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

Customs Appeal No. 254 of 2010
Customs Appeal No. 110 of 2011

[Arising out of Order-In-Original No. 41/2009 (CE) dated 03.12.2009 passed by Commissioner of Customs, Jaipur and Order in Appeal No. 36(DKV)CUS/JPR-I/2010 dated 16.12.2010 passed by Commissioner Customs (Appeals), Jaipur]

M/s. Aksh Optifibre Ltd. **Appellant**

Vs.

Commissioner of Customs **Respondent**
Jaipur

Appearance:
Ms Rinki Arora, Advocate for the Appellants
Shri Govind Dixit, AR for the Respondent

<u>CORAM</u>:

Hon'ble Ms Archana Wadhwa, Member (Judicial)
Hon'ble Mr. V Padmanabhan, Member (Technical)

Date of Hearing/ Decision: 15.3.2017

FINAL ORDER NO . 52586-52587 /2017

<u>Per Archana Wadhwa :</u>

Both the appeals are being disposed of by a common order as the issue involved is identical in both the appeals.

2. As per facts on record, the appellant is engaged in the manufacture of optical fiber cables. The dispute in the present appeal

relates to the applicability of concessional rate of duty to the imported items, to be used in the manufacture of said optical fiber cables in terms of notification No. 24/2005 dated 1.3.2005. As per the condition of the said notification, the appellants are required to follow the procedure set out in the Customs (import of goods at concessional rate of duty for manufacture of excisable goods) Rules, 1996. The appellants got themselves registered with the Central Excise department for the manufacture of their final product i.e. optical fibre cable as also for import of the goods at concessional rate of duty in terms of said notification.

3. During the period March, 2005 to June, 2006, involved in both these appeals, the appellant imported optical fibre cable along with other raw materials claiming the classification of the same as falling under Chapter heading 8544.70. Inasmuch as heading 8544.70 is one of the specified entry in notification No. 24/2005-Cus and inasmuch as the said optical fibre were to be used in the manufacture of cables again falling under chapter heading 8544, the concessional rate of duty was extended to the appellant. It may not be out of place to mention here that heading 8544 covers insulated optical fibre cable, made out of individually sheathed fibres.

4. Subsequently, samples were drawn from the appellants factory on 17.5.2006 and were sent to Telecommunication Engineering Centre, New Delhi for testing as to whether same contain individually sheathed

optical fibre or not. As per the test report of Telecommunication Engineering Centre dated 17.7.2006 the cables manufactured by the appellant from optical fibre were not individually sheathed though in some of the cases they were found to be containing individually sheathed fibre. If they are found to be not containing individually sheathed optical fiber, they would shift their classification from 8544 70 to heading 9001 10, which heading is not a specified heading for the goods in question and not entitled to the benefit of the notification.

5. Based upon the above, further investigations were undertaken where the statement of various persons were recorded. Based upon the result of such investigation read with test report, proceeding were initiated against the appellant by way of show cause notice dated 25.9.2008 in one case and show cause notice dated 31.12.2008 in another case wherein it was alleged that appellants have manufactured their goods without the use of individually sheathed optical fibre in which case their product would be classifiable under heading 9001 10 and the concessional rate of duty would not be available to them. The differential duty proposed in both the show cause notice was confirmed against the appellant along with confirmation of interest and imposition of penalty equivalent to 100% of duty. The adjudicating authority also upheld the invocation of longer period of limitation by recording that the appellant had breached the undertaking given to the department for use of imported goods in the manufacture of optical fibre cable falling

under heading 8544 and have intentionally availed the benefit of notification No. 24/2005 Cus dated 1.3.2005 for the manufacture of goods which are not falling under heading 8544. As such, the appellant has been held to be guilty of willful suppression and mis-statement in respect of classification of their final product, as such, upholding the invocation of longer period.

6. Learned advocate appearing for the appellant submits that they have been importing the individually sheathed optical fibre only and as such, the question of mis-declaration of the said goods and of their final product does not arise. However, on being questioned as to whether they have challenged test report of Telecommunication Engineering Centre, learned advocate fairly agrees that no contest was put to the said report, neither did the appellant applied for retest or got the goods tested from any other test centre so as to rebut the finding given in the test report of Telecommunication Engineering Centre. However, she assails the impugned order on point of limitation by submitting that the imports were made during the period March, 2005 to June, 2006 and samples were drawn on 7.5.2006 and the test report was available in July, 2006. Inspite of that Revenue has taken more than one and half year to issue show cause notices. As such, she submits that demands be struck down as barred by limitation.

7. Countering the argument, learned DR Shri Govind Dixit, has taken us through various paragraphs of the impugned order whereas

the Commissioner has given a clear finding that inasmuch as the final product i.e. optical fibre cables manufactured by the appellants were found to be not containing individually sheathed optical fibre , same would not be classifiable under 8544 70 and would fall under heading 9001. If that be so, the notification benefit would not be available to the assessee inasmuch as the said headings is not a specified heading under the notification, which fact, learned advocate has also agreed to.

As regards the limitation, submits the learned DR that this is a case where the appellant has declared their final product as falling under 8544 70 and have also got themselves registered with the department by following the procedure set out in the Customs (import of goods at concessional rate of duty for manufacture of excisable goods) Rules, 1996 with a malafide intention to avail the benefit of notification . Such malafide intention has come to the surface only with the Revenue's action by drawing of samples and sending for test to Telecommunication Engineering Centre. In such a scenario, submits learned DR, extended period of 5 years would be available to the Revenue. He accordingly, prays for rejection of the appeals.

8. We have considered the submissions made by both the sides and have gone through the impugned orders. As regards the imports of the goods, we find that the test report result by the Telecommunication Engineering Centre is very clear and learned advocate has also not been able to give us any justifiable reason to

deviate from the same. Both sides have agreed that if test report is accepted, that the final product i.e. optical fibre cable would shift its classification from heading 8544 70 to heading 9001 10, thus not making the notification applicable. As such, we are of the view that the appellants have wrongly availed the benefit of notification No. 24/2005-Cus.

As regards limitation, we note that the appellant had followed the procedure set out in the Customs (import of goods at concessional rate of duty for manufacture of excisable goods) Rules, 1996 which is one of the condition of notification. However, the benefit of notification is available only to the goods of heading 8544 and declaration made by the appellant with the department that they would be using their imported material only for manufacture of cables falling under 8544 70 has been proved to be mis-declared, as is evident from the test report. If that be so, it has to be held that there was a malafide mind of the assessee to avail undue benefit in the guise of following the procedure. In such a scenario, the longer period of limitation would admittedly be available to the Revenue. As such, we find no merits in the appellants contention that demand is barred by limitation.

9. At this stage, we note from the report of the Telecommunication Engineering Centre that whereas the cable have not been found to be containing individually sheathed fibre in some of the cases, in others they have been found to be containing individual sheathed fibre.

Wherever the cable have been found containing individually sheathed fibre, the benefit of notification would be available to the assessee. However, neither side has been able to make it clear that the demand confirmed by the lower authorities is only in respect of those cables which have not been found to be containing individually sheathed fibre. As such, we are of the view that the matter needs to be remanded to the original adjudicating authority for examination of the said aspect. As already made clear the demand would relate to only those consignment where the test report of Telecommunication Engineering Centre has made it clear that the cables do not contain the individually sheathed optical fibre. With these remarks, we direct the adjudicating authority to recompute the duty amount and if required, to redecide the penalty accordingly.

10. Both the appeals are disposed of in the above manner.

(dictated and pronounced in the open court)

(Archana Wadhwa)
Member(Judicial)

(V. Padmanabhan)
Member(Technical)

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