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

C/370/2005

(Arising out of Order-in-Original No. 28/2005 dated 11.5.2005 passed by the Commissioner of Customs, Tuticorin)

M/s. Ambika Cotton Mills Ltd. Appellant

Vs.

Commissioner of Customs, Tuticorin Respondent

Appearance

Ms. Sriniranjani, Advocate for the Appellant
Shri B. Balamurugan, AC (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: **31.08.2017**

Final Order No. 42145/2017

Per Bench

Facts of the case are that the appellants obtained Advance License from Jt. DGFT for import of cotton yarn. As per the terms of the said License, the import was to be completed within 12 months that is on or before 20.12.2000. So also export obligation had to be completed within 18 months from the date of license that is on or before 20.4.2001. The appellants had utilized the license for value of Rs.24,19,70,855/-. Even though they fulfilled export obligation to the tune of Rs.32.58 crores upto 20.4.2001, the export obligation fell short quantitatively. The appellant sought extension of time for fulfilling the export obligation, however, no extension was granted. Against this, the appellant approached the Hon'ble High Court of Madras by way of writ petition for extension of time but the same was dismissed. In the meantime, on 11.10.2003, the departmental officers visited Unit II (EOU) of the appellant for verification of documents. It emerged that the appellant had declared value of export made through Unit – I as Rs.3.76 crores and had categorized Unit I as Status Holder. It was further noticed that raw materials used in the manufacture of final products had been imported duty free. Show cause notice dated 29.12.2004 was issued to the appellants inter alia to show cause as to why:-

> *"(i) 362591.100 kgs. of raw cotton used in the manufacture of final products as per SION and cleared under 17AR4s and shipping bills as mentioned in Annexure – B by ACML II and accounted for export obligation in ACML I should not be held liable to confiscation under section 111(m) and 111(o) of the Customs Act, 1962.*
>
> *(ii) An amount of Rs.10,69,643/- (Rupees ten lakhs sixty nine thousand six hundred and forty three only) being the import duty on 362591.100 kgs. of raw cotton used in the manufacture of final products cleared under 17AR4s and shipping bills as mentioned in Annexure B by ACML II and accounted for export obligation in ACML I should not be demanded from them under proviso to section 28 of the Customs Act, 1962.*

(iii) Interest amount of Rs.7,06,053/- should not be recovered from them under section 28AB of Customs Act, 1962 for the import duty of Rs.10,69,643/- on 362591 kgs. of raw cotton used in the manufacture of final products cleared under 17AR4s and shipping bills as mentioned in Annexure B by ACML II and accounted for export obligation in ACML I.

(iv) The amount of Rs.10,69,643/- already paid by them should not be adjusted against the proposed demand.

(v) A penalty should not be imposed on them under section 112(a) of the Customs Act, 1962."

2. In adjudication, the Commissioner of Customs vide impugned order dated 11.5.2005, inter alia, held that the appellants had availed double benefit claiming clearance in respect of 17 shipping bills for fulfilling export obligation. The order is as follows:-

"(a) I hold that M/s. ACML – I (DTA Unit) have imported raw materials under DEEC Scheme without payment of duty and the goods exported in question were manufactured in their 100% EOU (Unit II)

(b) I hold that M/s. ACML have availed double benefit of claiming the value of clearance in respect of 17 shipping bills as mentioned in the Annexure (enclosed) for fulfilling export obligation under the DEEC Advance License held in the name of their Unit I (DTA) and also have taken into account the value for the calculation of NFEP for their Unit II (100% EOU).

(c) I demand an amount of Rs.10,69,643/- being the duty on 362591.100 Kgs. of non –duty paid raw cotton used in the manufacture of final products arrived at proportionally as per the SION and exported without payment of duty under Advance License Scheme as per condition No. (ii) of Notification No. 48/99 dated 29.4.1999 as amended

read with section 28(1) of the Customs Act, 1962 along with interest thereon."

3. Aggrieved, the appellants are before this forum.

4. Today, when the matter came up for hearing, ld. counsel Ms. Sriniranjani appeared on behalf of the appellant. She argued both on the ground of limitation as well as on merits. On merits, ld. counsel submits that their Unit II (100% EOU) had exported cotton yarn under 17 AR4s and shipping bills. However, the only discrepancy is that they have raised the invoice mentioned address of their administrative office at Chennai as the exporter. Ld. counsel however contended that in all the AR4s, it has been mentioned that Unit II proposes to export consignments under Unit I (Export House) through Tuticorin Port. In fact, Unit II had got permission from MEPZ, Chennai for third party export in the name of Unit I. However, they did not mention this aspect in the shipping bills or in the invoices. On limitation, ld. counsel submits that the period involved is September 2000 to November 2000 and the show cause notice has been issued on 29.12.2004. The visit of the officers was on 11.10.2003 on which date they had caused verification of the documents. She also submits that they an amount of Rs.10,69,643/- confirmed in the impugned order had already been paid by them under protest on 17.10.2003. In the circumstances, the show cause notice ought to have been issued within the period of limitation from that date.

However, the same having been issued more than one year i.e. on 29.12.2004, is therefore hit by limitation.

5. On the other hand, ld. AR Shri B. Balamurugan supports the adjudication.

6. From the facts on record, it is evident that although value-wise the appellants had fulfilled 122.25% of export obligation, however, they had fallen short in respect of quantitative obligation. They had also sought extension of time from DGFT, which was refused and in response to which they had taken up the matter to the Hon'ble High Court for seeking extension of time. These facts clearly indicate that the appellant had exported substantially fulfilling the export obligation and in fact had been seeking extension of time to complete the quantitative obligation also. It is not the case of the department that they were involved in any diversion of imported raw material clandestinely for purposes other than that intended. No doubt, discrepancies have been found concerning manner of clearance in the name of Unit I, these facts cannot also be disputed that the department was fully aware of these and particularly when they visited the factory on 11.10.2003. It is also not in dispute that the appellants immediately after the visit of the officers have paid up the amount of Rs.10,69,643/- on 20.10.2003. Viewed in these context, there is no case for invoking extended period of limitation. The show cause notice, therefore should have been

issued within a period of six months provided for normal period of limitation under section 28 of the Customs Act, 1962 as was in force at the relevant time. However, this was not done and the show cause notice was issued only after six months period i.e. on 29.12.2004.

7. Without doubt, the proceedings are therefore clearly hit by limitation. In arriving at the conclusion, we draw sustenance from the judgment of the Hon'ble High Court of Madras in the case of Commissioner of Customs, Chennai Vs. Lalchand Bhimraj – 2013 (297) ELT 358 (Mad.) wherein duty was paid on 1.6.2000 and the show cause notice was served on imported on 2.12.2000. It was held that the notice was time-barred. The relevant portion of the judgment is reproduced below:-

> *"8. Thus, the Revenue sought to support its contention on the strength of the decision of the Kerala High Court cited supra, which persuaded the adjudicating authority to hold that the demand was well within the time limit. A reading of Section 153 clearly points out various clauses which are recognised under the Act for the purpose of serving notice or for decision or to issue summons. It contains nothing about limitation. On the other hand, Section 28 of the Customs Act clearly states that when any duty has not been levied or has been short-levied or erroneously refunded, or when any interest payable has not been paid or erroneously refunded, the officer may initiate proceedings within a period of six months from the relevant date; that he may serve a notice on the person chargeable with the duty or interest which has not been levied or charged or which has been so short levied or part paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice. The six months period of limitation has to be calculated from the relevant date. The 'relevant date' is defined in Section 28(3) of the Customs Act as the date on which the proper officer*

makes an order for the clearance of the goods or in any other case the date of payment of duty or interest. Given the fact that the payment of duty on the above bill of entry was on 1-6-2000 and going by Section 28 of the Customs Act, the six months time for the purpose of invoking jurisdiction under Section 28 has to be counted from the date of payment of duty i.e. on 1-6-2000. On the facts admitted, with the notice served on 2-12-2000 after the expiry of time limit on 1-12-2000, we have no hesitation in holding that the Tribunal has rightly come to the conclusion that the proceedings initiated by the adjudicating authority was time barred. Hence, cannot be sustained.

9. As far as the reliance placed on the decision of the Kerala High Court is concerned, we do not find that Revenue could draw any assistance from the said decision by making reliance on Section 28 of the Customs Act. It may be relevant to point out that similar contention taken in respect of other two bills of entry are not under challenge before this Court. When the Revenue had accepted the two other bills of entry, on the same line of arguments, we fail to understand the logic in challenging the order of the Tribunal in respect of one bill of entry, which was the subject matter in one of the appeals before the Tribunal.

10. In any event, for the reasons stated above, we have no hesitation in rejecting the plea of the Revenue. Accordingly, the above Civil Miscellaneous Appeal is dismissed. No costs."

8. In the result, the impugned order is set aside and 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

Customs, Excise & Service Tax Appellate Tribunal

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चेन्नै / CHENNAI