IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH, CHENNAI

Appeal No. C/278/2011

(Arising out of Order-in-Original No. 361/2011 dated15.7.2011 passed by the Commissioner of Customs (Airport), Chennai)

M/s. Hritik Exim   Appellant

Vs.

Commissioner of Customs, Airport, Chennai   Respondent

Appearance

Shri G. shivadass, Advocate for the Appellant
Shri A. Cletus, Addl. Commissioner (AR) for the Respondent

CORAM

Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)
Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of Hearing / Decision: **24.05.2018**

Final Order No. **41658 / 2018**

Per Bench

The appellants had imported "Human Hair" through Chennai Air Cargo Complex vide various Bills of Entry for processing (job work) and re-export. The goods were classified under Customs Tariff Heading 0501 0010 and were assessed by extending benefit of Customs Notification No. 32/1997-Cus. Appellants process the human hair so received by soaking, shampooing, washing, drying, sorting and hackling the raw hair.

They were registered under Customs (Import of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods), Rules 1996 for the said job activity. After processing the human hair, appellant raised commercial invoices on the buyers identified by the supplier and exported the final goods to the identified buyers under shipping bills and corresponding ARE-I forms. Department took the view that the goods were not supplied free of cost by the foreign supplier but at a cost. Hence, they would not be entitled to duty exemption benefit under Notification No.32/97-Cus. Department issued show cause notice dated 21.6.2010 with respect to two Bills of Entry inter alia proposing demand of duty foregone on the grounds that appellants were not eligible for exemption under Notification No.32/1997. Subsequently, appellants were issued fresh show cause notice dated 6.11.2010 proposing to deny the benefit of Notification No.32/1997-Cus. in respect of the consignments cleared by appellants under 10 Bills of Entry alleging duty foregone amounting to Rs.1,13,41,444/- with interest, confiscated imported goods and imposition of penalties under various provisions of law. In adjudication, vide impugned order dated 15.7.2011, Commissioner took note of the Memorandum of Understanding between the appellant and the foreign supplier as per which appellant has to pay for raw materials imported by them and concluded that in the import invoice, the words are clearly shown as “FOB China” that nowhere in the invoice, is there any mention that the goods are being sent for job work and that there has been deliberate willful mis-declaration on the part of appellant to evade duty by wrongful claim on limitation. Based on these conclusions, the adjudicating authority denied the benefit of notification, confirmed duty along with interest as proposed in the show cause notice and imposed equal penalty on the appellant under section 114A of the Customs Act, 1962. Aggrieved, the appellants are now before the Tribunal.

2. Today, when the matter came up for hearing, on behalf of the appellant, ld. counsel Shri G. Shivadas made oral and written submissions, which are summarized as under;-

2.1 The purpose of the condition in the notification that the raw materials are supplied ‘free of cost’ by foreign buyer is that the ‘cost of raw materials’ supplied to job worker should not be borne by the job worker but should be borne by the supplier. The payment made by the appellant was only a security to the supplier.

2.2 The appellant also received advance from the suppliers towards exports of final products to be made from identified buyers. Hence, the appellants themselves have not borne the cost of raw materials supplied to them. The nature of the job work carried out by the appellant on the imported human hair is not disputed. The export of the resultant products as per the directions of the foreign supplier is also not disputed. Appellants could have very well have opted for import of the same goods either under advance authorization or could have imported the goods on payment of duty and re-export the finished goods under claim for drawback. In fact, for the subsequent period, from January 2010 onwards, appellants have imported the materials without payment of duty only under advance authorization in which option they have not faced any problems. The appellants have also been converted into 100% EOU from 2001 onwards.

2.3 At the initial stage when they started imports, appellants had written a letter dated 9.7.2009 to the Deputy Commissioner of Customs and Central Excise, Hyderabad with reference to availment of benefit of Notification No..32/1997-Cus. dated 1.4.1997 informing the fact of the MOU with foreign supplier and also informed that they have to make payment on supply of materials was not imposed on them but at the same time buyer also pays advance payment before export of goods. In spite of the same, they have not received anything from the customs authorities against this communication. Appellant did not also have any problems in the assessment of Bills of Entry for the impugned raw materials and availment of duty exemption benefit under Notification 32/97-Cus.

2.4 Subsequently, the impugned raw materials were worked upon and the finished product Human Hair Remi Single Drawn etc. was exported only as per the directions of the foreign supplier to various consignees in Brazil, Miami, USA etc.

2.5 The Notification 32/97 requires that there should be a value adoption of 10% which has been exceeded in the present exports.

2.6 Ld. counsel also drew attention to the copies of ER-II, bank realization certificates etc. related with the exports of the job worked products.

2.7 Considering that the appellant had themselves informed the department about the nature of the work, especially the fact that they would be effecting payment for the raw material to the foreign supplier, proceedings initiated against them by show cause notice dated 6.11.2010 will be hit by limitation.

2.8 No suppression or mis-statement of facts can be alleged against the appellant. The dispute in question relates only to matter of interpretation of the various conditions laid down in the Notification 32/97-Cus. The appellants have also kept the department informed right from the beginning about their nature of import etc. In the circumstances, not only can the extended period of limitation cannot be invoked and there cannot be any penalty imposable on them under section114A of the Customs Act.

3. On the other hand, ld. AR Shri A. Cletus supported the findings in the impugned order.

3.1 He submitted that for availing the benefit of Notification 32/97, 'goods' must be imported for jobbing. Explanation to the Notification gives the meaning of 'goods'. In or to fit into the meaning of 'goods' as used in the notification, the raw materials must be supplied free of cost by the foreign buyer. He submitted that the Explanation is part of the notification and it cannot be considered to be secondary or disregarded by seeing that it is only a procedural lapse.

3.2 The condition that the goods are to be supplied free of cost is a substantial condition. The importer / appellant knows very well the terms and conditions of import and for claiming the notification benefit, appellant should know the conditions of the notification. If the appellant had any confusion, they ought not to have availed the benefit of notification.

3.3 The ld. counsel has stressed upon the fact that appellants have satisfied and complied with all the requirements of Customs (Import of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods), Rules 1996. However, these goods were imported in Chennai Port and were processed in their factory in Hyderabad. Merely because they had executed a bond and complied with the above Rules cannot absolve them from non-availment of important condition of Customs

Notification No.32/1997. The appellant having declared and claimed the benefit of notification, it is implied that they are making a declaration that the goods have been supplied by the foreign supplier without any cost. The appellants should have written a letter to the Customs authorities in Chennai and not to Hyderabad Central Excise authorities. Such a letter is only for the purpose of creating documents.

3.4 There was no need to ask for any clarification since the notification is very clear and there should not be any doubt on the same.

3.5 It is not the duty of the department to teach the law. If the department had instructed them not to avail the notification, the appellant would not have done so is not sound argument. There cannot be any intendment while interpreting notification and notification has to be construed strictly. To support his argument, ld. AR relied upon the decision of the Hon'ble Supreme Court in the case of Commissioner of Central Excise, Chandigarh Vs. Mahaan Dairies - 2004 (166) ELT 23 (SC). They could have very well imported the goods through other advance authorization or other scheme instead of availing Notification 32/1997-Cus.

4. We have heard both sides and gone through the case records.

5. The dispute that comes up for resolution in this appeal concerns the eligibility of the appellant to the duty exemption extended under Notification No.32/1997-Cus. dated 1.4.1997. To understand the matter in broader perspective, it would be useful to reproduce the said notification as amended from time to time:-

> "In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962) and in supersession of the notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 81/95-Customs, dated the 31st March, 1995, the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the goods imported into India from the whole of the duty of Customs leviable thereon which is specified in the first Schedule to the Customs Tariff Act, 1975 (51 of 1975) and from whole of the additional duty leviable thereon under section 3 of the said Customs Tariff Act, subject to the following conditions, namely :-
>
> (i) that the goods are imported for execution of an export order placed on the importer by the supplier of goods for jobbing;
>
> (ii) that the goods so imported, including resultant products, are re-exported to the supplier of the goods or to any other person which the said supplier may specify within six months from the date of clearance or within such extended period as the Assistant Commissioner of Customs may allow:
>
> Provided that where the goods are in the nature of patterns, drawings, jigs, tools, fixtures, moulds, tackles and instruments, such goods may be allowed by the Assistant Commissioner of Customs to be retained subject to payment of customs duties leviable as on the date of import without allowing any depreciation except for items specified in the negative list of import in the Export and Import Policy for which the importer shall obtain and produce, necessary permission in terms of paragraph 7.12(v) of the Export and Import Policy;
>
> Provided further that the wastage arising during the process of jobbing, as determined in terms of Standard Input-Output norms published by the Government of India in the Ministry of Commerce in the Handbook of Procedure (Vol. 2) vide Public Notice No. 2/(PN)/1997-2002, dated the 31st March,

1997 and to where such Standard Input-Output norms for the resultant product have not been published, the satisfaction of the Assistant Commissioner of Customs and Central Excise shall be disposed off in the manner as may be specified by the said Assistant Commissioner of Customs and Central Excise.

(iii) that the goods are utilised only for the discharge of export obligation and no part thereof shall be sold, loaned, transferred or otherwise used or disposed off;

(iv) that the FOB value of the resultant products exported is at least 10% more than the C.I.F. value of all goods imported in relation to the said resultant products;

(v) that the jobbing is undertaken in accordance with the procedure set out in the Customs (Import of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 1996.

Provided that where the jobbing is to be undertaken by or through cottage industry without being confined to any specific premises, the importer shall execute a bond with such surety or security and in such form and for such sum as may be specified by the Assistant Commissioner of Customs, binding himself to pay on demand an amount equal to the duty leviable on the goods imported but for the exemption contained herein, in respect of which the conditions specified in this notification have not been complied with.

(vi) that the imports and exports are undertaken through sea ports at Bombay, Calcutta, Cochin, Kandla, Mangalore, Marmagoa, Madras, Nhava Sheva, Paradeep, Tuticorin and Visakhapatnam or through any of the airports at Ahmedabad, Bangalore, Bombay, Calcutta, Coimbatore, Delhi, Hyderabad, Jaipur, Madras, Srinagar, Trivandrum and Varanasi or through any of the Inland Container Depots at Bangalore, Coimbatore, Delhi, Gauhati, Hyderabad, Kanpur, Ludhiana, Moradabad, Pimpri (Pune) and Pitampur (Indore):

Provided that the Commissioner of Customs may by special order and subject to such conditions as may be specified by him, permit import and export through any other sea port, airport, or Inland Container Depot or through a land customs station.

Explanations. - In this notification, -

(i) "Export and Import Policy" means the Export and Import Policy 1 April 1997 - 31 March 2002, published vide notification of the Government of India in the Ministry of Commerce No. 1/1997-2002, dated the 31st March 1997.

> (ii) "Goods" means raw materials, components, intermediates, consumables, parts, packing materials including hangers for garments, patterns, drawings, jigs, tools, fixtures, moulds, tackles, instruments, and computer hardware and software, as are directly related to the export order and supplied free of cost by the foreign buyer."

5.1 It is seen that the following aspects are relevant to become eligible to avail the said notification.

i) The imported goods are for execution of export order placed on importer by foreign supplier.

ii) Thus imported goods will be subject to job work/jobbing

iii) The job worked goods have to be re-exported to the supplier or to any other person as directed by such supplier.

iv) Goods are utilized only for the intended purpose and no part thereof shall be otherwise used or disposed of.

v) FOB value of resultant products exported is at least 10% more than CIF value of the raw materials imported

vi) Job work is done in accordance with the procedure laid down in Customs (Import of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods), Rules 1996.

vii) Goods means raw materials, components, intermediates, consumables, parts, packing materials including hangers for garments, patterns, drawings, jigs, tools, fixtures, moulds etc. as are directly related to export order and "**<u>supplied free of cost by the foreign buyer</u>**".

5.2 From the facts and records, we find that the appellant has complied or satisfied all the above requirements, however has allegedly fallen foul of the requirement that imported raw materials should have been supplied to him free of cost.

5.3 There is no dispute that the appellant is the job worker. The MOU found in page 52 of the Paper Book Vol. – I refers to the appellant as “job worker cum exporter”. The foreign supplier vide letter dated 5.8.2009 placed purchase order for job work of ‘Human Hair Remi Single Drawn’. The said job order also instructs that the resultant product should be exported to consignee in Brazil.

It is also informed that the quantity and value, buyer/buyers would be intimated to appellant on a case to case basis for a job order of 525 Kgs. It has been instructed that the importee consignee would be a party in Brazil.

5.4 There is also no allegation that the appellant has not complied with the requirements of Customs (Import of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods), Rules 1996.

In the application dated 17.7.2009, made under the Customs (Import of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods), Rules 1996, seen at page 60 onwards of Vol. I, the schedule annexed to the bond clearly indicates that the import item is “unprocessed human hair raw”. The FOB value of the imported goods in dollars and rupees is indicated. The date of import is also worked out and indicated and the claim of full duty exemption under Notification 32/97-Cus. dated 1.4.1997 has also been indicated.

From perusal of the Customs (Import of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods), Rules 1996, it emerges that while such application is required to be made under Rule 4 of the Rules ibid to the Assistant / Deputy Commissioner of Central Excise and countersigned by the latter, the said document is then required to produce before the Assistant / Deputy Commissioner of Customs to allow benefit of exemption notification claimed by importer and also debit the quantity and value of imports made under a particular consignment before allowing the benefit of exemption notification. The Assistant / Deputy Commissioner of Customs is also required to forward a copy of the Bill of Entry containing the particulars of import, the amount of duty paid and other relevant particulars to the Assistant / Deputy Commissioner of Central Excise, which in turn is acknowledged by the latter.

5.5 In this back and forth movement of documents between the Customs and Central Excise authorities with constant updation of the nature and quantity of goods imported and of the exemption notification availed, there cannot be any allegation that appellants have mis-stated or suppressed the fact of availment of Notification 32/97-Cus. and in particular the fact of the raw materials having been invoiced to appellants at some cost.

5.6 It is also evident that even at an early stage of import, the appellant vide letter dated 9.7.2009 had informed the Deputy Commissioner of Customs and Central Excise, Hyderabad about the MOU entered into by them, enclosing a copy of the same and the letter also informs the department that the buyer would be sending raw materials to them which they have to make payment because the supplier shall not have confidence on them, however, at the same time, the buyer also pays advance payment before export of goods.

5.7 The ld. AR has contended that the appellant should have written to the port of import and not to Central Excise authorities. However, from the letter it is clear that the said Deputy Commissioner was holding jurisdiction of both Excise and Customs which is however indicated by the date stamp on the letter as 'Customs and Central Excise".

5.8 Once the jurisdictional Central Excise authorities also function as Customs officers, it is not necessary for the appellants to write to the port of import where they intend to import the goods. In any case, even from the samples of the Bills of Entry produced before us, we find that the appellants have made reference to the commercial invoices of the foreign supplier and have also declared the price in US Dollars as shown in that invoice. The claim of Notification 32/97-Cus. on job work has also been indicated in the Bills of Entry.

5.9 Thus, all the requirements and conditionalities of the notification have been complied with or satisfied by the appellant. We find that there is no dispute that appellant has not satisfied or complied with the requirements of Notification No.32/1997-Cus. The ostensible purpose of laying down such a condition in the Notification is, in our view, three fold:-

(a) Firstly, to create more opportunities and avenues for importer-manufacturer in India to import goods for jobbing / job work as per the requirements of foreign parties.

(b) Secondly, there has to be a value adoption of at least 10% when the resultant products are exported

(c) Thirdly, there should not be any foreign exchange outflow towards cost of raw materials.

5.10 In our considered opinion, after doing all the arithmetic, if there still emerges a minimum of 10% value addition between the raw materials imported and that of the resultant job work products exported, that should be sufficient compliance of Notification 32/1997.

5.11 Discernibly, there has to be a cost of raw materials to be taken into account, because otherwise, there would be no way of working out the value addition. Hence, even if the cost of raw materials is notional or value can be for customs purposes, when goods are supplied free of cost or otherwise, there is a actual value involved to be suffered by the importer as long as there is a net value addition of more than 10% of CIF value and all goods are otherwise imported compliance of with conditionalities of the notification, it would be unjust to deny the benefits of the notification of importer. Possibly for these very purposes, clause (iv) of Notification 32/1997-Cus. specifically indicates that the value of resultant products is at least 10% more than the CIF value of goods imported, the very use of the term of CIF value is only for the purpose of working out the 10% value adoption. There is no loss to the exchequer in any manner. On the other hand, as the averment of ld. Advocate, appellant have achieved more than the minimum 10% value adoption contemplated in 32/1997-Cus. The pith and substance of the notification then, in our view, fully satisfied. There is also no dispute that the resultant goods have been exported as evidenced by the invoices, bank realization certificates filed along with the appeal.

5.12 It is more interesting to note that after this dispute, the appellants have switched over to advance authorization scheme and carrying out the very same activities of job work and export of the resultant goods, without running with the Customs. It is only the words “free of cost” in the Notification that have caused them the niggles which led to this appeal. Notifications like 32/97-Cus. and schemes like advance authorization etc. and nothing but incentives and schemes approved by the Legislature and for the purposes of enhancing the export quotient of our country. If the intended purposes of these notifications, including the prescribed value addition etc. is complied with and there are no allegations of misuse or diversion of the imported goods, the larger substantive benefits of the notification should not be denied for a procedural requirement.

6. Viewed in this light, we are fully convinced that the appellants are very much eligible for the exemption benefit under Notification 32/1997-Cus. The impugned order cannot then sustain and will have to be set aside, which we hereby do. The appeal is allowed with consequential relief, if any.

(Operative portion of the order was
pronounced in open court)

(**Madhu Mohan Damodhar**)
Member (Technical)

(**Sulekha Beevi C.S.**)
Member (Judicial)

Rex