IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
SOUTH ZONAL BENCH, CHENNAI

COURT HALL No.III

EXCISE APPEAL No.41570 OF 2013

(Arising out of Order-in-Appeal No.24/2013-SLM-CED dated 22.03.2013 passed by Commissioner of Customs & Central Excise (Appeals) No.1, Foulkes Compound, Anai Medu, Salem- 636 001)

M/s.Annai Chemicals and Associators .... Appellant
No.B-17, SIDCO Industrial Estate,
Mettur Dam – 636 402,
Salem District.

Versus

The Commissioner of GST & Central Excise, ...Respondent
Salem Commissionerate
No.1, Foulkes Compound,
Anai Medu,
Salem 636 001.

APPEARANCE :

Ms. Mane Vera Niveditha, Advocate
For the Appellant

Mr. R. Rajaraman, Assistant Commissioner (A.R)
For the Respondent

CORAM :

Hon'ble Ms. SULEKHA BEEVI, Member (Judicial)
Hon'ble Mr. M. AJIT KUMAR, Member (Technical)

DATE OF HEARING : 20.06.2023
DATE OF DECISION : 22.06.2023

FINAL ORDER No.40463/2023

ORDER : Per Ms. Sulekha Beevi, C.S.

Brief facts are that the appellant is engaged in the manufacture of Magnesium Sulphate. During the verification of records by the department officers, it was found that the appellant had crossed the exemption limit of Rs.1 Crore during 2006-07 to 2007-08. The appellant had not discharged applicable duty even after crossing the threshold limit prescribed under Notification No.8/2003-CE dated 01.03.2003. Show cause notice dated 14.09.2011 was issued proposing to demand the duty along with interest and for imposing penalties. After dur process of law, the original authority confirmed the duty liability with interest and imposed penalty. On appeal, the Commissioner (Appeals) upheld the same. Hence this appeal.

2. On behalf of the appellant, Ld. Counsel Ms. Mane Vera Niveditha appeared and argued the matter. It is explained by the Counsel that the appellant has not crossed the threshold limit during the disputed period. Department has failed to consider the export clearances made by the appellant through the merchant exporter. Value of such export clearances made through merchant exporters against Form-H was included by the department to allege that the appellant has exceeded the threshold limit of the notification. Ld. Counsel adverted to Circular No.648/30/2002 dated 25.07.2002 and submitted that the Board has clarified that when exports are made through merchant exporters against Form-H, the same has to be taken into consideration for the benefit of SSI exemption. It is submitted by the Ld. Counsel that the issue stands covered by the decision of the Tribunal in the case of

Vadapalani Press Vs CCE Chennai - 2007 (217) ELT 248 (Tri.-Chennai) and *Ramani Plastics Pvt. Ltd. Vs CCE Chennai* - 2015 (317) ELT 343 (Tri.-Chennai).

3. Ld. A.R Sri R. Rajaraman appeared for department and supported the findings in the impugned order.

4. Heard both sides.

5. The show cause notice has been issued alleging that the appellant has crossed exemption limit of Rs.1 crore in terms of Notification No.8/2003-CE dated 01.03.2003 during the years 2006-07 and 2007-08. The appellant has contended that they have made export clearances which are not deducted from the aggregate value of clearances for determining the SSI exemption for the disputed periods. In para-5.4, the adjudicating authority has held that appellants have produced Form-H issued to them by the merchant exporter. However, the view taken by the adjudicating authority is that the subject goods have not been directly exported from the SSI unit and hence this cannot be considered as export clearances made by the appellant. The Board vide Circular No.648/39/2002 dated 25.07.2002 has clarified as under :

"Circular No. 648/39/2002-CX. F. No. 209/11A/2002-CX.6

25th July 2002

Subject : Export by SSI Units - Simplified Export Procedure - Clarification – regd.

I am directed to refer to Part III of Chapter 7 of Central Excise Manual issued in September, 2001 relating to Simplified Export Procedure for exempted units and to say that representations from small scale manufacturers have been received by Board with a request to accept Sales Tax documents as proof of export for the supplies made to other domestic manufacturers who use the said goods in manufacture/packing of goods for export. Further, it has also been requested that the value of such clearances may be excluded from the

total value of domestic clearances for the purpose of availing SSI exemption.

2. The matter has been examined by the Board. The Central Excise Manual provides that in the case of export by exempted units through merchant exporter, the documents prescribed by Sales Tax Department, *viz* H-Form or ST-XXII Form or any other equivalent Sales Tax form, will be accepted as proof of export. It is clarified that this facility is available only in respect of the exempted units which undertake exports themselves or through merchant exporters directly from the unit itself. The facility is not available for the supplies made to any other domestic manufacturer who may or may not export its finished products."

6. The Tribunal in the case of *Vadapalani Press Vs CCE Chennai* (supra) had occasion to consider a similar issue. The above Board's circular was also referred by the Tribunal. It was held that when Form-H has been produced to establish that the goods have been exported the value of such clearances would not be included in the aggregate value so as to deny the SSI exemption. Relevant para reads as under :

"6. In Circular No. 212/96-CX., dated 20-5-1996, the Board simplified the export procedure for SSI units. Where the export of goods cleared from SSI unit was effected through a merchant-exporter, the certificate in "Form-H" issued by the latter was accepted as proof of export and it was provided that, in case clearances from SSI unit for home consumption plus clearance for export, where proof of export was not furnished within 6 months, exceeded exemption limit, they should take Central Excise registration and follow the regular A.R. 4/A.R. 5 procedure. Where proof of export was furnished within 6 months, the clearances made for export were not to be added to clearances for home consumption. Circular No. 648/39/2002-CX. affirmed the position and further clarified that the above facility was available only in respect of exempted units which undertook exports themselves or through merchant-exporters. Ld. SDR argued that, for the above benefit, the SSI unit must be an "exempted unit", i.e. unregistered unit, and the export must be made either directly or through merchant-exporter. Neither of the Notifications speaks of registration of SSI unit. In the SSI scheme, a manufacturing unit is said to be "exempted unit" for a given financial year if it has enjoyed SSI exemption in the previous year. If, by excluding the clearances made by such a unit for export from the computation of aggregate value of clearances in a given financial year, it is within exemption limits, it is an 'exempted unit'. In this sense, the appellants remained an "exempted unit", thereby satisfying the first condition proposed by SDR. Circular No. 648/39/2002-CX. specifically refers to goods manufactured and cleared by SSI unit for packing of other goods for export. This circular deals with "Form-H" procedure as applicable to SSI unit selling

goods to a merchant-exporter. This would mean that it is open to the merchant-exporter to use packing materials supplied by the SSI unit for packing his own goods for export. By this activity, he does not turn "manufacturer-exporter". In other words, M/s. A.V. Thomas Co. and other customers of the appellants who used the "printed cartons" supplied by the appellants for packing their own goods for export cannot be called "manufacturer-exporters" insofar as the cartons are concerned. They can only be called "merchant-exporters" of the cartons. Thus both the conditions proposed by learned SDR were satisfied by the appellants. Hence, by ld. SDR's yardstick also, the appellants must be held to have established their case for acceptance of "Form-H" certificates as proof of export in respect of the "printed cartons" supplied by them to M/s. A.V. Thomas Co. and other similar customers during the period of dispute. It is ordered accordingly.

7. As we have already noted, each certificate in "Form-H" has a Schedule thereto, which contains details of exports, such as particulars of Air Waybills. These details are found elaborately in tabular statements annexed to the certificate. It is for the Commissioner to verify these particulars of exports to satisfy himself that every consignment of "printed cartons" removed from the appellants' factory under an invoice was exported by the buyer. For this purpose, the appellants shall be given an opportunity of adducing documentary evidence and of being personally heard. Ld. Commissioner shall examine such evidence along with other evidence already on record, consider the party's submissions and record fresh findings on the surviving issues."

7. The Hon'ble Gujarat High Court in the case of *CCE Vs Amar Packaging Industries* – 2016 (344) ELT 187 (Guj.) held as under :

"5.2 The case of the department is based on the above circular and it is contended that conditions prescribed therein were not met with. It is clear that 'H' form is not dispensed with as a document of proof of export. The acceptance of 'H' form to prove and establish that the export has taken place is only clarified in the above circular. This facility will be available for the purpose of exemption in respect of exempted unit which undertake exports themselves or through merchant exporters directly.

5.3 It is an admitted position that the merchant exporters having issued 'H' forms to the assessee, the proof of export is established in terms of requirement of above circular. It cannot be said that the condition of export has not been satisfied. The cartons were sent to exporters for export and which were the necessary part of the goods which were imported by the merchant exporters. By first concluding that there was no export as the conditions of the circular were not satisfied, the lower Authorities of the Central Excise could not have held that the exemption was exceeded.

5.4 This is not the case where there is non-compliance of conditions. The 'H' Form evidences the export. There is a direct nexus between the goods cleared by the assessee to the exporters who exports their product, for export of which the goods of the assessee are necessary components, and they are also accordingly exported. When primarily and substantially the export is not only established, but even evidenced by 'H' Forms issued by the merchant exporters, who used the assessee's goods for export, and such document is acceptable proof by the Department as per its own circular, it cannot be gainsaid that the requirement of the circular dated 25-7-2002 were not complied with or that there was no export of the goods by the respondent-assessee.

6. The Tribunal recorded its concluding findings as under.

> "…..the merchant exporters have been used for packing export goods which is also on record that appellants have produced Form-H as well as the relevant enclosures which show that goods have been exported and cartons supplied by them have been used for the purpose. Further, we also note that Tribunal in the case of *Vadapalani Press* had discussed the Circular issued by the Board from time-to-time in detail. We find ourselves in respectful agreement with the reason adopted by the Tribunal in *Vadapalani Press* case in coming to the conclusion in favourt of the appellants in that case and accordingly, we allow the appeal filed by the appellants with consequential relief."

7. In light of foregoing reasons, the Tribunal has not committed any error in allowing the appeal of the assessee. It is rightly held that requirements of the circular were substantively complied with. Accordingly, the substantial question of law is answered in the negative and in favour of the assessee and it is held that the respondent-assesse is rightly held entitled to claim exemption."

8. The Tribunal in the case of *Ramani Plastics Pvt. Ltd. Vs CCE Chennai* (supra) has taken a similar view. Relevant paras read as under :

"4. We find that in appeal No. E/160/2005, the adjudicating authority, after considering the Board's circular, dated 25-7-2002, and Sales Tax H-Form or ST-XXII Form and the Chartered Accountant's certificate dropped the proceedings. The relevant portion of findings of the adjudicating authority in OIO, dated 27-7-2004 is reproduced below :-

> "In this case, the assessee has cleared plastic hangers to the following units under Form H except Serial No. 1
>
> 1. M/s. Network Clothing Company (P) Ltd., Tirupur
> 2. M/s. Amstrong Knitting Mills, Tirupur
> 3. M/s. C.S. Garments, Tirupur
> 4. M/s. Stanfab Apparels, Chennai

5. M/s. R.R. Leather Products Pvt. Ltd., Chennai etc.

6. M/s. BNT Innovations, Tirupur

7. M/s. Gomathi International, Tirupur

8. M/s. Fulchand & Sons, Mumbai.

These hangers have been exported along with garments by the above mentioned units. The corroborative documents for export of hangers along with garments has been provided in the form of Form H in respect of all the units except unit mentioned under serial No. 1 above. The Form H or ST-XXII Form or any other equivalent sales tax form of the Sales Tax Department could be accepted as a proof of export provided the goods have been exported directly from the factory of manufacture as clarified by Board vide Circular No. 648/39/2002-CX, dated 25-7-2002 issued from file F. No. 209/11A/2002-CX.6 which was incidentally issued for clarifying the simplified export procedure available to exempted SSI unit. Though the assessee have not cleared the hangers directly from the factory premises, the Form H furnished is taken as an evidence to conclude that the hangers have been exported from the units mentioned above. On the basis of these documents, I am of the opinion that the assessee is entitled for deduction of the value of hangers cleared to these units from the total value of clearances in terms of Notification No. 47/94."

5. Revenue in their appeal before the Commissioner (Appeals) contended that the appellants had cleared the Plastic Hangers to various units (buyers) who have exported their own goods viz. Garments with hangers. Thus, the assessee had not directly exported the goods viz. Plastic Hangers from their factory as required in the aforesaid Board's circular.

7. On a plain reading of the Board's circular, we find that the dispute relates to acceptance of sales tax documents as proof of export by the exempted SSI units. The Board has clarified that the documents prescribed by the Sales Tax Department viz. H-Form or ST-XXII Form or any other equivalent Sales Tax Form will be accepted as proof of export. In the present case, Revenue has not disputed that the appellant placed sufficient material in the nature of H-Form or ST-XXII Form, Sales Tax Assessment Order as proof of export. There is no dispute that the Hangers were exported with garments by the merchant exporter. Thus, there is substantial compliance of the Board's circular. The Commissioner (Appeals) observed that there is procedural lapse in so far as the goods were not directly exported but through merchant exporter. The Board has clearly clarified that this facility is not available to the supplies made to any other domestic manufacturer who may or may not export its finished products. In the present case, it is observed from the

record that the merchant exporter exported the goods which was not disputed at any point of time.

8. In view of the above discussion, in Appeal No. E/1091/2005, we set aside the impugned orders and the appeal is allowed. In Appeal No. C/160/2005, the impugned order passed by the Commissioner (Appeals) is set aside and the adjudication order is restored. Both the appeals are allowed."

9. After appreciating the facts and evidence as well as decisions cited supra, we are of the considered opinion that the demand cannot sustain. The impugned order is set aside. Appeal is allowed consequential relief, if any.

(Order pronounced in court on 22.06.2023)

Sd/-

(M. AJIT KUMAR)
Member (Technical)

Sd/-

(SULEKHA BEEVI, C.S.)
Member (Judicial)

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