CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH

REGIONAL BENCH - COURT NO. I

Customs Appeal No. 639 of 2009

[Arising out of Order-in-Original No. 05-LDH-2009 dated 19.06.2009 passed by the Commissioner of Central Excise & Customs, Ludhiana]

Commissioner of Customs, Ludhiana **……Appellant**
ICD, GRFL, G T Road, Sahnewal, Ludhiana

VERSUS

Punjab Exports **……Respondent**
1202/2010, Sardar Nagar, Rahon Road, Ludhiana

APPEARANCE:

Present for the Appellant: Ms. Swati Chopra, Sh. Manoj Nayyar,
Authorised Representatives

Present for the Respondent: None

CORAM: HON'BLE MR. S. S. GARG, MEMBER (JUDICIAL)
HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO. 60106 /2023

DATE OF HEARING: 20.02.2023
DATE OF DECISION: 21.04.2023

PER P. ANJANI KUMAR

Brief facts of the case are that M/s Punjab Exports were licensed to operate as a 100% EOU for the manufacture of Fabrics and Garments; they were importing raw material i.e. Polyester Yarn, Polyester Fabrics, Woolen Yarn, Synthetic Waste, Acrylic Fibre and Acrylic Tow and availing exemption under Notification No. 53/97-Cus dated 03.06.1997; they were also procuring the goods from

indigenous sources. An investigation was initiated against M/s Punjab Exports and on conclusion, a show cause notice, dated 06.06.2003, was issued alleging diversion of imported/indigenous goods procured duty free. The show cause notice proposed confirmation of duty of Rs. 5,62,20,888/- along with interest, penalties on various persons and a redemption fine on the goods of value of Rs. 8,16,67,820/-, allegedly liable for confiscation, was imposed. The show cause notice was adjudicated by Order No. 77/CE/2004 dated 28.10.2004. On an appeal filed by M/s Punjab Exports, this Tribunal vide Final Order dated 24.08.2006 remanded the matter back for cross examination and to examine the admissibility of benefit of Notification No. 02/95-CE dated 04.01.1995. The Order-in-Original No. 05/LDH/09 dated 19.06.2009, in the remand proceedings, was passed confirming the duty of Rs. 2,88,30,643/- along with equal penalty on M/s Punjab Exports; imposed redemption fine of Rs. 25 lakhs and penalty of Rs. 60 lakhs on Shri Vinod Kumar Garg. The Revenue is in appeal against the Order-in-Original dated 19.06.2009 for the reasons taken herein under:-

(i) The adjudicating authority erred in deciding the ratio of imported/indigenous goods for calculating the duty liability without conducting verification from the jurisdictional officers; held that the suppliers of Polyester Yarn such as M/s Kansal Texo Tubes (P) Ltd were domestic manufacturers and not an EOU; thus learned Commissioner has erred in calculating the ratio of imported/indigenous raw material at 39.31:60.19.

(ii) DTA entitlement cannot be decide in terms of the Notification No. 02/95-CE dated 04.01.1995 but has to be decided in view of the provisions of the FT policy and the permission, if any, granted by the Development Commissioner on fulfillment of NFEE by the 100% EOU.

(iii) Learned Commissioner has wrongly arrived at the duty recoverable on Shri Vinod Kumar Garg of Rs. 52,730/- as against Rs. 1,67,146/-

2. Shri Manoj Nayyar, learned Authorised Representative for the Revenue, submits that the mistake committed by the adjudicating authority is evident from the fact that the show cause notice clearly mentions that M/s Kansal Texo Tubes (P) Ltd is a 100% EOU; learned Commissioner could have got the fact verified instead, he blindly accepted the contention of the respondent on the basis of copy of such invoices; it is evident from the proceedings before Ahmedabad Bench of this Tribunal in the case of ***M/s Kansal Texo Tubes (P) Ltd vs. Commissioner of CE & Customs, Surat*** reported in ***2015-TIOL-2962-CESTAT-AHMEDABAD*** that M/s Kansal Texo Tubes (P) Ltd is a 100% EOU; thus the entire edifice built upon wrong calculation on an approximate ratio based on wrong facts, falls flat. He further submits that the Hon'ble Apex Court in the case of ***Commissioner of Customs (Import), Mumbai vs. Dilip Kumar & Company*** reported in ***2018 (361) ELT 577 (SC)*** held that burden to prove the entitlement to an exemption notification is squarely on the assessee; if there is any ambiguity in exemption notification, the

benefit of such ambiguity cannot be claimed by the assessee. In support of his contention, he relies upon the following case-laws:-

(a) Commissioner of CE, New Delhi vs. Hari Chand Shri Gopal – 2010 (260) ELT (SC)

(b) Rajasthan Spg & Weaving Mills Ltd vs. Collector of C.E., Jaipur – 1995 (77) ELT 474 (SC)

3. None appeared on behalf of the respondents inspite of regular notices and opportunities. Hence, we proceed to decide the case.

4. We have perused the records of the case and considered the submissions made by the learned Authorised Representative.

5.1 We find that the learned adjudicating authority has clearly held that M/s Kansal Texo Tubes (P) Ltd was not a 100% EOU on the basis of the invoices issued under Rule 52(A) and 173(G); we find that learned adjudicating authority has totally ignored the assertion in the show cause notice that M/s Kansal Texo Tubes (P) Ltd was a 100% EOU; learned adjudicating authority has not carried out or got conducted any enquiry to come up such a conclusion. We find that the show cause notice as well as the submissions of the learned Authorised Representative, on the basis of the proceedings pertaining to M/s Kansal Texo Tubes (P) Ltd before Ahmedabad Bench of this Tribunal abundantly establish the fact that M/s Kansal Texo Tubes (P) Ltd was a 100% EOU; we find that the entire calculation by the adjudicating authority on the duty liability were arrived on the basis of the presumption that M/s Kansal Texo Tubes (P) Ltd was not a

100% EOU; as a result of which he concluded the ratio of imported/indigenous raw material to be 39.31:60.19. When the very basis of the calculation is wrong, we find that there is no way, such figures and calculation can be upheld. On this point alone, we find that the calculations arrived at by the adjudicating authority are not based on any factual matrix and therefore, are incorrect. To this extent, we are inclined to accept the contention of the Revenue and the submissions of learned Authorised Representative.

5.2 We also find that learned adjudicating authority has not examined the fact whether the respondent have achieved a positive NFEE and whether the realization for deemed export was in convertible currency in EEFC; we also find that the learned Commissioner has not bothered to verify whether the respondent had any permission granted by the competent authority i.e. Development Commissioner to sell the goods manufactured by the EOU in domestic market; we find that in terms of Notification No. 2/95-CE dated 04.01.1995 is only be extended as under –

> *"Provided that the amount of duty payable in accordance with this notification in respect of the said goods shall not be less than the duty of excise leviable on the like goods produced or manufactured outside the hundred per cent export-oriented undertaking or free trade zone or Electronic Hardware Technology Park (EHTP) unit or Software Technology Parks (STP) unit which is specified in the said Schedule, read with any other relevant notification issued under sub-rule (1) of rule 8 of the Central Excise Rules, 1944, or sub-section (1) of section 5A of the said Central Excise Act:*

Provided further that nothing contained in the above proviso shall apply to the goods which are chargeable to nil rate of duty leviable under section 12 of the Customs Act read with any other notification for the time being in force issued under sub-section (1) of section 25 of the said Customs Act:

Provided also that the exemption under this notification shall not be availed until the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise is satisfied that the said goods, including software, rejects, scrap, waste or remnants, –

(a) being cleared for home consumption, other than scrap, waste or remnants are similar to the goods which are exported or expected to be exported from the units during specified period of such clearances in terms of Export and Import Policy,

(b) the total value of such goods being cleared under paragraph 6.8 of the Export and Import Policy, for home consumption from the unit does not exceed 50% of the free on board value of exports made during the year (starting from 1st April of the year and ending with 31st March of next year) by the said unit; and

(c) the balance of the production of the goods which are similar to such goods under clearance for home consumption, is exported out of India or disposed of in terms of paragraph 6.9 of the Export and Import Policy.

Provided also that the clearance of goods for home consumption under paragraphs 6.8 (b) and 6.8 (h) shall be allowed only when the unit has fulfilled the minimum Net Foreign Exchange Earning as a Percentage of Exports (NFEP) prescribed in Appendix-I of the Export and Import Policy:

Provided also that the clearance of goods for home consumption under paragraph 6.8(a) in excess of 5% of Free on Board value

of exports made by the said unit during the year (starting from 1st April of the year and ending with 31st March of the next year) shall be allowed only when the unit has fulfilled the minimum Net Foreign Exchange Earning as a Percentage of Exports (NFEP) prescribed in Appendix-I of the said Policy."

In view of the above provisions, we find that learned adjudicating authority was not correct in extending the benefit of Notification No. 2/95-CE dated 04.01.1995 to the respondents without verifying the relevant facts. We find that nowhere, it was demonstrated that the respondents fulfilled NFEE condition and thus, are eligible to clear goods in DTA at a concessional rate.

5.3 We also find that in respect of shortage of raw material received during the period from 19.08.2001 to 25.03.2002, learned adjudicating authority appears to have accepted the contention of wrong recording of 4000 kgs in the Form IV Register on the basis of submissions of the respondents. However, it is quite clear in para I(2) on page 5 of show cause notice that such adjustment of 4000 kgs has been resorted to by the respondents twice and therefore, the balance was shown as 22650 kgs instead of 26650 kgs; thus we find that on this account also, learned adjudicating authority is incorrect in calculation.

5.4 Coming to the imposition of penalties, we find that learned Commissioner has imposed penalty only on Shri Vinod Kumar Garg, proprietor of M/s Annchal Export, Ludhiana and dropped penalties on other noticees; we find that the reason given by the adjudicating

authority for not imposing penalties on Shri Harbhajan Singh Sandhu, Shri Sushil Kumar Sharma, Shri Ramesh Kumar Jain etc are also applicable to Shri Vinod Kumar Garg. We find that it was incorrect on the part of the adjudicating authority to hold that Shri Vinod Kumar Garg was hand in glove with Shri Harbhajan Singh Sandhu in the evasion of customs duty by indulging in paper transactions only, while letting of Shri Harbhajan Singh Sandhu himself. We find that though there is no appeal filed by Shri Vinod Kumar Garg. We find that looking into the facts and circumstances of the case, imposition of penalty on Shri Vinod Kumar Garg is also not justified. It is reported that Shri Harbhajan Singh Sandhu is no more and therefore, it would not be proper to impose any penalty on Shri Harbhajan Singh Sandhu at this juncture. Regarding penalties not imposed on other noticees, we are in agreement with conclusion of learned adjudicating authority, therefore, while accepting the contention of the department, in so far as duty evasion by M/s Punjab Exports is concerned, we are not inclined to impose any penalties on any other persons. We set aside the penalty imposed on Shri Vinod Kumar Garg also.

6. In view of the discussions and findings as above, the appeal is partly allowed confirming the duty of Rs. 5,62,20,888/- against M/s Punjab Exports along with interest and equal penalty; maintaining the redemption fine of Rs. 25 lakhs imposed on M/s Punjab Exports and by setting aside the penalty on Shri Vinod Kumar Garg. Rest of the

order of dropping penalties by the adjudicating authority are being left untouched.

(Order pronounced in the court on 21.04.2023)

(S. S. GARG)
MEMBER (JUDICIAL)

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

RA_Saifi