SUPREME COURT OF INDIA

Commr.of Central Excise, Visakhapatnam

Vs.

NCC Blue Water Products Ltd.

C.A.Nos.4608-4609 of 2005

(D.K. Jain and H.L. Dattu JJ.)

24.09.2010

JUDGEMENT

D.K.Jain, J.:

1. Challenge in this batch of appeals filed by the revenue under Section 35(L)(b) of the Central Excise Act, 1944 (for short "the Act") is to the orders passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zone (for short "the Tribunal"), inter alia, holding that the duty of Central Excise on shrimps and shrimp seeds produced and removed by the respondent (hereinafter referred to as "the assessee"), a 100% Export Oriented Unit (for short "EOU"), in the Domestic Tariff Area (for short "DTA") without the approval of the Development Commissioner, would be payable under Section 3(1) of the Act and not under the proviso appended thereto.

2. Since the question of law arising for our consideration in all the appeals is the same, they are disposed of by this common judgment. In order to comprehend the controversy in these appeals, a brief reference to the facts in Civil Appeal Nos.4608-4609 of 2005, which was treated as the lead case, would suffice:

> "The assessee company is engaged in the production of shrimps and tiger prawns, falling under Chapter Sub Heading No.0301.00 of the Schedule to the Central Excise Tariff Act, 1985 (for short "the Tariff Act").
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> They imported some capital goods, viz. sand blowers and air filters, duty free under Customs Notification Nos. 188/93 dated 27th December 1993 and 196/94 dated 8th December 1994 for use in their integrated Aquaculture project. The imports were subject to the condition that the said goods would be used in the production of aquaculture products and 100% or such other percentage of the said products, as may be fixed by the Board of Approvals for 100% EOU, shall be exported out of India for a period of ten years or such extended period as may be specified by the said Board."

3. As per the Exim Policy (1st April 1992 to 31st March 1997), an EOU Aqua culture unit was permitted to sell upto 50% of its production in value terms in DTA, in accordance with the DTA sales guidelines notified in that behalf and subject to minimum value addition.

4. The guidelines for sale of goods in the DTA by an EOU were prescribed under Appendix XXXIII of the Hand Book of procedures for the aforementioned period. As per the said guidelines, sale of goods in the DTA was subject to payment of applicable duties as notified from time to time by the department of revenue; the units could opt for DTA sales on a quarterly, half yearly or annual basis with an intimation to the Development Commissioner of the EPZ concerned; application for DTA sales was to be accompanied by a statement disclosing information regarding ex-factory value of goods produced and of goods actually exported, and the Development Commissioner was to determine the extent of DTA sales admissible and issue goods removal authorisation in terms of value and quantity for sale in DTA.

5. It appears that during the period 1994-95 to 1997-98, the assessee produced and sold 11,15,29,540 number of shrimp seeds and 48,365 Kgs. of shrimps in DTA without obtaining the permission of the Development Commissioner; without issuing proper invoices as mandated under Rule 100E of Central Excise Rules, 1944 (for short "the Rules") and without payment of Excise Duty. Besides, the assessee also undertook certain job work whereby it processed 864.238 MT of shrimps and 905.580 MT of fish and cleared the said goods in DTA. According to the assessee, these goods were ultimately exported by the DTA units.

6. On 2nd September 1998, a notice was issued to the assessee to show cause as to why duty of excise equal to aggregate of the duties of customs, amounting to Rs. 7,80,58,074/-, should not be levied in terms of Section 3 of the Act read with Rule 9(2) read with proviso to sub-section (1) of Section 11A of the Act, and interest at 20% from first day of the month till the date of payment of duty should not be imposed under Section 11AB of the Act.

> "An additional penalty of Rs. 7,80,58,074/- for non-payment of duty for the reason of wilful suppression of facts and contraventions of the provisions of the Act, together with additional penalty under Rule 173Q(1) for contravention of Rule 9(1), 100D, 100E and 100F of the Rules for clearing goods without issuance of a proper invoice was also proposed to be imposed on the noticee."

7. The assessee contested the notice on diverse grounds. On adjudication, the Commissioner of Central Excise & Customs, Visakhapatnam, vide Order-in- Original No. 9/99 dated 15th April 1999, demanded a duty of Rs.1,83,46,493/- on the shrimp seeds, shrimps and fish, cleared by the assessee, under proviso to Section 11A of the Act. Interest at 20% was demanded on Rs.1,13,05,410/- as being the duty evaded on shrimp seeds, shrimps and fish cleared after 28th September 1996 under Section 11AB of the Act. Penalty of Rs. 1,13,05,410/- was imposed under Section 11AC of the Act with respect to duty evaded since 25th September 1996, and of Rs. 8,00,000/- under Rule 173Q(1) of the Rules.

8. The revenue as well as the assessee questioned the correctness of the adjudication order by preferring appeals before the Tribunal.

9. The Tribunal, vide order dated 27th December 2004, allowed the assessee's appeal and dismissed the appeal filed by the revenue. Reversing the order of the Commissioner, the Tribunal observed thus:

> "The commissioner, after classifying the shrimp seeds under chapter 3, has worked out the amount equal to the aggregate of the Customs duty leviable as per proviso to section 3(1) of the CE Act, 1944 and demanded the same. It is on record that for clearing the shrimp seeds, no permission was taken from the Development Commissioner. When the goods are cleared with the permission of the Development Commissioner, then only proviso to section 3(1) of the CE Act, would be applicable. In Del.), it has been held that when there is a removal to DTA without permission of the competent authority, duty is leviable under main section 3 of the CE Act, 1944 and not its proviso.
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> While arriving at the above decision, the Hon'ble Tribunal (153) ELT 711 (Tribunal) which has been affirmed by the Apex Court vide its order reported in 2003 (156) ELT A382. In view of the above decision, even if the Commissioner's finding on the classification of Shrimp seeds is upheld, the duty would be Nil. In that case, the classification issue becomes academic.
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> However, after going through the HSN Explanatory notes, we are convinced that Chapter 3 would not cover items unfit for human consumption. In the present case, the Shrimp seeds are undoubtedly not fit for human consumption in that stage.
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> Therefore, it would not be excisable at all. In view of this finding, the demand of duty on the Shrimp seeds cleared would be not sustainable."
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> In relation to the goods cleared on job work basis, the Tribunal held that since goods were cleared to other exporters, there was no duty liability and even otherwise, since the permission of the *Development Commissioner was of C. Ex., Indore*[1] would be applicable. It also held that there being no convincing evidence showing suppression of facts, the demand itself was time barred."

10. Being dissatisfied with the order of the Tribunal, the revenue is before us in these appeals.

11. Mr. R.P. Bhatt, learned senior counsel appearing for the Revenue contended that since as per Note 1 of Section 1 of the Customs Tariff Act, 1975, any reference in that Section to a particular genus or species of an animal, except where the context otherwise requires, includes a reference to the young of that genus or species and, therefore, both live shrimps and shrimp seeds are classifiable under heading 0306.23 of Chapter 3 of the Customs Tariff

Act, 1975. Learned counsel also submitted that the Tribunal committed an error in relying on the decision of this Court in SIV Industries that case, in the present case, the assessee had sought permission of the Development Commissioner, who in turn had advised them to approach the SIA for permission to clear shrimps and shrimp seeds which, in fact, was granted and, therefore, they were required to pay duty under proviso to Section 3(1) of the Act. It was argued that under the Exim Policy, an EOU is obliged to make exports of the entire production itself and not through any other entity.

12. Per contra, Mr. Joseph Vellapally, learned senior counsel appearing for the assessee, contended that the DTA sales made by an EOU without approval of the Development Commissioner are to be assessed to Excise Duty under Section 3(1) of the Act and not under proviso to the said Section.

> "In support of the submission, learned counsel placed reliance on the decision of this Court in SIV Industries (supra) and orders of the *Tribunal in Excise, Ahmedabad*[4]. Learned counsel also submitted that since shrimp seeds are microscopic post larva of 20 days, which do not contain meat and as such are not fit for human consumption, on a plain reading of Chapter Note 1(b) of Chapter 3 of the Tariff Act, these cannot fall within tariff entry 0301.00. It was argued that for the purpose of the Exim Policy sale of shrimps by supporting manufacturers carrying out job work and clearance of the same directly for exports on behalf of other exporters is to be treated as export sale and therefore, clearance of shrimps by the assessee on job work basis could not be treated as DTA sales for the purpose of the Act. It was asserted that since there was regular correspondence between the department and the assessee in relation to these sales and invoices and other documents were also submitted, there was no suppression of DTA sales by the assessee with the intent to evade payment of duty, particularly when the entire industry as also the jurisdictional excise authority were under the impression that no duty was payable on sale of shrimps and shrimp seeds. In support of the proposition that a mere violation of rule is not sufficient to invoke extended period of limitation, learned counsel commended us to the *Chemphar Drugs & Liniments, Hyderabad*[6] *and Gopal Zarda Udyog.*[7]

13. The core question for our consideration, therefore, is whether the sales of shrimps and shrimp seeds by the assessee in DTA, without requisite permission from the Development Commissioner, are to be assessed to Excise Duty under Section 3(1) of the Act or under proviso to the said Section?

14. Before evaluating the rival contentions on the point, we may refer to the relevant part of Section 3 of the Act, which reads as follows:

> "3. Duties specified in the Schedule to the Central Excise Tariff Act, 1985 to be levied.--(1) There shall be levied and collected in such manner as may be prescribed duties of excise on all excisable goods other than salt which are produced or manufactured in India and a duty on salt manufactured in, or imported by land into,

any part of India as, and at the rates, set forth in the Schedule to the Central Excise Tariff Act, 1985 :

Provided that the duties of excise which shall be levied and collected on any excisable goods which are produced or manufactured,-- (i) in a free trade zone and brought to any other place in India; or (ii) by a hundred per cent export-oriented undertaking and allowed to be sold in India, shall be an amount equal to the aggregate of the duties of customs which would be leviable under Section 12 of the Customs Act, 1962 (52 of 1962) on like goods produced or manufactured outside India if imported into India, and where the said duties of customs are chargeable by reference to their value, the value of such excisable goods shall, notwithstanding anything contained in any other provision of this Act, be determined in accordance with the provisions of Customs Act, 1962 (52 of 1962) and the Customs Tariff Act, 1975 (51 of 1975).”

15. It is manifest that all excisable goods produced or manufactured in India are exigible to duty of Excise under Section 3 of the Act, the charging Section, at the rates set forth in the Schedule to the Tariff Act. However, proviso to the said Section provides that the duties of Excise on any excisable goods, which are produced or manufactured by a 100% EOU and allowed to be sold in India shall be an amount equal to the aggregate of the duties of customs which would be leviable under Section 12 of the Customs Act, 1962. As aforestated, the controversy at hand is whether in the absence of an order by the competent authority, allowing the assessee to sell the shrimp seeds and shrimps in India, Excise Duty on such sales could be levied and collected in terms of the proviso. To put it differently, the issue relates to the significance of the expression "allowed to be sold in India" as appearing in clause (ii) to the proviso to sub-section (1) of Section 3 of the Act.

16. A similar issue fell for consideration of this Court in SIV Industries (supra). In that case, the assessee was a 100% EOU. Later on they sought permission to withdraw from 100% EOU Scheme, for which the Ministry accorded the necessary permission. However, some of the goods lying in the unit were removed prior to the debonding. A dispute arose regarding the rate of duty payable on such sales. The plea taken by the assessee was that they were liable to pay duty under Section 3(1) of the Act together with customs duty on the imported raw material used in the manufacture of said finished goods, lying in the stock whereas the stand of the revenue was that Excise Duty under the proviso to Section 3(1) of the Act was payable on the finished goods with no customs duty being leviable on the raw materials used in the manufacture of finished goods. Thus, the bone of contention in that case was also with regard to the interpretation of the expression "allowed to be sold in India" appearing in the said proviso. Interpreting the said expression, this Court held that the expression "allowed to be sold in India" used in the proviso to Section 3(1) of the Act is applicable only to sales made in DTA up to 25% of the production by 100% EOU, which are allowed to be sold into India as per the provisions of the Exim Policy. No permission was required to sell the goods manufactured by 100% EOU lying with it at the time the approval is accorded to debond. The Court opined that the goods having been sold without permission of the Central

Government to debond the unit, the duty on the goods sold by the assessee was leviable under main Section 3(1) of the Act.

17. It is pertinent to note that after the decision in SIV Industries' case (supra), a Circular was issued by the Central Board of Excise & Customs, New Delhi clarifying that prior to 11th May, 2001, the clearances from EOUs, if not allowed to be sold in India, shall continue to be chargeable to duty under main Section 3(1) of the Act. For the sake of ready reference Circular No. 618/9/2002-CX dated 13th February, 2002 is extracted below:

> "Circular :618/9/2002-CX dated 13-Feb-2002 EOU- Removal of goods by 100% EOU to DTA - Non- levy of duty under Section 3(1) of Central Excise Act, 1944 - Clarifications Circular No. 618/9/2002-CX., dated 13-2-2002 F. No. 268/69/2001-CX.8 Government of India Ministry of Finance (Department of Revenue) Central Board of Excise & Customs, New Delhi Subject : Removal of goods by 100% EOUs to DTA - Non-levy of duty under Section 3(1) of Central Excise Act, 1944.
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> I am directed to invite reference to Supreme Court's judgment in case of *SIV Industries v. CCE*[8] vide which the Apex Court had held that "proviso to Section 3(1) regarding the duty chargeable on goods cleared by EOUs shall be applicable only to sales made in DTA upto 25% of production which are allowed to be sold into India as per provisions of EXIM Policy". In other words, Hon'ble Court decided that if the goods are "not allowed" to be sold in India, the proviso to Section 3(1) of Central Excise Act, 1944 shall not be applicable. The expression `allowed to be sold' has since been replaced with `brought to any other place' w.e.f. 11-5-2001 vide Section 120 of Finance Act, 2001 [14 of 2001].
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> 2. It has come to the notice of the Board that field formations are interpreting the judgment of Apex Court to the effect that if the goods cleared by EOUs are not allowed to be sold into India, the Section 3(1) of Central Excise Act, 1944 is not applicable and duty can be demanded under the provisions of Customs Act, 1962 only. Board has taken a serious view of this mis- interpretation. The provisions of Central Excise Act, 1944 shall apply to all goods manufactured or produced in India for which Section 3 is the charging section.
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> EOUs are also situated in India and the chargeability under Central Excise Act is never in doubt. Therefore, it is clarified that prior to 11-5-2001, the clearances from EOUs if not allowed to be sold in India, shall continue to be chargeable to duty under main Section 3(1) of Central Excise Act, 1944. Appropriate action may be taken immediately to safeguard revenue and all pending decisions may be settled accordingly."
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> (Emphasis added by us)

18. As aforesaid, according to the Exim Policy 1992-1997 read with Appendix XXXIII of the Handbook of Procedures, an EOU may sell 50% of its production in value terms into a DTA only on issuance of a removal authorization by the Development Commissioner.

19. In the instant case, admittedly at the time of sales of shrimps and shrimp seeds by the assessee in DTA, the Development Commissioner had not issued the requisite removal authorization. Therefore, in view of the dictum of this Court in SIV Industries (supra), with which we are in respectful agreement, and the afore-extracted Circular issued by the Board following the said decision, Excise Duty on such sales is chargeable under main Section 3(1) of the Act.

20. Having come to the aforenoted conclusion, the controversy with regard to classification of the shrimp seeds is more in the nature of an academic exercise in as much as even if the finding of the Commissioner on classification of shrimp seeds is affirmed, still the duty payable on these goods would be nil. For the sake of ready reference, the relevant entry in Chapter 3 of the Tariff Act is extracted below:

> "Heading Sub-heading Description of goods Rate of No. No. duty (1) (2) (3) (4) 03.01 0301.00 Fish and crustaceans, Nil" molluscs and other aquatic invertebrates"

21. Thus, it is evident that even if the stand of the revenue is accepted and shrimp seeds are classified under sub-heading 0301.00 of the Tariff Act, the rate of Excise Duty chargeable would be nil. Similarly, if the Excise Duty payable is nil, the other question regarding the extended period of limitation on the alleged ground of suppression of sales also pales into insignificance.

22. For the foregoing reasons, the impugned orders passed by the Tribunal cannot be flawed and deserve to be affirmed. Resultantly, these appeals, being bereft of any merit, are dismissed accordingly. No order as to costs.

[1]*2004 (163) E.L.T. 212 (Tri.-Del.)*
[2]*2000 (117) ELT 281 (SC)*
[3]*2003 (153) E.L.T. 711 (Tri.-Del.)*
[4]*2005 (191) E.L.T. 1174 (Tri.-Mumbai)*
[5]*(1989) 4 SCC 275*
[6]*(1989) 2 SCC 127*
[7]*(2005) 8 SCC 157*
[8]*2000 (117) E.L.T. 281 (S.C.)*