

CASE NO.:
Appeal (civil) 5830 of 1999

PETITIONER:
Comm.of Central Excise, Allahabad

RESPONDENT:
M/s Ginni Filaments Ltd.

DATE OF JUDGMENT: 17/02/2005

BENCH:
S.N. VARIAVA, Dr. AR. LAKSHMANAN & S.H. KAPADIA

JUDGMENT:
J U D G M E N T

KAPADIA, J.

The issue in this civil appeal filed by the department under section 35L(b) of the Central Excise Act, 1944 relates to the eligibility to the benefit of exemption under Notification No.123/81-CE dated 2nd June, 1981, as amended.

M/s Ginni Filaments Ltd. (hereinafter referred to for the sake of brevity as "the assessee") is 100% Export Oriented Unit manufacturing filament yarn. The assessee was licensed under section 58 of the Customs Act, 1962 bearing Licence No. 1-Customs/90 dated 13.3.1990. The assessee was also granted L-4 licence for the manufacture of cotton yarn falling under Chapter 53.

The assessee made an application under notification no.123/81 to the Competent Authority for removal of certain goods, under form CT-3, from 100% Export Oriented Unit to its factory, namely, A.C. Sheets, air-Conditioners, flush doors, typewriters, storewells, tables, chairs, which was granted.

On 2.1.1991, the department issued a show-cause notice calling upon the assessee as to why duty of Rs.4,55,872.72 should not be recovered from the assessee for not using the goods, cleared under form CT-3 in the manufacture of cotton/filament yarn in their Undertaking.

By reply dated 31.1.1991, the assessee submitted that since the competent authority had allowed the above goods to be brought into their Undertaking from 100% export oriented unit under form CT-3 and since the said goods were brought into their undertaking in connection with the manufacture of combed cotton yarn, the requisite conditions mentioned in the notification no.123/81 stood satisfied and the department was not entitled to demand duty from the assessee. The assessee further submitted that direct utilization of the said goods in the manufacture of combed cotton yarn (which was an export product) was not necessary in view of the words "in connection with the manufacture" in the said notification.

The Adjudicating Authority confirmed the show-cause notice holding that the assessee had failed to prove that the said goods were used in the manufacture of combed cotton yarn. Being aggrieved, the assessee herein went in appeal to the Customs, Excise & Gold (Control) Appellate Tribunal (hereinafter referred to for the sake of brevity as

"the tribunal") which following its earlier judgments held that notification no.123/81 should be given widest possible interpretation as its object was to increase the revenue and balance of payment position. In this connection, the Tribunal also placed reliance on the words "in connection with the manufacture" in the recital to the said notification.

In this appeal, we are required to decide the scope, ambit and effect of notification no.123/81, as amended.

To decide the above question, we quote herein below notification no.123/81-CE dated 2.6.1981, as amended:-

"EXEMPTION TO GOODS FOR HUNDRED PER CENT EXPORT ORIENTED UNDERTAKINGS

The Central Government, being satisfied that it is necessary in public interest so to do, hereby exempts excisable capital goods, components and raw materials, consumables, spares and packaging materials (hereinafter referred to as the goods) when brought in connection with the manufacture and packaging of articles into an undertaking approved by the Board of Approval for hundred per cent Export Oriented Undertakings appointed by the notification of Government of India in the former Ministry of Industry and Civil Supplies (Department of Industrial Development) No. S.O. 163(E)/RLIU/10(2)/76 dated the 3rd March, 1976 from the whole of\027

(i) the duty of excise leviable thereon under section 3 of the Central Excises and Salt Act, 1944 (1 of 1944); and

(ii) the additional duty of excise leviable thereon under sub-section (1) of section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957), subject to the following conditions namely:-

(a) the hundred per cent export-oriented undertaking is approved by the said Board;

(b) the goods required by such undertaking for manufacture and packaging of articles are brought directly to the factory of manufacture and are used in the manufacture and packaging of such articles meant solely for export or for supply to a unit situated in another Free Trade Zone, Export Processing Zone or hundred per cent export oriented undertaking for the manufacture of goods solely meant for export;

(c) such undertaking exports out of India hundred per cent or such other percentage as may be fixed by the said Board of articles manufactured wholly or partly from the goods for the period stipulated by the said Board or such extended period as may be specified by the said Board;

(d) on clearances up to twenty-five per cent, of articles so produced or manufactured and allowed to be sold in India, such undertaking shall pay duty of excise leviable on such

articles under section 3 of the said Central Excises and Salt Act;

(dd) on clearances of five per cent of articles so produced or manufactured or such other percentage, as may be fixed by the said Board and allowed to be sold in India, such undertaking shall pay duty of excise leviable under section 3 of the said Central Excises and Salt Act, provided such articles are in the nature of rejects;

(e) the procedure set out in Appendix to this notification is followed by such undertaking;

(f) on the expiry of the period referred to in condition (c), such undertaking shall pay excise duty on the goods unused and the articles manufactured from the goods without depreciation and at the rates in force at the time of clearance.

2. Notwithstanding anything contained in the conditions in the preceding paragraph, samples of articles manufactured from the goods for the purpose of display and canvassing may be cleared in such quantities and subject to such limitations as may be specified by the said Board if the duty of excise at the appropriate rate has been paid on the goods contained in such samples.

3. Notwithstanding anything contained in the conditions (b) and (c) of the first paragraph, clearances of the articles manufactured wholly or partly from the goods brought into a hundred per cent export oriented undertaking for supply to the Oil and Natural Gas Commission or the Oil India Limited or as the case may be the Gas Authority of India Ltd. for their project in India against global tender shall be exempt from the so much of the duty of excise leviable thereon under section 3 of the Central Excises and Salt Act, 1944 (1 of 1944) as is in excess of the amount calculated at the rate of 15% ad valorem and from the whole of the additional duty of excise leviable thereon under sub-section (1) of Section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957), subject to the following further conditions, namely:-

(i) the said undertaking produces a certificate to the Assistant Collector of Central Excise, prior to the clearance of such articles from the General Manager or the Project Manager of the Oil and Natural Gas Commission or the Oil India Limited or as the case may be the Gas Authority of India Limited to the effect that such articles are required to be supplied against global tender to the Oil and Natural Gas Commission or the Oil India Limited or as the case may be the Gas Authority of India Limited for their project in India specified in the Certificate; and

(ii) the said undertaking produces to the Assistant Collector of Central Excise within three months from the date of the said clearance of such articles or such extended period as may be allowed by the Assistant Collector of Central Excise, a certificate from the General Manager or the Project Manager

of the Oil and Natural Gas Commission or the Oil India Limited or as the case may be the Gas Authority of India Ltd., to the effect that such articles have actually been received by the Oil and Natural Gas Commission or the Oil India Limited or as the case may be the Gas Authority of India Ltd., at the specified project and are intended for use in the specified project.

APPENDIX

Procedure to regulate the movement of the goods for Manufacture and packaging of articles for export.

(a) Application for obtaining the goods free of duty.\027 Any person intending to obtain the goods free of duty for use by him in his 100 per cent export oriented undertaking shall make an application in writing to the Assistant Collector of Central Excise in proper form to be prescribed by the Assistant Collector of Central Excise stating therein the annual quantity of the goods required and the purpose for and the manner in which such goods are intended to be used and declaring that the goods shall be used for such purpose and in such manner only. The Assistant Collector may grant the application after causing such enquiries to be made as he may deem fit and the applicant shall then enter into a bond in the form given at Annexure A below with such surety or sufficient security, in such amount and under such conditions as the Assistant Collector of Central Excise approves. The Assistant Collector of Central Excise may, however, allow the annual quantity of the goods to be brought as furnished by the manufacturer to be extended when a request to that effect is made. The concession shall expire on the 31st December every year, but may be renewed if the Assistant Collector of Central excise sees no reason to the contrary:

Provided that, in the event of death, insolvency or insufficiency of the surety, or where the amount of the bond is inadequate, the Assistant Collector of Central Excise, in his discretion, demand a fresh bond, and may, if the security furnished for a bond is not adequate, demand additional security.

After the grant of the application and execution of bond by the applicant, the Central Excise officer-in-charge of the 100 per cent Export oriented undertaking shall issue a certificate, in the form given in Annexure B below certifying that\027

(i) the said undertaking has executed a bond in the form given in Annexure A below with the Assistant Collector of Central Excise showing the number and particulars of the bond; and

(ii) the specimen signature of the agent of the said undertaking furnished on the body of the certificate is genuine and he would attest it. The certificate shall be sent by the said officer-in-charge under registered post (acknowledgement due) to the factory from which the goods are to be obtained. A copy of the certificate shall also be sent by the said undertaking to the Superintendent in-charge of the range of the factory from where the goods are to be received.

(b) Removal of goods to 100% Export oriented

undertaking. On receipt of the aforesaid certificate the factory (consignor) from where the goods have to be removed shall prepare an application in the form given in Annexure C below in quadruplicate for removal of non-duty paid goods from one warehouse to another mentioning clearly the number and date of the bond in Annexure A below as per the certificate issued by the Central Excise officer-in-charge of the 100 per cent Export Oriented Undertaking. Removal application in Annexure C below must be serially numbered. The serial No. should be according to the financial year. The serial No. must be noted on all the copies. Whenever any removal application has to be cited in the course of correspondence; the name of the factory, the Serial No. and date of Annexure C below should always be quoted as reference. The consignor shall however, intimate to the Central Excise officer-in-charge of the 100 per cent Export oriented undertaking about the removal of goods at least 12 hours before such removal is expected to take place.

(c) Marking of the packages. Packages to be marked and address to be noted in the application:

The factory of removal (consignors) must

(i) ensure that packages bear proper marking and number;

(ii) ensure that all copies of Annexure 'C' below are prominently marked "Intended for use in the undertaking approved for manufacturing 100 per cent Export oriented goods";

(iii) give the full address of the factory of removal as well as of the Superintendent-in-charge of the range under which the factory falls and the Collectorate to which it is attached.

Whenever any of these addresses is used for dispatching purposes, care must be taken by the dispatching factory to see that the full address of the Superintendent in-charge of the range including the names of the district is properly reproduced.

(d) Preparation of Gate Pass. The consignor shall also prepare a gate pass in Form G.P.2 in Appendix I (Central Excise Series No.65AA) to the Central Excise Rules, 1944, in respect of the goods proposed to be removed from his factory and will thereafter clear the goods on his own without any verification by any Central Excise Officer.

(e) Disposal of documents in Annexure C and Gate Pass. The Consignor shall send the original and triplicate copy of the Annexure C below and original copy of the gate pass along with the consignment to the consignee. The duplicate copy of Annexure C below will be sent by the consignor to the Assistant Collector of Central Excise in-charge of the 100 per cent Export oriented undertaking. The duplicate copy of the gate pass will be sent by the consignor to the officer-in-charge of his factory within 24 hours of the removal of the consignment in question. The said officer-in-charge shall maintain an account of all such removals in Annexure D below.

(f) Action at destination. On receipt of the duplicate copy by the Assistant Collector of Central Excise, it must immediately be entered in the 'Record of Receipts in bond' given in Annexure E below and forwarded the same day to the

Central Excise officer-in-charge of the 100 per cent Export oriented undertaking. The entries in this record should be verified against relative entries of the Record of Raw Materials prescribed by the Collector.

(g) Responsibility for further accounting.\027After delivery of the goods from a manufacturer, proper accounting of these goods shall be the responsibility of the Central Excise officer-in-charge of the 100 per cent Export oriented undertaking.

(h) Examination of the consignment on receipt.\027(1) The consignee must give intimation of the arrival of the consignment at his premises to the Central Excise officer-in-charge of the 100 per cent Export oriented undertaking without any delay and should store the same separately and intact, pending examination and check by the said officer and the said officer, after taking account of the goods, will identify them with the marks and numbers, and weigh the consignment in full. Thereafter, he shall complete the re-warehousing certificate on the duplicate copy received from the Central Excise Superintendent-in-charge of the factory at destination and original and triplicate copy of the applications presented by the consignee, return duplicate to the Central Excise officer-in-charge of the factory of removal direct and triplicate to the consignee for dispatch to the consigner after noting thereon the deficiency or excess, if any.

(2) Duty on shortages or losses in transit.\027Since the bond in Annexure A below would have been executed by the consignee, duty on shortages will be demanded from him after condoning the permissible losses in transit. For such commodity a separate schedule of losses will be formulated and issued by the Collector of Central Excise.

(i) Re-entry.\027If the duplicate application is received by the Central Excise Officer-in-charge of the 100 per cent Export oriented undertaking, before arrival of the goods is reported to him by the consignee, he must keep it pending, securely and systematically filed in a file marked "pending duplicate in Annexure B application" and record the particulars of the consignment in his "record of receipts in bond" prescribed as in Annexure E below and no sooner the consignment is received, he will follow the procedure prescribed in paragraph (h) above.

(j) Duty leviable on excisable goods not duly accounted for as having been utilized in the manufacture of goods for export, etc.\027If any excisable goods obtained under this procedure are not duly accounted for as having been utilized in connection with the manufacture and packaging of articles for export or clearances up to twenty five percent of the articles produced or manufactured and allowed to be sold in India on payment of duty of excise leviable under section 3 of the Central Excises and Salt Act, 1944 (1 of 1944) or for clearances for supply to the Oil and Natural Gas commission for their projects in India against global tender or are not shown to the satisfaction of the Central Excise officer-in-charge of 100 per cent Export oriented undertaking to have been lost or destroyed by natural causes or by unavoidable accidents during storage or handling in the approved premises, or, have been permitted to be disposed of as refuse or waste within the permissible limits prescribed by the Collector of Central Excise, the applicant shall, on demand by the said Central Excise officer, immediately pay the duty leviable on such goods. The concession may at any time be withdrawn by the Collector of Central Excise if a breach of the procedure is committed by the

applicant, his agent or any person employed by him. In the event of such a breach, the Collector of Central Excise may also order the forfeiture of the security deposited under paragraph (a) above and may also confiscate the goods and all articles manufactured from such goods in store in the premises of the 100 per cent Export oriented undertaking.

(k) Despatch of duplicates by registered post acknowledgement due.\027Despatch of duplicate application in Annexure B referred to in paragraph (a) above must always be made by registered post acknowledgement due, and the postal receipt acknowledgement must be systematically filed by the consignor and presented for inspection to the Central Excise officer-in-charge of the factory whenever required.

(l) Demand of duty on goods not reaching destination.\027 Under sub-rule (1) of rule 156B of the Central Excise Rules, 1944, if the certificate of receipt of a consignment of the goods dispatched to the consignee [as per paragraph (1)] is not received back by the consignor within 90 days of the removal of the goods or within such extended period as may be allowed by the Collector of Central Excise, it is the responsibility of the consignor to himself pay the duty leviable on the consignment by a debit entry in his account current. However, a provision has been made that in such cases where the consignor produces proof re-warehousing to the satisfaction of the Central Excise Officer-in-charge of the factory after payment of duty in the manner indicated above, he will be eligible for grant of refund on the duty so paid by making an application.

The Central Excise officer-in-charge of the factory may also demand duty on a consignment the certificate in respect of which has not been received within the stipulated period. In such cases, if the consignor has already paid the duty leviable on the consignment by a debit entry in his account current, he may intimate the officer-in-charge of the 100 per cent Export oriented undertaking about the particulars of such deposit in reply to this notice of demand.

(m) Action by the officer-in-charge of the factory of removal in case of non-receipt of the warehousing certificates.\027If the duplicate copy of Annexure B below is not returned to the officer-in-charge of the factory of removal within a month of the removal of consignment reminders must be issued regularly at fortnightly intervals to the Central Excise officer-in-charge of the 100 per cent Export oriented undertaking. If, despite such reminders, the duplicate application is not received within two months of the date of removal of the consignment, the matter should be reported to the Assistant Collector of Central Excise in whose charge the consignor operates, who will either secure a satisfactory proof of the consignment having been duly received by the consignee or ensure that the duty properly due on the goods not so received at destination is recovered as per paragraph (1) above.

(n) Verification of the use of non-duty paid goods.\027On receipt by the consignee, the goods shall be utilized in the manufacture and packaging of articles intended (solely) for export of clearances up to twenty-five percent of the articles produced or manufactured and allowed to be sold in India on payment of duty of excise leviable under section 3 of the Central Excises and Salt Act, 1944 (1 of 1944) or for clearances for supply to the Oil and Natural Gas Commission for their projects in India against global tender. It shall be the

responsibility of the Central excise officer-in-charge of the 100 per cent Export oriented undertaking to ensure that all the goods have been fully utilized for manufacture and packaging of articles intended for export or for clearances up to twenty five per cent of the articles produced or manufactured and allowed to be sold in India on payment of duty of excise leviable under section 3 of the Central Excises and Salt Act, 1944 (1 of 1944) or for clearances for supply to the Oil and Natural Gas Commission for their projects in India against global tender or are otherwise accounted for to the satisfaction of the Assistant Collector, Central Excise in-charge of the 100 per cent Export oriented undertaking.
[Emphasis supplied]"

The above notification gave exemption to goods for "use" in 100% export oriented unit. As can be seen from the preamble, the notification gave exemption to capital goods, raw materials, components, consumables etc. compendiously known as "goods" when brought into the undertaking of a licensed holder from the 100% export oriented unit approved by the Board under a certificate in form CT-3 "in connection with the manufacture of" products to be exported out of India. The said notification exempted the above goods from payment of basic excise duty and additional excise duty subject to conditions which further stipulated that exemption shall be granted only if the "goods" released from 100% export oriented unit were brought directly into the factory of the licensee and were "used in the manufacture of the products" to be exported. [See: Conditions 1(b)(c)(f), 2, 3 as well as the various Clauses in the Appendix to the notification, relevant portions of which have been underlined in bold print]. Therefore, in the preamble, which deals with removal of goods from 100% export oriented unit under CT-3 form, we find use of the words "in connection with the manufacture of" which words are wider when compared to the words in the conditions for exemption, namely, "used in the manufacture of". Reading the notification in entirety, therefore, two stipulations have to be fulfilled, namely, removal of the "goods" from 100% export oriented unit to the factory of the licensee under form CT-3 and use or participation of the said "goods" in the manufacture of products meant for export.

In the present case, the tribunal following its judgments in earlier cases has emphasized the words "in connection with the manufacture" in the preamble while failing to notice the words "used in the manufacture of" in the conditions which indicate use or participation of the said "goods" in the manufacture of products to be exported out of India. This test of participation has to be applied to the facts of each case. It is on fulfillment of both the above conditions, that, the assessee becomes entitled to the benefit of the above notification. In number of cases, the tribunal has wrongly drawn an analogy from notification no.272/79 which has no application to the present case. Each notification has to be read on its own terms and merely because the object of a notification is to increase resources of the State, conditions stipulated therein cannot be ignored. Further, it may be noted, that the word "capital asset" is very wide. It includes all types of properties including consumables, raw material, components etc. However, capital assets become capital goods when used in the manufacture of products. Every capital asset is not capital goods. Hence, one has to read the words "capital goods" in the context of the above notification. For example, a telephone instrument may constitute "capital goods" where the assessee is in the business

of telecommunication. However, if the assessee is in the business of manufacture of hydrogen peroxide, the same instrument cannot be construed as "capital goods" for the purposes of the above notification. Hence, the peculiarities of the business or the undertaking is also required to be kept in mind while interpreting the said notification.

Applying the above tests to the facts of the case in hand, we find that the assessee has claimed exemption in respect of table, chairs, air-conditioners etc. which cannot be said to be "goods" used in the manufacture of cotton or filament yarn. It is the case of the assessee that the words "in connection with the manufacture" are wide enough to cover every item which is allowed to be removed under CT-3 certificate. This contention of the assessee is accepted by the tribunal erroneously as it has failed to look at the words used in the conditions enumerated in the notification. As stated above, we have to read the notification in its entirety. Further, we are dealing with exemption notification which has to be read strictly so far as the eligibility is concerned. It was for the assessee to prove by evidence, and not by submitting a chart, the nexus between AC Sheets and the manufacture of filament/cotton yarn. It was for the assessee to prove by evidence the participation of AC Sheets in the manufacture of filament/cotton yarn, which has not been done and, therefore, the tribunal had erred in admitting the claim of the assessee for exemption without analyzing the notification no.123/81 dated 2.6.1981 (as amended).

For the reasons given hereinabove, this civil appeal filed by the department succeeds; the impugned judgment and order of the tribunal dated 4.2.1999 passed in Appeal No. E/A 2120/94-D is set aside; and accordingly the civil appeal stands allowed, with no order as to costs.