CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD
Division Bench
Court - I

Appeal No.	Appellant(s)	Respondent(s)	Impugned Order
E/535/2009	Kumar Cotex Ltd	CCCE & ST, Guntur	OIO: 05/2009 (Denovo) (Commr) dt.04.03.2009 passed by CCCE & ST, Guntur
E/2032/2012	-do-		OIO: 12/2012 (Denovo) (Commr) dt.31.01.2012 passed by CCCE & ST, Guntur
E/2033/2012	Abhishek Kumar Agarwal		
E/2034/2012	Anil Kumar Agarwal		
E/25008/2013	Kumar Cotex Ltd		OIA: 43-44/2012 dt.24.09.2012 passed by CCCE & ST, Guntur
E/25009/2013	Anil Kumar Agarwal		

Appearance:
Shri G. Shivadass, Shri G. Prahlad & Ms. Swetha, Advocates for the Appellants
Shri. C. Mallikarjun Reddy, Superintendent/AR for the respondent.

Coram:
HON'BLE Mr. M.V.Ravindran, MEMBER (JUDICIAL)
HON'BLE Mr. P. Venkata Subba Rao, MEMBER (TECHNICAL)

Date of Hearing: 28.01.2019
Date of Decision: 28.01.2019

FINAL ORDER No. A/30181-30185/2019

[Order per: P.V. Subba Rao.]

1. All these appeals are against Order-in-Original Nos. 05/2009 (Denovo) (Commr) dated 04.03.2009, 12/2012 (Denovo) (Commr) dated 31.01.2012 & Order-in-Appeal No.43-44/2012 dated 24.09.2012.

2. The appellant herein is a Central Excise registrant engaged in manufacture of cotton yarn and cotton waste and have been licensed as a 100% Export Oriented Unit (EOU). Accordingly, they were also granted private bonded warehouse license No.01/1995-Cus dated 18.05.1995 by the Asst. Commissioner of Central Excise, Guntur. They executed necessary B-16 Bond and imported capital goods/spares and inputs without payment of duty. They have been granted permission for Domestic Tariff Area (DTA) clearances

including advance DTA sale of Rs.950 lakhs. Under this permission, they cleared goods to DTA after availing exemption notification 08/97-CE dated 01.03.1997 and 23/2003-CE dated 31.03.2003 which provide for exemption in case only indigenous raw material was used by a 100% EOU for manufacture of products which are sold in the DTA. Show cause notices were issued to the appellant seeking to deny the benefit of these exemption notifications which is the point of dispute in the four show cause notices dated 09.12.2004, 03.08.2004, 21.10.2005 and 17.05.2006. All these notices were adjudicated by the learned Commissioner vide Order-in-Original No.04/2007. On an appeal by the department in Appeal No.E/383/2007 and Appeal Nos.E/239-241/2007 by the assessee, the matter was remitted for denovo adjudication to the Commissioner and the denovo Order-in-Original No.12/2012 was passed which is the matter in dispute. The issue to be decided is whether the appellant is liable to pay the differential duty or otherwise. Learned counsel submits that separately, a show cause notice No.V(52)/15/04/2001-S.11 dated 22.06.2001 has been issued to them by the department seeking to deny the benefit of custom duty exemption available to 100% EOUs and recover the customs duty of Rs.9,97,74,769/- on the ground that they have not been able to fulfil the export obligations as required under the notification. Thereafter, the Superintendent (adjudication) of the Commissionerate issued a letter C.No.VIII/10/11/2001-Adjn dated 08.04.2013 notifying them that a personal hearing was fixed before the Commissioner of Customs and Central Excise, Guntur on 18.04.2013 at 15:30 Hrs. They were requested to appear before the Commissioner on the appointed date and time and were also asked to submit their written reply on or before the personal hearing. The appellant filed writ petition No.31585/2013 challenging the notice for personal hearing dated 08.04.2013 and the Hon'ble High Court of Andhra Pradesh in order dated 05.11.2013 observed as follows:

> *"This writ petition is filed challenging the impugned notice dated 08.04.2013, which has nexus and correlation with previous notice dated 22.06.2001.*

> *It is submitted before us that the previous notice dated 22.06.2001 was not proceeded against the writ petitioner, since no action has been taken since 2001, no fresh notice can be issued in view of the past injunction in relation to 2001 notice. Taking all these objections, a comprehensive reply has been given by the writ petitioner.*
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> *We are of the view, at this stage, this Court will not decide anything except as follows. According to us, considerably an arguable point has been raised as a preliminary issue. We direct the respondent authority concerned to decide that issue first with reason and thereafter decide the matter on merit, if it is warranted, after taking decision on the preliminary issue. This exercise shall be completed within a period of three months from the date of communication of this order. We record that we have not decided anything on merit of this appeal and all the points are kept open."*

3. It is the submission of the learned counsel for the appellant that this show cause notice pertains to demand of customs duty denying the entire benefit of exemptions available to 100% EOU on the ground that they have not fulfilled the export obligations as required. He submits that this show cause notice has still not been adjudicated and their factory is already closed. Till the closure of the factory they have fulfilled only 61% of their export obligations required as per the notification. Therefore, the eligibility of customs exemption notification on the inputs and capital goods available to them needs to be decided first. If it is held against them then they are liable to pay the entire customs duty as demanded. Consequently, the denial of benefits of exemption notifications applicable for DTA clearances for 100% EOUs become irrelevant. It is not in dispute that they have paid excise duty on clearances to DTA sales as is applicable for goods cleared and manufactured by a DTA unit. Thus, if it is held that they are not eligible for benefit of the customs exemption notification available to 100% EOUs the entire demand in these appeals does not survive. If, on the other hand, it is held that they are eligible for benefit of the exemption notifications for 100% EOUs then the demand in the appeals need to be exempted.

4. Learned departmental representative reiterates the findings of the lower authority.

5. We have considered the arguments on both sides and perused the records. We find strong force in the arguments of the learned counsel that the

issue of their entitlement to the benefit of customs exemption notifications as a 100% EOU needs to be decided first and if they are not eligible for the benefit of these exemptions then the question of benefits under excise exemption notifications applicable to 100% EOUs which are the issues in dispute in the present appeals become infructuous. Learned counsel for the appellant fairly submits that they were not able to fulfil the export obligations as required and had, in fact, fulfilled only 61% of the export obligations. Therefore, prima facie, it appears that the customs demand may be against the appellant.

6. We also find that the Hon'ble High Court of Andhra Pradesh has in their order dated 05.11.2013 directed that the matter may be decided in the period of 3 months which does not appear to have been done. In this factual matrix, we find that this is a fit case to be remanded back to the original adjudicating authority with a direction to decide the show cause notice dated 22.06.2001 (for recovery of customs duty denying benefit of 100% EOU) and thereafter decide the issue in the present appeals.

7. In view of the above, without passing any remarks on the merits of the cases in hand, leaving all issues open, we remit the matters back to the original authority to decide the show cause notice dated 22.06.2001 demanding customs duty on the capital goods and raw materials imported by the appellant and consequently decide the matter in these appeals.

8. The appeals are disposed of as herein above.

(Operative Part of this Order was pronounced in the Open court
on conclusion of hearing)

(P.VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

(M.V. RAVINDRAN)
MEMBER (JUDICIAL)

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