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

APPEAL NO.E/408/2011

(Arising out of Order-in-Appeal No.PKS/447/Bel./2010 dated 26/11/2010 passed by the Commissioner of Central Excise (Appeals), Mumbai)

Trans Electric : **Appellant**

VS

Commissioner of Central Excise Belapur : **Respondent**

<u>Appearance</u>

Shri.N.S. Patel, Advocate for Appellant
Shri.Sanjay Hasija, Supdt. (A.R) for respondent

CORAM:

Hon'ble Dr. D.M. Misra, Member (Judicial)
Hon'ble Shri P Anjani Kumar, Member (Technical)

Date of hearing : 06/02/2019
Date of decision : 06/02/2019

ORDER NO.A/85356/2019

Per : Dr. D.M. Misra

Heard both sides.

1. This is an appeal filed against Order-in-Appeal No.PKS/447/Bel./2010 dated 26/11/2010 passed by the Commissioner of Central Excise (Appeals), Mumbai.

2. Briefly stated the facts of the case are that the appellants manufactured and cleared excisable goods, viz., two transformers at nil rate of duty availing benefit of Notification No.22/2003-CE dated 31/03/2003 to one M/s. International Hometex Ltd., indicating in the Invoice and AR-3A as "Export Under EPGC Duty Nil/EOU". Since the exemption was not available to the goods cleared to the unit availing EPCG Scheme, proceedings were initiated against the appellants by issuing show-cause notice on 23/07/2009 for recovery of the duty of Rs.3,03,352/- with interest and penalty. On adjudication the proceedings were dropped against the notices. Revenue filed an appeal before the learned Commissioner (Appeals), who in turn allowed the Revenue's appeal by confirming demand of duty, interest and penalty. Hence, the assessee-Appellant is in Appeal.

3. We find that there is no dispute of the fact that the appellants have cleared the excisable goods without payment of duty to M/s. International Hometex Ltd. as per Notification No.22/2003-CE dated 31/03/2003, and the said unit was availing benefit of EPCG Scheme. The issue of admissibility of the said Notification in similar circumstances has been considered by this Tribunal in the case of *Rimtex Industries Vs. CCE, Bhavnagar – 2010 (254) ELT 116 (Tri-Ahmd).* After analyzing the relevant provisions, the Tribunal observed as under:

> *5. The clarifications issued by Ministry of Commerce and CBEC cannot be applied to Domestic Manufacturers since they were issued in respect of clearances by an 100% EOU. It is well settled principle that 100% EOU clearances made to DTA are to be treated as import for the purpose of calculation of measure of customs duty since as per Section 3 of Central Excise Act, 1944,*

in respect of 100% EOUs, the duty will be equal to Customs duty payable. In fact, the clarification makes it quite clear that 100% EOU are liable to discharge excise duty and measure has to be derived from relevant customs notifications. Therefore, the clarification issued in respect of 100% EOU cannot be applied to DTA. In any case, clarification does not even say 100% EOU can clear goods without payment of Central Excise duty. We do not find decision of Tribunal in the case of Bhoruka Textiles Limited - 2007 (216) E.L.T. 640 (Tri.-Bang.), applicable to the facts of the present case. In that case, the issue before the Tribunal was whether the goods received under EPCG licence after invalidation from the manufacturer can be added to value of machinery imported for the purpose of examination of fulfilment of conditions in the EPCG licence. From the order it cannot be concluded in that case that machinery had been supplied by the domestic manufacturer without payment of duty. Similarly, the decision of this Tribunal in the case of Sahajanand Technologies Private Limited - 2007 (210) E.L.T. 108 (Tri.-Ahmd.) is also not applicable to the present case. In fact, in Para 4, it has been observed that clearance from 100% EOU are subject to duty equal to that payable when like goods are imported. In fact in this Para, Tribunal has discussed the applicability of concessional rate of duty under Notification No. 55/03-Cus., dated 1-4-2003. From the clarification issued by the Ministry of Commerce and the order of the Tribunal what emerges is that for the purpose of levy of duty to supplies made to EPCG licence holders by 100% EOU, customs duty leviable has to be worked out on the basis of Notification No. 55/03-Cus. and the same has to be recovered as Central Excise duty payable. What emerges from this clarification is that, unless there is exemption Notification applicable to clearances, duty has to be paid. In this case, learned advocate could not show any notification issued [under] Central Excise Act providing exemption in respect of clearances made to buyers who have EPCG licence and who have got the same invalidated in favour of domestic suppliers. As rightly observed by the Commissioner, in the absence of exemption Notification the remedy available to the appellants is specified in Para 8.3 itself, which provides that where supplies are not (sic) made against International Competitive Biddings, refund of terminal excise duty will be given. In the absence of any specific provision or exemption Notification and supplies made against invalidation of EPCG Licence, we cannot find fault with the demand for duty made by the lower authorities. Learned advocate also submits that deemed export is legal fiction created by law and therefore all the benefits which are extended to regular exports should be extended to deemed exports also. In this connection he cited the decision of the Hon'ble Gujarat High Court in the case of Commissioner of Income Tax v. Jaykrishna Harivallabhdas reported in ITR Vol-231 Page No. 108. While we fully agree with learned advocate that legal fiction has to be carried to its logical end and has to be applied, we have to observe that in the case of benefit of exemption from duty, unless there is statutory provision, such benefits cannot be extended. In this case and in the case of deemed exports, clearly the refund of terminal excise *duty benefit is available. If the Legislature intends to provide exemption, an exemption Notification would have been issued. In the absence of specific exemption, this benefit cannot be extended. As regards penalty on the appellants, we take note of the fact that clearances were made with the knowledge and approval of the department and this is because of their wrong interpretation of provisions of law by both the sides. Therefore, imposition of penalty on the appellants is totally unfair and not called for. Therefore, in view of the above discussion, the demand with interest is upheld and penalties imposed on both the appellants are set aside. Appeals are decided in the above manner.*

4. Following the aforesaid precedent, we do not find any reason to interfere with the merit of the order. However, considering the facts and circumstances of the case as also held in the above case, we do not find justification in imposing penalty.

5. In the result, imposition of penalty is set aside and the appeal is allowed to that extent.

(Pronounced in Court)

(P Anjani Kumar) **(D.M. Misra*)***
Member (Technical) ***Member (Judicial)***

PJ