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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
EXCISE APPEAL BRANCH

Appeal No. E/173 /2006 - EX[DB] Date 08/10/2009

Assistant Registrar
C.E.S.T.A.T. New Delhi

To :
M/S SHAMKEN SPINNERS LTD.
95 KM STONE,DELHI-MATHURA ROAD,VILLAGE-KOTWAN,KOSI KALAN,DISTT.MATHURA(UP)

M/S SHAMKEN SPINNERS LTD. Appellant
Vs
CCE,LUCKNOW Respondent

I am directed to transmit herewith a certified copy of **Final order No. 756/2009 EX[DB]** dated 01-10-09 passed by the Tribunal under Section 35-C(1)of Central Excises Act, 1944

Assistant Registrar
(Excise Appeal Branch)

Copy to :
1. Respondent
CCE,LUCKNOW
COMMISSIONER OF CNTRAL EXCISE,7A ASHOK MARG,LUCJNOW(UP)
2. Adv. / Consult
MR.S.C. KAMRA & CO.
B-2/210(BASEMENT), SAFDARJUNG ENCLAVE, NEW DELHI- 110029
3 C.D.R
4 ~~J.C.D.R.~~
5 Bar association, CESTAT, New Delhi
6 Director Publications, Customs, Excise, I.P. Estate, New Delhi
7 M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi - 3
8 Commercial Laws of India Pvt Ltd. Post Bag No. 1033, No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
9 Raghuraman's 44-B, Regal Flat,Shipra Suncity, Indirapuram - 201010,Ghaziabad, DT, U.P.
10 M/s Manupatra Information Solutions Pvt Ltd. Excise & Customs Cases B-37, Sector - 1, Noida - 201301, Gautam Budh Nagar, (UP)
11 M/s. Deeparchie Publications, M-93, Marg. 46, Saket, New Delhi 110017
12 Taxindiaonline.com Pvt.Ltd, B-XI/8183,Vasant Kunj, New Delhi - 110070
13 Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh, New Delhi - 110026
14 Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road,Ahmedabad-15
15 LAWCRUX Advisors Pvt Ltd. LAW House,1-8,Sector - 10, Faridabad 121003 (Haryana)
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Assistant Registrar
(Excise Appeal Branch)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
COURT NO.II

E/Appeal No.173/2006-Ex(Br)

(Arising out of order in appeal No.375-CE/2005 dated 20.7.05 passed by the Commissioner of Central Excise(Appeals), Lucknow)

M/s Shamken Spinners Ltd — Appellant

Vs

CCE, Lucknow — Respondent

Appeared for the Appellant : Shri S.C. Kamra, Advocate
Appeared for the Respondent : Sshri Sunil Kumar, SDR

Coram: **Hon'ble Mr.D.N. Panda, Judicial Member**
Hon'ble Mr. Rakesh Kumar, Technical Member

Date of Hearing: 2.9.09

Final Order No. 756/09-Ex /2009

Per D.N. Panda:

Shri S.C. Kamra, learned Advocate submits that a consignment of 193 cartons containing 8754.48 kgs of 100% combed yarn for export to Bangladesh moved to Kosi Kalan was lost in transit due to burglary and such matter is before a Magistrate Court. The appellant was not given possession of goods by police for which the appellant has suffered a serious loss. While this was the position, the appellant has also lost its remission remedy in relation to duty before the learned Commissioner, Lucknow. Before the learned Commissioner has decided the issue relating to remission, a show cause notice dated 13.2.2003 was issued by the learned Deputy Commissioner, Aligarh demanding duty of Rs. 3,30,590/- under Section 3 of Central excise Act, 1944.

2. Learned Counsel Shri Kamra further submits that when the goods meant for export could not be exported, there is nothing wrong to treat the same to be fit for sale in Domestic Tariff Area. The goods without being exported for the aforesaid reason remained in DTA only as if those were meant for sale in DTA without possession thereof being given to the appellant by police. The quantity to be sold in the domestic area is prescribed by Development Commissioner. Therefore, there will be no difficulty to hold that the goods failed to be exported although meant for export and lost in transit for the reasons beyond control of the appellant to be the goods meant for sale in Domestic Tariff Area following the decision of the Larger Bench in the case of Jaipur Golden Transport Co Pvt Ltd Vs CCE Surat reported in 2007 (215) ELT 503 (Tri. LB). Similarly, once remission is not considered in favour of appellants, Government has taken a view that an assessee can be considered in terms of any concessional notification applicable to DTA clearance. Shri Kamra fairly agrees that there is no malafide of the appellant in respect of burglary loss. Quantum of export loss may not be denied to be permitted by learned Development Commissioner. Therefore, if the matter goes back to the learned Commissioner below, he shall be able to examine whether the goods to be treated as DTA sale shall be within the ceiling prescribed by the learned Development Commissioner. If the quantity is within the ceiling, the appellant may be considered for the benefit of Notification No.8/97-CE dated 1.3.1997 subject to fulfillment of the conditions of the said Notification. If the quantity of the goods is beyond the ceiling, the

appellant shall have no hesitation to pay the excise duty according to normal rates. He further points out that the inputs for the goods being duty free, there was no Cenvat credit availed by the appellants. Shri Kamra also raised a point that if at all interest is payable on demand of duty that shall be payable in consonance with law.

3. Shri Sunil Kumar, learned DR supports the order of the authority below and points out that when the goods were under bond for export, such export cannot be DTA sale. Therefore, the appellant is not entitled to the benefit of notification as held by the learned Commissioner (Appeals). Once there is demand that shall follow the interest.

4. Heard both the sides and perused the record.

5. The fact born by record is that the goods meant for export were lost in transit when that was in the course of export. Export does not fetch excise duty. But the appellant agrees to pay excise duty even if it has lost its goods in transit. Also prays that such liability is to be confined only to the extent permissible by Notification No. 8/97-CE dated 1.3.1997.

6. We do not appreciate that the goods lost shall be treated as sale under the law when there was no sale in DTA. When the appellant prefers to pay the duty availing concession in view of sale in the course of export, there will be no bar to consider the claim of the appellant in terms of Notification claimed by the appellant. Sale being in the course of export, sale of the same as DTA sale, is not permissible under law. But on the peculiar circumstances of the case, the sale having been made already and

the appellant prefers to discharge the duty liability, it should not face further hardship of normal levy of excise duty under Section 3 of Central excise Act, 1944. Had there been export no excise duty could have been collected. Therefore, we direct the learned adjudicating authority to examine as under:-

1) Whether the quantum of goods involved in export if considered to be DTA clearance shall be within the ceiling prescribed by the learned Development Commissioner;

2) Whether the appellant fulfills other conditions of Notification No. 8/97-CE dated 1.3.97 to get duty concession under that notification;

3) If duty liability arises upon examination in the manner indicated above, the appellant is required to pay interest liability in accordance with law.

7. With the aforesaid observations and conclusion, we send the matter back to the learned adjudicating authority to do justice to the appellant in accordance with law granting fair opportunity of hearing and passing a reasoned and speaking order.

8. Impugned order is accordingly set aside remanding the matter as above.

(Order dictated and pronounced in the open Court).

(D.N. Panda)
Judicial Member

(Rakesh Kumar)
Technical Member

MPS*