the Interpretative Note to Rule 7A specifically states, inter-alia, that the use of the computed value method will generally be limited to those cases where the buyer and seller are related. In the present case there is no allegation that the Appellants and their buyers are related. Thus the Rule 7A of the Customs Valuation (Determination of Price of Imported Goods) Rules 1988 has been erroneously invoked against the Appellant.

9. He also argued that even if an appellant has sold the goods at a price lower than the cost of production the assessable value cannot be challenged or changed unless there is an allegation that there was any flow back of the money from the buyer to the assessee or that the wholesale price to the buyer was for a consideration other than the one for which it was purported to be sold. He placed reliance on the following judgments.

(i) CCE Vs. Guru Nanak Refrigeration Corporation -2003 (153) ELT 249 (SC).

(ii) Honda Cars India Ltd. Vs. CCE -2015 (328) ELT 273 (T)

(iii) T&T Metals Pvt. Ltd. Vs. Principal Commissioner of CGST & CE - 2021 (376) ELT 345 (T)

10. He also submits that unless the revenue was able to demonstrate that the invoice price was manipulated the transaction value was to be arrived at in accordance with the provisions of Section 14(1). In absence of any special circumstances indicated in Rule 4(2) of the CVR 1988 the price paid or payable by the buyer to the seller was the transaction value. He placed reliance on the following judgments.

(i) Eicher Tractors Ltd. Vs. Commissioner – 2000 (125) ELT 321 (SC).

(ii) Commissioner of Customs, Vishakhapatnam Vs. Aggrawal Industries -2011 (272) ELT 641 (SC)

(iii) CCE &ST. Noida Vs. Sanjivani Non-ferrous Trading Pvt. Ltd.- 2019 (365) ELT 3 (SC)

(iv) Banyan Chemicals Ltd. Vs. Commissioner of Central Excise, Vadodara -2009 (236) ELT 298 (Tri. Ahmd.)

11. As regard the imposition of penalties he submits that since the demand, per se, is erroneous and unsustainable there is no basis for imposition of any penalty on the Appellant. Since Rule 173Q is subject to the provisions contained in Section 11AC of the Act the confiscation of goods and levy of penalty is conditional upon the requirements of Section 11AC of the Central Excise Act 1944 being satisfied. In the present case neither of the two show cause notices alleged willful misstatement or suspension of facts with an intention to evade payment of duty. Thus the requirement of Section 11AC are not satisfied in the present case. Thus the adjudicating authority has wrongly invoked the provisions of Section 173Q of the Central Excise Rules, 1944 against the Appellants and imposed penalty on them. He placed reliance on the following judgments.

(i)Prince Muliplast Pvt. Ltd. Vs. Union of India -2012 (276) ELT 48 (Guj.)

(ii)Commissioner of Central Excise, Coimbatore Vs. Sutham Nylocots - 2014(306)ELT 255(Mad.)

(iii) Commissioner of C.Ex. Delhi vs. Ganpati Rolling Pvt. Ltd. -2016 (338) ELT 587 (Del.)

12. He further submits that in the present case the subject notice did not allege removal of any excisable goods in contravention of any of the provisions of the Central Excise Rules or contravention of any of the provisions of the said rules with intent to evade payment of duty. Thus there was no basis of invocation of provisions of Rule 173Q against the Appellant. Even otherwise, penalty under Rule 173Q cannot be imposed as the Appellant were governed by the provisions of Rules contained in Chapter V-A since they were a 100% Export Oriented Unit. He also placed reliance on following judgments.

(i) Deputy Commr. Of Cus. Vs. Baccarose Perfume & Beauty Products Ltd. -2010(267)ELT 177(Guj.)
(ii) Commissioner of Central Excise , Chandigarh –I Vs. Deepak Polyspin -2004(167)ELT 360(Tri.-Del.)
(iii) Alsa Marine & Harvests Ltd. Vs. Comm. Of Cus. Visakhapatnam - 2003(168)ELT 741 (Tri. Bang.)
(iv) La Mansion Granites Ltd. Vs. Commissioner of C.Ex., Hyderabad - 2003(187)ELT 115(Tri.-Bang.)
(v) Bee International Vs. Commissioner of Central Excise, Thane –II- 2007(220)ELT 128 (Tri. –Mumbai)
(vi) Hanil Era Textiles Ltd. Vs. Commissioner of C.Ex. Raigad - 2005(192)ELT 1109 (Tri. –Mumbai)
(vii)T.V. Raja Reddy Vs. Commr. Of C.Ex. & Customs, Guntur- 2001(138)ELT 793 (Tri.- Chennai)

13. On other hand, Shri Ajay Kumar Samota, Superintendent (AR) appearing on behalf of the Revenue reiterates the findings of the impugned order.

14. We have carefully considered the submissions made by both the sides and perused the records. The only dispute to be decided in this matter is

whether the Appellant had resorted to undervaluation of finished goods cleared by them in DTA and whether the value of the DTA clearances made by a 100% EOU should be the transaction value at which the goods have been sold to domestic buyers or it has to be the value at which department demanded duty.

15. We find that it has been alleged that the average price indicated by the Appellant in invoices related to the clearances effected into the DTA is neither the assessable value nor the transaction value in as much as (i) raw material price (ii) processing charges (iii) notional profits etc. have not been taken into account by the Appellant. As per the revenue the actual sale price for the DTA sale was not the transaction value. Appellant had made DTA clearances of Texturising Yarn at an average rate of Rs. 38.45 Kg., whereas the average cost of raw material i.e. POY and PFY was Rs. 45.64 Kg. We find that disputed DTA sale was made in the year 2000 and the matter was adjudicated in 2017 i.e about 17 years after the DTA sale. The revenue has not supported it with any documentary evidence. The department has not produced any evidence in support of allegation of undervaluation with any documentary evidence such as DTA invoices issued by other manufactures showing more DTA sale price than the Appellant at the relevant period in the year 2000. It is evident that the Appellant has submitted the data and details in their application for DTA sale to the Development Commissioner. Based on submitted details and scrutiny of the other records the Learned Development Commissioner had granted permission for DTA sale. It is not the case of the department that the Appellant had supplied goods in DTA in excess of the permitted value. The DTA sale was made to several independent buyers on principal to principal basis. There is not a whisper of allegation that the sale price for such DTA sale was depressed or suppressed or manipulated in any manner whatsoever. There is also not a whisper of allegation that there is any financial flow back from the buyers to the appellant or that there was any extra consideration received by the Appellant from buyers. In the instant case the department could not show any evidence that the transaction value declared by the appellant was not price actually paid by the buyer. There is also no documentary evidence produced by the revenue that the value adopted for DTA sale is a manipulated one. The sale has been made to the independent buyers and the price is the sole consideration of sale. In case of

M/s Eicher Tractors Ltd. v. *Commissioner - 2000 (122) E.L.T. 321* (S.C.) the Hon'ble Apex Court held that unless the "special circumstances" exists, the Transactional value cannot be rejected. In these circumstances, the transaction value declared by the appellant cannot be dis-regarded.

16. We also find that in terms of the provisions of proviso to Section 3(1) of Central Excise Act, 1944, while the duty payable in respect of the goods cleared by a 100% EOU into DTA is the aggregate value of duties of customs on import of like goods into India, the assessable value for this purpose is to be determined under Section 14 of the Customs Act, 1962. Therefore, the assessable value of the goods cleared into DTA must be comparable with the contemporaneous import price of identical goods or similar goods into India in comparable quantity. However in the present matter there are no details in this regard produced by the department. We are, therefore, of the view that the impugned order rejecting the DTA sale price of the appellant unit is not correct.

17. It is settled law that when there is no duty demand, there could be no penalty. Therefore, the penalties imposed are liable to be set aside. Accordingly, We set aside the impugned order and allow the appeal with consequential relief, if any, to the appellant as per the law.

(Pronounced in the open court on 25.07.2024*)*

(Ramesh Nair)
Member (Judicial)

(RAJU)
Member (Technical)

KL