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

APPEAL Nos. C/1233,1234/2009

(Arising out of Orders-in-Appeal No. 281/2009/MCH/AC/CII-C/2009 and 282/2009/MCH/AC/CII-C/2009 dated 27.10.2009 passed by Commissioner of Customs (Appeals), Mumbai-I)

Surbhit Impex Ltd. **Appellant**
Vinit International

Vs.

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

Appearance:

Shri Arun Jain, Advocate, for appellant
Shri Bhushan Kamble, Assistant Commissioner (AR), for respondent

CORAM:

Hon'ble Dr. D.M. Misra, Member (Judicial)
Hon'ble Mr. Sanjiv Srivastava, Member (Technical)

Date of Hearing: 24.9.2018
Date of Decision: 24.9.2018

ORDER No. A/**88100-88101/2018**

Per: Sanjiv Srivastava

These appeals are directed against the order dated 27.10.2009 of Commissioner (Appeals) Customs, Mumbai Zone-I, holding as follows:

"3. The reason why the AC denied the exemption are that there was no nexus between the imported goods and exported goods as required in the condition of the Advance License # p/w/2270714 dated 9.1.95; that it was not established th at the imported polyester fabric 58 was commercially usable for manufacture of synthetic

shoes (which was the export product); that the fabric being an item in the sensitive list, quantitative restriction was attracted.

4. The appellant were heard on 29.09.09. I have considered the submission. It is true that not only the conditions of the exemption notification have to be satisfied but also those expressly mentioned in the license. The license had in fact a condition that there must be nexus between the imported and exported goods. This condition was not, as found by the lower authority, superseded in the duplicate license subsequently issued. This apart, the notification # 203/92 also defined materials as those required for manufacture of export product. Read together, the conclusion by the lower authority that the required nexus could not be proved appears justifiable.

5. From the impugned order I do not find that the importer-appellant submitted any documentary evidence regarding the importer polyester fabric being synthetic material or whether the fabric can be used in the manufacture of shoes (the 4th paragraph of impugned order only speak of importer's submission that the polyester fabric is synthetic material; it does not mention any documentary proof.) In fact the importer-appellannt did not even appear for hearing before the lower authority despite oppurtunities of hearing granted to him on 21.05.09, 22.06.09 and 10.07.09. Therefore in view of restriction in Rule 5 of the Customs (Appeals) Rules, 1982 on the submission of documentary evidence at the appellate stage, I decline to permit the appellant to submit evidence on the above-mentioned aspects at the appellate stage. As such it is also not convincing that a <u>*textured*</u> *(as it appears from the TC report) polyester fabric is commercially used as a shoe lining material.*

6. The appellant relied upon several judgments. Let me examine them and see whether any one or all are applicable:

………

6.1 Therefore I uphold the decision of the lower authority to deny the exemption under notification # 203/92-Cus."

2.1 The appellants filled three bill of entries namely 884578, 884579 and 884580 dated 27.02.2009 for clearance of polyester fabrics claiming benefit exemption under notification No 203/92-Cus against Value Based advance License (VBAL) {License No p/w/2270714 da 09.01.1995 validated (as amended0 till 25.06.2009}.

2.2 Since the revenue was of the view that the benefit of exemption under notification 203/92-us cannot be extended in the case of import of "polyester fabric 58" matter was adjudicated by the Assistant Commissioner vide his order in original dated 07.08.2009, holding as follows:

"I now have to decide, whether "polyester fabric 58" can be considered as synthetic material for the purpose of clearance against this subject License and the nexus between export and import items. I find that all types of fabric are covered under sensitive items list-I during the relevant period. The sensitive list mandates that DEEC Licenses must be issued with quantitative restrictions under VBAL. Since the license does not mention any quantitative restriction against synthetic material, it follows only non sensitive items can be cleared under this

heading of "synthetic material". I refer to Hon'ble CEGAT's judgment in SABRI EXIM PVT LTD VS CC CHENNAI 2003 (160) ELT 230 wherein it was held that even non-sensitive items cannot be imported against the residual value. I also refer to Tribunal's judgment in Union Of India Vs TAMIL NADU DADHA PHARMACEUTICALS wherein it is held that Sensitive items cannot be imported in excess of quota specified therein in the license. In the view of the above it appears that duty free clearance of the imported goods namely polyester fabric as synthetic material in the License submitted appears improper.

In view of the above I pass the following orders:-

Order

I order that the Bills of Entry be finally assessed without extending the benefit under notification 203/92-Cus dated 19.5.1992 claimed by the importer and goods be assessed at appropriate of duty as per the annexure. Now I direct the importer to pay duty along with interest u/s 1893) of Customs Act, 1962 at appropriate rate as specified in this regard."

2.6 Against the orders of adjudicating authority appellants preferred the appeal before the Commissioner (Appeal). Commissioner (Appeal) rejected appeal filed by the appellant holding as stated in para 1, supra.

2.7 Aggrieved appellants have filed these appeals.

3.1 In their appeal appellants have assailed the order of Commissioner (Appeal) stating-

i. The imported goods i.e. "Polyester Fabric" are synthetic material which can be used as a lining material in the manufacturing of "synthetic shoes".

ii. Imported goods are not sensitive items, since no quantity restrictions have been imposed in the license. It is well settled that absence of specific quantity restriction in the value based advance license for the Fabrics, would not render the lines invalid. Once an advance license is made transferable and if detailed particulars of the goods importable are not mentioned in the license, the concerned authorities cannot insist upon the detailed nexus. {A Kumar & Co [2001 (132) ELT 655 (T-MUM)] & Salem Stainless Steel [2001 (131) ELT 30 (Mad)]}

iii. as per technical expert opinion dated 20/23/04.2009 issued by Institute of Chemical technology, evidently states that the fabric is polyester and hence synthetic material and further opined that the products thus formed are of the similar nature fabric used in the footwear and hence footwear is synthetic footwear.

iv. Similar view has been expressed by the office of the DGFT, New Delhi in their letter to Commissioner of customs (Export) New Custom House Ballard Estate Mumbai vide F No 01/87/162/000090/AM10/DES/VII/835 dated 30/07/2009. DGFT has clarified that the

Polyester Fabric of GSM Value 219 to 236 is a synthetic materia which is used in the manufacturing of synthetic footwear as per SION Product Group 63 (Plastic) at Serial No 2008.

v. Commissioner (Appeal) failed to appreciate that they were constantly seeking adjournment from the adjudicating authority on the date of hearings fixed, for the reason that they were in process of collecting documents and other related papers in order to present their case before him.

vi. Commissioner (appeal) has failed to consider the documentary evidence produced by them before him which they intended to be produced before the adjudicating authority in form Lab Report of DYCC, Test Report from Textile Committee, Clarification issued by DGFT etc, confirming that the imported material is a synthetic material and can be used in the manufacturing of synthetic shoes.

vii. Since these documentary evidence which he produced before the Commissioner (Appeals) go to the root of matter under consideration Commissioner (Appeal) should have not denied them by resorting to Rule 5 of Customs (Appeal) Rules, 1982.

4.1 We have heard Shri Arun Jain Learned Advocate and Shri Bhushan Kamble, Assistant Commissioner Authorized Representative for the revenue.

4.2 Arguing for the appellant learned advocate reiterated the submissions made in the appeal. He drew the attention of Bench to the Test Report No TC/LM/SE/7497/2008-09 (Part I) dated 23/24/02/2009 of Textile Committee (Exhibit C), Letter No REG/MAS595 dated 23rd April 2009 of Institute Chemical Technology (Exhibit F) and Letter File No 01/87/162/00090/AM10/DES VII dated 30.07.2009 of Foreign trade Development Officer (for Director General Foreign Trade) and argued that the documents address the issue in its entirety and in their favour. He further submitted Commissioner (Appeal) has vide order in appeal No 95 (AC/ GR VII D)/ 2009 (JNCH) dated 12.03.2009 (Exhibit D) in respect of similarly placed appellant allowed the same benefit.

4.3 Arguing for the revenue learned Authorized Revenue reiterated the order of Commissioner (Appeal)

5.1 We have considered the submissions made. The issue in the matter can be decided in a very narrow campus for consideration of the test reports and clarifications issued by the DGFT in the matter. Both the authorities have failed to consider these documents referred in para 4.2 and render a finding in respect of these. We are in agreement with the submissions of the Counsel, that these documents go to the root of matter specifically the letter of DGFT dated 30.07.2009.

5.2 Since these documents have not been considered by the lower authorities, the matter needs to go back to the original adjudicating authority for reconsideration of the issue in light of the clarification given by the Director General Foreign Trade and the test reports as indicated above. While doing so we are not expressing any opinion in respect of merits of clarification issued or its applicability and keep all questions involved open for consideration of adjudicating authority.

6.0 The order of Commissioner (Appeal) is set aside and appeals allowed by way of remand to original adjudicating authority to consider the report dated 30.07.2009 and pass a fresh speaking order. Needless to say that since the matter is quite old, adjudicating authority should in remand proceedings adjudicate the matter within four months from the date of receipt of this order after hearing the appellants.

(Pronounced in court)

(Dr. D.M. Misra)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

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