M/S. Siv Industries Ltd vs Commissioner Of Central Excise & ... on 10 March, 2000

Equivalent citations: AIR 2000 SUPREME COURT 1153, 2000 (3) SCC 367, 2000 AIR SCW 941, (2000) 3 JT 133 (SC), 2000 (2) SCALE 304, 2000 (2) LRI 28, 2000 (3) JT 133, 2000 (4) SRJ 77, (2000) 117 ELT 281, (2000) 89 ECR 209, (2000) 2 SUPREME 228, (2000) 2 SCALE 304

Author: D.P. Wadhwa

Bench: D.P.Wadhwa, Ruma Pal

PETITIONER:
M/S. SIV INDUSTRIES LTD.

Vs.

RESPONDENT:
COMMISSIONER OF CENTRAL EXCISE & CUSTOMS

DATE OF JUDGMENT: 10/03/2000

BENCH:
D.P.Wadhwa, Ruma Pal

JUDGMENT:

D.P. WADHWA, J.

This appeal is directed against the order dated November 5, 1997 of the Customs, Excise and Gold (Control) Appellate Tribunal (for short the 'Tribunal') allowing the appeal of the respondent and directing that duty of Central Excise was payable under Section 3(1) of the Central Excise and Salt Act, 1944 (for short the 'Act') and not under proviso to Section 3(1) of the Act as claimed by the appellant. Section 3(1) of the Act with proviso, in relevant part, is as under: - "Section 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).

Explanation 1. Where in respect of any such like goods, any duty of customs leviable under the said section 12 is leviable at different rates, then, such duty shall, for the purposes of this proviso, be deemed to be leviable under the said section 12 at the highest of those rates.

Explanation 2 In this proviso, -

(i) "free trade zone" means the Kandla Free Trade Zone and the Santa Cruz Electronics Export Processing Zone and includes any other free trade zone which the Central Government may, by notification in this 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."

Under the relevant import policy the 100% Export Oriented Unit Scheme (EOU) envisages an industrial unit offering for export its entire production, excluding rejects or items otherwise specifically permitted to be supplied to the Domestic Tariff Area. Industrial units approved by the Board of Approvals (BOA) set up for this purpose alone are eligible for import of capital goods, raw materials, components and spares, etc. required by them for export production under the Scheme. Based on the approval granted by the Board of Approvals a 100% EOU is eligible to import, without payment of customs duty, capital goods, office equipment, proto-types and technical samples, generating sets, raw materials, components consumables, intermediates, packing materials, material handling equipment like fork lifts, overhead cranes and spares under Open General Licence subject to certain conditions. Applications for approval as 100% Export Oriented Unit are to be submitted to the Secretariat for Industrial Approvals, Ministry of Industry. Such EOU under no circumstances can be allowed to dispose of the export product in the domestic market unless specifically allowed by the Government. Appellant was granted permission to set up a 100% Export Oriented Unit (EOU) for the manufacture of viscose staple fibre at its factory at Sirumugal in

Coimbatore District in the State of Tamil Nadu. The Letter of Intent dated December 19, 1991 was issued to the appellant for the purpose by the Secretariat for Industrial Approvals (SIA), Ministry of Industry, Government of India. On September 8, 1993 appellant made an application to the Secretary, Ministry of Commerce, Government of India and sought debonding of its unit from 100% EOU, i.e., withdrawal from 100% EOU Scheme. By letter dated October 18, 1993 of the Ministry of Commerce it was agreed in principle to allow the appellant to withdraw from the 100% EOU Scheme subject to the conditions on which withdrawal was permitted and as mentioned in annexure to the letter. Once the debonding of the unit is permitted, finished goods earlier manufactured in the 100% EOU could be cleared for Domestic Tariff Area (DTA) on levy of duty of Central Excise. The dispute is at what rate this duty is to be levied. As noted above, it is the contention of the appellant that excise duty is payable on the finished goods under main 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. The Revenue on the other hand contends that excise duty under proviso to Section 3(1) of the Act is payable on the finished goods and with no customs duty being levied on the raw materials gone into the manufacture of finished goods. It is the expression "allowed to be sold in India" appearing in proviso to Section 3(1) of the Act which in fact is the bone of contention between the parties. Appellant contends that for the application of proviso to Section 3(1) two conditions have to be cumulatively and simultaneously satisfied, viz., (1) goods should have been produced or manufactured by an existing 100% EOU and (2) these goods should have been allowed to be sold in India. It is not necessary for us to state the grounds on which appellant sought debonding of its 100% EOU. By letter No. 12/335/91-EP dated October, 1993 from the Government of India in the Ministry of Commerce, appellant was told that its request for debonding of the unit was considered by the Board of Approvals (BOA) for 100% EOUs in its meeting and had been recommended for approval subject to normal conditions of debonding. It was stated that formal letter would be issued by SIA in due course. It was also pointed out that the letter was being issued to enable the appellant to work out various modalities with the Customs Authorities and start for switching over from 100% EOU to DTA and to enable it to obtain release/dispose of the stocks/ inventories on payment of applicable duties. By letter No. E.O.335(91)-IL/MRTP dated November 3, 1993 from the Government of India in the Ministry of Industry, Department of Industrial Development, Secretariat for Industrial Approvals (SIA) to the appellant it was agreed in principle to allow the appellant to withdraw from 100% EOU Scheme subject to conditions mentioned in the annexure to the letter. It will be appropriate to set out this letter as well as the annexure thereto, containing the conditions governing withdrawal from 100% EOU Scheme: -

> "No.E.O.335(91)-IL/MRTP Government of India Ministry of Industry Department of Industrial Development Secretariat for Industrial Approvals EOU SECTION New Delhi, the 3rd November, 1993 M/s. South India Viscose Limited., P.B. No.1844, 1977-A, Trichy Road, Singanallur, Coimbatore 641 005.
>
> Subject:- Letter of permission No. PER:163 (91) /E.O.335(91)-IL(MRTP), dated 18.12.1991 issued for the manufacture of viscose staple fibre under 100% Export Oriented Scheme Debonding of the unit. (E.O.335/91-IL/(MRTP)-

Gentlemen, I am directed to refer to your letter addressed to Ministry of Commerce (EP Section) on the above subject and to say that in the circumstances explained therein, Government of India agree, in principle, to allow you to withdraw from the 100% Export Oriented Scheme, for which letter of permission No. PER:163(91)/E.O.335(91) IL(MRTP), dated 18.12.1991 was granted to you for the manufacture of viscose staple fibre for an annual capacity of 18,000 tonnes. The withdrawal from 100% EOU Scheme will be subject to the conditions mentioned in the Annexure (attached).

2. After you have complied with the conditions mentioned in the Annexure, you may approach your Administrative Ministry for issue of final debonding letter.

3. As regards surrender of Letter of Permission No. PER:163(91)/E.O.235(91)-IL/MRTP, dated 18.12.1991, a separate communication will follow from the Administrative Ministry (viz. Ministry of Textiles A&MMT Section), Udyog Bhawan, New Delhi.

4. All further correspondence in the matter, if any, may please be addressed to the Administrative Ministry viz. Ministry of Textiles A&MMT Section, Udyog Bhawan, New Delhi.

5. Please acknowledge receipt.

Yours faithfully, Sd/- (Baldev Raj) Under Secretary to the Government of India."

"Annexure STANDARD CONDITIONS GOVERNING WITHDRAWAL FROM 100% EOU SCHEME

1) The undertaking shall pay all customs and excise duties on the imported and Indigenous capital goods, raw materials, components, consumables and spares in stock as well as on the finished goods in stock, together with all penalties and other charges as per Customs Act and Rules, before the issue of final debonding letter.

2) The undertaking shall also deposit a penalty of 10% of the cif value of imported capital goods, towards non-fulfillment of export obligation, with the import licensing authority with whom it had executed a legal undertaking in respect of the 100% Export Oriented Unit.

This penalty shall be paid before the issue of final debonding letter.

3) In case the undertaking has availed of the facility of external commercial borrowings, the same shall be disinvested before the issue of final debonding letter.

4) The undertaking shall obtain a fresh approval under the current Industrial Licensing Policy to undertake the proposal activity under domestic tariff area scheme.

5) The undertaking shall undertake an export obligation of 25% of the annual production for a period of 5 years or an amount equal to five times of the Cif value of imports whichever is higher. For this purpose it shall execute a Legal undertaking with the Import Licensing Authority concerned.

6) The undertaking shall also make such payment(s) as may be necessary for all other major benefits that it might have availed of under 100% Export Oriented Scheme."

When the appellant received letter dated October 18, 1993 from the Ministry of Commerce it approached the Assistant Collector of Central Excise for valuing the goods and the duties of customs and central excise payable. Appellant was informed by the Assistant Collector of Central Excise by his letter No. C.No.VIII/48/3/92-Cus. dated November 8, 1993 that value of the goods and duties have been worked out and it was asked to pay the same. Appellant was also informed that the assessment had been done on a provisional basis. The dispute in the present case concerns the finished goods which had been manufactured prior to the date of debonding of 100% EOU of the appellant. There is no dispute that whole of the duties of customs and central excise as demanded by the Assistant Collector of Central Excise in his letter No. C.No.VIII/48/3/92-Cus dated November 15, 1993, had been paid and which amounted to Rs.6,62,70,540.76. It is also not disputed that all the conditions stipulated in the letter dated November 3, 1993 of the Government of India in the Ministry of Industry, Secretariat for Industrial Approvals (SIA) have also been complied with by the appellant. On February 2, 1994 a formal letter was issued by the Ministry of Textile in the Government of India debonding the appellant's unit and permitting it to operate as a DTA unit. This letter took note of the fact that on the basis of the provisional assessment by the Assistant Collector of Central Excise appellant had deposited the amount of duties of customs and central excise and the appellant had also been allowed to clear the finished stock lying with it in its stock as on November 16, 1993 as well as the production from December 8, 1993 onwards on provisional basis. After the appellant had been allowed in principle to withdraw from the 100% EOU Scheme by letter dated November 3, 1993 of the Ministry of Industry it had recognised its manufacturing activities as a DTA unit from December 6, 1993. On January 21, 1994 Assistant Collector of Central Excise issued a show cause notice to the appellant now seeking to assess the finished goods lying in the stock on the date of debonding and demanding excise duty under proviso to Section 3(1) of the Act. It would appear that the Assistant Collector of Central Excise had earlier demanded duty under main Section 3(1) of the Act. A corrigendum dated February 14, 1994 was issued by the Assistant Collector of Central Excise to the show cause notice seeking now to demand duty in respect of clearance made from November 16, 1993 to February 1, 1994 under proviso to Section 3(1) of the Act after deducting the duties already paid by the appellant. Yet another corrigendum was issued to the show cause notice by the Assistant Collector of Central Excise on February 21, 1994. By his order dated March 31, 1994 Assistant Collector of Central Excise passed his order in original in which he agreed with the appellant to the extent that the date of debonding should be taken as November 15, 1993 when the appellant paid the applicable duties and not February 2, 1994 when formal letter of debonding was issued by the Ministry of Textiles. However, in respect of applicability of proviso to Section 3(1)

of the Act Assistant Collector of Central Excise decided the issue against the appellant and accordingly confirmed the duty demanded. Aggrieved appellant filed an appeal before the Collector of Central Excise (Appeals) under Section 35 of the Act. Collector of Central Excise (Appeals) agreed with the appellant and decided the issue in its favour thus allowing the appeal. Now it was the Revenue which felt aggrieved. Collector of Central Excise filed appeal before the Appellate Tribunal against the order of the Collector of Central Excise (Appeals) under Section 35B of the Act. By order dated November 5, 1997 which is impugned, Tribunal allowed the appeal of the Revenue holding that it was the proviso to Section 3(1) of the Act, which was applicable. We may note that corrigendum to show cause notice which was issued on February 14, 1994 was later on dropped by the Assistant Collector of Central Excise himself. Now it is the appellant which has come before this Court. To appreciate the rival contentions we may consider the policy of the Central Government under which EOU Scheme came into operation. Under Notification No. 13/81-Cus. dated February 9, 1981 as amended from time to time (as on October 15, 1992) and issued under sub-section (1) of Section 25 of the Customs Act, 1962, Central Government exempted specified goods when imported into India for the purpose of manufacture of articles for export out of India or for being used in connection with the production or packaging of goods for export out of India by 100% EOU approved by the Board of Approvals (BOA) from whole of the duty of customs leviable thereon and the additional duty, if any, subject to the conditions contained in the notification. One of the conditions was "on the clearance of five per cent of articles so manufactured or such other percentage as may be fixed by the said Board, which are allowed to be sold in India, being in the nature of rejects, the importer shall pay a sum equivalent to the duty of excise payable on such articles under Section 3(1) of the Act, which have not been exported". Benefit of the notification is to be availed of by the importer, if he exports out of India 100% or such other percentage, as may be fixed by the said Board, of articles manufactured wholly or partly from the goods for the period stipulated by the Board or such extended period as may be specified by the said Board. On the expiry of this period the importer is required to pay customs duty on the imported capital goods, material handling equipment, office equipment, captive power plants, etc. on depreciated value but at the rates prevalent at the time of import and also to pay customs duty on enhanced imported raw materials or components on the value at the time of import and at the rates in force at the time of clearance. Proviso to Section 3(1) of the Act thereafter was inserted in Section 3 of the Act by Act 14 of 1982. A circular dated February 17, 1983 was issued by the Central Government clarifying the introduction of proviso. It applied to units in Kandla Free Trade Zone and Santa Cruz Electronics Export Processing Zone allowing them to sell their goods not exceeding 25% of the production in DTA on payment of excise duty equal to the duties of customs leviable on like goods imported from abroad. Clearance to the DTA was to be allowed only after necessary permission had been obtained by the unit from the Development Commissioner/Administrator in-charge of the Free Trade Zone (FTZ). The circular pointed out that in order to levy excise duty equal to the duties of customs leviable on the like goods imported from abroad, a proviso had already been inserted in Section 3(1) of the Act. In 1984 there was further amendment to proviso to Section 3(1) of the Act by Act 21 of 1984. The effect of the amendment was that the facility of sale in DTA was now extended to 100% EOUs as well. On May 29, 1984 Central Government issued a circular explaining further amendment to proviso to Section 3(1) of the Act. It said that the Central Government had decided to allow 100% EOU which had been approved by the Board of Approvals (BOA) to sell their goods not exceeding 25% of their exportable production in the Domestic Tariff Area (DTA) on payment of

appropriate duty of excise. In addition these undertakings could remove 5% of such other percentage of the goods, as may be fixed by the BOA provided such goods are in the nature of rejects. It was pointed out that amendment has been carried out in proviso to Section 3(1) and that such of the goods would be liable to duty of excise equal to the aggregate of the duties of customs of like goods imported from abroad. Circular provided that application for permission to sell 25% of exportable production should be certified by the Central Excise Officer indicating the quantity of goods which had actually been produced or manufactured as on that date. On June 18, 1992 a Public Notice No. 16-ITC(PN)/92-97 was issued, being one of the import and export public notices, laying down guidelines for sale of goods in DTA by EOUs and units in the Export Processing Zone (EPZs). The Public Notice referred to the export and import policies and the Handbook of Procedures (1992-97) providing for sale of goods in the DTA by EOUs and units in EPZs up to 25% and then laid down the guidelines which would govern sales in DTA. This Public Notice could not be applicable to EOU when it is debonded in view of the norms laid in Public Notice which could apply only to the unit not withdrawing from EOU Scheme. Contention of the Revenue is that permission to withdraw from scheme is itself a permission to sell in India, i.e., when unit is permitted to debond, it would be deemed to have been permitted to sell the goods in India. But then permission to sell in India has to be in terms or in accordance with the provisions of the export import policy. Permission to sell in India by 100% EOU consists of all those factors like value addition, fulfillment of export obligation, sale of a general currency licence holder, item being not mentioned in the negative list and then there being a limit of 25%, etc. When permission to debond is given, none of these criteria or aspects are applied by Board of Approvals (BOA) to the closing stock of finished goods. Board of Approvals is a statutory authority, which permits debonding. It is created under the Industrial (Development and Regulation) Act. On the other hand permission to sell the goods in India under and in accordance with the import policy has to be given by the Development Commissioner in the Ministry of Commerce. Board of Approvals and the Development Commissioner are two different authorities constituted for two different purposes. Permission to debond is a statutory function exercised by one statutory authority. On the other hand permission to sell in India is to be exercised by different statutory authority. If reference is made to para 102 of the relevant import export policy permission of the Development Commissioner is required for selling the goods in India up to limit of 25% by 100% EOU. Para 117 of the policy deals with debonding of 100% EOU. Thus it is apparent that debonding and permission to sell in India are two different things having no connection with each other. It also becomes apparent that in view of the EOU Scheme as modified from time to time and corresponding amendments to Section 3 of the Act the expression "allowed to be sold in India" in proviso to Section 3(1) of the Act is applicable only to sales made up to 25% of production by 100% EOU in DTA and with permission of the Development Commissioner. No permission is required to sell goods manufactured by 100% EOU lying with it at the time approval is granted to debond. Revenue has proceeded on the assumption that by debonding permission has been granted by the BOA for selling the closing stock of finished goods in India. This cannot be so. BOA does not concern itself with the manner of the disposal of the closing stock of the finished goods. After debonding it is open to the erstwhile 100% EOU, which is now like any other manufacturing unit in India to sell the goods in India or export it by following the normal procedure. By its application dated September 8, 1993 appellant had only asked the Central Government for permission to debond the unit. Pending formal debonding clearance, appellant requested the Central Government that it might allow it to sell the goods in India. This request of the appellant was never acceded to by

the concerned authority and letter of debonding was issued. This application of the appellant, therefore, could not be treated as an application for permission to sell in India as contended by the Revenue and the debonding letter of the BOA cannot be construed as permission to sell in India. Argument of the Revenue that debonding assumes allowing all closing stock of the goods on the date of debonding to be sold in India would be stretching the matter a little too far. Conditions for sale of 25% of the finished products by EOU and sale of finished stock by a debonded 100% EOU on the date of debonding are different. It was contended by Mr. Lakshmikumaran, learned counsel for the appellant, that under Rule 9A(1)(ii) of the Central Excise Rules framed under the Act duty is chargeable at the rate on the date of removal of the goods and not from the date of their manufacture (See Wallace Flour Mills Co. Ltd. vs. Collector of Central Excise, Bombay, Division III [(1989) 4 SCC 592]). He said it is not material when the goods were manufactured and that it is the date of removal for sale in India that matters. He, therefore, submitted that central excise duty could be charged at the rate prevalent at the time when the goods were sold by the appellant in India on the date when 100% EOU was debonded which would be the date for removal for sale in India. We may also refer to the counter affidavit filed by the Revenue in this appeal. It is stated that in December, 1991 appellant started 100% EOU and was following all the rules and regulations set out for running an EOU. Owing to poor running of the unit appellant applied for debonding of the unit, which was accepted in October, 1993. The Department issued show cause notices demanding duty on the stock of finished goods lying on the date of debonding, which is equal to customs duty leviable under Section 12 of the Customs Act, 1962 as per proviso to Section 3(1) of the Act which provides for charging duty on 25% of goods sold by an EOU in DTA. It will thus be seen that it is the stand of the Revenue itself that proviso to Section 3(1) of the Act is applicable to 25% of goods sold by an EOU in DTA. Concept of bonding or debonding is well understood both under the Act and the Customs Act, 1962. The entire operations of an EOU are to be in customs bonded factory, unless otherwise specifically exempted from physical bonding. The approved unit is required to execute a bond/legal undertaking with the Development Commissioner concerned in the form prescribed. Under the conditions laid for EOU, bonding period for units under the EOU Scheme is ten years. This period may be reduced to five years by the Board of Approvals in case of products liable to rapid technological change. On completion of the bonding period it shall be open to the unit to continue under the Scheme or opt out of the Scheme. Such debonding is, however, subject to industrial policy in force at the time the option is exercised. On the satisfaction of the Board of Approvals, EOU may be debonded on its inability to achieve export obligations, value addition or other requirements. Such debonding is subject to such penalty as may be imposed and levy of the following duties: - (a) Customs duty on capital goods at depreciated value but at rates prevalent on the dates of import; (b) Customs duty on unused raw materials and components on the value on the dates of import and at rates in force on the dates of clearance. Unless there is a specific prohibition EOU is permitted sale in the DTA all rejects up to 5% production or such percentage as may be fixed by the Board of Approvals subject to payment of applicable duties and other conditions. DTA sale entitlement is 25%. It is to be determined in relation to the ex-factory value of the total production, excluding permissible levels of rejects. DTA sale entitlement may be up to 25% of the total production provided the value of indigenous constituents of the final products excluding water, power, services and spares for capital goods is in excess of 30% of the cost of the product. Such entitlement may be up to 15% only if the value of indigenous constituents is less than 30% of the total cost. Chapter V-A of the Central Excise Rules contains provisions for removal from a free trade

Zone or from a 100% EOU of excisable goods for home consumption. This Chapter was made applicable to units under the EOU Scheme by a notification No. 130/84-C.E. dated May 26, 1984. This Chapter contains Rules 100A to 100H. Rule 100A provides that the provisions of this Chapter shall apply to a person permitted under any law for the time being in force to produce or manufacture excisable goods in a 100% Export Oriented Undertaking and who has been allowed by the proper officer to remove such excisable goods for being sold in India on payment of duty of excise leviable thereon. It will be thus seen that this Chapter V-A would not be applicable where EOU is outside the EOU Scheme after the unit is debonded. Under Rule 100H Rule 57A and other Rules mentioned therein shall not apply to excisable goods produced or manufactured by 100% Export Oriented Undertaking. Rule 57A relates to allowing credit of any duty of excise or the additional duty under Section 3 of the Customs Tariff Act, 1975 as may be specified by the Central Government in the notification, paid on the goods used in or in relation to the manufacture of the final products and for utilising the credit so allowed towards payment of duty of excise leviable on the final products. Considering the whole aspect of the matter, we are of the opinion that the Tribunal was not right in holding that duty is to be leviable in terms of the proviso to Section 3(1) of the Central Excise Act, 1944. We, therefore, set aside the impugned judgment of the Tribunal and restore that of the Collector of Central Excise dated October 11, 1994. The appeal is accordingly allowed. There shall be no order as to costs.