
(2010) 01 GUJ CK 0003
In the Gujarat High Court
Case No : Tax Appeal No"s. 722-723 of 2006

Deputy Commr. of Cus.

APPELLANT

Vs

Baccarose Perfume and Beauty Products Ltd.

RESPONDENT

Date of Decision : 21-01-2010

Acts Referred:

Central Excise Rules, 1944 — Rule 173A(2), 173Q, 209
Central Excises and Salt Act, 1944 — Section 11A, 11A(1), 11AA, 11AC, 2
Customs Act, 1962 — Section 130

Citation : (2010) 257 ELT 177

Hon'ble Judges : Rajesh H. Shukla, J;K.A. Puj, J

Bench : Division Bench

Advocate : Ameer Yagnik, for the Appellant; Paresh M. Dave, for the Respondent

Final Decision : Dismissed

Judgement

K.A. Puj, J.—The Deputy Commissioner of Customs, Kandla Special Economic Zone, Gandhidham-Kachchh has filed this tax Appeal u/s 130 of the Customs Act, 1962 proposing to formulate certain questions of law for determination and consideration of this Court. The questions reframed at the time of hearing of this appeal are as under:

Tax Appeal No. 722 of 2006

A. Whether or not the activity of cellophaning products of foreign origin manufactured, marked and labeled as per requirements of their country would amount to "manufacture" within the meaning of Section 2(f) of the Central Excise Act, 1944 read with Notification No. 133/94-Customs, dated 22-6-1994 and would be entitled to exemption under Notification No. 02/95-Central Excise dated 4-1-1995?

B. Whether or not the Commissioner of Customs is entitled to demand duty short paid while denying the benefit of Notification No. 02/95 dated 4-1-1995 on a finding that the activity undertaken by importer for clearance of goods in DTA

does not amount to "manufacture" where it is clarified in Notification No. C-32/40/97-TRV dated 6-5-1997 that the exemption under Notification No. 01/95 does not require manufacture of only "excisable goods"?

C. Whether in the facts and circumstances of the case, the Tribunal is justified in holding that levy of penalty under Rule 173Q of the Central Excise Rules, 1944 read with Section 11AC of the Central Excise Act, 1944 could not be upheld on the ground that the demand of Central Excise Duty u/s 11AC of the Act could not be upheld as there is no manufacture and despite having held in para 2.1(d) that the processes undertaken by the respondent are to be treated as processes amounting to "manufacture" in terms of Notification No. 133/1994?

D. Whether the Tribunal in the facts and circumstances of the present case, is justified in holding that the imposition of joint 100% mandatory penalty under Rule 173Q of the Central Excise Rules, 1944 read with Section 11AC of the Central Excise Act, 1944 cannot be upheld?

E. Whether the Tribunal, in the facts and circumstances of the present case, is justified in holding that the total duty demand as worked out in the invoice values of sales to Domestic Tariff Area (DTA) cannot be upheld despite considering the demand as under the Customs Act and whether the Tribunal is justified in holding that the respondent is not liable to pay Customs and Central Excise Duty despite they being not eligible for the benefit of Notification No. 133/1994-Cus., dated 22-6-1994 as amended?

Tax Appeal No. 723 of 2006

(A) Whether in the facts and circumstances of the case, the Tribunal is justified in holding that levy of penalty under Rule 173Q of the Central Excise Rules, 1944 read with Section 11AC of the Central Excise Act, 1944 could not be upheld on the ground that the demand of Central Excise Duty u/s 11A of the Act could not be upheld as there is no manufacture and despite having held in para 2.1(d) that the processes undertaken by the respondent are to be treated as processes amounting to "manufactured" in terms of Notification No. 133/1994?

(B) Whether in the facts and circumstances of the case the Tribunal is justified in holding that Section 11AC of the Central Excise Act, 1944 has not been invoked?

(C) Whether the Tribunal in the facts and circumstances of the present case, is justified in holding that the imposition of joined 100% mandatory penalty under Rule 173Q of the Central Excise Rules, 1944 read with Section 11AC of the Central Excise Act, 1944 cannot be upheld?

(D) Whether the Tribunal, in the facts and circumstances of the present case, is justified in holding that the total duty demand as worked out on the invoice values of sales to Domestic Tariff Area (DTA) cannot be upheld despite considering the demand as under Customs Act and whether the Tribunal is justified in holding that the respondent is not liable to pay Customs and Central Excise Duty despite they being not eligible for the benefit of Notification No.

133/1994-Cus., dated 22-6-1994 as amended ?

(E) Whether the Tribunal, in the facts and circumstances of the present case, is justified in granting benefit of Notification No. 02/95-C.E. to the respondent?

2. Heard Ms. Amee Yajnik, learned Standing Counsel appearing for the Revenue and Mr. Paresh M. Dave, learned advocate appearing on Caveat for the respondent-assessee.

3. For the sake of convenience facts are taken from Tax Appeal No. 722 of 2006.

The brief facts giving rise to the present tax appeal are that the respondent-assessee is an Unit established in Kandla Special Economic Zone earlier known as Kandla Free Trade Zone, in terms of permission granted by the Ministry of Commerce under its letter dated 18-12-1984 for manufacturing, cosmetics and toilet preparations like perfumes, EAU-D-Toilette, after shave, talc powder, deodorants. As per Condition No. (iii) of the said permission letter, Unit was permitted to import cosmetics and performance in bulk and not in finished form in consumer packs. Subsequently, vide letter dated 12-10-1999 of the Deputy Commissioner, Kandla Free Trade Zone (hereinafter referred to as "KFTZ"), the respondent was granted permission to import cosmetics and toiletries in bulk and export the same after reassembling, testing and repacking in assorted sizes in different cartons subject to the unit obtaining a separate no objection certificate from KFTZ Customs in all such cases.

4. The respondent was regularly importing the cosmetics and cosmetics raw materials, for manufacturing the cosmetics and exporting them. A significant quantity of cosmetics is being cleared by them in DTA availing the benefit of Notification No. 2/95-CX., dated 4-1-1995 under which the respondent was paying the duty equal to 50% of the customs duty leviable. The respondent had filed few invoices for DTA clearance for various types of cosmetics and toiletries declaring as manufactured by it and sought the benefit of the Notification No. 2/95-C.E. The respective samples were called from the consignments covered under the Invoice Nos. 489 & 490, both dated 5-1-2000 and again from the consignments covered under Invoice No. 590 & 591 dated 18-12-2000.

5. The respondent had also imported a number of consignments of cosmetics in fully assembled and filled bottles of the measured doses in retail/consumer pack along with packing duly printed, labeled, marking giving the full description of the goods like manufacturer's name, brand name of cosmetics and other complete details of the products. The respective samples from these consignments were also called. Since these consignments did not appear to be covered for the benefit of Notification No. 133/94-Cus. and imported in violation of certain other provisions of the laws for the time being in force, a show-cause notice was issued on 7-3-2000, inter alia, proposing that the goods are not eligible for duty benefit under Notification No. 2/95-C.E., dated 4-1-1995 in view of the provisions of Para 3 of the Notification No. 133/94-Cus., dated 2-6-1994 and the goods are leviable to duty at the full rate of 40% + CUD 50% under the

Medicinal and Toilet Preparations (Excise Duty) Act, 1955 and recovery of duty amounting to Rs. 60,41,095/- u/s 11A of the Central Excise Act, 1944 and the recovery of interest u/s 11AA of the Central Excise Act, 1944 and confiscation of goods under Rule 173Q(b) read with Rule 209 of the Central Excise Rules, 1944 and imposition of penalty u/s 11AC of Central Excise Act, 1944.

6. The said show-cause notice was adjudicated by the Commissioner of Customs, Kandla who vide his order in original dated 4-12-2000 denied the benefit of Notification No. 2/95-C.E., dated 4-1-1995 on the ground that the processes carried out by the respondent did not amount to manufacture and confirmed the duty and imposed penalty on the respondent.

7. Being aggrieved by the order of the Commissioner, the respondent preferred Appeal before CESTAT, Mumbai which came to be decided on 30-5-2005 [2006 (194) E.L.T. 310 (Tri.-Mumbai)] in favour of the respondent assessee by setting aside the order of the Commissioner.

8. It is this order of the Tribunal which is under challenge in the present tax appeal.

9. Ms. Yajnik, learned Standing Counsel appearing for the Revenue has submitted that the process employed by the respondent is not amounting to manufacture u/s 2(f) of the Central Excise Act, 1944. The goods in question sold as such could not have been construed as repacking from bulk packing to retail packing. The respondent has not undertaken any treatment to make the products marketable nor the physical aspect of the product was changed or modified by the use of processes employed by the respondent. The same did not amount to manufacture u/s 2(f) of the Central Excise Act, 1944. The exemption to the imported goods is subject to the conditions that the goods are used in the manufacture or the processing of goods by the respondent in the Free Trade Zone. The notification is a conditional one and the benefit would be available only and only if the conditions of the notification are satisfied by the respondent. She relied on the decision of the Apex Court in the case of Novopan India Ltd., Hyderabad Vs. Collector of Central Excise and Customs, Hyderabad, wherein it is held that exemption being in the nature of exception is to be construed strictly at the stage of determination whether assessee falls within its terms or not and in case of doubt or ambiguity, benefit of it must go to the State. She also relied on the decision of the Apex Court in the case of Liberty Oil Mills (P) Ltd., Bombay Vs. Collector of Central Excise, Bombay, and Rajasthan Spinning and Weaving Mills Limited, Bhilwara, Rajasthan Vs. Collector of Central Excise, Jaipur, Rajasthan, and also Commissioner of Central Excise, Hyderabad Vs. Sunder Steels Ltd.,

10. She has further submitted that simply putting a sticker does not amount to labeling or re-labelling and it cannot be treated as manufacture in terms of Note 3 to Chapter 18 of Central Excise Tariff Act, 1985. Affixing of sticker containing information regarding importer's name and address, MRP, date of packing,

monogram, net weight and expiry date on items imported, in compliance with the provisions of Packing Commodity Rules, 1997 does not amount to manufacture. She has, therefore, submitted that while none of the conditions of the notifications are met by the respondent, the Commissioner has rightly concluded that the process is not covered by Section 2(f) of Central Excise Act, 1944. If the process undertaken by the respondent is not considered to be a manufacturing activity, as a natural corollary, the respondent is not entitled to the exemption of the notification.

11. Mr. Paresh M. Dave, learned advocate appearing for the respondent-assessee, on the other hand, has strongly supported the order passed by the Tribunal. He has submitted that the Tribunal has enumerated different processes undertaken by the respondent under three different heads A, B & C and arrived at the conclusion that various processes undertaken by the respondent are covered by the concept of manufacture. All manufacturing activity cannot be judged with reference to Section 2(f) of the Act. As a matter of fact, the Central Board of Indirect taxes vide its order/circular has directed the field staff that broader view is called for in respect of the interpretation of the provisions of Notification No. 1/95-C.E. There is no such provision that if there is no manufacture under the Central Excise Act, duty of customs is a foregone conclusion. The demand under the Central Excise Act cannot be confirmed as the goods were removed to Domestic Tariff Area are manufactured and contained Ethyl Alcohol and are preparations thereof. In this view of the matter, the levy itself is not called for and proceedings u/s 11A of the Central Excise Act could not have been initiated. If there is no levy of duty under the excise laws, there is no question of penalty or interest. He has, therefore, submitted that the Tribunal has rightly reversed the order passed by the Commissioner and decided the appeal in favour of the respondent-assessee. The findings recorded by the Tribunal are based on the notifications and the decisions of the Apex Court and hence, no substantial questions of law can be said to have arisen out of the order of the Tribunal and hence, appeal deserves to be dismissed.

12. We have considered the rival submissions made by the learned Counsels appearing for the parties and we have also gone through the orders passed by the Commissioner as well as CESTAT. In light of the relevant Statutes, Notifications and decisions on the subject matter of this appeal, we are in complete agreement with the view taken by the Tribunal and considering the various processes undertaken by the respondent, it is difficult to uphold the view of the revenue that the respondent was not indulged in any manufacturing activity. As a matter of fact, a detailed list of processes enumerated under 3 different heads indisputably prove that various processing activities were undertaken by the respondent. We are also in agreement with the view taken by the Tribunal that for the purpose of claiming exemption, it is not necessary that the activities undertaken by the respondent would strictly fall within the ambit of Section 2(f) of the Act.

13. Apart from the merits of the matter, the Tribunal has also considered that once the Commissioner having held that there was no manufacture taking place under the Act or the Rules or Chapter Note/Section note of Central Excise Tariff Act, 1985, he could not have confirmed and demanded the duty of Rs. 60,41,095/- made in the show-cause notice under the provisions of Section 11A of the Act. On the same analogy, penalty under Rule 173Q read with Section 11AC of the Act also cannot be leviable as, if no manufacture under Central Excise Act, 1944 and the Rules etc. took place, the question of violation of Rule 173Q cannot be upheld. The Tribunal further observed that the Proviso to Section 11AC is directly co-related to the duty demands determined in such cases under Central Excise Act, 1944 where the ingredients of Proviso to Section 11A(1) are involved and established. The Tribunal further observed that there is no demand raised in the show-cause notice under the Customs Act, 1962. The order of the Commissioner demanding the duty and interest under the provisions of Customs Act, 1962 without specifying the same as to under which provision such demand is raised would certainly travel beyond the show-cause notice. It is, therefore, bad in law. The Tribunal has also considered the fact that the respondent is in a Free Trade Zone and hence, at the material time, it was covered by the provisions of Chapter VA of the Central Excise Rules. Units covered by Chapter VA of the Central Excise Rules were not covered by the Rules of Chapter VII-A of the 1944 Rules vide Rule 173A(2). Rule 173Q is under Chapter VII-A of the 1944 Rules. Hence, penalty under Rule 173Q on the respondent is also invalid.

14. Considering the reasoning adopted by the Tribunal in its order while reversing the order of the Commissioner and allowing the appeal, by formulating substantial questions of law for their future consideration and determination. This Appeal is, therefore, dismissed.

15. Since issues involved in Tax Appeal No. 723 of 2006 being identical and learned Counsels appearing for the parties made same submissions for this Tax Appeal too, for the reasons recorded hereinabove, this Tax Appeal also stands dismissed.