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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/2209/2010 - EX[DB] WITH E/S/2107/2010-EX Date **11/04/2011**

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

To:
M/S CENTURY YARN
DIVISION OF M/S CENTURY TEXTILES &
INDUSTRIES LTD. CENTURY BHAVAN, DR. ANNIE
BESANT ROAD, WORLI, MUMBAI-30

M/S CENTURY YARN Appellant

Vs

C.E. INDORE **STAY ORDER NO. 438/2011-EX** Respondent

I am directed to transmit herewith a certified copy of **Final order No.**338/ **2011 EX|DB|** dated 08-4-11 passed by the Tribunal under **Section 35-C(1)of Central Excises Act, 1944**

Assistant Registrar
(Excise Appeal Branch)

Copy to :

1. Respondent
C.C.E. INDORE
MANIK BAGH PALACE, POST
BOX NO. 10, INDORE 452001 (M.P.)

2. Adv. / Consult
MR.V. LAXMIKUMARAN
B-6/10, SAFDARJUNG ENCLAVE, NEW DELHI-110029

3. C.D.R
4. Bar association, CESTAT, New Delhi
5. Director Publications, Customs, Excise. I.P. Estate, New Delhi
6. M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -
7. Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
8. M/s. Deeparchie Publications, M-93, Marg. 46, Saket, New Delhi 110017
9. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi - 110005
10. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road, Ahmedabad-15
11. LAWCRUX Advisors Pvt Ltd, LAW House,1-8,Sector - 10, Faridabad 121003 (Haryana)
12. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
13. Office Copy
14. Guard file
15. HON'BLE PRESIDENT,

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI PRINCIPAL BENCH, COURT NO. I

Excise Stay Application No. 2107 /2010-Ex(BR)
Excise Appeal No. 2209 /2010-Ex(BR)

M/s. Century Yarn — Appellants

Vs.

Commissioner of Central Excise
Indore — Respondent

Appearance:
Shri B.L. Narasimhan, Advocate for the Appellants
Shri V. Choudhary, SDR for the Respondent

CORAM:

Hon'ble Shri Justice R.M.S. Khandeparkar, President
Hon'ble Shri Rakesh Kumar, Member (Technical)

Date of Hearing/decision : 18.2.2011

STAY **ORDER** 438/2011-EX

Per Shri Justice R.M.S. Khandeparkar (for the Bench):

Heard advocate for the appellants and DR for the respondents. Since we propose to dispose of the appeal itself, we allow the application without insisting for any deposit and direct the Registry to place the appeal for hearing forthwith.

2. Application accordingly stands disposed of.

(Justice R.M.S. Khandeparkar)
President

(Rakesh Kumar)
Member(Technical)

ss

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI PRINCIPAL BENCH, COURT NO. I

Excise Appeal No. 2209 /2010-Ex(BR)

[Arising out of Order-in-Appeal No. IND-I/108/2010 dated 31.3.2010 passed by Commissioner (Appeals) Central Excise, Indore]

For approval and signature:

Hon'ble Shri Justice R.M.S. Khandeparkar, President
Hon'ble Shri Rakesh Kumar, 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? :
2. Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not? :
3. Whether Their Lordships wish to see the fair copy of the Order? :
4. Whether Order is to be circulated to the Departmental authorities? :

M/s. Century Yarn — Appellants

Vs.

Commissioner of Central Excise
Indore — Respondent

Appearance:

Shri B.L. Narasimhan, Advocate for the Appellants
Shri V. Choudhary, SDR for the Respondent

CORAM:

Hon'ble Shri Justice R.M.S. Khandeparkar, President
Hon'ble Shri Rakesh Kumar, Member (Technical)

Date of Hearing : 18.2.2011
Date of decision : ~~22.3.2011~~ 8.4.2011

FINAL **ORAL ORDER No. 338/2011-EX**

Per Shri Justice R.M.S. Khandeparkar (for the Bench):

Heard at length the learned advocate for the appellants and the DR for the respondents in terms of order passed on 18.2.2011 in Stay application No. 2107/2010. We have also perused the written submissions filed on behalf of the appellants.

2. The present appeal arises from order passed by the Commissioner (Appeals) Indore on 31.3.2010. By the impugned order the Commissioner (Appeals) rejected the appeal filed by the applicants against order-in-original passed by the adjudicating authority. The Assistant Commissioner, Indore by his order dated 13.11.2009 had confirmed the demand of duty to the tune of Rs.4,99,705/- with interest and imposed penalty of Rs.50,000/- against the appellants.

3. The appellants are the manufacturers of cotton yarn classifiable under Chapter heading 5205 of the Central Excise Tariff Act. Previously the appellants were 100% EOU. The appellants applied to the Development Commissioner for exit from EOU scheme and obtained the debonding permission from yarn division. The final debonding from 100% status to normal unit in respect of yarn division was granted by the Assistant Development Commissioner, NOIDA under order dated 20.4.04 to be effective from 31.3.2004. The Commissioner, Indore under order dated 16.4.04 directed the appellants to deposit duty payable. In view of debonding from 100% EOU status to normal unit, the appellants were required to pay duty on the finished goods manufactured or produced and lying in stock on the day of

debonding in terms of provisions of law applicable thereto. Accordingly, the Commissioner, Indore vide letter dated 16.4.04 directed the appellants to deposit the duty payable on the raw materials, consumables, capital goods, waste and finished goods as self assessed by them to the tune of Rs.1,08,83,399/-. At the time of debonding the appellants had paid the Central Excise duty at the concessional rate on the basis of Notification No. 23/03-CE dated 31.3.2003 on the finished goods available in the stock on 31.3.2004. Since the appellants had violated the provisions of section 3(1) inasmuch as that they had not discharged the duty as per the provisions of law and had availed the benefit of Notification No. 23/2003-CE dated 31.3.2004 which was restricted to ~~sale~~ goods allowed to be sold by 100% EOU unit by clearing ~~the~~ goods to Domestic Tariff Area and not for debonding purposes, therefore, a show cause notice dated 6/7th March, 2009 came to be issued to the appellants which was contested by the appellants by filing their reply dated 14.4.2009. The adjudicating authority, however, confirmed the demand as stated above and the appeal against the same before the Commissioner (Appeals) did not yield favourable result to the appellants and hence the present appeal.

4. The learned advocate for the appellants while assailing the impugned order has submitted that the appellants had worked out the duty on the finished goods at the rate applicable to a normal DTA unit. The reason for working out the duty as per normal excise duty was that on the date of clearance, appellants would have ceased to be a EOU unit

and therefore, in terms of Rule 5 of Central Excise Rules, the rate of duty in force on the date of clearance alone being relevant for payment of duty, the appellants were entitled for the benefit of the notification no. 23/03-CE dated 31.3.2003, and therefore the authorities below were not justified in confirming the demand. He further submitted that the department wrongly denied the benefit of Notification No. 23/03-CE dated 31.3.2003 and calculated the duty liability in terms of proviso to section 3 (1) of Central Excise Act, 1944. According to the learned advocate, the proviso to section 3(1) of the said Act could be attracted only in case of clearance of goods to DTA by an EOU and not otherwise. Since the appellants had already ceased to be EOU at the time of bringing the goods in DTA unit, the proviso to section 3(1) of the said Act was not attracted and law in that regard is well settled by the decision of the Apex Court in the matter of Siv Industries Ltd. vs. CCE and Customs reported in [2000 (117) ELT 281(SC)]. He further submitted that at the time of debonding appellants did pay the excise duty as per S.No. 3 of the Notification No.23/03 and not as per S.No.2 of the said Notification. According to the appellants S.No. 2 of the said Notification has no application. He further submitted that the decision of the Larger Bench of the Tribunal in the matter of Himalaya International Ltd. vs. CCE, Chandigarh reported in [2003 (154) ELT 580(Tri-LB)] is not applicable to the case in hand. According to the learned advocate, the ratio of the said decision is inapplicable to the facts of the case wherein an assessee stands exited from EOU scheme and functions as normal DTA unit and in such a case duty payable on debonding unit is in terms of main section 3(1) of said Act and not by applying the proviso to the said section. He further submitted that the appellants debonded their unit in March, 2004 and final debonding order was obtained on 20.4.2004. The appellants paid the Central Excise duty on the finished goods at the time of debonding on 4.4.2004. The show cause notice was issued on 6.3.2009. There was no suppression of any fact and therefore, the extended period of limitation was not invokable.

5. The DR on the other hand, while justifying the decision of the lower authorities submitted that the amount demanded and confirmed against the appellants relates to difference in duty between the duty paid and duty payable by the appellants at the time of debonding and not in relation to the duty payable after debonding and hence, the decision of the Apex Court in Siv Industries case will have no application to the facts of the case. Further, reliance was placed in the Larger Bench decision in the matter of Jaipur Golden Transport Co. Pvt.Ltd. vs. CCE Surat reported in [2007 (215) ELT 503 (Tri-LB)]. He further, submitted that issue of bar of limitation was not raised before the adjudicating authority and the fact that duty was paid by wrongly availing the benefit of exemption Notification No. 23/2003-CE dated 31.3.2003 and not in accordance with the proviso to section 3(1) of said Act has not been disputed and being so, there is no case for interference in the impugned order.

6. Taking into consideration the facts of the case, it is apparent that in answer to the show cause notice by the appellants, it was the case of the appellants that they had rightly paid the duty at the concessional rate on the finished goods at the time of debonding. In other words, the contention which is now sought to be canvassed that the appellants were entitled to work out the duty on the finished goods as if the clearance is by DTA unit and not EOU unit, cannot be accepted. Indeed it had been specific case of the department right from the time of issuance of show cause notice that the amount of duty demanded is equivalent to the difference in the duty payable and paid at the time of debonding from EOU to DTA unit. The show cause notice clearly stated that "at the time of debonding, the noticee had paid the central excise duty at the concessional rate on the basis of Notification No. 23/03 CE dated 31.3.03 on the finished goods available in the stock on 31.3.04." It was further stated that "it is observed that the provisions made in sub paragraph (a), (d), (e) and (g) of paragraph 6.8 of the foreign trade policy, are for DTA sale by 100% EOU and not for the purpose of discharging the duty of Central Excise at the time of debonding of the unit." Further, it was brought to the notice of the appellants that "the noticee has thus, followed the provisions of section 3(1) inasumuch as they had not discharged the duty as stipulated as stipulated for such purposes, it is obligatory on the part of the noticee to abide by the Rules and Notification laid therein for the purpose of debonding'. It was also stated that 'the benefit of Notification No.

23/2003-CE is restricted to sale allowed to be sold' states and not for debonding purposes". The show cause notice further recorded that "the noticee also appears to have contravened the provisions of Rule 4, 6 and 8 of the Central Excise Rules, 2002 as much as at the time of debonding while self assessing the duty liability, the noticee had wrongly availed the benefit of Notification No. 23/2003-CE dated 23.03.03, thereby short paid the duty." It was also stated therein that "the noticee has no followed the Notification No. 23/03 CE dated 31.3.03 and proviso to section 3(1) of Central Excise Rules, 1944 and intentionally paid the lesser duty at the time of debonding which resulted in short payment of duty due to suppression of facts." It is therefore, apparent that the demand of duty was not in relation to the goods cleared after debonding the unit from EOU to DTA but it was the duty liability which was required to be cleared at the time of debonding of the unit.

7. In terms of Foreign Trade Policy there is specific procedure prescribed for exit from EOU scheme according to which, with the approval of Development Commissioner, EOU units may opt out of scheme. But such exit is subject to payment of Excise and Customs duty and in accordance with the industrial policy in force at the time of exit. Further, the scheme specifically provides that the unit proposing to exit out of EOU scheme shall intimate Development Commissioner and Customs and Central Excise authorities in writing, that the unit shall assess the duty liability arising out of debonding and submit details

of such assessment to Customs and Central Excise authorities. The authority then shall confirm the duty liabilities. After payment of duty and clearance of all dues unit, the manufacturer shall obtain 'no due certificate' from such authorities and on the basis of such certificate issued by those authorities, the unit shall apply to the Development Commissioner for final debonding. Obviously, therefore, the provisions of law clearly require the manufacturer of goods in EOU scheme to pay necessary duties " the time of debonding". In fact this obligation is not in dispute. It is the case of the appellants themselves that they had paid the Excise duty on the finished goods at the time of debonding. Their case is that they are entitled to calculate the duty on the basis of clearance of raw material, consumables, capital goods, waste and finished goods from DTA unit and not from EOU unit. The contention of the applicant as above is totally devoid of substance. Once it is not in dispute that the duty liability is on account of debonding and on account of clearance of goods at the time of such debonding from EOU, and the statutory provision clearly require payment of dues at the stage of debonding, the question of availing benefits of Notification or provision of law applicable to the clearance of goods from normal DTA units cannot apply to the goods in respect of which the duty is payable on account of debonding from EOU.

8. It is undisputed fact that under EOU scheme manufacturer enjoys various benefits and concessions. Consequent to debonding manufacturer cannot claim the same benefits. Therefore, goods which

were manufactured while the unit was enjoying the benefit of EOU scheme on ceasation of being EOU has obviously to pay the normal duty payable for exporting the goods in the absence of applicability of the said scheme, and that is what had been held by Larger Bench in Jaipur Golden Transport Co. Pvt.Ltd. cited supra. It was clearly ruled therein as under:-

> "We find that the wordings of proviso to Section 3(1) of the Central Excise Act and Notification 125/84 which we have been called upon to interpret are similar and the basic dispute is as to how the words "allowed to be sold in India" are to be interpreted. After going through the various submissions made by both sides, we find that 100% EOUs were allowed to be established with the sole purpose of exporting 100% of their production as is evident from the words 100% EOUs. However, on account of certain hardship faced in getting export order, sales in DTA up to 25% were permitted from the year 1984 but there was a clear intention to distinguish between such sales by the 100% EOU from the sales by domestic units other than 100% EOU and it was for this purpose that proviso to Section 3(1) and Notification 125/84 was introduced. Since there were only two modes of clearance in which the 100% EOUs could have cleared the goods i.e. one by export and the other by domestic sale after obtaining the permission of the Development Commissioner, in respect of domestic sales the words "allowed to be sold in India" were incorporated in both the provisos. The fact however remains that 100% EOUs were never treated at par with other domestic units and for all practical purpose they were considered as units located outside India and accordingly Central Excise duty equal to amount of duties of customs leviable on like or similar goods manufactured outside India when imported into India was made

applicable. In fact a different procedure was carved out and a separate Chapter VA was inserted in Central Excise Rules relating to removal of goods from free trade zone and 100% EOU for home consumption and many provisions of the Central Excise Rules were made inapplicable. Even exemption Notifications issued under Rule 8 were made inapplicable unless Notification itself said so. The intention of the legislature and the purpose of introducing proviso to Section 3(l) and Notification 125/84 is therefore very evident that 100% EOUs are to be treated differently from other domestic units. We are therefore in agreement with the plea raised by the Revenue that no interpretation which would have the effect of defeating the very statutory provision shall be given. It has also been observed by Supreme Court in British Airway's case that while interpreting the statute, courts are required to keep in mind, the consequences which are likely to flow up on the intended interpretation that it is the duty of the court to give a harmonious construction of a statute and that such a construction shall suppress the mischief and advance the remedy. Further as observed by the Supreme Court in the case of Ispat Industries it is no where laid down by our constitution or any other law that only Maxwell's Principles of Interpretation can be used by the court. We can use any system of interpretation which helps us solve the difficulties like the mimansa of principle of interpretation which lay down that when there is the conflict between the purpose and the material, purpose is to prevail because in the absence of the prescribed material a substitute can be used, for the material is subordinate to the purpose. If a subordinate idea clashes with the principal idea, the former must be adjusted to the latter or must be disregarded altogether. Further when there is a conflict between the use and the substance, greater regard should be paid to the use. Following these principles, we find that the purpose all along has been to treat 100% EOUs differently from domestic units other than 100% EOU and therefore we hold that so long an hundred per cent EOU continues as an EOU, it will be within the proviso to Section 3(1) of the Central Excise Act and a mere violation of the permission in the matter of sale to DTA will not take it outside the proviso to Section 3(1) of the Central Excise Act and Notification 125/84-C.E. Any other interpretation will mean that while the law abiding assessee will be liable to pay duty on domestic clearances, others violating the law can conveniently escape duty liability and this would be against the principle of suppressing mischief and advancing remedy."

9. In Himalaya International Ltd. vs. CCE, Chandigarh-I reported in [2003 (154) ELT 580(Tri-LB)], the Larger Bench had ruled as under:-

"**5.** We find merit in the contention raised by the learned DR that in the nature of the conditions under which an hundred percent EOU is functioning, an interpretation suggested by the assessee would defeat the purpose of the proviso. As far as 100% EOU is concerned its entire production is expected to be sold under export. Whenever it is permitted to sell its goods in DTA, provisions under the proviso would be applicable. The main provision in Section 3(1) is applicable to excisable goods which are produced or manufactured by the units other than 100% EOU and units in free trade zone. Therefore, goods produced and manufactured by 100% EOU and sold in DTA in excess of the permission granted cannot come under the main Section 3(1). If the interpretation sought to be given on the proviso by the assessee is accepted, it would lead to an anomalous situation wherein an EOU would pay higher rate of duty in respect of supplies made to DTA with the permission of Development Commissioner and a lesser rate of duty in respect of goods sold in excess of the permission for clearance to DTA. In *British Airways PLC* Supreme Court has observed that while interpreting the statute the courts are required to keep in mind the consequences which are likely to flow upon the intended interpretation. It has been also observed therein that it is the duty of the court to give a harmonious construction of a statute and that such construction shall suppress the mischief and advance the remedy. Therefore, we hold that so long as an hundred percent EOU continues as an EOU it will be within the proviso mere violation of the permission in the matter of sale to DTA will not take it outside the proviso."

10. In both the decisions, the Larger Benches have clearly distinguished the decision of the Apex Court in Siv Industries Ltd. case. Indeed the issue for consideration before the Apex Court in Siv Industries was relating to the duty liability after debonding and not at the time of debonding and this is apparent from the paragraph 4 of the said decision wherein it is recorded that "Once the debonding of the unit is permitted, finished goods earlier manufactured in the 100% EOU could be cleared for Domestic Tariff Area (DTA) on levy of duty of Central Excise. The dispute is at what rate this duty is to be levied." Apparently therefore the decision is not relevant to a situation arising at the time of debonding of the unit.

11. In the facts of the case in hand, we are concerned at the stage of debonding and provisions of the scheme and in particular clause 6.18 of Chapter 6 of the Foreign Trade Policy as was in force at the relevant time, sub clause (e) specifically provided that "Units proposing to exit from EOU scheme should obtain permission for in principle approval

and submit details of imports and exports made to the Central Excise / Customs Authority. After such verification, the said authority will assess the duty payment and the unit will pay the duty so assessed and obtain 'no due certificate' from the excise authority. During the period between such payment of customs duty and obtaining the final debonding letter, the unit will not be entitled to claim any exemption for procurement of capital goods or inputs." It is therefore, clear that at the time of debonding, the question of availing the benefits available to DTA unit cannot arise.

12. Both the authorities below on detailed discussions about applicability of the proviso to section 3(1) of the said Act in the facts of the case have clearly applied the provisions of law as they are applicable to the facts of the case and therefore, we do not find any infirmity in the impugned order in that regard. Commissioner (Appeals) was justified in observing that the concessional duty under the said exemption Notification would apply only in a situation where the goods are brought to DTA under specified paragraphs (a), (d), (e) and (g) of the Foreign Trade Policy which is not the case when the unit exits from EOU scheme to DTA unit. The benefit under the said Notification is restricted to the sale allowed to be sold from EOU to DTA and not in relation to the goods at the time of debonding.

13. As regards the ground related to bar of limitation is concerned, the DR is justified in contending that no such pleas was ever raised before the adjudicating authority. The issue relating to the bar of limitation is

not a pure question of law. It is a mixed question of law and facts. It is to be raised at the first available opportunity. The contesting party is entitled to place on record its defence supported by the facts and materials which could support the defence plea. In the absence of such plea being raised before the adjudicating authority, obviously the department had no opportunity to meet the same by placing on record the required material in support of their defence. Being so, it is too late in the day for the appellants to raise such issue at the appellate stage.

14. In the facts and circumstances of the case, therefore, we find no infirmity in the impugned order and hence the appeal fails and is hereby dismissed.

(Justice R.M.S. Khandeparkar)
President

(Rakesh Kumar)
Member(Technical)

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