

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

WEST ZONAL BENCH

Custom Appeal No. 120 of 2011

(Arising out of Order-in-Appeal No. SB/243 to 248/TH-I/10 dated 23rd
November 2010 passed by the Commissioner of Central Excise
(Appeals), Mumbai Zone I)

M/s. Technocraft Industries (I) Ltd
(Yarn Division)
Village Dhanivali, Tah. Murbad
Thane Dist.

.....Appellant

Vs.

Commissioner of Central Excise, Thane I
Chandrama Bldg.
Valipeer Road, Kalyan (W),
Thane Dist.

.....Respondent

WITH

(i) Custom Appeal No. 121 of 2011 (M/s. Technocraft Industries (I) Ltd; (ii) Custom Appeal No. 122 of 2011 (M/s. Technocraft Industries (I) Ltd; Custom Appeal No. 123 of 2011 (M/s. Technocraft Industries (I) Ltd; Custom Appeal No. 124 of 2011 (M/s. Technocraft Industries (I) Ltd; Custom Appeal No. 125 of 2011 (M/s. Technocraft Industries (I) Ltd

(Arising out of Order-in-Appeal No. SB/243 to 248/TH-I/10 dated 23rd
November 2010 passed by the Commissioner of Central Excise
(Appeals), Mumbai Zone I)

APPEARANCE:

Shri M.H. Patil, Advocate for the appellant
Shri S.K. Mathur, Spl. Counsel(AR) for the respondent

CORAM: Hon'ble Mr C J Mathew, Member (Technical)
Hon'ble Ajay Sharma, Member (Judicial)

FINAL ORDER No: A/86386-86391/2019

DATE OF HEARING : 19.02.2019
DATE OF DECISION : 13.08.2019

PER: C J MATHEW

These six appeals, arising from order-in-appeal no. SB/243 to 248/TH-I/10 dated 23rd November 2010 of Commissioner of Central Excise (Appeals), Mumbai Zone I, are taken up for disposal together as the issue, even if for different periods and pertaining to different goods, is common and as different orders of the original authority were heard and disposed off in a single order now impugned before us.

2. In brief, appellant is a unit operating under the 'export oriented unit' scheme of the erstwhile EXIM Policy (and the successor Foreign Trade Policy) issued with 'Letter of Permission (LOP)' by the jurisdictional Development Commissioner for the manufacture of 'cotton yarn.' Relying upon EXIM Policy 1997-2000 and the conditions prescribed in notification no. 1/95-CE dated 4th January 1995 and no. 22/03-CE dated 31st March 2003 pertaining to domestic procurement of raw materials and consumables and notification no. 53/97-Cus dated 3rd June 1997 and no. 52/03-Cus dated 31st March 2003 pertaining to imported raw materials and consumables, proceedings were initiated against the appellant for having manufactured and cleared 'cotton waste,' to the 'domestic tariff area'

at 'nil' rate of duty in which raw materials and consumables that have been procured domestically and from outside the country without payment of duty were utilized. In all these notifications, the relevant condition is

'Notwithstanding anything contained in the notification, the exemption contained herein shall also apply to the said goods used for the purposes of production, manufacture, processing or packaging of articles in a user industry and such articles (including rejects, waste, scrap and remanants arising out of such production, manufacture, processing or packaging of such articles) even if not exported out of India, are allowed to be cleared outside the user industry under and in accordance with the Export-Import Policy and subject to such other limitations and conditions as may be specified in this behalf.... on payment of appropriate duty of excise'

3. Units under the referred scheme are privileged with procurement of duty free inputs for manufacture of output that are to be exported. As an exception to this obligation, the utilisation of inputs so procured in goods that are sold in the domestic market is also relieved of the burden of duties. It is the case of original authority, as upheld by the first appellate authority, that the expression 'payment of appropriate duty of excise' does not extend to 'nil' rate of duty and repayment of duties foregone at the time of procurement or import is, thereby, the consequence.

4. The appellant procured, or imported, 'cotton' and 'lubricants' without payment of duty and the proceedings were directed at the recovery of duty on goods that were utilised in the clearance of 'cotton waste' on which the duties leviable is, admittedly 'nil.'

5. Learned Counsel for appellant places reliance on the decision of the Hon'ble High Court of Patna in *Tata Yodagawa Ltd & Another v. Union of India & Others* [1987 (32) ELT 521 (Pat.)], of the Hon'ble Supreme Court in *N B Sanjana, Assistant Collector of Central Excise, Bombay and Others v. The Elphinstone Spinning and Weaving Mills Co Ltd* [1978 (2) ELT (J 399) (SC)] and on the decision of the Tribunal in *Tata Iron & Steel Co Ltd v. Collector of Central Excise, Jamshedpur* [1996 (81) ELT 338 (Tribunal)], *Maharashtra Steel Industries v. Collector of Central Excise, Aurangabad* [1997 (95) ELT 342 (Tri)] and that of *Supreme Industries Ltd v. Commissioner of Central Excise, Mumbai III* [2002 (148) ELT 484 (Tri-Mumbai)], which has been upheld by the Hon'ble Supreme Court, to contend that the expression 'payment of duty' included 'nil of duty'.

6. It is also contended that, in *Commissioner of Central Excise, Ludhiana v. Aarti Industries Ltd* [2004 (167) ELT 348 (Tri-Del)], it was held by the Tribunal that

'3. We have considered the submissions of both the sides. According to Second Proviso to Para 5 of Notification No. 1/95-C.E., dated 4-1-95 excise duty has to be paid on the

articles included rejects waste and scrap material if they are not excisable goods. As per Section 2(d) of the Central Excise Act excisable goods means goods specified in the First Schedule and the Second Schedule to the Central Excise Tariff as being subjected to duty of excise and includes salt. Cotton waste is specifically covered by Heading 52.02 and presently the rate of duty mentioned in the First Schedule to the Central Excise Tariff Act is nil. It is, therefore, apparent that cotton waste is an excisable goods as it finds mention in the First Schedule to the Central Excise Tariff Act and is subjected to duty which is presently 'nil'. It has been held by the Supreme Court in the case of Vazir Sultan Tobacco Company Ltd. that excisable goods do not become non-excisable goods merely because of the exemption given under the Notification. As the cotton waste is excisable goods, Second Proviso to Notification No. 1/95-C.E. is not attracted. Accordingly, we reject the Appeal filed by the Revenue.'

besides which, in *Clancey Precision Components Pvt Ltd v. Commissioner of Central Excise & Customs, Pune* [2007 (216) ELT 242 (Tri-Mumbai)], the issue itself has been decided by the Tribunal. Further, reliance is placed on a series of other decisions of the Tribunal viz. *Hanil Era Textile Ltd v. Commissioner of Central Excise & Customs* [2004 (171) ELT 33 (Tri-Mumbai)], which has been upheld by the Hon'ble Supreme Court, in *Sesame Foods Pvt Ltd v. Commissioner of Central Excise, Jaipur-I* [2016 (343) ELT 970 (Tri-Del)], *Synergies-Dooray Automotive Ltd v. Commissioner of Central Excise, Visakhapatnam-I* [2008 (226) ELT 529 (Tri-Bang.)] and *Indira Printers v. Commissioner of Central Excise, Delhi-II* [2010 (262) ELT 940 (Tri-Del)].

7. Learned Authorised Representative places reliance on the decision of the Hon'ble Supreme Court in *Collector of Central Excise, Vadodara v. Dhiren Chemical Industries* [2002 (139) ELT 3 (SC)] and on section 65 of Customs Act, 1962 requiring waste of any warehoused goods, if used for manufacture, that is cleared for home consumption to be liable to duty as though imported in prime form.

8. We have considered the submissions at length and find that the dispute relates to the manner in which duty liability has been discharged on 'cotton waste'. There could be no doubt that no manufacturer sets out to produce waste which is only incidentally generated in the process of manufacture of finished goods. Appellant is required to take approval of the competent authority for manufacture of identified goods and the scheme itself acknowledges that any waste and rejects arising therefrom would be treated akin to approved finished goods. Therefore, there is no requirement to export such goods for entitlement to the benefit of the exemption notification under Central Excise Act, 1944 and Customs Act, 1962. The only condition thereof is the compliance with the procedure prescribed, adherence to ceiling of clearance into the domestic market, approval of the competent authorities and discharge of appropriate duties.

9. Clearances from export oriented unit into the domestic tariff area are subject to duties of central excise even though the rate and the value applicable are derived from the provisions of Customs Act,

1962 and the Customs Tariff Act, 1975. There is no dispute that the impugned goods are a waste product and have been subject to the process of assessment as decreed by law. There is also no dispute that the impugned goods have materially altered from the raw materials utilised for manufacture and were not the duty free goods removed as such. The only issue that arises is the discharge of duty liability and the dispute is limited to the non-payment of duty arising from non-dutiability. It is clear from the decision of *Aarti Industries Ltd* that 'cotton waste', even though subject to nil rate of duty, is considered to be excisable. In *Winsome Yarns Ltd v. Commissioner of Central Excise, Chandigarh [2001 (127) ELT 833 (Tri-Del)]* the Tribunal was concerned with an identical dispute and it was held that

'4. We have considered the submissions of both the sides. The 100% E.O.U.s. are provided facilities, among other things, of importing capital goods, raw-material, components etc. without payment of customs duty and also of obtaining similar goods from domestic market without payment of Central Excise duty. These units have also been provided facility to sell a specified quantity of their products in Domestic Tariff Area in India. Section 3 of the Central Excise Act provides that the duty of excise shall be an amount equal to the aggregate of the duties of Customs on like goods produced or, manufactured outside India, if imported into India. It is thus apparent that the nature of duty levied on the goods manufactured by the 100% E.O.U. is Central Excise Duty whereas the measure of collection of duty is Custom duty. Section 3 (1) of the Act nowhere provides that in addition to the Central Excise duty which is aggregate of

customs duty, the 100% E.O.U.s. have to pay separately customs duties also. The measure of collection of duty does not change the nature of duties required to be paid by 100% EOU that is Central Excise Duty if goods are cleared to any other place in India. As Notification No. 8/96 provides Nil rate of duty in respect of all goods produced or manufactured by 100% Export Oriented Undertaking and allowed to be sold in India, no Customs duty under Section 12 of the Customs Act will be leviable thereon. This was the view of the Larger Bench of the Tribunal in the case of Vikram Ispat, supra. The reliance placed by Id. Commissioner (Appeals) on the decision in Winsome Yarns Ltd. supra, is not correct as it was not held by the Tribunal that customs duties are separately leviable on the clearances of the goods effected by 100% E.O.U. The Tribunal mentioned in that case that for “levy of duty, we have not to consult the Central Excise Tariff Act but we have to look at the Customs Tariff Act,” as the duty is Excise duty which shall be an amount equal to the aggregate duty of Customs. Even in that decision the Customs Tariff Act provided levy of duty @ 25% on soft waste of cotton but in view of Notification No. 2/95-C.E. dated 4-1-1995, the effective rate of duty was reduced to 12.5%. In the present matter the Notification provides Nil rate of duty and as such no duty is payable by the Appellants on the cotton waste falling under Heading 52.02 of the Central Excise Tariff. Accordingly, we allow appeal filed by the appellant.’

In Commissioner of Central Excise, Surat v. Angana Textiles P Ltd [2009 (234) ELT 506 (Tri-Ahmd)], the Tribunal has held that

4. On going through provisions of Section 72, it is noticed that the same relates to goods improperly removed from the warehouse and such provisions will be attracted only in respect of goods, which have been bonded. In this case, the

bonded goods namely, the raw materials were not found cleared unauthorisedly or in contravention of the Customs Act. On the other hand, we find that the raw materials were admittedly issued for manufacture and a portion of the finished goods have been held to be rejects and waste and they were cleared in the domestic market as per the permission granted by the Development Commissioner. Under these circumstances, no case of diversion or use of the raw materials procured duty free for a purpose other than intended purpose, has been made out. Therefore, no valid grounds have been adduced to interfere with the findings of the Commissioner in so far as non-demand of duty on the raw materials and not taking the consequential penal action.

In the decision of the Constitution Bench of the Hon'ble Supreme Court in *re Dhiren Chemical Industries*, reference arose in view of the conflict between the decisions in *Collector v. Usha Martin Industries* [1997 (7) SCC 47] and *Motiram Tolaram v. Union of India* [1999 (6) SCC 375] on the duty liability of inputs that were cleared without duty for use in the manufacture of final product on which duty has been paid but were utilised in manufacture of exported finished goods. In that context, and in accordance with the policy imperative behind such an exemption, the Hon'ble Supreme Court held that

'6. An exemption notification that uses the said phrase applies to goods which have been made from duty paid material. In the said phrase, due emphasis must be given to the words "has already been paid". For the purposes of getting the benefit of the exemption under the notification, the goods must be made from raw material on which excise duty has, as a matter of fact, been paid, and has been paid at the

“appropriate” or correct rate. Unless the manufacturer has paid, the correct amount of excise duty, he is not entitled to the benefit of the exemption notification.’

10. The various judgments pertaining to this issue were examined by the Hon'ble High Court of Madras in *HGL Trading v. Union of India* [2016 (331) ELT 651 (Mad.)] before going on to conclude that

‘90. As we have pointed out earlier, we are supposed to take an importer to be a domestic manufacturer of a like product by a deeming fiction. To this extent, the law is very clear and all the learned counsel for the petitioners are correct. Thereafter, the next question that we should ask is as to whether all domestic manufacturers would automatically be entitled to the benefit of the exemption notification. In respect of the exemption notifications that are absolute and unconditional, all domestic manufacturers will be entitled to the benefit of the exemption notification. Therefore, the importers will also be entitled. But, insofar as exemption notifications that are conditional in nature, the respondents will have to see whether all domestic manufacturers will automatically get exemption or some of them may not get exemption due to non fulfillment of the conditions prescribed in the notification. If some of them are not entitled, due to non fulfillment of the conditions, the importers, for whom it is impossible of complying with those conditions, are also not entitled to the benefit. It is this position that is sought to be clarified by the impugned amendment notifications dated 17.7.2015 and 21.7.2015.’

11. It would, therefore, appear that the decision in *re Dhiren Chemical Industries* would not apply to the present instance where the

dispute pertains to an offshoot of the process of production of approved goods that were manufactured. Despite being a waste, it suffers duty only because it emerges through a manufacturing process and finds a place in the Tariff. The scheme of 'export oriented unit' is intended to provide special facilities to units that are engaged in export and even in the matter of clearance of domestic tariff area are subject to higher duties than a corresponding domestic unit is. The policy prescription also includes a ceiling on the quantity of goods that may be sold in the domestic market. A unit operating outside the scheme is subject only to the duties of excise on their finished products and there is no limit on the clearance that may be effected from the factory. The scheme of conditions in the exemption notifications under the Central Excise Act, 1944 and Customs Act, 1962 are intended to ensure that a unit operating under the scheme does not derive any unintended advantage *vis-à-vis* a unit operating outside by utilisation of exempted raw material and consumables. It cannot have been the conception behind the scheme to subject the waste generated by such units to a levy that is not less than that devolving outside the scheme; more so, as the cost of production of the finished goods invariably subsume the value of the materials that are embedded in the waste. Hence such value have already been either included in the obligation for export or subject to rate of duty not less than that suffered by a domestic unit and does not confer any unwarranted advantage to the appellant.

12. In line with the decision of the Hon'ble Supreme Court that has examined the principle behind the scheme of exemption and the various decisions of the Tribunal cited *supra*, we set aside the impugned order and allow the appeal.

(Order pronounced in open court on 13.08.2019)

(C J Mathew)
Member (Technical)

(Ajay Sharma)
Member (Judicial)