IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL, CHENNAI

Customs Appeal No.41724 of 2014

(Arising out of Order-in-Appeal No. 3/2014-Cus dated 25.4.2014 passed by the Commissioner of Central Excise (Appeals), Salem)

M/s. Blue Mount Textiles **Appellant**
A Unit of Sharadha Terry Products Ltd.
Bhadrakaliamman Kovil Road
Nellithurai Post
Mettupalayam – 641 305.

Vs.

Commissioner of GST & Central Excise **Respondent**
No. 1, Foulkes Compound
Anaimedu, Salem 0 636 001.

APPEARANCE:

Shri S. Durairaj, Advocate for the Appellant
Shri N. Satyanarayanan, AC (AR) for the Respondent

CORAM

Hon'ble Shri P. Dinesha, Member (Judicial)
Hon'ble Shri M. Ajit Kumar, Member (Technical)

Final Order No.40010/2024

Date of Hearing : 11.12.2023
Date of Decision: 03.01.2024

Per M. Ajit Kumar,

This appeal is filed by the appellant against Order-in-Appeal No. 3/2014-Cus dated 25.4.2014 passed by the Commissioner of Central Excise (Appeals), Salem). (impugned order)

2. Briefly the findings of the impugned order are that the appellant who are an 100% Export Oriented Unit engaged in the manufacture and export of terry towels had contravened the provisions of Exemption Notifications since they removed 22 looms that were imported without payment of duty, by discharging Basic Customs Duty (BCD) at a concessional 50% of the applicable duty amount that too by paying

duty through CENVAT credit account which is not permissible. They should have cleared the looms on payment of applicable customs duty on the depreciated value thereof and at the full rate of duty in force on the date of such clearance. The total customs duty payable on the clearance of the said 22 looms worked out to Rs.9,58,783/- whereas the appellant removed the looms on payment of duty of Rs.6,31,584/- After due process of law, the original authority confirmed the demand along with interest by invoking the extended period of limitation and imposed penalty. Aggrieved by the order, appellant filed an appeal before Commissioner (Appeals) who vide the impugned order upheld the adjudication order. Hence this appeal.

2.1 No cross objection has been filed by the respondent department.

3.1 Shri S. Durairaj, learned counsel appeared for the appellant and Shri N. Satyanarayanan, learned AR appeared for the respondent.

3.2 The learned Counsel for the appellant has stated that they had cleared the capital goods on payment of duty of Rs.6,31,584/- through CENVAT credit as per Rule 17(1) of Central Excise Rules, 2002 and also by availing the benefit of Notification 23/2003-CE dated 31.3.2003. He stated that this procedure for payment of duty using CENVAT credit had found acceptance as per the decision of CESTAT [Single Member] in the case of CCE Vs Matrix Laboratories Ltd – 2012 (281) ELT 569 (Trib. Bang). However, he fairly admitted that subsequently the matter was decided against the appellants in the case of Continental Engines Ltd Vs CCE – 2018 (363) ELT 187 (Trib. De) and also in the case of Divis Laboratories Ltd Vs CCE – 2019 (370) ELT 457 (Tri. Hyd). However, they have a strong case on limitation. In terms of Section 28(3)(d) of Customs Act, 1962 the relevant date for issue of SCN is the date of payment of duty which is mentioned in Annexure-A of the SCN. In the normal course, without invoking the extended period, notice has to be issued within six months from the relevant period. The details of the notice issued in the impugned matter were furnished in their written submission.

Sl.No.	Relevant date (Date of payment of duty)	Cut off date for issue of SCN without invoking the extended period.
1	9.5.2008	8.11.2008
2	10.5.2008	8.11.2008
3	12.5.2008	11.11.2008
4	13.5.2008	12.11.2008
5	19.5.2008	18.11.2008
6	30.12.2008	29.6.2009
7	9.9.2010	8.3.2011

The learned counsel stated that SCN was issued on 6.5.2013 by invoking the extended period. In the SCN, it is alleged that duty was paid by willfully availing the ineligible exemption under notification 23/2003-CE and by wrongly utilizing the cenvat credit. In the OIA (impugned order), extended period was invoked on the ground that the Appellants have not furnished sufficient details in the ER-2 returns. The learned Advocate stated that the extended period cannot be invoked for the following reasons. They obtained permission from the Assistant Commissioner vide letters dated 8.5.2008 & 8.9.2010 for the removal of capital goods in domestic area as per 6.15(b) of FTP and followed the procedure prescribed in Rule 17 of Central Excise Rules, 2002, which is a special rule to be followed by 100EOU for removal of goods in domestic tariff area. There is no allegation in the notice for contravention of Rule 17. Appellants removed the goods under Rule 11 invoices as per Rue 17(1). As per the SCN duty was paid through

CENVAT credit on the same day of removal. Appellants have paid the duty through CENVAT credit on the bonafide belief that as per Rule 17(1) of Central Excise Rules, 2002 permits utilization of CENVAT credit for payment of duty on any goods removed by an 100%EOU. Appellants submitted monthly ER-2 returns as per Rule 17(3). ER-2 for May, 2008 was filed on 10.6.2008. ER-2 for Dec, 2008 was filed on 9.1.2009. ER-2 for Sep, 2010 was filed on 11.10.2010. The said returns were also scrutinized by the proper officers as per Rule 17(4) on 21.7.2008, 6.3.2009 and 25.11.2010 but no discrepancy was raised by them. All the relevant details were furnished in the invoices and ER-2 returns. There is no willful suppression of facts with intent to evade. The core issue is applicability of Rule 17(1) of CER, 2002 or Rule 3(4) of CCR, 2004. It is an interpretational issue. Further, all the details are furnished in the invoices and ER-2 returns. So, extended period cannot be invoked. Reliance was placed on the decision of Hon'ble Apex Court in the case of International Merchandising Company, LLC Vs CST – 2022 (67) GSTL 129 (SC) and Kaybee Tex Spin Ltd Vs CC – 2022 (381) ELT 407 (Trib. Ahmd). Apart from the issue of limitation he further stated that in the bill of entry, customs duty was assessed as 5% as per notification 21/2002-Cus [Sl.No:251(1) List 31-Item 9]. The said rate is applicable for these clearances also. But, in the SCN, tariff rate of 7.5% & 10% was adopted. For the same description of goods, the CVD is 8% till 6.12.2008 and 4% after that as per notification 6/2006-CE [Sl.No:3 List 2 – Item 37]. But, in the SCN, tariff rate of 14% and 10% was adopted. Therefore, while considering the effective rates, the demand would be only Rs.6,12,597/-. Amount paid through CENVAT credit is Rs.6,31,584/-. In the case of Divis Laboratories Ltd

Vs CCE – 2019 (370) ELT 457 (Tri. Hyd), the Tribunal has allowed the re-credit once the demand is paid in cash. In the instant case, re-credit is not possible but refund by cash is allowed in terms of Section 142 of CGST Act, 2017. Therefore, the issue is revenue neutral. Reliance is placed on the decision of CESTAT, Chennai in the case of Hyundai Motor India (P) Ltd Vs CCE – 2019 (29) GSTL 452, which was also affirmed by the Hon'ble Apex Court – 2020 (32) GSTL J154(SC). He hence prayed that the impugned order be set aside and the appeal below allowed.

3.3 Learned AR stated on behalf of revenue that the appellant had contravened the provisions of Notification No. 53/1997-Cus dated 3.6.1997 read with Notification No. 52/2003-Cus dated 313.3.2003 inasmuch as they removed from their factory 22 looms imported under the above said notification during May 2008, December 2008 and September 2010 without payment of appropriate customs duty. The exemption under Notification No. 23/2003-CE dated 31.3.2003 is applicable only to goods manufactured in the EOU. As the looms were not manufactured by the appellant in the factory, the said exemption was not applicable for clearance of looms. As per the above notification, the capital goods imported by an EOU have to be cleared on payment of applicable customs duty on the depreciated value thereof at the rate in force on the date of such clearance. Therefore, at the time of removal of capital goods from the EOU, customs duty including CVD and additional duty of customs etc. leviable under sec. 12 of the Customs Act, 1962 r/w Customs Tariff Act, 1975 was payable. Hence the customs duty arrived at by the appellant under the above notification for discharging duty for the clearance of the said looms is not correct. Since the action of the appellant was done by suppressing the information from the department, the extended period for issue of SCN was correctly invoked hence the impugned order demanding duty with penalty may be upheld.

4. We have carefully gone through the appeal records and heard the rival parties. We find that the only point for discussion is whether the matter is hit by time-bar. We find that the appellant had sought permission from the department before clearing the goods. He had reported the matter in their ER-II returns. The issue also involves the interpretation of law with even a difference of opinion among the Tribunal Single Member Bench and its Division Bench on certain aspects of payment of duty. We hence find that the appellant has not acted with dishonest or fraudulent intent and suppression of facts is not involved. This being so, question of invoking the extended time limit or imposing penalty does not arise. We do not go into the merits of the issue, due to a lack of challenge on the said grounds, further the appeal on time bar is answered in favour of the appellant.

5. Since the Show Cause Notice has been issued beyond the normal time-limit, the impugned order is set aside and the appeal is allowed with consequential relief, if any, as per law.

(Pronounced in open court on 03.01.2024)

(**M. AJIT KUMAR**)
Member (Technical)

(**P. DINESHA**)
Member (Judicial)

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