

(2018) 11 DEL CK 0184

In the Delhi High Court

Case No : Custom Act Appeal No. 147 Of 2018 & CM APPL. 23960 Of 2018

Commissioner Of Customs (Export)

APPELLANT

Vs

Kothari Foods & Fragrance Pvt. Ltd

RESPONDENT

Date of Decision : 26-11-2018

Acts Referred:

Customs Act, 1962 — Section 25(1), 108, 114, 125(1), 130

Foreign Trade Development & Regulation (FTD&R) Act, 1992 — Section 11, 13

Citation : (2018) 11 DEL CK 0184

Hon'ble Judges : S. Ravindra Bhat, J;Prateek Jalan, J

Bench : Division Bench

Advocate : Amit Bansal, Pankaj Bhati, Amit Awasthi, Dhruv Surana, Ashish Choudhary

Judgement

Prateek Jalan, J

1. This appeal filed by the Revenue, under Section 130 of Customs Act 1962 (hereafter, "the Act"), is directed against an order dated 01.09.2017

passed by the Customs Excise and Service Tax Appellate Tribunal (hereafter, "the Tribunal") in Appeal No. C/53217/2015. By the impugned order,

the Tribunal allowed the Respondent/ Assessee's appeal against an order dated 04.06.2015 passed by the Commissioner of Customs (Exports),

New Delhi and set aside the redemption fine and penalty imposed.

2. The present appeal was admitted on 03.08.2018 and the following questions of law were framed for consideration:

(i) Did the Customs Excise and Sales Tax Appellate Tribunal (hereinafter "CESTAT") fall into error in its interpretation of Notification No.

40/2006-Cus dated 01.05.2006, and also with respect to para 4.55.3 of the Handbook of Procedure for Export and Import;

(ii) Did the CESTAT err in law in its appreciation of specifications that the exporter had to provide and the declaration required, in terms of the above

Notification No. 40/2006-Cus read with para 4.55.3 of the Handbook of Procedure for Export and Import) in the circumstances of the case?â??

3. The facts giving rise to this appeal are not in dispute. During the period 2006-09, the assessee used to clear and export its goods, namely pan masala

and gutka. These exports were covered by a Duty Free Import Authorization license (hereafter, ""DFIA License"") issued by the Director General of

Foreign Trade (hereafter, â??DGFTâ?), under the prevalent Foreign Trade Policy (â??FTPâ? hereafter) of the Central Government. Based on the

its records and the statement of the assesseeâ??s Director, Shri Vikram Kothari, as well as statement of perfume suppliers, the revenue issued a

show cause notice (dated 21.06.2013) alleging that the assessee had contravened the provisions of Paragraph 4.55.3 of the Handbook of Procedure of

Import and Export (hereafter, ""HBP"") and an exemption notification dated 01.05.2006 (Notification No. 40/2006-Customs, hereafter â??the

exemption notificationâ?) issued by the Customs authorities. According to the Revenue, the effect of the HBP and the exemption notification was that

the assessee had to mention the technical characteristics, quality and specifications of the perfumes/essential oils/ aromatic chemicals used by it in its

shipping bills. The assessee resisted the show cause notice and contested the proceedings.

4. In the Order-in-Original dated 04.06.2015, the Commissioner of Customs (Exports) considered exports made by the the assessee at New Delhi and

Kanpur and imposed, in sum, fines of ` 18,00,000 (in lieu of confiscation of the goods in question, under Section 125 (1) of the Act), and penalty of `

8,00,000/- (under Section 114 of the Act).

The Order-in-Original recorded inter alia as follows:-

â??3. In terms of Exim Policy 2004-09, Chapter 4 of Foreign Trade Policy (FTP) 2004-09, Duty Free Import Authorization (DFIA) is issued to allow

duty free import of inputs, fuel, oil, energy sources, catalyst which are required for production of export product. This scheme is in force from 1st

May, 2006. These Authorizations shall be issued only for products for which Standard Input and Output Norms (SION) have been notified. A

minimum 20% value addition shall be required for issuances of such

authorization except for items in germs and jewelry sector. Once export obligation has been fulfilled, requires for transferability of authorization or inputs imported against it may be made before concerned RA. Once, transferability is endorsed, Authorization holder may transfer DFIA or duty free inputs, except fuel and any other item(s) notified by DGFT. An Advance Authorization shall specify:

- (a) name and description of items to be imported and exported/supplied.
- (b) quantity of each item to be imported or wherever quantity cannot be indicated, value of item shall be indicated. However, if in SION, quantity and value of individual inputs is a limiting factor, same shall be applicable.
- (c) aggregate CIF value of imports; and
- (d) FOB / FOR value and quantity of exports / supplies.

4. In view of the above, in order to avail the benefits of DFIA scheme, the Exporters were under obligation to indicate the technical characteristics, quality, specification and value of the essential oil used in the manufacture of the panmasala / gutkha in their shipping bills at the time of export and thereafter while applying for the Duty Free Import Authorization Licenses Scheme Under Chapter 4 of FTP 2004-09.

5. In tandem with the para 4.55.3 handbook of procedure Vol. I (2004-09), Notfn. No. 40/2006 Customs dated 01.05.2006 also specifies the similar conditions, wherein, if perfume/ essential oil/aromatic chemical are the inputs of the export produce, the exporter shall give a declaration with regard to technical characteristics, quality and its specification in their shipping bills at the time of export. In the light of the same, exporter is bound to show nexus between the essential oil/perfume/aromatic chemicals actually used in the manufacture of export goods and the essential oil/perfume finally imported against the said exports (i.e. the DFIA license).â??

5. The Commissioner also referred to the statement of Shri Vikram Kothari under Section 108 of the Act:-

â??Further on being specifically asked that under para 4.55.3 handbook of procedure 2004/09 and as per the conditions specified under Notfn. No. 40/2006 Customs dated 01.05.2006, he had to declare the technical characteristics of the Essential Oil, Perfume and Aromatic compounds used as the input of the resultant export products (i.e. Gutka in instant case) in the

corresponding shipping bills. He stated that the said provision of declaring the technical characteristics of the essential oil on the shipping bill were not followed at the time of export neither it was declared at the time of transferability of said DFIA Licenses to the jurisdiction DGFT Authorities as the same was not brought to his notice by the Custom Authorities or DGFT Authorities.â??

6. The Commissioner noticed that statements of some of the assesseeâ??s suppliers, recorded under Section 108 of the Act, which stated that the products supplied to the assessee were not ""natural essential oils"", but manufactured by mixing the aroma of natural flowers on base oils. As the documents recovered from the Respondent included applications filed by it for DFIA Licenses in which it had declared that its products contained natural essential oils"" as inputs and the use of synthetic aromatic chemicals was not declared, the Commissioner was of the view that the DFIA Licenses were obtained by suppression and distortion of facts.

7. The Commissioner recorded the following findings:

â??32.3 Thus, as per the above paras, the exporter shall give a declaration with regard to technical characteristics, quality and its specification of the Perfumes/Essential Oil/ Aromatic Chemicals used in the manufacture of the export goods (panmasala/gutkha) in the shipping bills filed under DFIA Scheme. But exporter did not fulfilled these conditioned. Import authorization regarding import of essential oils is valid only after fulfillment of said conditions.

32.4 I also find that Sh. Vikram Kothari himself accepted that the provision of declaring the technical characteristics of the essential oil on the shipping bill were not followed at the time of export and in 2012 DFGT had raised a query on the same matter and issued Show Cause Notices to his firm. I

further noticed that exporter never declared the technical characteristics in their shipping bills and in the Appendix-23 filed before the DDFT, Kanpur.

The Appendix-23 filed by them for the transferability of the DFIA specifically mentions the â??Natural Essential Oils viz. Sandal wood oils, Geranium

Oils, Mint Oil, Vetiver Oil; Patchouli Oil, Kewara Oilâ?? as he was under impression that in the DFIA scheme, his firm was entitled to get the duty free

imports of the constituents as mentioned in the SION norms. Further, they had used Patchouli Oil & Menthol as stabilizer to the perfumery compounds

in their export product. Patchouli Oil & Menthol are Natural Essential Oil.

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32.6 I also noticed that the fact i.e applicability of provisions contained 4.55.3 handbook of procedure 2004/09 and in the light of DGFT circular

No.57/2009-14 (RE 2011) dated 06.03.2012 wherein it was emphasized that RAs should ensure that the exporter has given the details with regard to

technical characteristics, quantity and specifications in the application for DFIA (as at SI. No.15 of ANF A-H) had been verified from the Office of

Jt. DGFT, Kanpur and it was observed, on the basis of documents received DCFT, Kanpur, that DGFT, Kanpur had issued SCNs dated 18.07.2012 to

the Exporters under Section 13 of Foreign Trade Development & Regulation (FTD&R) Act, 1992 wherein, it has been, inter-alia, alleged that the

technical characteristic, quality and specifications of the essential oil used in the export product had not been mentioned on the Shipping Bills in

contravention or 4.55.3 handbook of procedure 2004/09 thereby suppressing the facts from the licensing authority while availing facility of transferable

DFIA.

32.7 In view of above, I find that M/s Kothari Foods & Fragrances has made exports under DFIA scheme, in contravention or the provisions

contained in Para 4.55.3 handbook of procedure 2004/09 (Earlier Para 21) and Customs Notfn. No. 40/2006 and had made the impugned exports in

violation of prohibitions stipulated under Section 11 of FTD&R Act, 1992. Therefore, the impugned export consignments as per Annexure-

INDEL/KNP (having FOB Rs.89,51,655/-) and Annexure-INDEL/KNP (having FOB Rs.79.87,437/-) held liable to confiscation under Section 113(d)

of Customs Act, 1962.â??

[The reference in the quoted paragraph is to the Foreign Trade (Development & Regulation) Act, 1993].

8. The assessee's appeal before the Tribunal succeeded on an interpretation of paragraph 4.55.3 of the HBP and the exemption notification,

holding that the requirement was that the technical specifications of the resultant product, and not the inputs, are required to be mentioned on the

shipping documents. The Tribunal relied on its earlier orders in the case of Global Exim vs. Commissioner 2010 (253) ELT 417 (affirmed by the

Bombay High Court in 2010 (259) ELT A139), and Commissioner vs. Sicpa India

Ltd. (2012) 279 ELT 113. The reasoning of the Tribunal was as follows:

11. On going through the said provisions of notification No. 40/2006 ibid clause 1 proviso provides that in respect of resultant products specified in para 4.55.3 of the handbook of procedures, the material permitted in the said authorization or the duty free authorization or the intermediate supply shall be for technical characteristic and specification as the material used in the said resultant product. Provided further that in respect of said resultant product, the exporter shall give declaration with regard to technical quality, characteristics and specifications in the shipping bill. The notification no. 40/2006 provides that the items mentioned in para 4.55.3 of HBP are the resultant products.

12. On going through the para 4.55.3, the resultant product manufactured by the appellant is pan masala, pan masala gutkha have no mentioned therein. The dispute has been arose between appellant and the Revenue is that as perfumes / essential oil are mentioned as an item (out of 22 items mentioned) in para 4.55.3 in respect of those items the appellant is required to give technical characteristics, quality and specification. As perfume/essential oil is one of the item, therefore, it is to be seen that as per notification no. 40/2006-Cus dated 01.05.2006 whether these essential oil/perfume are resultant product or not? Because as per notification no. 40/2006, the appellant is required to give specifications in respect of the resultant product mentioned in para 4.5.5.3. Admittedly, the perfume/essential oil are not the resultant product. On this understanding, no objections were raised at the time of export and no objections were raised by the DGFT while transferring the license.

9. The exemption notification is issued under Section 25(1) of the Act. It exempts materials imported into India under DFIA Licenses from customs duty, additional duty, safeguard duty and anti-dumping duty, subject to various conditions. These conditions include the following:-

(i) That the description, value and quantity of materials imported are covered by the said authorization and the said authorization is produced before the proper officer of customs at the time of clearance for debit:

Provided that in respect of resultant product specified in paragraph 4.55.3 of the Handbook of Procedure (Vol.I) of the Foreign Trade Policy, the

materials permitted in the said authorization or a duty free import authorization for intermediate supply, as the case may be, shall be of the same

quality, technical characteristics and specifications as the materials used in the said resultant product.

Provided further that in respect of the said resultant product the exporter shall give declaration with regard to the quality, technical characteristic and

specifications of materials used in the shipping bill.â??

10. The said condition specifically refers to Clause 4.55.3 of the HBP which is reproduced below:-

â??However in respect of the following items, the exporter shall be required to give declaration with regard to technical characteristics, quality and

specification in the shipping bill. The regional authority while issuing DFIA shall mention the technical characteristics, quality and specification in

respect of such inputs.

Alloys steel including stainless steel, copper alloys, synthetic rubber, bearings, solvent, perfumes/essential oil, aromatic chemicals, surfactants, relevant

fabrics, marble, articles made of poly-propylene, articles made of paper and paper board, insecticides, lead ingots, zinc ingots, citric acid, relevant glass

fibre reinforcement (glass fibre, chopped/stranded mat, roving woven surfacing mat), relevant synthetic resin (unsaturated polyester resin, epoxy resin,

vinyl ester resin, hydroxyl/ethyl cellulose), Lining Material.â??

11. Mr.Amit Bansal, learned counsel for the revenue, submitted that a reading of the exemption notification and paragraph 4.55.3 of the HBP make it

clear that these declarations are required if the inputs imported under the DFIA License are enumerated in paragraph 4.55.3. Applying this to the

present case, the revenue argues is that the assessee was duty bound to make the requisite declarations on the shipping bills, as its inputs

perfumes/essential oils, aromatic chemicals) are listed in paragraph 4.55.3. Learned counsel for the assessee, on the other hand emphasized the use of

the words â??resultant productâ? in the exemption notification, and contended that the declaration was required only if the items produced by using

the imported inputs are listed in paragraph 4.55.3. The Respondentâ??s products (pan masala, guthka) not having been included in that list, the

Respondentâ??s case is that no such declaration was required.

12. This court is of the considered view that the revenueâ??s argument is

merited and deserves acceptance. The DFIA scheme was intended to permit duty free import of inputs used in the manufacture of exported goods. The licenses issued by the DGFT thereunder are subject to the conditions stipulated in the HBP. Insofar as the license is in respect of the products specified in paragraph 4.55.3 thereof, the licensee is required to furnish a declaration with regard to the technical characteristics, quality and specification in the shipping bill.

13. The revenue contended that the DFIA scheme came into force on 01.05.2006, which is also the date on which the exemption notification was issued. The exemption was evidently granted to operationalize the benefits accruing under the DFIA scheme. The condition contained in paragraph (i) of the exemption notification must therefore be read harmoniously with the provision of the HBP to which it expressly refers. Such an interpretation leads to the conclusion that the "resultant product" mentioned in the two provisos to paragraph (i), refers to the goods produced using the inputs imported under the DFIA.

14. The rival interpretation advanced by the assessee, (and accepted by the Tribunal) is that the declaration requirement of the exemption notification is applicable only if the exported goods are included in the list of items enumerated in paragraph 4.55.3. This contention cannot be accepted.

15. The consequence of the assessee's interpretation would render it impossible to correlate the duty-free imports made under the DFIA, with the inputs used in the exported products. Further, if the "resultant products" are those enumerated in paragraph 4.55.3, then this interpretation would require a declaration of the quality, technical characteristics and specification of the materials used in those items. Such a construction, in this court's opinion, is unreasonable as the DFIA is intended to exempt inputs used in production of other goods in India, and is not concerned with the materials that have been used in the production of those inputs.

16. Learned counsel for the revenue had cited Global Exim and Sicpa India (Supra). In Global Exim, the Tribunal has taken the view that there is contradiction between the exemption notification and paragraph 4.55.3. On such a view, the Tribunal applied the provisions of the notification rather than that of the HBP. Although the matter was carried to the Bombay High Court by the Revenue, that court held that the factual findings recorded

by the Tribunal could not be dislodged by the revenue, and therefore dismissed the appeal on the ground that it did not raise any substantial question of law. The decision of the Bombay High Court does not therefore turn on an interpretation of the HBP and the exemption notification. In *Sicpa India*, the Tribunal has relied inter alia upon its earlier judgment in *Global Exim*. It has also referred to the judgment of Supreme Court in *Titan Medical Systems Pvt. Ltd. Vs. Collector of Customs* (2003) 9 SCC 133.

17. *Titan Medical Systems* is in respect of a Duty Exemption Scheme and exemption notification. The Supreme Court has interpreted the term “substantial manufacturing activity” in the Scheme, and held that, in the absence of any action taken by the licensing authority, the revenue could not rely upon any alleged fraud and misrepresentation on the part of the assessee in obtaining licenses under the Duty Exemption Scheme. *Titan Medical Systems* therefore is authority for the proposition that the assessee’s entitlement to an exemption, if it is otherwise eligible, cannot be denied on the basis of alleged misconduct of the party in obtaining an import license. In the present case, however, we have based our decision only on the entitlement of the assessee under the notification in question.

18. In view of the above discussion, the questions of law framed are answered in the affirmative, i.e. in favour of the revenue and against the assessee.

19. Although arguments before this Court were confined only to the above questions of law, learned counsel for the assessee pointed that certain other issues had also been raised before the Tribunal, including particularly the question of limitation which has not been decided in the impugned order. It was therefore submitted that, in the event the CESTAT’s order is set aside, the appeal may be remanded to the tribunal for deciding the other issues involved, including the question of limitation.

20. In view of the above, the appeal is allowed. The impugned judgment of the CESTAT is set aside, and Appeal No. C/53217/2015 is restored to the file of that tribunal for disposal in accordance with this judgment, and consideration of other issues in accordance with law. There shall be no order as to costs.