CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI

REGIONAL BENCH - COURT NO. I

Customs Appeal No. 526 of 2010

(Arising out of Order-in-Original No. S/10-66/Adjn/2009/VA & S/1010-01/Adjn/2010/VA dated 12.04.2010 passed by the Commissioner of Customs (Import), Mumbai-I)

M/s Grasim Industries Ltd. .... **Appellant**
(Engineering and Development Divisions),
Birlagram, Nagda, M.P. - 456331

Versus

Commissioner of Customs (Imp), Mumbai .... **Respondent**
Ballard Estate, New Custom House, Mumbai – 400001

WITH

Customs Appeal No. 527 of 2010

(Arising out of Order-in-Original No. S/10-66/Adjn/2009/VA & S/1010-01/Adjn/2010/VA dated 12.04.2010 passed by the Commissioner of Customs (Import), Mumbai-I)

Shri N.K. Garg .... **Appellant**
Assistnat Manager
(Engineering and Development Divisions),
Birlagram, Nagda, M.P. - 456331

Versus

Commissioner of Customs (Imp), Mumbai .... **Respondent**
Ballard Estate, New Custom House, Mumbai – 400001

AND

Customs Appeal No. 908 of 2010

(Arising out of Order-in-Original No. S/10-66/Adjn/2009/VA & S/1010-01/Adjn/2010/VA dated 12.04.2010 passed by the Commissioner of Customs (Import), Mumbai-I)

Shri O.P. Pareek .... **Appellant**
Marketing Manager
(Engineering and Development Divisions),
Birlagram, Nagda, M.P. - 456331

Versus

Commissioner of Customs (Imp), Mumbai .... **Respondent**
Ballard Estate, New Custom House, Mumbai – 400001

Appearance:

Shri T. Viswanathan, Advocate for the Appellant

Shri Ramesh Kumar, AC,Authorized Representative for the Respondent

CORAM:

HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)
HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO. A/85847-85849 / 2020

Date of Hearing: 04.02.2020
Date of Decision: 04.02.2020

Per: Dr. D.M. Misra

These three appeals are filed against Order-in-Original No. S/10-66/Adjn/2009/VA & S/1010-01/Adjn/2010/VA dated 12.04.2010 passed by the Commissioner of Customs (Import), Mumbai-I.

2. Briefly stated the facts of the case are that the appellants are engaged in the manufacture of engineering goods namely, Multi Stage Flash Evaporation System (MSFE) falling under Chapter 84 of the Central Excise Tariff Act, 1985, at their Engineering and Development Division, Nagda. The MSFE is used in the manufacturing industry of Viscose Staple Fiber for the process of removing excess water generated during the course of manufacturing of fibers. Each unit of MSFE consists of a number of Graphite Tubes fitted into the Heat Exchangers, which are manufactured by the appellants. The appellants during the relevant period, against two purchase orders, imported 5700 nos. of Graphite Tubes during June, 2005 to November, 2005 and 27850 nos. of Graphite Tubes during August, 2007 to

September, 2008. For which, they filed Bills of Entry claiming concessional rate of duty under Sr. No. 425 of Notification No. 21/2002-Cus dated 01.03.2002 as amended. Alleging that the condition of Notification was not satisfied by the appellants as the goods imported were not used in the factory, two show-cause notices were issued to them on 25.06.2009 and15.02.2010 demanding differential customs duty of Rs.31,67,555/- and Rs.18,79,173/- respectively with interest and penalty. Also, the imported goods were proposed to be confiscated under Section 111(d) and 111(o) of the Customs Act, 1962. On adjudication, the demands have been confirmed with interest and penalty of equivalent amount; goods were directed to be confiscated under Section 111(o) of the Customs Act, 1962 with an option to redeem the same on payment of fine; penalty of Rs.3.50 lakhs was imposed on Shri N.K. Garg under Section 112(a) of the Customs Act, 1962 and the proceedings against Shri O.P. Pareek directed to be kept in abeyance till service of notice to him. Hence, the present appeals.

3. At the outset, the learned Advocate for the appellants Shri T. Viswanathan has submitted that during the relevant period they had availed the benefit of concessional rate of duty under Notification No. 21/2002-Cus dated 1.3.2002 on import of the Graphite Tubes for its use in Heat exchangers manufactured in their factory. He has submitted that they have followed the entire procedures laid down under Customs (Import of Goods at Concessional Rate of Duty for manufacturing of Excisable Goods)

Rules, 1996. The imported Graphite Tubes were received in the factory of the appellants and due intimation about the receipt of the said goods was given to the concerned Range Superintendent of Central Excise Department in accordance with Rule 7 of the said Rules. After receipt of the imported Graphite Tubes in their factory, the same were inspected and tested for its suitability for use in the Heat Exchanger. At the time of clearance of the goods from the factory, excise duty was duly paid on the manufactured goods and the imported ones cleared separately. The manner in which the Graphite Tubes were removed from the factory of the appellant was well within the knowledge of the Department which is evident from the letter dated 6.8.2007 submitted by the appellant to the Department. It is his contention that imported Graphite Tubes were used in the manufacture of Heat Exchanger, which in turn, were used in the manufacture of MSFE system installed at the site of their sister unit. He has submitted that the entire dispute revolves on the interpretation of "in his factory" appearing under Rule 4 of the 1996 Rules and the question is whether use of the imported goods viz. Graphite Tube was in their factory or that of customers, where MSFE system had been installed. It is his contention that it is good enough to confer the benefit of exemption under Sr. No. 425(2) of Notification No. 21/2002-Cus dated 01.03.2002, once the said goods were used in the Heat Exchangers, the purpose for which it were imported.

3.1 Further, he has submitted that the present show-cause notice was issued for recovery of differential duty by the

Commissioner of Customs, who has no jurisdiction in the matter as the same rests with jurisdictional Central Excise Officer. In support, he has referred to the judgment of this Tribunal in the case of *Samtel Colour Ltd. Vs. Collector of Central Excise, Meerut – 2000 (126) ELT 1256 (Tri)* later affirmed by the Hon'ble Supreme Court reported at *2006 (196) ELT A145 (SC)*. It is his contention that the appropriate authority to issue demand notice in the present case is the Assistant Commissioner of Central Excise having jurisdiction over the factory of the appellant and not Assistant Commissioner having jurisdiction over the Port of Importation. Further, he has submitted that the imported Graphite Tubes forms an integral part of the MSFE System. It is because of the brittle nature of the Graphite Tubes, the same cannot be cleared by fitting it into the Heat Exchangers/MSFE, hence, it was cleared separately and fitted into the MSFE at the site of the customer’s plant. The End Use Certificates are enclosed by the appellant, which has also been accepted by the adjudicating authority in the impugned order. Thus, the graphite tubes which were imported had been undisputedly used in the MSFE System/Heat Exchangers manufactured and cleared from the factory of the appellant.

3.2 He has further submitted that the learned Commissioner in the impugned order denied the benefit of exemption only on the ground that the goods imported were not used in the factory of the importer as required under 1996 Rules, but were traded by clearing as such to the site of their customer. He has submitted that the said finding of the learned Commissioner is contrary to the principles of law laid down by the Tribunal in the case of *Tamil Trading Corporation Vs. CCE – 2006 (198) ELT 539 (Tri-Chennai)* by interpreting the 1996 Rules. In the said case, the Tribunal while interpreting the expression "his factory" held that it is a factory where the importer wants to utilize the imported goods in terms of the Notification. The Department cannot insist on the ownership of the factory and deny the registration for the purpose of the said Notification. This principle has been subsequently followed in the case of *CCE, Bangalore Vs. Electronic Research Ltd. – 2005 (187) ELT 495 (Tri-Bang), FDC Ltd. Vs. CCE, Belapur – 2017 (357) ELT 464 (Tri-Mum) and Finolex Cables Ltd. Vs. CCE – 2017 (358) ELT 990 (Tri)*. In the present case, the Graphite Tubes have been used by the appellant in their factory as well as at the site of the customer; the tubes became part of the plant permanently only at the site of the customer, cannot be the ground to deny the benefit under the said Notification to the appellant.

3.3 Further, he has submitted that the imported Graphite Tubes have been subjected to the process of testing and inspection in the factory of the appellants, which has been confirmed in the impugned order. Therefore, in view of the principles of law laid down in the case of *Asahi India Safety Glass Ltd. Vs. UOI – 2005 (180) ELT 5 (Del)* affirmed by the Hon'ble Supreme Court reported at *2015 (320) ELT 179 (SC)* the process of testing of graphite tubes would qualify as 'manufacture'. Consequently, the objection of the Department that no process was carried out on the imported goods in their factory does not hold good. Further, he has submitted that all the facts have been communicated to the Department and within the knowledge of the Department as is evident from the letter dated 6.8.2007, therefore, invocation of extended period of limitation in confirming differential duty is unsustainable in law. Also, since there is no violation of any of the provisions, therefore, directing confiscation under Section 111(o) and imposition of penalty on the appellants are bad in law. Besides, imposition of penalty on Mr. N.K. Garg as well as Mr. O.P. Pareek is also unwarranted and unsustainable in law.

4. Per contra, the learned AR for the Revenue reiterates the findings of the learned Commissioner.

5. Heard both sides and perused the records.

6. The short question involved in the present appeal for determination is: whether the appellants have complied with the condition of Notification No. 21/2002-Cus dated 1.3.2002 (Sr. No. 425) on import of the Graphite Tubes. It is an undisputed fact that the imported Graphite Tubes during the relevant period were received in the factory premises of the appellant, and the same cleared to the site of the customer, and fitted to Heat Exchangers, which in turn, used in MSFE system installed at the site of the customer. The Revenue's objection is that as a condition of the said Notification No. 21/2002-Cus dated 1.3.2002 read with Customs (Import of Goods at Concessional Rate of Duty for manufacturing of Excisable Goods) Rules, 1996,

the imported Graphite Tubes were required to be used "in his factory", even though the same were fitted to Heat Exchanger at the site of the customer. Rebutting the said argument, the appellants have submitted that after receiving the Graphite Tubes in their factory the same were tested for its suitability in the Heat Exchanger and cut to relevant sizes, thereafter cleared to the site of the customer for fitting it finally in the Heat Exchanger. They have argued that the Graphite Tubes are cleared separately instead of fitting the same in their factory due to the fragile nature of the said Graphite Tubes, which in all probability could break during the course of transportation of the Heat Exchanger to the site. Also, the appellants have referred to the judgment of this Tribunal in *Tamil Trading Corporation (supra),* where expression "his factory" in the said 1996 Rules, has been interpreted.

7. We find that the Revenue's only objection in denying the benefit of Notification is that the imported Graphite Tubes were not used by the appellant in their factory. There is no dispute of the fact that the Graphite Tubes were received in the factory and to the claim of the appellant that they were tested and made suitable after necessary cutting and polishing etc. to be used in Heat Exchanger, a part of MSFE system, no contrary evidence has been placed on record. The said submission of the Appellant was brushed aside on the ground that it is an afterthought. In absence of contrary evidence, it is to be accepted that some process viz. cutting, testing etc. had been carried out on the imported Graphite Tubes in the factory to make it suitable for its

use in the Heat Exchangers. The objection of the Revenue is that the imported Graphite Tubes have not been cleared along with the Heat Exchanger after being fitted into it, but cleared separately. We find that a logical, reasonable and technically sound explanation has been furnished by the appellant for such separate clearance. It is stated that due to fragile nature of the imported graphite tubes, after its testing the same were cleared separately to avoid damage during transportation of the Heat Exchangers to the site. It cannot be denied that the Heat Exchanger cannot function without having fitted with the Graphite Tubes and the Revenue has not disputed that the said Graphite Tubes were fitted to Heat Exchanger at the site of the customer.

8. In the above circumstances , we are of the view that the appellant had complied with the condition of Notification of using the imported goods in their factory both in letter and spirit, hence denial of benefit exemption Notification 21/2002-Cus dated 01.03.2002 to them would be unjustified and accordingly, the impugned order is liable to be set aside on merit. Also, there is a good case on limitation also. On import of the goods, the appellant through their letter dated 6.8.2007 informed the department about the procedure to be followed in the receipt and use of the said Graphite Tubes in their factory and hence no fact was suppressed nor mis-declared to the Department, therefore, invoking extended period of limitation in confirming the demand also cannot be sustained.

9. In the result, the impugned order is set aside and the Appeals are allowed.

(Operative portion of the order pronounced in court)

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

(P. Anjani Kumar)
Member (Technical)

Sinha