Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench at Ahmedabad

REGIONAL BENCH-COURT NO. 3

Customs Appeal No. 10163 of 2018 - DB

(Arising out of OIA-CCESA-SRT-APPEALS-PS-50-2017-18 dated 29/09/2017 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-SURAT-I)

Indian Polyfins **........Appellant**
(100% Eou), Plot No. A/1-2,
Block No.57, Pipodara Industrial Estate,
Pipodara, Taluka-mangrol,
Surat, Gujarat

VERSUS

Commissioner of C.E. & S.T.-Surat-ii **......Respondent**
New C.Ex Building...Opp. Gandhi Baug,
Chowk Bazar,
Surat, Gujarat- 395001

With

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Indian Polyfins Ltd **........Appellant**
(sizing Division), Plot No. A/1-2, Block No.57,
Pipodara Industrial Estate,
Pippdara, Taluka-mangrol,
Surat, Gujarat

VERSUS

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(Arising out of OIA-CCESA-SRT-APPEALS-PS-50-2017-18 dated 29/09/2017 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-SURAT-I)

Shri Vijayendra Kanhaiyalal Arya **........Appellant**
Director Of M/s. Indian Polyfins (100% Eou),
Plot No. A/1-2, Block No.57, Pipodara,
Industrial Estate, Pipodara, Taluka - Mangrol,
Surat, Gujarat

VERSUS

Commissioner of C.E. & S.T.-Surat-ii **......Respondent**
New C.Ex Building...Opp. Gandhi Baug,
Chowk Bazar,
Surat, Gujarat- 395001

APPEARANCE:
Shri Ankur Upadhyay, Advocate for the Appellant
Shri A R Kanani, Superintendent (AR) for the Respondent

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

Final Order No. 12237-12239/2024

DATE OF HEARING:20.06.2024
DATE OF DECISION:27.09.2024

RAMESH NAIR

The brief facts of the case are that the appellant M/s. Indian Polyfins Ltd. (100% EOU) is engaged in manufacturing of articles of texturized yarn and grey fabrics falling under chapter 54 of the Central Excise Tariff Act, 1985. During the physical verification of the stock of goods lying at the unit of the appellant with the statutory records maintained by them, shortage of 25,187 Kgs of imported Polyster Filament yarn (PFY) was found. Shri Vijendra Arya, director of the appellant stated that quantity of 25,187 Kgs of PFY were transferred to the Indian Polyfins Ltd. (Sizing division). Revenue alleged that out of the 25,187 Kgs of PFY, only 2,028 Kgs of Polyster Filament yarn was found and remaining 23,159 Kgs of PFY had been cleared clandestinely through the agent Shri Nathabhai Agrawal and Abhishek Market, Ring Road, Surat without payment of duty and without cover of any duty paying documents. Accordingly appellant was issued show cause notice dated 16.01.2008 for recovery of custom duty of Rs. 9,83,639/- on Polyster Filament Yarn (PFY) imported by M/s. Indian Polyfins Ltd. (100% EOU) without payment of customs duty under section 28 (1) of the Customs act, 1962. Further penalty of Rs. 2,00,000/- under section 112(b) of the Customs Act, 1962 has been imposed on M/s. Indian Polyfins Ltd. (Sizing Division) and penalty of Rs. 1,00,000/- under section 112(b) of the Customs Act, 1962 has been imposed on Shri Vijyendra

Kanhaiyalal Arya, Director of M/s. Indian Polyfins Ltd. (100% EOU as well as Seizing Unit). The said show cause notice was adjudicated by the adjudicating authority vide Order-in-Original dt. 29.12.2008 and subsequently said order was upheld by the Commissioner (Appeals) vide Order-in-Appeal dated 29.09.2017. Being aggrieved, appellants filed the present appeals.

2. Shri Ankur Upadhyay, Learned Counsel appearing on behalf of the appellants submits that no investigation has been made by the department from the buyer of the goods as no evidence has been adduced by the revenue regarding the clearance of the goods. The revenue did not make any investigation from the agent Shri Nathabhai Agrawal and Abhishek Market, Ring Road, Surat through whom goods were alleged to be sold.

2.1 He further submits that demand of customs duty cannot be solely confirmed on the basis of statement of the director Shri Vijyendra Arya without corroborating the said statement with the evidences. In this context he placed reliance upon the judgment of Rochees Impex Pvt. Ltd. vs CCE, Jaipur [2004 (174) E.L.T. 254 (Tri.- Del.)]

2.2 He also submits that the demand is time barred as show cause notice has been issued under section 28(1) of the Customs Act, 1962 which is for normal period of limitation and without invoking extended period of limitation in terms of section 28 (4) of the Customs Act, 1962. The show cause notice dated 16.01.2008 has been issued after the period of five years from the date of import of Polyester Filament Yarn. He placed reliance on following judgments to support his arguments:-

- CCE, Pune Vs Emcure Pharmaceuticals Ltd. [2014 (307) E.L.T. 180 (Tri. - Mumbai)]
- Commissioner Vs Asian Exports [2003 (157) E.L.T. A202 (S.C.)]

3. On other hand Shri A R Kanani Learned Superintendent (AT) appearing on behalf of revenue reiterated the findings of the impugned order.

4. We have carefully gone through the submission made by both the sides perused the records and find that no corroborative evidence has been relied upon by the Revenue regarding the clandestine clearance of the short found goods from the factory premises of the appellant and also no investigation has been made by the department from the transporter and the buyer to whom such goods were alleged to be sold by the appellant. The burden of proof is on the revenue to establish their case beyond doubts and it is required to be discharged effectively and also the allegation of clandestine removal solely made on the basis of statement of the director without any corroborative evidence is not sustainable as held in the case of M/s. Vikram Cements (P) Ltd. reported in 2012 (286) E.L.T. 615 (Tri. Del.). The said decision was confirmed by the Hon'ble Allahabad High Court in the case of CCE Vs Sunil Kumar Gupta reported in 2015 (315) E.L.T. A89 (All.).

4.1 We also find that Tribunal in the case of Arya Fibres Pvt. Ltd. Vs CCE, Ahmedabad-II reported in 2014 (311) E.L.T. 529 has examined the issue of clandestine removal and in para 40 of the said order has laid down the parameters to prove clandestine removal of goods which is reproduced hereunder:-

"40. After having very carefully considered the law laid down by this Tribunal in the matter of clandestine manufacture and clearance, and the submissions made before us, it is clear that the law is well-settled that, in cases of clandestine manufacture and clearance, certain fundamental criteria have to be established by Revenue which mainly are the following :

(i) There should be tangible evidence of clandestine manufacture and clearance and not merely inferences or unwarranted assumptions;

(ii) Evidence in support thereof should be of:

(a) Raw materials, in excess of that contained as per the statutory records;

(b) Instances of actual removal of unaccounted finished goods (not inferential or assumed) from the factory without payment of duty;

(c) Discovery of such finished goods outside the factory;

(d) Instances of sale of such goods to identified parties;

(e) Receipt of sale proceeds, whether by cheque or by cash, of such goods by the manufacturers or persons authorized by him;

(f) Use of electricity far in excess of what is necessary for manufacture of goods otherwise manufactured and validly cleared on payment of duty;

(g) Statements of buyers with some details of illicit manufacture and clearance;

(h) Proof of actual transportation of goods, cleared without payment of duty;

(i) Links between the documents recovered during the search and activities being carried on in the factory of production; etc."

Admittedly, nothing has been brought on record with corroborative evidence to allege clandestine removal against the appellant. Therefore we are of the view that demand against appellant is not maintainable by simply relying upon the statement of Shri Vijyendra Kanhaiyalal Arya, director of the Appellant who has also not been cross examined as mandated under section 9D of the Central Excise Act, 1944.

4.2 We also find that neither investigation has been made by the department from the agent Shri Nathabhai Agrawal and Abhishek Market, Ring Road, Surat through whom goods were alleged to be cleared by the appellant and nor their statements were recorded by the department to establish their case. Further the onus has to be discharged by the Revenue with the production of sufficient evidence which may lead to the probability of having removed the goods as held in the case of CCE, Raipur Vs ABS Metals (P) Ltd. as reported in 2016 (341) E.L.T. 425 (Tri. – Del.) and the said decision was affirmed by the Hon'ble Chhattisgarh High Court in Commissioner Vs ABS Metals (P) Ltd. reported in 2017 (354) E.L.T. A200 (Chhattisgarh) which has not been done by the department in the present matter. Hence we do not find any merit in the impugned order.

5. In view of the above observation, impugned order is set aside and appeals are allowed with consequential relief, if any, as per law.

(Pronounced in the open court on 27.09.2024)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Raksha