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

Appeal No. C/716 /2007 - CU[DB] Date 10/10/2008

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

To :
C.C. JAIPUR I
N.C.R.BUILDING, STATUE CIRCLE,
"C" SCHEME, JAIPUR 302005.

C.C. JAIPUR I Appellant
Vs
M/S SHRI RAM RAYONS Respondent

I am directed to transmit herewith a certified copy of **Final order** No.C/369/08-CUS DATED 07.10.08 passed by the Tribunal under Section 129, (B) of the Customs Act,1962 & Financial Act 1994 relating to Service Tax

Assistant Registrar
(Customs Appeal Branch)

Copy to :
1. Respondent M/S SHRI RAM RAYONS, (A UNIT OF DCM SHRI RAM INDUSTRIES LTD),
SHRI RAM NAGAR, KOTA (RAJASTHAN)
2. Adv. / Consult
MR.C.HARISHANKAR, ADV.
46, BANK ENCLAVE,DELHI-110092
3 S.D.R
4 J.C.D.R.
5 Bar association, CESTAT, New Delhi
6 M/s. Deeparchi Publications, M-93, Marg, 46, Saket, New Delhi 110017
7 M/s Centax Publictions (P) Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New - 3
8 Excise & Customs cases, B-37, Sector -1, NOIDA - 201301 Gautam Budh Nagar, (U.P.)
9 Raghuraman's 44-B, Regal Flat,Shipra Suncity, Indirapuram - 201010.Ghaziabad, DT. U.P.
10 Nidheshak publications, I.P.Estate, new Delhi
11 Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh, New Delhi - 110026
12 Commercial Laws of India Pvt Ltd Post Bag No. 1033, No.70(Old No. 88), Thyagaraya Road, T. Nagar,Chennai
13 Taxindiaonline.com Pvt.Ltd, B-XI/8183,Vasant Kunj, New Delhi - 110070
14 Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road,Ahmedabad-15
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Assistant Registrar
(Customs Appeal Branch)

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

West Block No.2, R.K.Puram, New Delhi

COURT-I

Date of hearing:23/24.9 .2008
Date of pronouncement: 07 .10.2008

Customs Appeal No.716 of 2007

Arising out of the order in appeal No.15(GRM)CUS/JPR-I/2007 dated 31.7.2007 passed by the Commissioner (Appeals I),Customs & Central Excise, Jaipur.

For Approval and Signature:

Hon'ble Mr. Justice S.N. Jha, President
Hon'ble Mr. M. Veeraiyan, Member (Technical)

1	Whether Press Reporter may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	No
2	Whether it should be released under Rule 27 of CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	yes
3	Whether their Lordships wish to see the fair copy of the Order?	Seen
4	Whether Order is to be circulated to the Departmental authorities?	Yes

Appellant | Respondents

C.C., Jaipur vs. M/s Shri Ram Rayons

Appearance:

Shri Sumit Kumar, Authorized Departmental Representative (DR) for the Revenue and Shri M. Chandrashekhran, Senior Advocate and Shri Sunil S., Advocate for the respondents

Coram: Hon'ble Mr. Justice S.N. Jha, President
Hon'ble Mr. M. Veeraiyan, Member (Technical)

Final Order No. C/369/08

Per M. Veeraiyan:

This is an appeal by the Department against the order in appeal No. 15 (GRM) Cus/JPR-I/2007 dated 26.7.07 which was passed by the Commissioner (Appeals) in de novo proceedings in pursuance to the Final Order of CESTAT No. 88/07 dated 16.3.07.

2. Heard both sides.

3. Relevant facts, in brief, are as follows:

(a) The respondent obtained an EPCG licence dated 31.7.95 under EXIM policy 1992-97; they imported goods under the said licence during November, 1988 to June, 1999 and paid duty amounting to Rs. 36,64,459/- after availing concessional rate under notification 28/97 dated 1.4.97, as against normal duty payable amounting to Rs.1,38,97,422/-. Thus, the duty of Rs.1,02,32,963/- was foregone.

(b) In terms of the licence, they were required to fulfil export obligation amounting to about Rs.97.5 crores, within five years from 31-7-95, the date of issue of the licence., i.e. before 30.6.2000.

(c) A show cause notice dated 3.1.2000 was issued proposing demand of duty of Rs. 1,02,32,963/-foregone on the ground that they have not fulfilled the conditions of the notifications 28/97 dated 1.4.97 and the duty demand was confirmed by the original authority. Commissioner (Appeals) upheld the said order. When the matter came on appeal, the Tribunal, vide order dated 16.3.07 remanded the matter to Commissioner (Appeals) to consider the effect of amending notification No. 29/2004 dated 28.1.2004.

(d) In pursuance of the said direction, Commissioner (Appeals) passed the impugned order holding that the demand was not sustainable under the law and hence the department is in appeal.

4. Learned DR made the following submissions:

(a) The imported capital goods were installed on 19.1.99 and thereafter. Therefore, the question of their using the imported machinery for the purpose of goods exported during the earlier period did not arise.

(b) The exports have to be made using the imported capital goods for manufacture. The exports made in advance, i.e. with out using the imported machinery in the manufacture of goods exported, can not be counted towards the export obligation to be fulfilled under EPCG scheme.

(c) The decision of the DGFT authorities conveyed by their letter dated 28.4.2000 addressed to the party holding that the respondents have completed the export obligations in respect of the licence dated 31.7.95 was not acceptable for the Customs purposes.

(d) The action by the Customs Authorities under the Customs Act for violations of conditions of notifications is totally independent of any action by the DGFT authorities under EXIM policy. The duty demand for violation of the conditions of the notification, cannot be guided by changes made in the EXIM policy unless there are corresponding changes in the Customs notification.

(e) The notification No. 29/2004 dated 28.1.2004 amending the notification 28/97 cannot be given retrospective effect merely because the amendment by notification 29/2004 is by way of substitution.

5. Learned senior advocate, Shri M. Chandrashekaran, appearing for the respondent took us through the relevant changes in the EXIM Policy and also changes in the Customs notification and made the following submissions:

(a) The EXIM Policy for the period 1992-97 envisages export obligation to be fulfilled by the licence holder by export of goods after 'manufacture using the capital goods'. He referred to notification dated 31.3.99 issued by the Commerce Ministry, the Policy for the period 1997-2002 liberalizing the manner of fulfilment of export obligation and also referred to Amendment by DGFT Notification NO.28 (RE 2003)/2002-07 dated 28.1.2004 enabling manufacture of export goods through third parties (supporting manufacturers) and also permitting export of "other goods" towards fulfilment of export obligation. In this regard, he also referred to para 6.5(1) of the Policy for the period 1997-2002.

(b) Consequent to liberalisation of mode of fulfilment of export obligation retrospectively, the respondent applied to DGFT indicating that they have already made export of goods valued Rs.236 crores during the period August 1995 to September 1999 and DGFT issued certificate dated 28.4.2000 holding that they have fulfilled export obligations in the light of the new Policy. In this connection he refers to Board's Circular No. 25/2003-Cus dated 1.4.2003 which *inter-alia* mentioned as follows:

> *"It is reiterated that redemption of Bond/BG against licence issued under EPCG Scheme shall normally be allowed by the Custom House on the basis of EO Discharge Certificate issued by DGFT authorities without insisting for production of copies of relevant export documents including shipping bill etc. This is because the job of monitoring of export obligation fulfilled under EPCG Scheme is assigned to relevant DGFT authorities."*

(c) The notification No. 29/2004 has amended several notifications and in respect of some of them, the amendments were by way of 'insertion'. However, the Notification No. 29/2004 amended the notification 28/97 by substituting clause (iv) with a new clause. The decision to amend by way of substitution was a conscious decision to align the retrospective changes made in the EXIM policy.

6.1. We have carefully considered the submissions from both sides. At the outset, we find that the licence was issued on 31.7.95 under the EXIM Policy for the period 1992-97. The actual imports have taken place during the currency of policy for the period 1997-2002. The new policy, provides transitional arrangements under para 6.13 which read as under:

"EPCG licences issued under EPCG scheme during the Exim Policy 1992-97 shall be deemed to have been issued under Export and Import Policy, 1997-2002 for goods yet to be cleared from Customs against such licences. However, in such cases, the licence holder shall fulfil the export obligation in terms of paragraph 6.2 of the Exim Policy, 1997-2002."

In view of the said transitional arrangements under para 6.13, the licence dated 31-7-95 was deemed to have been issued under the Exim Policy, 1997-2002. and the licence holder was required to fulfil the export obligation in terms of paragraph 6.2 of the said Exim Policy.

6.2 The normal period prescribed for the fulfilment of export obligation was due to expire only on 30.6.2000. This period can be extended by the DGFT authorities. But the department has chosen to issue show cause notice dated 3.1.2000 i.e. even before the expiry of the time allowed.

6.3 The relevant portions of the notification 28/97, before amendment and after amendment, are reproduced below:

Before Amendment:-

"(1) The goods imported are covered by a valid licence issued under the Export Promotion Capital Goods (E.PC.G.) Scheme in terms of Export and Import Policy (hereinafter referred to as the said policy) permitting import on payment of duty of customs at the rate of 10% and the said licence is produced for debit by the proper officer of the customs at the time of clearance:...........

(2) The importer executes a bond in such form and for such sum and with such surety or security as may be specified by the Assistant Commissioner of Customs binding himself to fulfil export obligation equivalent to four times the CIFG value of the goods imported or for such higher sum as may be fixed by the Licensing Authority within a period of five years from the date of issue of the said licence in the following proportions:- ....

(3) ......

(4) ......

(5) ......

(6) Notwithstanding anything contained in conditions (3) and (4), where the Licensing Authority grants an extension of the period for fulfilment of export obligation or regularisation of shortfall in export obligation, not exceeding 5% of such export obligation, the said period of fulfilment of export obligation may be extended and the said shortfall in export obligation condoned by the Assistant Commissioner of Customs.

....

'Explanation. – In this notification.-

....

....

(iv) 'Export obligation', in relation to importers other than those rendering services, means export to a place outside India of products manufactured in terms of capital goods imported, assembled or manufactured in terms of this notification, or making of supplies of such products in terms of clauses (a), (b), (d), (e) and (f) of paragraph 10.2 of the Export and Import Policy and , in relation to importers rendering services, means receiving payments in freely convertible foreign currency for services rendered through the use of such capital goods".

<u>After Amendment</u>

" Export obligation –

(a) in relation to importers other than those rendering services means export to a place outside India of products manufactured with the use of capital goods imported, assembled or manufactured in terms of this notification or making of supplies of such products in terms of clauses (a), (b), (d),(f) and (g) of paragraph 10.2 of the Export and Import Policy.

(b) in relation to importers rendering services, means receiving payments in freely convertible foreign currency for services rendered through the use of such capital goods; and

(c) means , export of goods in terms of notification of the Government of India in the Ministry of Commerce and Industry (Department of Commerce) No.28 (RE-2003)/2002 – 2007, dated the 28th January, 2004".

6.4. It could be seen that the exemption is subject to fulfilment of certain conditions and the compliance of some of these conditions depend upon action by the DGFT authorities. Condition 1 of the said notification require production of a licence issued by the DGFT authorities; condition 2 refers to export obligation to be determined by the licensing authorities; the condition No. 6 empowers the licensing authorities to alter the period of export obligation given to the licence holder. In other words, the notification under the Customs Act, while extending the benefit of exemption has given specific roles to the DGFT authorities which form part of the conditions of the notification. The DGFT authorities, in the light of policy changes effective from 31.3.99 came to conclusion that as per the revised and liberalised norms Exim Policy for 1997-2002, the respondents have already fulfilled the export obligation.

6.5. The CBEC Circular dated 1.4.2003 referred above also considers the job of monitoring export obligation to be that of DGFT authorities and the discharge certificate given by them should be normally accepted. We find that the DGFT authorities have taken a view and held that the policy amendments are retrospective in nature.

6.5. Under these circumstances, it may not be proper to make any allegation that the respondent mis-declared or suppressed any relevant information and consequently obtained discharge certificate from the DGFT authorities.

6.6. Amendment is a term having wide meaning. It may be by way of insertion, addition, deletion, substitution etc. Every amendment by way of substitution may not necessarily be retrospective. A submission was made by the Ld D.R. that many exemption notifications are amended by merely substituting the "rates" applicable. If such amendments are taken to be retrospective, then the enhanced/reduced rates may have to be applied retrospectively from the date of original notification. This submission is valid and every amendment by way of substitution cannot be held to be retrospective and each amendment has be examined in the light of the circumstances in which the amendment is carried out.

6.7. In the present case, the Exim Policy is of the Central Government. The process of implementation, interalia, involves issue of exemption notification under the Customs Act to be in alignment with the said policy which has been liberalised and given retrospective application. Under these circumstances, the Customs notification 29/2004 dated 28.1.2004 which seeks amendment by way of substitution of clause (iv) of notification 28/97 deserves to be held as retrospective.

6.8. Therefore, we do not find anything wrong with the findings and reasoning given by the Commissioner (Appeals) to hold that the amendment by 29/2004 should be treated as retrospective.

7. Having held that the amendment is retrospective, we find that para 13 of the new policy envisages that export obligation should be fulfilled under the Policy provision of 1997-2002. In the earlier proceedings, the dispute was decided on the limited issue as to whether the amendment to notification 29/2004 is retrospective or otherwise. We find that the aspect as to whether the appellant has fulfilled export obligation in terms of exim policy for the period 1997-2002 has not engaged the attention of the authorities below. The appellant submits that they have fulfilled the export obligation under the new policy as well. As this involves verification of facts, we deem it appropriate to remit the matter for consideration by the original authority.

8. We uphold the view of the Commissioner (Appeals) that the amendment by notification 29/2004 is retrospective. However, we remit the matter to the original authority to consider the party's claim that the export obligation has been fulfilled in the light of the revised policy, and pass order after granting reasonable opportunity of hearing to the party.

9. Appeal is disposed off in the above terms.

(Pronounced in the open Court on 07 .10.2008)

(Justice S.N. Jha)
President

(M. Veeraiyan)
Member (Technical)

scd/