IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI
COURT No. I

APPEAL No. C/563-565,173/2009

(Arising out of Order-in-Original No. 156/2008/CAC/CC(I)/SR/GR.III dated 28.11.2008 passed by Commissioner of Customs (Imports), Mumbai-I)

Sterling Commercial Ltd. **Harish Bulchandani** **Pawan K. Chaturvedi**	**Appellant**

Vs.

Commissioner of Customs (Import), Mumbai	**Respondent**

AND

Commissioner of Customs (Import), Mumbai	**Appellant**

Vs.

Sterling Commercial Ltd.	**Respondent**

Appearance:

Shri Prasad Paranjape, Advocate, for assessees
Shri Ahibaran, Additional Commissioner (AR), for respondent

CORAM:

Hon'ble Mr. Ramesh Nair, Member (Judicial)
Hon'ble Mr. Raju, Member (Technical)

Date of Hearing: 14.3.2018
Date of Decision: 11.5.2018

ORDER NO. A/**86362-86365/2018**

Per: Ramesh Nair

Brief facts of the case are that the appellant-assessees M/s Sterling Commercial Ltd. are engaged in trading of

Polyester Filament Yarn and chips etc. They had imported POY/PFY and claimed exemption from Special Additional Duty (SAD) of 4% under Notification No. 56/98 – Cus dt. 01.08.98 and Notification No. 22/99 – Cus dt. 28.02.99 by furnishing necessary declaration "that the goods would not be sold from a place located in area where no tax is chargeable on sale or purchase of goods". They were issued show cause notice that the imported goods were sold to various units in Dadra/ Silvassa and have not paid sales tax as all sales were made against sales tax form. The intention behind the exemption from SAD given to traders is that since the goods are subject to sales tax at the time of sales of such goods, goods shall be subjected to double taxation unless exempted from SAD. That as the case are not subjected to sales tax, the exemption from SAD has been wrongly availed. It was thus proposed to demand SAD along with interest and penalty. Penalty was also proposed against Shri Pawan K. Chaturvedi, Authorised Signatory and Shri Harish Bulchandani, Director of appellant-assessee concern. The demand was confirmed as proposed and penalties were also imposed against all above persons. Hence the present appeals by the appellant-assessees.

2. Revenue also filed appeal against the common impugned order for enhancement of the penalty imposed on

the appellant-assessee under Section 114A of the Customs Act, 1962.

3. Shri Prasad Paranjape, ld. Counsel appearing for the appellant-assessees submits that the notification has been wrongly interpreted. The exemption is not available "If the area from where the goods are sold is a tax free zone" i.e where there is no tax on sales or purchase of goods whatsoever – then the benefit of notifications would not be available; else it would be available. That the Dadra (U.T of D & N.H) is not a tax free area and this interpretation of the impugned order is erroneous. There is no exemption from sales tax. Sales tax was not paid for the reason that because the buyers had purchased the goods under Form 11 – C in which no tax was required to be paid thereon as per Dadra & Nagar Haveli Sales Tax, Act, 1978. If in a particular case a person avails the exemption on fulfilling the condition or conditions prescribed therefore that could not by any stretch of imagination imply in a tax free zone. The "area" under which the sales took place was not "tax by their peculiar characteristics, exempted from sales tax under the sales tax act. The Appellant-assessees were registered under sales tax and were liable for sales tax. Hence there is no violation of notifications in question. He also submits that the demand is hit by limitation of time as there was no intention to evade payment of duty. He relies upon Tribunal's order in case of

Jindal Photofilms Ltd. 2004 (178) ELT 955 (TRI), G.H. Shaikh 2003 (154) ELT 540 (TRI), Moser Bear India Ltd. 2009 (240) ELT 25 (Tri – LB) and Hon'ble Apex Court's order in case of Rukmani Pakkwell Traders 2004 (165) ELT 481 (SC), Continental Foundation Jt. Venture 2007 (216) ELT 177 (SC), Gopal Zarda Udyog 2005 (188) ELT 251 (SC) and Seiko Brushware India 2015 (323) ELT 641 (SC).

4. Shri Ahibaran, ld. Additional Commissioner, AR appearing for the Revenue reiterates the findings of the impugned order. He submitted that the purpose of allowing exemption of SAD is to avoid double taxation on account of SAD charged in terms of Custom Tariff Act, 1975 and sales tax charged by the State Governments. The subject notification will not apply if the importer sells the goods from the place located in area where no tax is chargeable on sale or purchase of goods. In the instant case as no sales tax was charged because of any reason by virtue of goods sold in the concerned State/ UT such goods cannot be considered as eligible for the said notifications. The sales tax was not paid because the sales took place in a particular State/ UT and therefore it would be treated that no tax was charged on sale or purchase of said goods. The meaning of 'area' in this case has to be taken in wider perspective. Even if it is presumed the sales tax was not paid because the buyer had a specific benefit clause, again the special benefit would be because of

buyers being in that area only and therefore emphasis in the notification condition is given to the word ‘area’. Importer had sold goods without payment of sales tax from the area where no tax was chargeable on such type of sales of goods and has violated the notifications. He relies upon the Larger Bench judgment in case of Moser Baer India Ltd. 2009 (240) ELT 25 (TRI – LB) to submit that clearance on which sales tax is exempted, SAD component should be included while determining duty in terms of Notification No. 20/2003 – CE dt. 31.03.2013 as amended. There is no concept of ‘Tax free zone’ as the appellant-assessee has claimed, the meaning of area used in notifications. Whatever benefits of sales tax act is because of location of the place of sale in the concerned state/ UT only and therefore, the area has got much relevance in this case. That the demand is not barred by the limitation as the Appellant-assessee has given wrong declaration/ undertakings at the time of imports that the goods shall not be sold from the area where no sales tax is chargeable. That the Appellant-assessee has given declaration with malafide intention.

5. We have perused the record and taken into consideration the submission made by both the sides. The Appellant-assessee is a trader and has imported the goods with the purpose of resale. It is an undisputed fact that the goods were sold in Dadra which is not a tax free area. The

goods sold are liable to sales tax. It is only for the reason that the units procuring the goods from the Appellant-assessee are not liable for sales tax and on subject to condition of the sales tax of producing the required form 11C under sales tax, they are entitled to get the goods without payment of tax. We find that as per the terms of the declaration of the Notification in question, in order to avail exemption the declaration to the effect is "that sale of the goods will not be effected from a place located in an area where no tax is chargeable on sale or purchase of goods". The area of Dadra in question from where the goods were sold is not an area exempted from Sales Tax. It is liable for sales tax but only under certain conditions the Appellant-assessee can sell the goods without payment of sales tax. An exemption from sales tax thus would not make the place of Dadra as the area where no sales tax is chargeable on sale or purchase of goods. We find that the same analogy was adopted by the Tribunal in case of Jindal Photofilms Ltd. 2004 (178) ELT 955 (TRI) wherein it was held as under :

"11. The Notifications were issued under sub-section (1) of Section 3A of the Customs Tariff Act and their provisions should be understood in the light of provisions of the parent statutory provision viz. sub-section (1) of Section 3A ibid, which reads as below : -

"SECTION 3A. Special additional duty. - (1) Any article which is imported into India shall in addition be liable to a duty (hereinafter referred to in this Section as the special additional

duty), which shall be levied at a rate to be specified by the Central Government by notification in the Official Gazette, having regard to the maximum sales tax, local tax or any other charges for the time being leviable on a like article on its sale or purchase in India:

Provided that until such rate is specified by the Central Government, the special additional duty shall be levied and collected at the rate of eight per cent. of the value of the article imported into India.

Explanation - In the sub-section, the expression "maximum sale tax, local tax or any other charges for the time being leviable on a like article on its sale or purchase in India" means the maximum sales tax, local tax, other charges for the time being in force, which shall be leviable on a like article, if sold or purchased in India or if a like article is not so sold or purchased which shall be leviable on the class of description of articles to which the imported article belongs. (Emphasis supplied)

Either of the two Notifications reads as below :-

"In exercise of the powers conferred by sub-section (1) of Section 3A of the Customs Tariff Act, 1975 (51 of 1975), the Central Government having regard to the maximum sales tax, local tax or any other charges for the time being leviable on the like goods in their sale or purchase in India, hereby specifies the rates of special additional duty as indicated in column (3) in the Table below in respect of goods, when imported into India, describe in corresponding entry in column (2) of the said Table and falling within the First Schedule to the said Customs Tariff Act :" (Emphasis supplied).

It is clear from Section 3A(1) ibid and the Notification that (i) the special additional duty of customs is a levy on imported goods to offset the burden of sales tax and other local taxes and charges borne by manufacturers who procure like goods *indigenously on payment of such taxes and charges and that (ii) the rate of SAD is prescribed having regard to the maximum sales tax, local tax or other charges for the time being leviable on a like article on its sale or purchase in India. The proviso to the entry at S. No. 12/S. No. 5 in the Table to Notification No. 56/98-Cus./No. 22/99 - Cus., which reads :*

"Provided that the rate specified herein shall not apply if the importer sells the said imported goods from a place located in an area where no tax is chargeable on sale or purchase of goods." (Emphasis supplied)

bars "Nil" rate of SAD in respect of goods imported for sale from a place where no tax is chargeable on sale or purchase of like goods. It is quite obvious from the provisions which we have examined, that the expression "chargeable" has been used in the proviso as a synonym for "leviable". If tax is "leviable" on any goods, the goods are said to be "taxable" also. In the instant case, admittedly, the non-taxable goods are only those goods specified in the Second Schedule to the DNH Sales Tax Regulations, 1978. This is obvious from sub-section (1) of Regulation 10 of DNH Sales Tax Regulations, 1978, which says that no tax shall be payable under this Regulation on the sale of goods specified in the Second Schedule subject to the conditions and exceptions, if any, set out therein. For a registered dealer like CPFL, the charging provisions under the DNHST Regulations are Regulations 4 & 6 thereof. Regulation 4 provides that every dealer whose gross turnover exceeds the taxable quantum in the previous year shall be liable to pay tax on all sales, provided that a dealer who deals exclusively in one or more classes of goods specified in the Second Schedule shall not be liable to pay any tax under the said Regulation. Regulation 6 is another charging provision which imposes liability of tax on a dealer registered under the Central Sales Tax Act, 1956. Regulation 7(1) prescribes the rates of sales tax in respect of (a) goods specified in the First Schedule, (b) goods specified in the Third Schedule and (c) any other goods, not being goods specified in *the Second Schedule. Regulation 7(3) defines the expression "taxable turnover". According to this definition, taxable turnover during any period shall not include the turnover, during that period, of sales (not being the sales of goods which are specified by the Administrator under Regulation 8 as goods taxable at a particular point of sale), to a registered dealer, of taxable goods of the class or classes specified in the certificate of registration of such dealer, as being intended for use by him within Dadra & Nagar Haveli as raw material for manufacture of taxable goods for sale within Dadra & Nagar Haveli. The first proviso to Regulation 7(3) stipulates that the above deduction shall not be allowed unless the dealer, who sells the goods, furnishes in the prescribed manner a declaration duly filled up and signed by the registered dealer, to whom the goods are sold, in such form and containing such particulars as may be prescribed. The prescribed form for this declaration is ST-XI. In the instant case, it is not in dispute that the JPFL who purchased the goods in question from CPFL used the goods as raw material for manufacture of taxable goods viz. finished products of photographic films & papers. Further, it appears from the assessment order that, in respect of those quantities of Jumbo Rolls sold by CPFL to JPFL, for which the latter issued declaration in ST-XI Form, the assessing authority has allowed deduction from gross turnover in terms of Regulation 7(3)(II)(a)(iv). In respect of a minor quantity of Jumbo Rolls sold to JPFL by CPFL, for which no such declaration was made by the former, no deduction was allowed by the assessing authority. Accordingly, it appears, CPFL paid sales tax on this latter quantity of Jumbo Rolls sold to JPFL. It is on this basis that the appellants have argued that the goods in question were chargeable to local sales tax. The Revenue has argued that, where the declaration, in ST-XI Form, of the buyer is produced before the assessing authority by the seller, the turnover of sales of the subject goods is deductible from the gross turnover of sales for the purpose of determining the taxable turnover under Section 7(3) and, therefore, the goods cannot be held to be chargeable to tax. We are unable to accept this argument. The deduction* *of the sales turnover of the goods in question from gross turnover for the purpose of determination of taxable turnover is in the nature of an exemption. Any exemption from payment of tax on any goods which are otherwise taxable cannot be held to have the effect of rendering the goods non-taxable. We are supported on this point by the judgment of the Kerala High Court in Aluminium Industries (supra). A ld. Single Judge of the High Court considered the question whether exemption from payment of Customs duty on certain goods made the goods non-dutiable. His Lordship held : "An exemption granted under Section 25(1) of the Customs Act does not have the effect of taking the goods out of the class of dutiable goods or placing them beyond the reach of Section 12. An exemption only suspends or eclipses chargeability which can be revived the moment the exemption is withdrawn." This ruling of the ld. Single Judge was affirmed by a Division Bench of the Court vide [1999 (110) E.L.T. 474 (Ker.)]. The decision of this Tribunal in the case of G.H. Shaikh v. CCE, Pune [2003 (154) E.L.T. 540], cited by ld. Counsel, is also relevant to this context. Dealing with the entry at Sr. No. 5 of Notification 22/99-Cus., the Tribunal held thus: "It is common that exemptions have been given under the Sales Tax Act in respect of certain transactions and such exemptions for specified cases would not make the place, "an area where no duty is chargeable on sale and purchase of goods."*

12.Following the above judicial authorities, we hold that the goods in question, sold by CPFL to JPFL during the period of dispute are to be treated as chargeable to tax for the purpose of the entries at Sr. Nos. 12 and 5 under Notification Nos. 56/98-Cus. and 22/99-Cus. respectively. Consequently, the provisos to the said entries are not applicable to the subject goods and the goods are eligible for the benefit of 'Nil' rate of duty in terms of the said entries. The demand of SAD raised in the impugned order is, therefore, unsustainable. Consequently, the confiscation of the goods and imposition of penalties on CPFL and JPFL are also liable to be set aside."

6. The above decision of the Tribunal was based upon the earlier Tribunal's order in case of G.H Sheikh 2003 (154) ELT 540 (TRI) wherein it was held as under :

> *"8. We have perused the records and have considered the submission made by both the sides. A mere perusal of Sl. No. 5 to Notification No. 22 of 1999 makes it clear that the proviso to Sl. No. 5 relates to a place from where sales takes place and not place to which sale is made. Therefore, the finding in the impugned order is clearly contrary to the terms of the Notification. Accordingly, we are in agreement with the learned Counsel for the appellant that the duty demand has been made on erroneous understanding of the legal position. We are not able to accept the contention raised by the learned SDR as it is common that exemptions have been given under the Sales tax Act in respect of certain transactions and such exemptions for specified cases would not make the place "an area where no duty is chargeable on sale and purchase of goods". We do not find any merit in the finding of excess quantity also. The quantity itself is very negligible. Further, this has been arrived at by comparing the sales quantity with the imported quantity. The difference is only notional as and no excess quantity was found on weighment of goods at the time of clearance. The demand on this count is therefore, not sustainable."*

7. The Larger bench order of Tribunal in case of Moser Baer supra is not applicable to the facts of the present case as the notifications involved in present case and the Moser Baer case were differently worded, therefore the Larger Bench is distinguishable.

8. In view of our above observation we hold that the impugned demand against the Appellant is not sustainable. Further we also find that since the issue involved is of interpretation and has been subject of matter of dispute in many cases which were settled by the Tribunal in cases supra, therefore no malafide intention can be attributed to the Appellant-assessees. Thus we are of the view that the demand is also time barred.

9. We set aside the impugned order and allow the appeals filed by all the Appellant-assessees with consequential reliefs, if any.

10. As regards the Revenue's appeal against the common impugned order, which seeks enhancement of the penalty imposed under Section 114A from Rs.20 lakhs to equal to the duty amount, we find that since the demand itself is set aside, the Revenue's appeal, which is for penalty which is consequent to the demand, will not sustain. Accordingly, the Revenue's appeal is dismissed.

(Pronounced in court on 11.5.2018)

(Raju)
Member (Technical)

(Ramesh Nair)
Member (Judicial)

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