

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
MUMBAI**

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 86325 OF 2013

[Arising out of Order-in-Original No: 11/ANS-11/ASB INTERNATIONAL/TH-I/2012 dated 27th December 2012 passed by the Commissioner of Central Excise, Thane-I.]

ASB International Pvt Ltd

E-9, MIDC, Additional Ambernath Industrial Area
Anand Nagar, Ambernath (East)

... Appellant

versus

Commissioner of Central Excise, Thane-I

Navprabhat Chambers, Ranade Road, Dadar (West)
Mumbai - 400028

...Respondent

AND

CUSTOMS APPEAL NO: 86326 OF 2013

[Arising out of Order-in-Original No: 12//ANS-12/ASB INTERNATIONAL/TH-I/2012 dated 27th December 2012 passed by the Commissioner of Central Excise, Thane-I.]

ASB International Pvt Ltd

E-9, MIDC, Additional Ambernath Industrial Area
Anand Nagar, Ambernath (East)

... Appellant

versus

Commissioner of Central Excise, Thane-I

Navprabhat Chambers, Ranade Road, Dadar (West),
Mumbai - 400028

...Respondent

APPEARANCE:

Shri AB Nawal, Consultant for the appellant

Shri Ram Kumar, Assistant Commissioner (AR) for the respondent

CORAM:

HON'BLE MR S K MOHANTY, MEMBER (JUDICIAL)

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)

FINAL ORDER NO: A /85946-85947/2023

DATE OF HEARING: 15/12/2022
DATE OF DECISION: 14/06/2023

PER: C J MATHEW

By this common order, we dispose off two appeals filed by M/s ASB International against confirmation of demand¹ of ₹ 68,75,451 and demand² of ₹ 3,88,600 under section 28 of Customs Act, 1962, along with interest thereon under section 28AA of Customs Act, 1962, and imposition of penalties of like amount under section 114A of Customs Act, 1962 for the period from 13th April 2005 to 5th June 2009 and from 5th August 2009 to 5th February 2010 in orders of Commissioner of Central Excise, Thane-I. The appellant had been issued with the respective notices dated 6th April 2010 and 18th August 2010 for alleged wrong availment of exemption accorded to ‘inputs’ required for manufacture of goods intended for export even though the impugned ‘polyethylene (PET) granules’ were actually utilised for testing their machines.

2. The appellant is an ‘export oriented unit (EOU)’, operating under chapter 6 of the Foreign Trade Policy (FTP) with ‘letter of permission (LoP)’ granted by the Development Commissioner concerned and are entitled to exemption on procurement – domestic and foreign - of ‘inputs’

¹ [order-in-original no. 11/ANS-11/ASB INTERNATIONAL/TH-I/2012 dated 27.12.2012]

² [order-in-original no. 12/ANS-12/ASB INTERNATIONAL/TH-I/2012 dated 27.12. 2012]

for manufacture of goods enumerated in the permission. Such units are permitted to establish their manufacturing facilities and, upon declaration of 'commencement of commercial production', become bound by the obligation specified in the policy and, thereby, entitled to exemption on 'inputs', 'capital goods' and 'consumables' in terms of notification no. 52/2003-Cus dated 31st March 2003. The appellant is in the business of producing moulds used for manufacture packaging in pharmaceutical, cosmetic and food industry varying from 40 ml to 5 litre in volume with capacity of 12000 such units.

3. It is submitted by Learned Consultant that machines and moulds are operated continuously for eight to ten hours and consuming 'polyethylene (PET) granules' for quality assurance of moulds and the resultant products are subjected to various tests and inspections for conformity with end-use parameters. The moulds are produced according to the designs furnished by their customers and are despatched to them only after ascertaining adherence to the standards and the design. The produce of the test is to be mutilated solely for the reason that it cannot be marketed by them and, thereafter, sold as scarp on payment of applicable duties of customs. The case of the appellant, according to Learned Consultant, is that the 'polyethylene (PET) granules' are, undeniably, 'inputs' necessary for marketability of 'moulds' exported by them.

4. He submitted that the adjudicating authority has erroneously concluded that the 'polyethylene (PET) granules' not being deployed in

the finished goods that are exported but in goods that were never intended to be exported would not fall within the purview of eligible inputs even though testing of the exported goods using ‘polyethylene (PET) granules’ is essential to the process. It was his contention that ‘consumables’, as defined in 9.15 of the Foreign Trade Policy (FTP), are entitled to the exemption notwithstanding enumeration among ‘inputs’ in the permission granted by the Development Commissioner; according to him, the enumeration is submitted by an ‘export oriented unit’ as required for manufacture and the distinguishment of ‘inputs’ from ‘consumables’ is not relevant to the permission or usage to the extent of not having been diverted of which there is no allegation in the impugned proceedings.

5. He relied upon the decision of the Hon’ble Supreme Court in *Flex Engineering Ltd v. Commissioner of Central Excise, UP* [2012 (276) ELT 153 (SC)] in support of his argument that testing is essential to marketability of ‘custom made equipment’ and, therefore, intrinsic to production of goods. It was also contended that the Hon’ble High Court of Bombay in *Orient Litho Press v. Collector of Customs, Madras* [1994 (71) ELT 32 (Mad)] had extended the benefit of concession available to ‘project imports’ to goods imported in small quantities for testing of equipment on installation.

6. Relying on the decision of the Hon’ble Supreme Court in *Vanasthali Textiles Industries Ltd v. Commissioner of Central Excise, Jaipur* [2007 (218) ELT 3 (SC)], it was contended by him that Tribunal

could decide upon the categorisation of the goods for the purpose of admissibility of exemption. He submitted that it was not within the competence of customs authorities to deny exemption on goods that the Development Commissioner had deemed to be essential for production of goods in fulfilment of export obligation. It was also pointed out by him that, for the period between March 2010 and March 2013, the appellant was proceeded against for ineligibility to avail CENVAT credit from lack of conformity of 'polyethylene (PET) granules', on which duty liability had been discharged, with definition of 'inputs' when used for testing, as in the impugned duty, and, on clear finding of nexus with manufacture of 'moulds', the same jurisdictional Commissioner of Central Excise³ dropped proceedings. On specific enquiry with Learned Authorized Representative, it was ascertained that the said adjudication had been accepted.

7. According to Learned Authorized Representative, the appellant does not manufacture any goods utilizing 'polyethylene (PET) granules' which alone would qualify them for exemption in procurement. It was further contended that the goods were procured from another 'export oriented unit (EOU)' which had included the value thereof towards fulfillment of 'export obligation' without even the indirect earning of 'convertible foreign exchange' by the appellant. It was also submitted that no evidence has been adduced that the appellant was contractually obligated to conduct such trial production using the moulds manufactured

³ [order-in-original no. 01/SJB-01/ASB In/K-IV/TH-I/2013 dated 7th June 2016]

by them. Reliance was placed on the decision of the Hon'ble Supreme Court in *Dharampal Satyapal v. Commissioner of Central Excise, Delhi-I* [AIR 2005 SC 4043] and in *Bhor Industries Ltd v. Collector of Central Excise* [1989 (40) ELT 280 (SC)].

8. The issue before us is not as complex as made out in the rival submissions and requires no reference to the concept of manufacture. The short point for determination is the eligibility of 'polyethylene (PET) granules' used in testing of 'moulds' manufactured, and acknowledged as goods eligible to qualify towards fulfilment of 'export obligation', by appellant as intended to be covered by notification no. 52/2003-Cus dated 31st March 2003. The said exemption operationalizes the intent of Government of India in formulation of the design of the 'export oriented scheme (EOU)' of the Foreign Trade Policy (FTP). The policy does not distinguish any category of goods in the conceptual framework but allows 'all types of goods' in paragraph 6.2(b) and even the Handbook of Procedures (HoP), in paragraph 6.5.1, has clubbed 'raw materials, components, consumables, intermediates, spares and packing materials' as one distinct category for the purposes of exemption implying, thereby, that these are all inputs in the manufacturing process. The definition of 'consumables' in paragraph 9.15 of the Foreign Trade Policy (FTP) is broad enough to cover goods that do not go into the final product but, nonetheless, is essential to the final product. An untested product, especially custom-made, as held in *re Flex Engineering Ltd*, is not a product that will be accepted by the customer and, therefore, undeniably

rendering the raw materials used for test production as ‘consumables’ eligible for exemption. The output of test of manufactured ‘capital goods’ is distinguishable from test run of ‘installed machinery’ which precedes actual commercial production and it would appear that the jurisdictional authorities were unable to appreciate the distinction which shifts an input from ‘raw material’ to ‘consumables’ for the purposes of the impugned notification.

9. The clubbing of all of these as ‘inputs’ for the purpose of accountal of eligible quantities of each does not exclude any type of goods used in production and the jurisdictional authorities have not been able to show that the ‘standard input output norms (SION)’ have not been conformed to.

10. The apprehension of audit authorities, leading to the proceedings, rested on two counts: of non-conformity with the rules of the scheme and of non-realization of foreign exchange which is the objective of the scheme. Our finding *supra* discards the first. As far as the second is concerned, it must be borne in mind that duty foregone is not the only investment in the unit; a higher proportion is invested by the appellant, including the costs of the trial production, which invariably would be included in the price contracted by the appellant with its customers. There is no factual evidence to substantiate any compromise of the ‘export oriented unit (EOU)’ scheme on this count.

11. That the ‘polyethylene (PET) granules’ deployed in production of

goods in trial run of moulds manufactured by the appellant have been considered as 'inputs' for manufacture between March 2010 and March 2013 for the purposes of CENVAT Credit Rules, 2004. These are, thereby, procured for manufacture of output and it is not open for Revenue to adopt a contrary stand merely for denial of exemption on procurement under a scheme of the Foreign Trade Policy (FTP).

12. Considering that 'polyethylene (PET) granules' are used during the manufacture of 'moulds' that are the acknowledged export product of the appellant and which, even if not deployed in manufacture of mould, renders the acceptability of the goods for the customer in the absence of which export obligation would remain unfulfilled, it is nothing but 'consumables' which are covered by the omnibus enumeration of eligible requirements other than capital goods, the impugned order has erred in denying the benefit of exemption. Accordingly, the impugned order is set aside and appeals allowed.

(Order pronounced in the open court on 14/06/2023)

(S K MOHANTY)
Member (Judicial)

(C J MATHEW)
Member (Technical)