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

Customs Appeal No. 51531, 51801 & 51863 of 2014

[Arising out of Order-In-Original No. Commissioner/ RPR/CE/114/2013 dated 25.11.2013 passed by Commissioner of Customs & Central Excise, Raipur]

M/s. Uniworth Ltd. **Appellants**
Shri S N Maheshwari, VP
Shri A P Khetan, DGM
Vs.

Commissioner of Customs, **Respondent**
Raipur

Appearance:

Shri A. Hidayatullah, Sr. Advocate with Shri Rupesh Kumar, Advocate for the Appellants
Shri S. J. Singh, (Special Counsel) DR for the Respondent

CORAM:

Hon'ble Mr S K Mohanty, Member (Judicial)
Hon'ble Mr. V Padmanabhan, Member (Technical)

Date of Hearing : 08.05.2017
Date of Decision : 18.05.2017

FINAL ORDER NO . 53337-53339 /2017

Per V Padmanabhan:

The appeals have been filed against order No. 114 /2013 dated 25.11.2013 passed by Commissioner, Raipur. The appeals have been filed by M/s. Uniworth Ltd., Shri S N Maheshwari, Vice President (Commercial) as well as Shri A P Khaitan, DGM. All the three appeals are against the same impugned order and are being decided by this common order.

2. The appellant is a 100% Export Oriented Unit, who has been granted the letter of permission by the proper officer for manufacture of export of wool yarn. They have one division (100% EOU) in Butibori, Nagpur and another at Raipur. The appellant imported second hand machinery and claimed exemption from Customs duty under Customs Notification No. 53/97 dated 3.6.97 for installation and use at Nagpur unit. The goods were cleared by filing two Bills of Entry and warehoused at Nagpur unit on 27.11.97. Subsequently, the appellant obtained permission from the Assistant Commissioner, Nagpur to transfer the machinery to their Raipur unit. After obtaining the said permission, the goods were shifted to Raipur and rewarehoused at the Raipur unit in April, 2000. The officers of DGCEI commenced investigation on intelligence to the effect that the appellants were misusing the benefits of exemption granted to EOU. The officers visited the Raipur unit and during the course of verification, noticed that the machinery remained uninstalled even in the month of March, 2005. The condition of machinery, which were kept outside the bonded area, were not useable. Show cause notice

was issued demanding the customs duty attributable to machinery which were found uninstalled and unusable. The show cause notice was decided in the original proceedings by the Commissioner vide his order in original dated 9.2.07 in which the customs duty demand was confirmed along with imposition of various penalties under the Customs Act. The appellant challenged this order before the Tribunal, who vide the Final Order No. C-227-229/11 dated 19.5.11 set aside the order and remanded the matter for denovo decision to the Commissioner with the following observations:

> "*7. On careful consideration of the submissions made by both the sides, we find that the adjudicating authority has imposed penalty on the appellant company under Section 140 of the Customs Act, 1962 which is totally incorrect as the said Section deals with prosecution and consequences thereof. We find that the bill of entry was filed claiming benefit of exemption notification No. 53/97, which did not have the clause prevailing during the relevant period needs to be addressed by the adjudicating authority, which is absent in this case.*
>
> *8. In view of the above, we are of the considered view that the impugned order is incorrect, need to be set aside and the matter needs to be reconsidered by the adjudicating authority. Without expressing any opinion on the merits of the case and keeping all the issues open, we set aside the impugned orders and remand the matter back to the adjudicating authority to*

reconsider the issue afresh following the principles of natural justice.

9. The appeals are allowed by way of remand."

3. The impugned order was passed by the Commissioner in denovo proceedings *inter alia* as follows:-

(i) Duty demand of Rs. 1,88,26,572/- confirmed.

(ii) Penalty of Rs. 15 lakh imposed on the appellant

(iii) Imposition of penalty of Rs. 5 lakh on Shri S N Maheshwari

(iv) Penalty of Rs. 5 lakh on Shri A P Khetan .

4. Aggrieved by the impugned order, present appeals have been filed.

5. With the above background, we heard Shri A Hidayatullah, Senior Advocate along with Shri Rupesh Kumar, Advocate on behalf of the appellants. Revenue was represented by Special Counsel Shri S J Singh.

6. The learned Senior Counsel argues the case of the appellants and the important points are summarized below:

1. The present proceedings emanate from the order-in-original No. Commissioner /RPR/CEX/14/2013 dated 25.11.2013 passed by the learned Commissioner, Raipur.

2. It is submitted that the appellant has been able to consistently meet its export obligations and there has been no revenue loss caused to the Exchequer and the NFE Earning also remained positive during the subsequent years.

3. The jurisdictional Assistant Commissioner, Central Excise, Division Raipur in his verification report dated 22.06.2001, endorsed the fact that the all imported goods / machinery were found to be intact and in an un tampered condition.

4. The entire basis of issuance of above mentioned SCN is the allegation that the appellant has violated condition no. 6 of Notification No. 53/97-Cus which states that the imported goods shall be installed in bonded area within a period of one year from its importation. During the relevant period i.e. on the date when the subject machineries were imported in the year 1997, there was no condition of prescribing any specific period for installation of imported capital goods.

5. The restriction was inserted only on 19.5.1999 by way of notification No. 65/97-Cus dated 19.5.1999 amending the Notification No. 53/97-Cus. CBEC Circular No. 30/99 Cus dated 25.05.1999, on which reliance has been placed in the impugned order, would have no application to the facts of the instant case, inasmuch as the said circular had been issued as a

consequence of and was complimentary to the amending Notification No. 65/99-Cus dated 19.5.99, which amended the aforesaid Notification No. 53/97-Cus.

6. The amendment Notification No. 65/97-Cus dated 19.05.1999 has not been given any retrospective effect.

7. The goods were admittedly in bond, and thus, any demand of duty on imported capital goods which are in Customs bond can arise only when the said goods are ex-bonded and not prior to that.

8. The reliance upon para 9.1 of Chapter 25 of CBEC Customs Manual to come to the conclusion that, the relevant period for determining the application of the prevailing provisions of Notification No. 53/97-Cus would be date of removal of imported capital goods from one warehouse to another, is misplaced. There is no mention of removal of capital goods to other EOU's , in para 9.1 ibid, which has been erroneously read into the said extract by learned adjudicating authority. The specific mention in para 9.1 is 'clearance to other EOU' which in the ordinary course, would denote clearance of finished goods to another EOU and not removal of imported capital goods. It is further respectfully submitted that CBEC Customs Manual cannot have precedence over specific statutory provisions.

9. Under Rule 174(9) of the erstwhile Central Excise Rules, 1944, a deeming provision under the law existed which stated that if registration certificate was not granted within a period of 30 days of making an application in that regard, registration applied for, was deemed to have been granted and thus, in the present case, since no response was received, the appellant was under bona fide belief that, central excise registration had been granted to it.

7. Arguing the case for the Revenue, the learned Special Counsel putforth the following arguments:-

The goods were imported by the appellant under Notification No. 53/97, in November, 1997. On the date of import, the original notification in para 6 did not have any stipulation regarding completion of installation within a period of one year from the date of import. The same was introduced by amending notification No. 53/97 by issue of notification No. 65/99 Cus dated 19.5.99 (S.No. 8). The amended notification provided for procurement of goods without payment of duty alternatively from a public warehouse or a private warehouse, in addition to import. The condition of installation of capital goods within one year was made applicable both for goods which are imported duty free as well as procured duty free as above. The case of the appellant was under the category of procurement from private bonded ware house, inasmuch as the second hand capital goods were procured from the appellant's Nagpur unit. Since the appellants has failed to complete installation of the goods so procured even after a period of 5 years (up to March, 2005 the date of verification by DGCEI), they are liable to pay the Customs duty in terms of amended notification. Even in the unamended notification 53/97, in para 6, there was stipulation that the Asstt. Commissioner, Customs can demand duty in respect of goods imported under the notification which are not proved to have been used in the manufacture of goods. In the present case, goods have not been installed and consequently were not used for manufacture of goods for export and consequently even in terms of unamended provisions of notification, the customs authorities were within their right to demand the duty.

8. Both sides relied upon various case laws to support their arguments.

9. To consider the rival claims and to decide the duty demands, we consider it necessary to reproduce the relevant paragraphs of notification No. 53/97 before amendment as well as after the amendment vide notification No. 65/99 dated 19.5.99.

Notification:53/97-Cs dated 3.6.1997

"(6) The importer executes a bond in such form and for such sum and with such security or surety as may be prescribed by

the Assistant Commissioner of Customs, binding himself to fulfil the export obligations and conditions stipulated in this notification and in or under 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 or in connection with the production or packaging or job work for export of goods or services out of India.

In the said notification Amendment by Notification No. 65/99-Cus dated 19.5.99 (vide para 8) :-

(a) In the opening paragraph, for the words "when imported into India, for the purpose of manufacture of articles for export out of India", the words "when imported into India or procured from a Public warehouse or a private warehouse appointed or licensed, as the case may be, under section 57 or section 58 of the said Customs Act, for the purpose of manufacture of articles for export out of India", shall be substituted;

(b) *In condition (6), for the portion beginning with the word "duty leviable on the goods" and ending with the words "services out of India", the following shall be substituted namely* :-

“duty leviable on the goods and interest at the rate of 20% per annum on the said duty from the date of duty free importation or procurement of the said goods till the date of payment of such duty, if –

(i) *In the case of capital goods, such goods are not proved to the satisfaction of the Assistant Commissioner of Customs to have been found installed or otherwise used within the bonded premises or re-exported within a period of one year from the date of importation or procurement thereof or within such extended period not exceeding five years as the Assistant Commissioner of Customs may, on being satisfied that there is sufficient cause for not using them as above within the said period, allow;* ”

10. The appellant imported second hand capital goods in November 1997 (prior to amendment). The notification provided for exemption from customs duty when the goods were imported for being used as 100% EOU for manufacture of articles for export subject to conditions prescribed therein. But after the amendment in May, 1999, exemption was permissible even for the goods which were procured from a public or private bonded ware house. In the present case, the capital goods when imported in 1997 were warehoused in

the Nagpur unit. Subsequently, the appellants procured the goods without payment of duty for use in their Raipur unit. The application for such rewarehousing has been made to the relevant Central Excise and DGFT authorities and the goods have been rewarehoused in Raipur unit on 17.4.2000. It is pertinent to note that procurement and rewarehousing has been done after the date of amendment of the relevant Foreign Trade Policy as well as amendment to Notification No. 53/97 by Notification No.65/99-Cus in May, 1999. As per the amendment terms of the Notification No. 53/97, goods which are procured from another public / private bonded warehouse are required to be installed or otherwise used within the bonded premises or re-exported within a period of one year from the date of such procurement. In the present case, it is on record that goods were found uninstalled and not used even in 2005 at the time of verification i.e. even after a period of 5 years. The goods procured by the appellants on 17.4.2000 should have been installed by 17.4.2001 but were not found installed even in March, 2005. From the above facts, it is clearly established that the appellant has failed to satisfy the impugned conditions of notification No. 53/97. Since the procurement of goods has been done after the amendment of notification and as per the amended terms of the notification, it is incumbent on the part of the appellant to also satisfy the other conditions imposed by the amended notification i.e. capital goods to be installed and used within a period of one year from the date of procurement. Under the changed circumstances, they have availed the benefits under the notification prevalent at the time of procuring the goods and consequently the adjudicating authority has not committed any mistake in confirming the duty demand.

11. Learned Senior Counsel for the appellant has repeatedly emphasized the argument that the conditions prevalent in notification No. 53/1997 at the time of import only will be applicable to the appellant and not the conditions after the amendment. It has been argued that since there was no condition regarding the installation at the time of import, same cannot be made applicable to the appellants. It has further been argued that there can be no demand for Customs duty in case of removal of goods from one warehouse to another since the goods remained warehoused and Customs duty is payable only upon removal from the warehouse.

12. We find that second hand capital goods stand imported in November, 1997 at which time there was no condition specified in the notification that installation is to be completed within one year from the date of import. However, it is on record that the appellant has subsequently procured the same capital goods for use in their Raipur unit. Such re-warehousing was covered by the amendment carried out in the relevant Customs Notification to give effect to such changes in Export Import Policy. Once the goods have been

procured in Raipur unit in terms of amended terms of EXIM Policy as well as Customs Notification, it is also imperative on the part of the appellant to satisfy the other conditions imposed on them. Consequently, we reject the argument that the amended condition in the notification will not be applicable to these goods since the same have been imported prior to amendment.

13. The goods in the present case have no doubt been removed from one warehouse to another. In that sense they had not yet been cleared for home consumption. Section 72 of the Customs Act provides for the proper officer to demand duty in many cases. Section 72 (1)(d) which is been reproduced as follows:

> **"*Section 72*. *Goods improperly removed from warehouse, etc.-***
>
> ***(1) In any of the following cases, that is to say, -***
>
> *a) ……….*
>
> *b) ………..*
>
> *c) ……….*
>
> *d) where any goods in respect of which a bond has been executed under section 59 and which have not been cleared for home consumption or exportation are not duly accounted for to the satisfaction of the proper officer,*
>
> *the proper officer may demand, and the owner of such goods shall forthwith pay, the full amount of duty, chargeable on account of such goods together with all penalties, rent, interest and other charges payable in respect of such goods."*

In the present case, goods have been removed from one warehouse to another. However, even though the goods have not been cleared for home consumption, the same have not been accounted for to the satisfaction of the proper officer inasmuch as the condition under which such warehousing was permitted was not satisfied. In view of the position as above, we are of the view that the Customs authorities have rightly demanded the Customs duty on the goods which have been found uninstalled and unused.

11. In view of the above discussion, the impugned orders are upheld and all the appeals are rejected.

(Pronounced in the open court on 18.05.2017)

(S K Mohanty)
Member(Judicial)

(V. Padmanabhan)
Member(Technical)

ss