

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, WEST ZONAL BENCH AT MUMBAI**

REGIONAL BENCH - COURT NO. 02

Customs Appeal No. 855 of 2010

(Arising out of Order-in-Oppeal No. 05/CSP(05)COMMR/RGD/10-11 dated 30.07.2010 passed by Commissioner of Central Excise, Customs, & Service Tax, New Mumbai)

M/s Confidence Export Pvt. Ltd. **.....Appellant**
9, Industry House, Plot No. 4, Marwah Estate,
Opp. Saki Vihar Road, Andheri (E), Mumbai-
400072

VERSUS

Commissioner of Central Excise **.....Respondent**
Raigad
Utpad Shulk Bhavan, Plot No.1, Sector-17,
Khandeshwar, Navi Mumbai-410206

WITH

Customs Appeal No. 856 of 2010

(Arising out of Order-in-Oppeal No. 05/CSP(05)COMMR/RGD/10-11 dated 30.07.2010 passed by Commissioner of Central Excise, Customs, & Service Tax, New Mumbai)

Harish Bulchandani **.....Appellant**
9, Industry House, Plot No. 4, Marwah Estate,
Opp. Saki Vihar Road, Andheri (E), Mumbai-
400072

VERSUS

Commissioner of Central Excise **.....Respondent**
Raigad
Utpad Shulk Bhavan, Plot No.1, Sector-17,
Khandeshwar, Navi Mumbai-410206

AND

Customs Appeal No. 857 of 2010

(Arising out of Order-in-Oppeal No. 05/CSP(05)COMMR/RGD/10-11 dated 30.07.2010 passed by Commissioner of Central Excise, Customs, & Service Tax, New Mumbai)

M/s Vivilon Textile Industries Pvt. Ltd. **.....Appellant**
9, Industry House, Plot No. 4, Marwah Estate,
Opp. Saki Vihar Road, Andheri (E), Mumbai-
400072

VERSUS

Commissioner of Central Excise **.....Respondent**
Raigad
Utpad Shulk Bhavan, Plot No.1, Sector-17,
Khandeshwar, Navi Mumbai-410206

Appearance:

Shri Prakash Shah, Advocate along with Shri Mohit Raval, Advocate for the Appellant

Shri Ramesh Kumar, Authorized Representative for the Respondent

CORAM:

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

Hon'ble Mr. P. Anjani Kumar, Member (Technical)

FINAL ORDER NO. A/85953-85955/2019

Date of Hearing: 31.01.2019

Date of Decision: 21.05.2019

Per: S.K. MOHANTY

Feeling aggrieved with the impugned order dated 30.07.2010 passed by the Learned Commissioner of Central Excise, Customs & Service Tax, Mumbai, these appeals were filed by the appellants M/s Vivilon Textile Industries Pvt. Ltd. (Appellant No. 1)), Shri Harish Bulchandani, Director of M/s Vivilon Textiles (Appellant No. 2) and M/s Confidence Export Pvt. Ltd. (Appellant No.3). In the impugned order, the Learned adjudicating authority has confirmed Customs duty demand of Rs.37,65,791/- and ordered for its recovery from the Appellant No. 1 under Section 72 of the Customs Act, 1962 read with sub-section (1) of Section 28 of the said Act. The impugned order has also held that POY valued at Rs.65,53,677/- is liable for confiscation under Section 111(o) of the Act for violation of the conditions of Notification No. 53/97-Cus., and since the goods were not available for confiscation, it has imposed redemption fine of Rs.20,00,000/- in lieu of confiscation on the Appellant No. 1. Besides, the impugned order has also imposed penalties on all the appellants in terms of Section 112 of the Act.

2. Brief facts of the case are that the Appellant No. 1 is a 100% EOU engaged *inter alia*, in the manufacture of Polyester Twisted Yarn (PTY). One of the raw materials used by the Appellant No. 1 to manufacture PTY is Partially Orient Yarn (POY). During the period November' 2001 to March' 2002, the Appellant No.1 had

cleared 17 nos. of consignments of PTY to the EOUs namely, M/s. Bluemoon Textiles (1 consignment), M/s. Maharashtra Weaving Works (4 consignments) and M/s. Sunrise Textiles (12 consignments), all are located in Malegaon. The case of the department is that PTY covered by the above consignments did not reach the premises of EOUs and were diverted in DTA. Based on the investigation, the department had initiated show cause proceedings against the above EOUs, proposing for confirmation of duty demand on the PTY purchased from the Appellant No.1. The notices issued to the said EOUs were adjudicated in confirming the proposed demand for duty saved on purchase of PTY from the Appellant No.1. Appeal filed against the adjudication order was rejected by the Learned Commissioner (Appeals). Further, based on the allegation that the Appellant No. 1 had diverted PTY in the DTA, present Show Cause Notice (SCN) dated 23.06.2008 was issued to it, amongst others, seeking for demand of Customs Duty on the POY imported by it. The charges levelled in the SCN was that, in view of diversion of the PTY in the DTA, POY used in the manufacture of said PTY is not entitled to the exemption provided under the Notification No. 53/97-Cus., dated 03.06.1997 inasmuch as the final products (PTY) were neither exported nor delivered to EOUs by way of deemed export and the Appellant No. 1 had contravened the post import condition of the said notification. The matter arising out of the SCN dated 23.06.2008 was adjudicated vide the impugned order dated 30.07.2010, wherein the adjudged demands were confirmed against the appellants.

3. The Learned Advocate appearing for the Appellants submitted that since the duty demand has been confirmed on the above referred EOUs under the proviso to Section 3 of the Central Excise Act, 1944 on the alleged ground that PTY were diverted in the DTA, no further duty demand can be fastened on the raw material imported or procured indigenously without payment of duty by the Appellant No.1. In this context, the Learned Advocate has placed reliance on the following judgments delivered by the judicial forums:-

- (i) *Commissioner of Central Excise & Customs, Surat Vs Amitek Silk Mills P. Ltd., 2007 (216) ELT 166 (Tri – Ahmd.) – affirmed by Supreme Court in 2010 (254) ELT A98 (S.C.)*

- (ii) *Commissioner of Central Excise, Surat Vs Sanjari Twisters, 2009 (235) ELT 166 (Tri – Ahmd.) – affirmed by Supreme Court in 2010 (255) ELT A15 (S.C.)*
- (iii) *Commissioner of Central Excise & Cus., Surat- I Vs Chirag Prints, 2013(323) ELT 155 (Tri – Ahmd.) – affirmed by Supreme Court in 2015 (323) ELT A30 (S.C.)*
- (iv) *Sarla Polyester Ltd. vs. Commissioner Of C. Ex., Surat-II, 2008 (222) ELT 376 (Tri-Ahmd.)*
- (v) *Dupont Synthetics Pvt. Ltd. vs. Commissioner Of C. Ex., Surat, 2010 (259) ELT 408 (Tri-Ahmd.)*

3.1 The Learned Advocate further submitted that as per Section 28 of the Act, no demand can be made beyond the period of five years from the relevant date, even if the bond has been executed in terms of Notification No. 53/97-Cus., dated 03.06.1997. He has relied upon the judgment of Hon'ble Bombay High Court, in the case of Dharampal Lalchand Chug vs. Commissioner of Central Excise, Nashik – 2015 (323) ELT 753 (Bom.), to support the stand that the entire duty demand is beyond the period of 5 years and as such, the same cannot be sustained. With regard to confiscation of goods and imposition of redemption fine, the Learned Advocate submitted that since the goods were already cleared and used in the manufacture of finished goods, fine cannot be imposed in respect of such goods. In this context, he has relied on the judgment of Hon'ble Bombay High Court, in the case of Commissioner of Customs (Import), Mumbai vs. Finesse Creation Inc.- 2009 (248) ELT 122 (Bom.), affirmed by the Hon'ble Supreme Court, reported in 2010 (255) ELT A 120 (S.C.).

4. On the other hand, the Learned AR appearing for the Revenue has reiterated the findings recorded in the impugned order and further submitted that the appeals of the appellants are devoid of merits and liable to be dismissed in view diversion of the PTY in DTA.

5. Heard both sides and examined the case records, including the written notes of submission filed after conclusion of hearing.

6. So far as confirmation of Customs duty demand on imported POY is concerned, we find that the duty on finished goods (PTY)

has already been demanded under the proviso to Section 3(1) of the Act, on the ground that the same did not reach the premises of EOUs and were diverted in DTA. From the adjudication proceedings initiated against the above EOUs, it transpires that the imported goods were consumed as per the requirement of the impugned notification and thus, no duty can be demanded on raw material used in the manufacture of such finished goods. The issue arising out of the present dispute stands settled by various orders of the Tribunal and affirmed by the Hon'ble Apex Court, in case of Amitek Silk Mills P. Ltd., 2007 (216) ELT 166 (Tri – Ahmd.) – affirmed by Hon'ble Apex Court in 2010 (254) ELT A98 (S.C.), Sanjari Twisters, 2009 (235) ELT 166 (Tri – Ahmd.) – affirmed by Hon'ble Apex Court in 2010 (255) ELT A15 (S.C.), Chirag Prints, 2013(323) ELT 155 (Tri – Ahmd.) – affirmed in 2015 (323) ELT A30 (S.C.), Sarla Polyester Ltd. vs. Commissioner Of C. Ex., Surat-II, 2008 (222) ELT 376 (Tri-Ahmd.) and Dupont Synthetics Pvt. Ltd. vs. Commissioner Of C. Ex., Surat, 2010 (259) ELT 408 (Tri-Ahmd.). In the case of Sarla Polysters Ltd. (Supra), this Tribunal by following its earlier order in the case of Sanjari Twisters (supra) has held that the demand on raw material cannot be sustained in view of duty demand being confirmed on the final products cleared clandestinely. In other words, once duty has been demanded on the finished goods cleared in DTA, no duty demand can be made on the raw material.

6.1 As regard confiscation of POY, we are of the view that the same is not liable for confiscation, since the conditions of the notification dated 03.06.1997 has not been contravened. Material available in the case record proves the fact that the POY were used for the intended purpose and there was no contravention of post import condition. Even otherwise, the imported POY was not available for confiscation at the time of initiation of show cause proceedings, and as such, in view of the judgment of the Hon'ble Bombay High Court in the case of Finesse Creation Inc. (supra), cited by the Appellant, no redemption fine can be imposed in the absence of goods being available for confiscation.

7. In view of the foregoing discussions, we do not find any reason to uphold the impugned order as no duty can be demanded

on the inputs as no violation has been brought out on record vis-à-vis raw material consumption in EOUs for the required purpose. Further, the impugned order imposing redemption fine and penalties on the appellants cannot also be sustained for judicial scrutiny.

8. In view of our above findings, the impugned order is set aside and the Appeals are allowed with consequential relief.

(Order pronounced in the open court on 21.05.2019)

(S.K.Mohanty)
Member (Judicial)

(P. Anjani Kumar)
Member (Technical)

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