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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/90 /2006 - CU[DB] Date 14/10/2008

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

To :
M/S. BEEKAY HYGINE PRODUCTS.
(UNIT OF BSBK PVT. LTD.) BSBK HOUSE,
NANDINI ROAD, BHILAI, (C.G.)
M/S. BEEKAY HYGINE PRODUCTS. Appellant

Vs

C.C., RAIPUR Respondent

I am directed to transmit herewith a certified copy of **Final order No.** C/375/08-CUS DATED 26.09.08

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 C.C., RAIPUR,
CENTRAL REVENUE BUILDING,
CIVIL LINES. RAIPUR.

2. Adv. / Consult MR.S.K.BAGARIA & SANJAY GROVER.
E-500. G.K.-II, NEW DELHI – 48.

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
15 Office Copy
16 Guard file

Assistant Registrar
(Customs Appeal Branch)

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, R.K. PURAM, W.B. NO.2, PRINCIPAL BENCH NEW DELHI, COURT NO.I

Customs Appeal No. 90 of 2006

[Arising out of Order-in-Original No. Commissioner/RPR/42/2005 dated 28/31.10.2005 passed by the Commissioner of Customs (Appeals) New Delhi]

Date of Hearing/ decision: 26.09.2008

For approval and signature:

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

1.	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982.	Yes
2	Whether it should be released under Rule 27 of the 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

M/s Beekay Hygine Products — Appellant

Vs.

CC, Raipur — Respondent

Appearance:

Mr. Sanjay Grover, Advocate for the Appellant
Mrs. Archana P. Tiwari, Jt. CDR for the Respondent

CORAM: Mr. Justice S.N. Jha, President
Mr. M. Veeraiyan, Member (Technical)

Final ORDER No. C/375/08

Per M. Veeraiyan:

This is an appeal against the order-in- original No Commissioner/RPR/42/2005 dated 28/31.10.2005.

2. Heard both sides.

3. The relevant facts, in brief, are as follows:-

(a) The appellant was issued a industrial licence dated 19.4.90 as a 100% EOU to manufacture and export latex hand gloves with annual capacity of 30 million pieces and annual export target value of Rs. 168 lacs.

(b) They imported capital goods valued at Rs. 52,80,833/- duty free and imported inputs and also procured inputs from domestic tariff area duty free totally valued at Rs.2.03 crore which included value of capital goods. The duty foregone amounted to Rs. 1,92,77,577/-.

(c) The appellant commenced production in March 1990 and exported totally about six million pieces valued about Rs. 4 crores. It is claimed that they faced unprecedented competition in the international market as the value fell from about 70 US$ per thousand pieces to 20 US $ per thousand pieces. They applied for de-bonding and were granted in principle de-bonding permission by the DGFT authorities vide their letter dated 8th September 1994. They stopped the manufacture in 1995 and completed export of whatever stock of goods manufactured by March 1996. Consequent to de-bonding permit obtained, they sought for details from the Customs the amount of duty to be paid.

(d) They received a show cause notice dated 18.4.96 seeking demand of duty of Rs. 95,07,701/- and proposing imposition of penalties.

(e) Commissioner vide impugned order held that the appellant had failed to fulfill export obligation as per the letter of permission and that they did not achieve value addition as prescribed under Notification No. 13/81-Cus. Dated 9.2.81 and Exim Policy of 1992-97. and accordingly confirmed the demand of duty of Rs. 95,07,701/- along with interest; he ordered confiscation of capital goods valued at Rs. 52,80,833/- but allowed redemption on payment of fine of Rs. 10 lacs; he also imposed a penalty of Rs. 25 lacs.

4.1. Learned Advocate submits that the dispute relating to value addition was finally settled in their favour by the DGFT authorities. Initially an order was issued in 1996 holding that the value addition was minus 19.04% and a penalty of Rs. 25 lacs was imposed. Against the decision they preferred appeal to the appellate Committee of the Commerce Ministry who remanded the matter to the DGFT authorities for de novo consideration. In pursuance of the said remand direction the appellant filed detailed worksheet/ data certified by the Chartered Accountant claiming the value addition as 49.22 %(as against the required value addition of 44.95%) ; the Development Commissioner got these details verified through the jurisdictional Superintendent and ultimately the show cause notice dated 23.8.99 issued to them was withdrawn on 31.12.2002 holding that the party has achieved the value addition.

4.2. He admits that there is partial non fulfillment of export obligation. He submits that the capital goods imported have been duly installed and used for the intended purposes and substantial exports have been made using the said capital goods. The entire raw materials imported/procured duty free stand utilized and the entire finished goods which have been manufactured using the duty free materials stand exported. There is no allegation or finding about any diversion of the raw materials or finished goods. It has been clearly specified in the reply to the show cause notice that they were only having the capital goods lying in their factory as on 31.3.96.

4.3. As per the provisions governing de-bonding they are required to pay duty only on the capital goods which was initially valued at Rs. 5280533/- and the written down value as on 31.3.96 was 2218075/-.

4.4. The Commissioner has demanded duty on the raw materials required (arrived on a notional basis) for meeting short fall in export obligation, even though the required raw materials have been imported/procured duty free. Such a demand is legally not sustainable.

4.5 . Learned Advocate submits that having obtained the licence on 19.4.90 gestation period ends on 18.4.91 and the five years period for determining value addition norms should be from 1990-91 onwards.

5.1. Learned Joint CDR submits that the notification under which the goods have been imported duty free envisages fulfillment of condition including the value addition norms. The Customs authorities are empowered independently examine whether the condition has been satisfied or not, notwithstanding any contrary decision of the DGFT authorities. In this regard she relies on the following decision-

i) Exports Apparel Group Ltd., vs. Union of India
1997 (91) ELT 307 (Del.)

ii) Sheshank Sea Foods Pvt. Ltd.,
Vs. Union of India

iii) Jacsons Thevara vs. CC&CE
1992 (61) ELT 343 (SC)

5.2. She reiterates the finding of the Commissioner relating to adoption of five year period for determining of value addition norms starting from 1989-90 onwards on the ground that the appellant commenced production in the month of March 1990 i.e. few days earlier to the close of the financial year.

6.1. We have carefully considered the submissions from both sides. At the outset we observe that the 100% EOU is a scheme governed by EXIM policy with corresponding exemption Notifications under the Customs Act/ Central Excise Act. It is an interlinked scheme. There are certain responsibilities and powers given to DGFT authorities like taking action for non fulfillment of export obligation within the specified period, not adhering to value addition norms, premature exit from the scheme etc.

6.2. This is a case where the appellant failed to fulfill export obligation in full in terms of letter of permission due to circumstances beyond their control. Thus, there is a short fall in the export obligation to be fulfilled. It is not a case of diversion of the capital goods for purpose other than the intended purpose; it is also not a case where any part of the raw materials procured duty free has not been used for export production and resultant product not exported. In other words, the entire inputs imported/procured duty free have been used for producing the goods and the resultant product has been exported. It is also not a case of diversion finished goods.

6.3. The manner of determining value addition has been disputed by DGFT authorities and finally settled by them in favour of the appellant vide their order dated 31.12.2002. There was finding in 1996 that value addition was minus 19.04% as against the value addition claimed by the appellant at 49.22%. Such variation was reconciled in the subsequent proceedings. The wide variation was explained as due taking 'five year period' for determining value addition norms from 89-90 (based on commencement of production in March 90) instead of 90-91 (based on expiry of gestation period on 18-4-91) erroneously and taking only the exports made only up to 1994 till the time of seeking de-boning ignoring the subsequent exports.

6.4. The very same issue of not meeting value addition norms has been raised by the Customs authorities. The exemption notifications governing the 100% EOU are subject to conditions including conditions imposed under EXIM policy. The custom authorities are empowered and required to ensure that the conditions of notifications are fulfilled. When the customs authorities decide as to whether the condition on value addition norms has been fulfilled or not the decision of DGFT authorities passed in quasi-judicial proceedings cannot be overlooked or brushed aside. If the decision of the DGFT authorities in this regard was found not acceptable as per Exim policy, it would have been appropriate on the part of the Customs authorities to take up matter with DGFT for change of their decision in the manner provided for under the law. This is not the case here. Therefore, we have no alternative but to hold that the value addition norm have been satisfied by the appellant.

6.5. We also find that admittedly the appellant opted out of 100% EOU scheme prematurely and as a consequence they were required to pay 10% of CIF value as penalty. The duty liability arising out of de-bonding has to be worked out as provided for in the Exim policy and said condition has been stipulated in the concerned exemption notification as indicated below.

> "(6) The importer executes a bond in such form and for such sum and with such authority, as may be prescribed by the Assistant Commissioner of Customs, binding himself to fulfill the export obligations and conditions stipulated in this notification and in or under the said Export and Import Policy and to pay on demand an amount equal to the duty leviable on the goods as are not proved to the satisfaction of the Assistant Commissioner of Customs to have been used in the manufacture of articles for export".

6.6 In the present case, there were no raw materials or finished goods pending as stock at the time of de-bonding and that there was no diversion of such materials also. We do not agree ~~with~~ that any duty liability can be fastened on the basis of notional requirement of inputs/raw materials meant for unfulfilled export obligation even when there was no actual import/procurement duty free of such inputs/ raw materials. If duty demand is upheld in such a situation, then it would amount to levying duty on goods not imported and not procured which is not legally sustainable. The duty demand in this regard is set aside.

7. As regards the capital gods, as already mentioned they have been put to use and sizable quantity of finished goods have also been exported. The appellant had asked for de-bonding as on 31.3.96. The de-bonding permission should be held effective from 31.3.96. To grant any depreciation beyond that date, would amount to granting extra benefit for the delay in applying for de-bonding and delay in actual payment of duty. Therefore, we hold that the appellant shall pay applicable duty on the capital goods on the written down value which is said to be Rs. 22,18,075/- as on 31.3.96 along with interest.

8. In the given facts and circumstances of the case, the confiscation of the capital goods and imposition of penalty are not justified and same are set aside.

9. The appeal is disposed of on the above terms.

[Justice S.N.Jha]
President

[M. Veeraiyan]
Member (Technical)

[Pant]