

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

Appeal No. C/43 /2008-47 /2008

Date 01/05/2008

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

To :
C.C. (PREVENTIVE) AMRITSAR
CUSTOM HOUSE, CENTRAL REVENUE BUILDING,
THE MALL, AMRITSAR 143001.
C.C. (PREVENTIVE) AMRITSAR

M/S MALWA INDUSTRIES LTD.

Appellant
Vs
Respondent

I am directed to transmit herewith a certified copy of Final order No. C/107-111/08-CUSTOMS DATED 30.04.08
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)

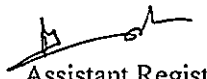
Copy to :

1. Respondent

M/S MALWA INDUSTRIES LTD.
VILLAGE HARIAN, KOHARA, LUDHIANA

2. Adv. / Consult SHRI AJAY AGRAWAL, ADV.
C/O M/S MALWA INDUSTRIES LTD.
VILLAGE HARIAN, KOHARA, LUDHIANA

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
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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 60017
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Assistant Registrar
(Customs Appeal Branch)

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(3)

CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
PRINCIPAL BENCH,
NEW DELHI, COURT NO.1

CUSTOMS APPEAL NOS.43-47 OF 2008

[Arising out of Order-in-Appeal No. 117-122/CUS/APPL/LDH/2007 dated 3.10.2007 passed by the Commissioner of Customs & Central Excise (Appeals), Jalandhar]

Date of Hearing: 25.4.2008

Date of Decision: 30.4.2008

Hon'ble Mr. Justice S.N. Jha, President

Hon'ble Mr. M. Veeraiyan, Member (Technical)

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- | | | |
|--|---|------|
| 1. Whether Press Reporters 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 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 |
-

CC, Amritsar

Applicant
[Rep. by: Shri A.P.S. Suri, Authorized Representative (JCDR)]

Versus

Malwa Industries Ltd.

Respondent
[Rep. Shri Ajay Agrawal, Advocate]

Coram: Hon'ble Mr. Justice S.N. Jha, President

Hon'ble Mr. M. Veeraiyan, Member (Technical)

Final **ORDER** NO C/107-111/08

Per Justice S.N. Jha:

These appeals by the Revenue are directed against the common order of the Commissioner (Appeals) dated 3.10.2007 setting aside the assessment on the Bills of Entry.

2. The respondent, M/s. Malwa Industries Ltd., is engaged in the business of textile and textile goods and in that connection imports certain goods for use as raw material in the manufacture of textile goods. It submitted Bills of Entry for clearance of Dystar Indigo VAT 40 percent SOL/Indigo Powder 90 percent Wettable falling under Tariff Heading 32041559. Additional duty (CVD) was charged on the assessable value of the goods in terms of Section 3 of the Customs Tariff Act, 1975. Feeling aggrieved and contending that the goods were not liable for excise duty under Notification No.4/2006-CE dated 1.3.2006, the respondent preferred appeals. By the impugned order, upholding the contention of the respondent, assessment was modified deleting the additional duty (CVD), and the appeals were allowed.

3. Section 3(1) of the Customs Tariff Act, 1975 provides for levy of additional duty equal to excise duty. If the import is found to be covered under the said Notification dated 1.3.2006, the respondent would not be liable for any additional duty as the goods in question was chargeable to 'nil' rate of excise duty. Having regard to its significance, the provision i.e. Section 3(1) may be quoted as under:-

"3. Levy of additional duty equal to excise duty.- (1) Any article which is imported in India shall, in addition, be liable to a duty (hereinafter in this section referred to as the additional duty) equal to the excise duty for the time being leviable on a like article if produced or manufactured in India and if such excise duty on a like article is leviable at any percentage of its value, the additional duty to which the imported article shall be so liable shall be calculated at that percentage of the value of the imported article.

Provided.....

Explanation – In this section, the expression 'the excise duty for the time being leviable on a like article if produced or manufactured in India' means the excise duty for the time being in force which would be leviable on a like article if produced or manufactured in India, or, if a like article is not so produced or manufactured, which would be leviable on the class or description of articles to which the imported article belongs, and where such duty is leviable at different rates, the highest duty."

(5)

4. On a plain reading it is manifest that the goods imported into India are liable to a duty- called additional duty- equal to excise duty leviable on a like goods if produced or manufactured in India. The object underlying the provision is that an importer should not be placed at more advantageous position vis-à-vis the producers/manufacturers of similar goods in India.

5. Before referring to the respective case of the parties and the contentions advanced it would be appropriate to extract the relevant part of the Notification dated 1.3.2006 as under :-

"In exercise of the powers conferred by sub-section (1) of section 5A of the Central Excise Act, 1944 (1 of 1944), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts excisable goods of the description specified in column (3) of the Table below..... as are given in the corresponding entry in column (2) of the said Table, from so much of the duty of excise specified thereon under the First Schedule to the Central Excise Tariff Act, as is in excess of the amount calculated at the rate specified in the corresponding entry in column (4) of the said Table and subject to the relevant conditions specified in the Annexure to this notification, and the Condition number of which is referred to in the corresponding entry in column (5) of the Table aforesaid.

Table

S.No.	Chapter or heading or sub-heading or tariff item of the first schedule	Description of excisable goods	Rate	Condition No.
(1)	(2)	(3)	(4)	(5)

67. 3204 or 3809 Finishing agents, dye carriers to accelerate the dyeing or fixing of dye-stuffs, printing paste, and other products and preparations of any kind used in the same factory for the manufacture of textiles and textile articles

Nil -

6. The case of the Revenue is that the exemption i.e. the 'nil' rate of duty provided in the notification is subject to the condition that the goods are used in the same factory which means that the goods must be used in the same factory in which they were manufactured. Where the goods are manufactured but sold to some other factory or person, for whatever

purpose, excise duty would be leviable. Similarly, where the goods are not manufactured in the factory where they are used, the benefit of the notification cannot be claimed. The case of the respondent is that if the expression 'same factory' is understood to mean the factory where the goods are actually manufactured, the notification can never be applied in the case of import of goods, for, in the case of import, there is no question of the goods being manufactured in the same factory. According to the respondent, 'the same factory' only means that the imported goods must be used in the factory of the importer where manufacturing activity takes place. It was submitted that in order to attract Section 3 of the Customs Tariff Act, by virtue of the Explanation to sub-section (1), it is not necessary that there should be actual production or manufacture – as held by the Apex Court, and, therefore, where excise duty is not leviable on the manufacture of goods, the importer would not be liable to pay any additional duty for import of like goods. In support of the contention reliance was placed on **Thermax Pvt. Ltd. Vs. CC** 1992(61) ELT 352 (SC), **Hyderabad Industries Vs. Union of India** 1999 (108) ELT 321(SC), **Plastic Processors Vs. Union of India** 2002 (143) ELT 521(Del.) and **Lohia Sheet Products Vs. Commissioner of Customs** 2008(152) ECR 173. On behalf of the Revenue, on the other hand, reliance was placed on the larger Bench decision of the Tribunal in **Priyesh Chemicals and Metals Vs. Collector of Central Excise, Bangalore** 2000 (120) ELT 259(Tribunal-LB) and **CCE, New Delhi Vs. Hari Chand Shri Gopal** 2005 (188) ELT 353 (SC). It was stated that correctness of the decision in **Thermax Pvt. Ltd.** has been doubted in **Hari Chand Shri Gopal** and matter has been referred to the larger Bench.

7. It is true that the decision in **Thermax Pvt. Ltd.** has been doubted in **Hari Chand Shri Gopal** but it appears notwithstanding the reference to larger Bench vide order dated 3.10.2005, **Thermax Pvt. Ltd.** is still being followed, as a matter of fact, the case of **Lohia Sheet Products** was decided placing reliance on it. In any view, until **Thermax Pvt. Ltd.** is overruled by a larger Bench of the Supreme Court, it will continue to hold the field as laying down the law on the subject and we have no option but to follow it. It would not be out of place to mention that the decision in **Thermax Pvt. Ltd.** was quoted with approval by the Constitution Bench in **Hyderabad Industries Ltd.**

8. The question involved in **Thermax Pvt. Ltd.** was as to applicability of Rule 192 occurring in Chapter X of the Central Excise Rules, 1944 relating to concession. Dealing with the question the Apex Court observed as under :-

“11. It will at once be seen that there is nothing in the scheme of the rule which makes it inapplicable to an importer of goods. The assessee here has imported the goods and is selling them for use in a factory, a use which qualifies for the concession under the S.8 notifications. The types of use specified in the concessions notified could be of any kind and, even in the notifications under our consideration, they are many and varied. In respect of items falling under S.Nos.3 and 8, in particular, the actual users may be private individuals or authorities and need not necessarily be manufacturers using the goods in question is an ‘industrial process’ in a narrow sense of that term. For instance, any computer room, hospital or factory purchasing parts of refrigerating and air-conditioning appliances and machinery for use in the computer room, hospital or factory would be entitled to claim the concession by following the prescribed procedure. Only, for claiming a concession in excise duty the user should be the manufacturer himself or he must have made the purchase from a manufacturer liable to pay excise duty on the item whereas in regard to a claim for CVD concession, the supplier will be an importer. The latter will be entitled to sell the goods at the concessional rate of duty (or at nil rate if there is an exemption) if the purchaser from him who puts the goods to the specified use (whether a manufacturer or not) fulfils the requirements of Rule 192. Since the concession under Rule 192 turns only on the nature and use to which the goods are put by the user or purchaser thereof and on whether he has gone through the procedure outlined in Chapter X, it would not be correct to deny it to a supplier of such goods on the ground that he is an importer and not a manufacturer. That aspect is provided for by Section 3(1) of C.T. Act which specifically mandates that the CVD will be equal to the excise duty for the time being leviable on a like article if produced or manufactured in India. In other words, we have to forget that the goods are imported, imagine that the importer had manufactured

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the goods in India and determine the amount of excise duty that he would have been called upon to pay in that event. Thus, if the person using the goods is entitled to the remission, the importer will be entitled to say that the CVD should only be the amount of concessional duty and, if he has paid more, will be entitled to ask for a refund. In our opinion, the Tribunal was in error in holding that the assessee could not get a refund because the procedure of Chapter X of the rules is inapplicable to importers as such." [Emphasis supplied]

We may also notice the relevant observations in **Hyderabad Industries Ltd.** as under :-

"10. Section 3(1) of the Customs Tariff Act, 1975 provides for levy of an Additional Duty. The duty is, in other words, in addition to the Customs Duty leviable under Section 12 of the Customs Act read with Section 2 of the Customs Tariff Act. Secondly, this duty is leviable at a rate equal to the Excise duty for the time being leviable on a like article to the one which is imported if produced or manufactured in India. The explanation to this Sub-section expands the meaning of the expression 'the Excise duty for the time being leviable on a like article if produced or manufactured in India'. The explanation to Section 3 has two limbs. The first limb clarifies that the duty chargeable under Sub-section (1) would be the Excise duty for the time being leviable on a like article if produced or manufactured in India. The condition precedent for levy of Additional Duty thus, contemplated by the Explanation is that the article is produced or manufactured in India. The second limb to the explanation deals with a situation where 'a like article is not so produced or manufactured'. The use of the word 'so' implies that the production or manufacture referred to in the second limb is relatable to the use of that expression in the first limb which is of a like article being produced of (sic) manufactured in India.

11. The words 'if produced or manufactured in India' does not mean that the like article should be actually produced or manufactured in India. As per the explanation if an imported article is one which has been manufactured or produced then it must be presumed, for the purpose of Section 3(1), that such article can likewise be manufactured or produced in India. For the purpose of attracting Additional Duty under Section 3 on the import of a manufactured or produced article the actual manufacture or production of a like article in India is not necessary. As observed by this Court in *Thermax Private Limited v. Collector of Customs, Bombay* 1992 (61) ELT 352 (SC): (1992) 4 SCC 440 that Section 3(1) of the Customs Tariff Act 'specifically mandates that the CVD will be equal to the Excise duty for the time being leviable on a like article if produced or manufactured in India. In other words, we have to forget that the goods are imported, imagine that the importer had manufactured the goods in India and determine the amount of Excise duty that he would have been called upon to pay in that event'. To our mind the genesis of Section 3(1) of Customs Tariff Act has been brought out in the aforesaid observations of this Court, namely, for the purpose of saying what amount, if any, of additional duty is leviable under Section 3(1) of the Customs Tariff Act, it has to be imagined that the articles imported had been manufactured or produced in India and then to see what amount of Excise duty was leviable thereon." [Emphasis supplied]

9. The case of **Lohia Sheet Products** was decided following the decisions in **Thermax Pvt. Ltd.** and **Hyderabad Industries Ltd.** As the relevant term of the notification which was subject matter of consideration in that case was somewhat similar to the notification involved in the present case we may refer to the facts of that case in brief. The appellant, Lohia

Sheet Products, imported scraps and claimed exemption from additional duty under Section 3 of the Customs Tariff Act on the ground that the scrap was chargeable to nil rate of duty. The goods which qualified for nil rate of duty – as described in the notification was – was copper waste and scrap used within the factory of production for the manufacture of unrefined or unwrought copper, copper sheets or circles and handicrafts. The case of the Revenue was that the expression “within the factory of production” pre-supposes that only such waste and scrap is exempted from payment of duty which is generated and then used within the factory of production and since, in that case, the waste and/or scrap had been imported from abroad, it cannot be said that it was to be used in the factory of production. It may be kept in mind that in the present case too the stand of the Revenue is more or less the same. Rejecting the contention of the Revenue, their Lordships held as under :-

“.....The entry nowhere uses the word ‘generated’ or ‘imported’. The condition that only that scrap would be entitled to exemption which has been generated in the factory of production is, therefore, unwarranted and unsustainable. The word ‘within’ occurs after the word, ‘used’. The Assessing Authority as well as the Tribunal have arrived at the finding that only that scrap/waste of copper would be entitled to the exemption which had been generated in the same factory because of the word, ‘within’ used in the Heading 74.04. According to them, the word, ‘within’ pre-supposes that the copper waste and scrap was generated in the same factory. We are unable to read the entry in the manner as suggested by the Revenue.”

The Court recalled the dictum laid down in **Thermax Pvt. Ltd.**, approved in **Hyderabad Industries Ltd.**, that “one has to forget that the goods are imported, imagine that the importer had manufactured the goods in India, determine the amount of Excise duty that he would have been called upon to pay in that event”.

10. In the case of **Plastic Processors** (supra), while considering the validity of a circular of the Central Government directing that the relevant exemption notifications are applicable only in respect of plastics

"reprocessed in India", it was held that for the purpose of attracting additional duty under Section 3 of the Customs Tariff Act on the import of a manufactured or produced article, the actual manufacture or production of a like article is not necessary. In essence, what has to be imagined is that the importer had manufactured the goods in India and then the amount of excise duty that he would have been called upon to pay in that event has to be determined.

11. Notification No.4/2006 dated 1.3.2006, it may be clarified, is a notification issued under Section 5A of the Central Excise Act which empowers the Central Government to grant exemption from duty of excise in public interest. The rates of excise duty and the exemptions, if any, under Section 5A are nevertheless relevant for the purpose of levy of additional duty (countervailing duty) under Section 3 of the Customs Tariff Act. On import of any goods the importer is liable to pay, in addition to customs duty, a duty equal to excise duty applicable to goods "if" produced or manufactured in India. It is, therefore, clear that the additional duty is leviable equal to, that is at the same rate, excise duty for goods if like goods are produced or manufactured in India, but as held by the Apex Court, actual production or manufacture is not necessary for levying additional duty. As observed above, the object underlying under Section 3 is to bring the importers at par with the domestic manufacturers. When no excise duty is leviable, it would follow that the importer would not be liable to pay any additional duty. The question as to whether the goods are actually produced or manufactured is not relevant at all.

12. Adverting to the present case, the words "same factory" on the first blush would appear to suggest that the goods must also be produced or

manufactured in the same factory, but if that interpretation were to be given, it would render the operation of the notification impossible in the case of import, for, there is no question of the goods being manufactured and then used in the same factory in the case of import. Where the goods are imported, there is no question of their being manufactured or produced in India. They can only be used in the manufacture of some other product as raw material apart from being sold in the market. It is to be kept in mind that actual production of a like goods is not essential, and if that be so, the Revenue cannot insist that notification can be applied only when the goods (imported goods) were manufactured in India. In the case of **Lohia Sheet Products**, the words were "used within the factory of production". In the present case, the words are "used in the same factory". In our opinion, the words "used in the same factory" simply mean that the goods in question should not be used in any other factory i.e. anywhere else other than the factory for the purpose of manufacture of textiles and textile articles. The case of the respondent is that it has only one factory of production. It is not in dispute that the goods in question are 'finishing agents' and they otherwise conform to the description in Column 3 of the Table appended to the notification – extracted above. The conclusion is irresistible that the 'nil' rate of duty was chargeable and, therefore, the respondent was not liable to pay any additional/countervailing duty on the import of goods under Section 3 of the Customs Tariff Act.

13. The order in **Hari Chand Shri Gopal** (supra) is not final decision on the point and, in any view, from para 5 of the order it does not appear that the law laid down in **Thermax Pvt. Ltd.** that in order to attract Section 3 of the Customs Tariff Act, there need not be actual production or manufacture,

has been doubted. **Thermax Pvt. Ltd.**, it was observed, requires reconsideration as among other things the requirement that the applicant must obtain L-6 licence and also registration certificate for seeking remission/concession, was not taken into consideration.

14. The decision in **Priyesh Chemicals & Metals** was relied upon in support of the contention that the conditions laid down in the notification must be satisfied. There cannot be two opinions on this point. Having found that there need not be actual production or manufacture of the goods in order to attract Section 3 of the Customs Tariff Act, muchless in the case of import of like goods, we are satisfied that the conditions stand satisfied and accordingly the goods in question was not liable for additional duty, and the impugned order of the Commissioner (Appeals) modifying the assessment on the Bills of Entry to that extent, therefore, cannot be said to be erroneous to warrant any interference by the Tribunal.

15. In the result, we find no merit in these appeals and they are accordingly dismissed.

[Pronounced in the open Court 30-4-2008]

[Justice S.N. Jha]
President

[M. Veeraiyan]
Member (Technical)