

Reportable

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 8371 of 2002

Commissioner of Customs, CalcuttaAppellant

- *Versus* -

Indian Rayon & Industries Ltd.Respondent

J U D G M E N T

BHAN, J.

1. The instant appeal has been filed by the Revenue under Section 35L of the Central Excise Act, 1944 against the final judgment and order No.1-1255/KOL/2001 dated 23rd November, 2001 passed by the Customs, Excise and Gold (Control) Appellate Tribunal, Eastern Bench, Kolkata (for short "the Tribunal"), whereby the Tribunal has set aside the order passed by the Commissioner.

2. The three Bills of Entry which are the bone of contentions in the present case are detailed below:-

- (i) Bill of Entry Sl. No. 2256 dated 30th April, 1998, per Vessel X-Press Singapore Voy-257, Rot. No. 258/98 dated 7th April, 1998, Line No. 97, Country of origin - India, Goods 135 cartons 2/64 NM Merino Wool 100% Raw White on paper cone, Assessable Value - Rs.36,63,829/- .
- (ii) Bill of Entry Sl. No. 2440 dated 29th May, 1998, per Vessel S.S. Acacia V. 818, Rot No. 370/98, Line No. 154, Country of Origin - India, Goods - 20 pallets Polyester 100% Semi Dull Ring Spun Yarn for weaving NE 24/2, Assessable value - Rs.16,88,481.23
- (iii) Bill of Entry Sl. No.930 dated 12th August, 1998 per Vessel Breeze, Rot. No. 549/98, Line No. 26, country of origin - India,

Goods 765 Ctns. of 100% polyester yarn,
Assessable value liable to duty
Rs.27,37,954.76.

FACTS:

3. The goods were initially exported by the respondent-assessee, which were rejected by the foreign buyer being defective and the assessee re-imported them back to India.

4. Assessee had initially claimed in the Bills of Entry the benefit of Notification No. 158/95-Cus and also executed bonds for re-export, as required under the said notification. The Bills of Entry were assessed provisionally. The assessee could not re-export the goods due to recessionary conditions in the textile industry. It claimed before the adjudicating authority that since it was not possible for it to re-export the goods, it may be allowed the benefits of another Notification No.

94/96-Cus., which was in force at the time of the clearance from the factory originally.

5. Three show cause notices were issued in respect of the three Bills of Entry for realization of the amounts which were guaranteed under the bonds executed by the assessee at the time of importation. The demands under the show cause notices were in terms of Notification No. 158/95-Cus. referred to above. Confronted with the liability to pay the duty as enjoined under the notification, in view of non re-export of the goods within six months of the date of re-importation as stipulated, the assessee took the ground before the adjudicating authority that Notification No. 158/95-Cus. was not in force at the time of the importation. Having realized this to be incorrect, the assessee shifted its stand and submitted that Notification No. 94/96-Cus. dated 16th December, 1996 was applicable to the goods in question and the benefit thereunder should be given to it.

6. The main contention raised by the assessee was that if the benefits were available under the two Notifications to the assessee, then the assessee could avail of the benefits under either of them. Revenue's reply to the said contention was that it was not correct to say that if the two Notifications are applicable, assessee after having opted to take benefit under one of the Notifications, could change its option and avail the benefit under the other scheme. In any case, this would depend upon the nature and contents of the Notifications. It was revenue's contention that the assessee could not change its option because of the nature and contents of the notifications.

7. The Authority-in-Original confirmed the demand against (i) Bill of Entry No. 930 in the sum of Rs.20,76,111/- and (ii) Bill of Entry No. 2440 in the sum of Rs.13,86,355.24. The assessee was given the benefit of Notification No. 94/96-Cus. in respect of Bill of Entry No. 2256 of 1998 as the goods were re-exported under Incentive Scheme,

i.e., Duty Exemption Entitlement Scheme (DEEC). Thus, in relation to Bill of Entry No. 2256 dated 30th April, 1998, the duty was confirmed in the sum of Rs. 4,99,188.79. The benefit was not extended to other two Bills of Entry as the goods in these cases were covered under Duty Entitlement Passbook Scheme (DEPB). Contention raised on behalf of the assessee that the benefits of the Notification No. 94/96-Cus. having been given to the assessee in regard to Bill of Entry No. 2256, could not be denied on Bills of Entry Nos. 930 and 2440, was rejected.

8. The assessee being aggrieved filed an appeal against the order of the Commissioner, which has been accepted by the Tribunal by its impugned order. The Revenue being aggrieved has filed the present appeal.

9. Counsel for the parties have been heard.

10. Section 20 of the Customs Act, 1962, which deals with re-importation of the goods, provides:-

"20. Re-importation of goods. - If goods were imported into India after exportation therefrom, such goods shall be liable to duty and be subjected to all the conditions and restrictions, if any, to which goods of the like kind and value are liable or subject, on the importation thereof."

11. By Notification No. 158/95-Cus. dated 14th November, 1995, goods manufactured in India and re-imported in India for repairs or for re-conditioning are exempted from whole of the duty of customs leviable on them as well as additional duty subject to the condition, *inter alia*, that the goods are re-exported within six months of the date of re-importation or any extended period as may be allowed and a bond is executed at the time of importation to export within the said period and, in the event of failure to do so, pay an amount equal to the difference between the duty levied at the time of re-import and the duty leviable on such

goods at the time of importation. The assessee executed a bond with the President of India, complying with the aforesaid condition of notification and undertook to pay, on demand in the event of its failure to comply with any of the conditions of notification, an amount equal to the difference between the duty levied and leviable on such goods. In respect of each of the Bills of Entry, separate bonds were executed indicating Bill of Entry No., description of goods, country of origin, CIF Value, the assessable value and the bond value.

12. The Revenue contends that the assessee could not avail the benefit under Notification No.94/96-Cus and that it could not change its option. According to the assessee, the assessee could change its option even at a later stage and it could avail of the benefit under Notification No.94/96-Cus which was in force at that time.

13. We do not find any substance in this submission advanced on behalf of the assessee. The only notification which was available to the assessee at the time of import which granted the assessee the right to import duty free goods was Notification No. 158/95-Cus. Having availed of the benefit of notification, the assessee has necessarily to comply with the conditions of the notification. It goes without saying that the assessee cannot approbate and reprobate. In Tractors and Farm Equipment Ltd. v. Collector of Customs, Madras, [1998 (9) SCC 665], it was pointed out by this Court that once the assessee's case was that what it had imported do not constitute internal combustion piston engines but only certain components, the importer cannot turn around and say that what was imported constitutes piston engines. Of course, there is no estoppel against the law but having sought for and taken the benefit of the notification to import goods without payment of duty, it is not open to the assessee to contend

that the conditions in the said notification need not be fulfilled, be it on the ground that the benefit under another notification is available to him or otherwise.

14. In any event, Notification No. 94/96-Cus. is, on its own terms, not applicable to the facts of the present case. The assessee has claimed the benefit under clause 1(e) of Notification No. 94/96-Cus. The description of the goods claimed in Serial No. 1(e) under Notification No. 94/96-Cus., which reads as under:

Sl. No.	Description of goods	Amount of duty
(1)	(2)	(3)

1.	Goods exported- (a). XXX (b). XXX (c). XXX (d). XXX (e). under duty exemption scheme (DEEC) or export Promotion Capital Goods Scheme (EPCG)	XXXXXX XXXXXX XXXXXX XXXXXX XXXXXX Amount of excise duty leviable at the time and place of importation of goods and subject to the following conditions Applicable for such Goods (I) DEEC book has not been finally closed and export in question is delogged from DEEC book. (II) In case of EPCG scheme the period of full export performance has not expired and necessary endorsements regarding reimport have been made. (III) The importer had intimated the details of the consignment re-imported to the Assistant Commissioner of Central Excise in charge of the factory where the goods were
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(2)	XXX	XXX
(3)	XXX	XXX

refers to the goods exported under DEEC or Export Promotion Capital Goods (EPCG) Scheme and not under DEPB Scheme. In the present case, out of the three Bills of Entry covering goods which had to be re-exported, only one of them was for goods earlier exported under DEEC scheme while the other two were under DEPB scheme. The adjudicating authority had, in respect of goods initially imported under DEEC Scheme, given the benefit of the Notification No. 94/96-Cus, while rejecting the claim in respect of the goods exported under a DEPB Scheme. This is in accordance with the language of Notification No. 94/96-Cus. The difference between DEEC and DEPB Schemes can be seen from the following :-

"DEEC Scheme

Under this scheme the importer is issued an Advance Licence to procure the raw material for a manufacturer of the export product. The goods which are cleared

under Advance Licence are meant for use in the manufacture of export product or replenishment of the raw materials already used. The clearance is allowed duty free. The details of items allowed for import against a specific export product are published by the Ministry of Commerce in their Input Output Norms which are part of the Exim Policy.

DEPB Scheme

Under this scheme the exporters are issued DEPB scrips which allows them the specific amount to be utilized for payment of Customs duty. The amount for which DEPB scrip is issued depends upon the rate for a particular export product. The Ministry of Commerce notifies DEPB credit rates for export of an item. The DEPB scrip is freely transferable and can be used to debit the payment of duty at the time of clearance of goods except capital goods and goods mentioned in negative list."

15. An attempt was made on behalf of the assessee to refer to Sl. No.1(d) of the said notification which refers to goods exported under bond without payment of excise duty. It is only Sl. No. 1(e) which deals with benefit under the EXIM Policy but, at the same time, confines to DEEC and EPCG Scheme and not to the DEPB Scheme. Sl. Nos. 1(a), (b),

(c) and (d), all deal with export of goods in the normal course, where duty becomes payable under the provisions of Central Excise Act, 1944 or the Customs Act, 1962, as the case may be, and to the Customs or Excise duties leviable on goods so exported. They do not deal with imports or exports under the EXIM Policy which fall in Sl. No. 1(e).

16. Rule 13 of the Central Excise Rules, 1944, which was in force at the time of initial export of goods in question (February 1998), provides as under:

"RULE 13- Export in bond of goods on which duty has not been paid-

- (1)The Central Government may, from time to time, by notification in the Official Gazette-
- (a)permit export of specified excisable goods in bond without payment of duty, in the like manner, as the goods regarding, which the rebate is granted under sub-rule (1) of rule 12 from a factory of manufacture or warehouse or any other premises as may be approved by the Commissioner of Central Excise;
- (b) specify materials, removal of which without payment of duty from the place of manufacture or storage for use in the manufacture in bond of export goods, may be

permitted by the Commissioner of Central Excise;

- (c) allow removal of excisable material without payment of duty for the manufacture of export goods, as may be specified, to be exported in execution of one or more export orders; or for replenishment of duty paid materials used in the manufacture of such export goods already exported for the execution of such orders, or both;

subject to such safeguards, conditions and limitations as regards the class or description of goods, class or description of materials used for manufacture thereof, destination, mode of transport and other allied matters as may be specified in the notification which the exporter undertakes to abide by entering into a bond in the proper form with such surety or sufficient security, and under such conditions as the Commissioner approves.

- (2) The Central Government may, from time to time, by notification in the Official Gazette, permit export of specified excisable goods in bond, without payment of duty from a factory of manufacture or warehouse, to Nepal or Bhutan, subject to such conditions or limitations as regards the class of goods, destination, mode of transport and other matters as may be specified therein.

Explanation I.- In this rule, the expression "manufacture" includes the process of blending of any goods or making alterations or any other operation thereon.

Explanation II.- In this rule, the term 'materials' shall include raw materials, consumables, components, semi-finished goods, assemblies, sub-assemblies, intermediate goods,

accessories, parts and packaging materials used in the manufacture of export goods but does not include capital goods used in the factory in or in relation to manufacture of export goods."

17. Rule 14 provides for entering into General Bond, for permission to export goods from India under the prescribed conditions and Rule 14A provides for penalty for failure to furnish proof of export within the prescribed period. Sl. No. 1 (d) of Notification No. 94/96-Cus. covers these instances where goods are manufactured in India and exported without payment of duty in accordance with the procedure set out in Rule 13, as indicated above. Sl. No. 1(d) has, therefore, no relevance to exports made under Export Import Policy Schemes.

18. Since the two consignments vide Bills of Entry Nos. 930 dated 12th August, 1998 and 2440 dated 29th May, 1998 under DEPB Scheme do not get the benefit of Notification No.94/96-Cus., the order of the Tribunal deserves to be set aside and the order of

the Commissioner of Customs restored. Ordered accordingly. Appeal is allowed with costs.

.....J.
(ASHOK BHAN)

New Delhi;
July 16, 2008

.....J.
(DALVEER BHANDARI)