

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 4222-4223 of 2007

COMMISSIONER OF CENTRAL
EXCISE, DAMAN

...APPELLANT

VERSUS

M/S SAHAJANAND TECHNOLOGIES
PVT. LTD. & ANR.

...RESPONDENTS

WITH

CIVIL APPEAL NO. 4354 OF 2007
CIVIL APPEAL NOS. 4364-4366 OF 2007
CIVIL APPEAL NOS. 5267-5270 OF 2007
CIVIL APPEAL NOS. 4543-4545 OF 2007

ORDER

1. These appeals arise out of a judgment dated 19 th December, 2006 passed by CESTAT, West Zonal Bench, Ahmedabad, dealing with nine appeals against three orders in original passed by the Commissioner of Central Excise, and judgments of CESTAT which apply and follow the aforesaid judgment. By the judgment dated 5.12.2006, excise duty amounting to Rs.4,26,93,826/-, Rs.7,22,75,718/- and Rs.7,10,10,030/- along with penalty of Rs.4,26,93,826/-, Rs.5 crore and Rs.5 crore have been imposed

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on M/s Sudhir Gensets Ltd. for varying periods, and a penalty of Rs.10 lakhs has been imposed on Shri Yusuf Khan, Works

ASHWANI KUMAR
Date: 2015.11.03
16:43:10 IST
Reason:

Manager of Sudhir Gensets Ltd. by the Commissioner's order.

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Duty amounting to Rs.66,17,29,496/- and penalty of equal amount has been imposed on M/s Sahajanand Tech. Pvt. Ltd. along with a penalty of Rs.2 crore on Shri J. Vaghasia, Vice President of M/s Sahajanand Tech. Pvt. Ltd. by the Commissioner's order in the aforesaid case, and duty amounting to Rs.1,44,75,596/- along with penalty of equal amount has been demanded from M/s Jakson and a penalty of Rs. 10 lakhs and Rs. 5 lakhs has been imposed

on Shri Sameer Gupta, Managing Director and Shri P. Rameshan, Vice President respectively by the Commissioner's order in the aforesaid case.

2. The brief facts of these cases are that all the three assesseees are 100% EOUs who were supplying goods to EPCG licence holders and accordingly, in terms of Section 3 of the Central Excise Act, 1944, such sales were to be considered as DTA sales for which Central Excise duty was required to be paid, which according to Section 3 of Central Excise Act, 1944 was an amount equal to the aggregate of duty of customs which would be leviable under Section 12 of the Customs Act, 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 the

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Central Excise Act be determined in accordance with the provisions of the Customs Act, 1962 and the Customs Tariff Act, 1975. The EPCG licence holders were entitled to concessional rate of basic customs duty @ 5% ad valorem or 10% ad valorem as the case may be and were exempted from additional duty and special additional duty in terms of notification No. 28/97 dated 1.4.97, notification No. 49/00 dated 27.4.2000 and notification No. 44/2002, 55/2003-Cus in force during the relevant period. The appellants have supplied the goods to these EPCG licence holders on payment of concessional Customs duty at the applicable rate by availing the benefit of the said notifications, and cleared the same to the EPCG units. The appellants were, however, issued show cause notices stating that what was payable by them was Central Excise duty, and accordingly the exemption notifications relating to Customs duty shall not be applicable to them unless there is an exemption notification issued under the Central Excise Act. Another ground of the show cause notices was that notification No. 55/03 specifies the ports from which the imports

could take place and since in the present case the goods were not imported through these specified ports, concessional rate of duty prescribed under Notification No. 55/03 was not applicable to them. The show cause notices were adjudicated and duties were

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demanded and penalties imposed by the Commissioner in three orders as has been stated above.

3. Shri Yashank Adhyaru, learned Senior Advocate, appearing on behalf of the revenue, reiterated the submissions made before the Tribunal. His basic submission was that as what was, in fact, paid by these 100 per cent export oriented units was excise duty and not customs duty, the benefit of customs duty exemption notifications will not avail them. The second ground of the show cause notices was not pressed before us as Board circulars have clarified that the condition of import through specific ports is inapplicable to 100% EOU's. On the other hand, Shri V. Lakshmikumaran, learned Advocate, appearing on behalf of the respondents, stated that Shri Adhyaru's argument would not be correct for the simple reason that Section 3 of the Central Excise Act creates a legal fiction by which all sales made by these EOU's in the domestic tariff area to EPCG licence holders were to be governed by the Customs Act and Customs Tariff Act, and hence exemption notifications under these Acts alone were to be seen.

4. Section 3 of the Central Excise Act, as it stood at the relevant time, states:

"Section 3. Duties specified in First Schedule and the Second Schedule to the Central Excise Tariff

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Act, 1985 to be levied. -

(1) There shall be levied and collected in such manner as may be prescribed, -

(a) a duty of excise to be called the Central Value Added Tax (CENVAT)] on all excisable goods (excluding goods produced or manufactured in special economic zones) which are produced or manufactured in India as, and at the rates, set forth in the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986);

(b) a special duty of excise, in addition to the duty of excise specified in clause (a) above, on excisable goods excluding goods produced or manufactured in special economic zones specified in the Second Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) which are produced or manufactured in India, as, and at the rates, set forth in the said Second Schedule.

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 brought to any other place in India, shall be an amount equal to the aggregate of the duties of customs which would be leviable under the Customs Act, 1962 (52 of 1962) or any other law for the time being in force, 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 the

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Customs Act, 1962 (52 of 1962) and the Customs Tariff Act, 1975 (51 of 1975).

Explanation 1. - Where in respect of any such like goods, any duty of customs leviable for the time being in force is leviable at different rates, then, such duty shall, for the purposes of this proviso, be deemed to be leviable at the highest of those rates.

Explanation 2. - In this proviso, -

- (i) "free trade zone" means a zone which the Central Government may, by notification in the Official Gazette, specify in this behalf;
- (ii) "hundred per cent export-oriented undertaking" means an undertaking which has been approved as a hundred per cent export-oriented undertaking by the Board appointed in this behalf by the Central Government in exercise of the powers conferred by section 14 of the Industries (Development and Regulation) Act, 1951 (65 of 1951), and the rules made under that Act.;
- (iii) "Special Economic Zone" means a zone which the Central Government may, by Notification in the Official Gazette, specify in this behalf."

5. The Tribunal, in the impugned judgments, construed the said Section as referring only to the Customs Act and not the Central Excise Act, and also relied upon the circulars issued by the Board from time to time to arrive at the conclusion that exemption

notifications issued under the Customs Act would be applicable in

the facts of the present cases. The Tribunal held:

"We have considered the submissions. The basic

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issue to be determined is whether the clearances made by 100% EOUs are entitled to concessional rate of Customs duty provide under EPCG Schemes. The adjudicating authority has laid a great emphasis on the fact that what is payable under Section 3 of the Central Excise Act by the 100% EOUs in respect of DTA clearance is the Central Excise duty and not Customs duty and therefore, the exemption notification issued under Customs Act and the exemption notification issued under Section 5A will not be applicable in respect of clearances effected by 100% EOUs unless specifically provided for in the notification itself. We, however, find that the Commissioner has failed to observe that even though what is required to be paid is in the nature of central excise duty but through a legal fiction, clearances by 100% EOUs have been placed at par with the imports and it is for this reason that the duty required to be paid is equal to the aggregate of Customs duty payable on such like goods if produced or manufactured outside India and imported into India. Therefore, all clearances by 100% EOUs have to be treated as imports for the purpose of calculating the duty. What is required to be determined/quantified is the Customs duty and not the Central Excise duty. Once Section 3 itself creates a legal fiction of levying customs duty and treating clearances by 100% EOUs at par with imports, the question of altering nature of levy and the exemptions by circulars does not arise. The Commissioner has totally misunderstood the circulars which made it abundantly clear that notifications applicable to units working under EPCG schemes shall be equally applicable to goods being procured from 100% EOUs. The emphasis on Section 5A of the Central Excise Act is totally misplaced. It refers to exemption notifications issued under Section 5A and not under the Customs Act. Therefore, the exemption notification issued under Central Excise Act cannot be made applicable to 100% EOUs unless specifically provided for in that notification. But the same cannot be applied to notifications issued under Customs Act where Section 5A of the Central Excise has no application what so ever. The three circulars issued by the Board in 1994, 1.12.2004 and May, 2005 make it very clear that the concessional rate of

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duty shall be leviable in respect of clearances effected by 100% EOUs to EPCG units and even the condition of import through specific ports has been clarified to be inapplicable as clearance by 100% EOUs have been considered as clearance from any port in India including the specified port. We, therefore, hold that the concessional rate of duty has been rightly availed of by the appellants and there is no case for further demand of duty. Since there has been no evasion of duty the question of imposition of any penalty on any of the appellants does not arise. We therefore, set aside all the three orders-in-original and allow the appeals of all the appellant."

6. We find no infirmity in the aforesaid findings of the Tribunal

Mr. Aditya Bhattacharya, Adv.
Mr. T.D. Satish, Adv.

UPON hearing the counsel the Court made the following
O R D E R

The Civil Appeals are dismissed in terms of the signed order.

Interlocutory Application(s) pending, if any, stands disposed
of accordingly.

(Ashwani Thakur)
COURT MASTER

(J.P.Sharma)
COURT MASTER

(Signed order is placed on the file)