(2022) 01 CESTAT CK 0017

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Customs Appeal No. 51104, 51105 Of 2020

M/s Devtara Industries And Anr. APPELLANT

Vs

Commissioner Of Customs (Exports) RESPONDENT

Date of Decision : 21-01-2022

Acts Referred:

Customs Act, 1962 — Section 25, 112, 112(a), 114AA
Customs Tariff Act, 1975 — Section 3(8)

Citation : (2022) 01 CESTAT CK 0017

Hon'ble Judges : Anil Choudhary, J

Bench : Single Bench

Final Decision : Allowed

Judgement

1. The issue involved in these appeals is whether fine and penalty under Section 112(a)/ 114AA on the appellant-assessee and its Partner have been rightly imposed.

2. Brief facts of the case are that the appellant having IEC number and Central Excise registration, who are engaged in the manufacture of all kinds of textile made-ups and fabrics had imported capital goods under Zero duty EPCG Authorisation No. 0530160789 dated 09.05.2013. The appellant utilised the said authorisation on import of capital goods during the financial year 2013-14 when they imported capital goods valued at Rs.32,22,346/-and thus saved imported duty of Rs. 8,42,561/- imported vide Bill of Entry No. 2246923 dated 28.05.2013. As the appellant had availed zero duty EPCG scheme, they were not entitled to use or avail benefit under 'Status Holder Incentive Scheme (SHIS)' as per para 3.16 of Foreign Trade Policy, in the same financial year. However, the appellant due to inadvertence applied to DGFT for issue of SHIS script No. 0510363429 dated 23.08.2013 to save the duty amounting to Rs.47,74,743/-. This script was sold/ transferred by the appellant to one M/s Kajaria Ceramics Limited on 07.09.2013 for Rs. 11,25,475/-.

3. The allegation by Revenue is that the appellant have wrongly utilised the

benefit under the two schemes in the same financial year, which was not permissible as per para 3.16 of Foreign Trade Policy and thus the appellant violated the Condition No. 4 of para 2 of Notification No. 102/2009-Cus. dated 11.09.2009.

4. The appellant came to know of this mistake on 08.03.2014 when the DRI issued summons and apprised the appellant about this mistake. The appellant immediately on learning of mistake committed, repaid the amount of duty saved on import under zero duty of Rs. 8,42,561/- alongwith interest plus Rs. 69,342/- unutilised portion plus interest Rs.45,118/- totalling Rs. 9,57,021/- vide TR-6 challan No. 544 dated 21.03.2014 under information to the Department. The show cause notice dated 14.03.2016 was issued after about two years on the aforementioned facts and allegations alleging as under:-

"30. A perusal of the Condition No. (4) of Notification No. 102/2009-Cus. dated 11.09.2009, as it stood at the relevant point in time, confirms that prior to 22.06.2012 the duty exemption was not available to an importer who was issued in the year of issuance of a Zero Duty EPCG authorisation, a duty credit scrip under the SHIS scheme under para 3.16 of the FTP. In the instant case, it is a matter of fact that M/s Devtara Industries was issued both the EPCG authorisation and SHIS scrip in the year 2013-14. Thus, the said condition No. (4) of the said Notification No. 102/2009-Cus. dated 11.09.2009, as amended, was violated.

31. As can be seen importers apply for an EPCG authorisation in Form ANF 5A prescribed by the DGFT. At Sl. No. 4B of the said application, the importers/ applicants are required to give a declaration/ undertaking: "I/we hereby certify that our applicant firm/ company has NOT availed and shall not avail the benefit of Status Holders Incentive Scheme under Para 3.16 of FTP in the current year (Applicable to zero duty EPCG scheme only)". The EPCG authorisations are issued taking into account the above declaration. M/s Devtara Industries too followed this procedure. But they deliberately made/gave a false declaration/ undertaking that they had "not availed and shall not avail the benefit of the SHIS scheme under Para 3.16 of FTP in the current year". The applications for Zero Duty EPCG authorisation and SHIS scrip were both signed by Shri Umesh Tyagi, Partner, M/s Devtara Industries. Thus, M/s Devtara Industries has violated the condition of the EPCG authorisation.

32. From the express conditions incorporated in the EPCG authorisations (as brought out in para 15 above), it is evident that the import of capital goods shall be subject to the stipulations of the Customs Act, 1962, which governs the levy and collection of Customs duties and includes relevant duty exemption notifications issued under Section 25 of the Customs Act, 1962 read with Section 3(8) of the Customs Tariff Act, 1975.

33. Further, from the available evidence, it appears that M/s Devtara Industries applied for SHIS scrip on 02.05.2013 and subsequently filed three Bill of Entry

No. 2246923 dated 28.05.2013 under the Zero Duty EPCG scheme for import of capital goods. However, M/s Devtara Industries, at the time of filing of Bill of Entry under the Zero Duty EPCG scheme did not bring to the notice of Customs, the fact that they have applied for the said SHIS scrip. This suppression of vital fact allowed M/s Devtara Industries to claim and incorrectly avail the benefit of the aforesaid duty exemption Notification under the Zero Duty EPCG scheme.

34. As aforementioned, M/s Devtara Industries applied for SHIS scrip on 02.05.2013 but did not inform this fact to the Customs authorities concerned when they filed Bill of Entry for import of capital goods under the Zero Duty EPCG authorisations and wrongly availed the benefit of Notification No. 102/2009-Cus. dated 11.09.2009, as amended. Further, when the SHIS scrip was issued on 23.08.2013, they were duty-bound to bring this fact to the notice of the Customs authorities in observance and fulfilment of the conditions of the said Notification, whose benefit they had already claimed and availed. However, at no stage did M/s Devtara Industries inform the Customs authorities, either of the application made by them for the issue of the SHIS scrip or of the actual issue of the said SHIS scrip. This allowed M/s Devtara Industries to claim and avail the benefit of Notification No. 102/2009-Cus. dated 11.09.2009, as amended, and also retain the said benefit, which was otherwise not due to them.

35. Subsequent to availing the benefit of the Zero Duty EPCG scheme, on the basis of their application dated 02.05.2013 M/s Devtara Industries obtained one SHIS scrip No. 0510363429 dated 23.08.2013 from DGFT. Not only M/s Devtara Industries did not inform the Customs authorities that they were issued SHIS scrip in contravention of the condition of the said Notification No. 102/2009-Cus dated 11.09.2009, as amended, but they also filed one Bill of Entry under the EPCG scheme, on 28.05.2013 and availed its benefit. Even at this stage they chose not to inform the Customs Authorities that they were issued EPCG authorisations in the same year i.e., year 2013-14 during which the SHIS scrip being used by them were issued. Had they done so the Customs authorities would have questioned the benefit of the Zero Duty EPCG scheme earlier availed by them. This suppression of vital fact allowed M/s Devtara Industries to incorrectly retain the benefit of the aforesaid Notification No. 102/2009-Cus. dated 11.09.2009, as amended.

36. M/s Devtara Industries vide TR6 Challan No. 544 dated 21.03.2014 deposited the duty saved amount of Rs. 9,11,903/- with applicable interest (total amount deposited is Rs.9,57,021/-) under Zero duty EPCG scheme. This was done on the basis of the DGFT Notification No. 01(RE-2013)/2009-2014 dated 18.04.2013 which referred to amendment to Para 5.1(b) of Chapter 5 of the FTP, 2009-14 and stated that "Zero duty EPCG Scheme shall not be available to exporters, who avail in that year, the benefit of Status Holder Incentive Scheme under paragraph 3.16 of FTP. In case they have already availed SHIS benefit they would be eligible for Zero Duty EPCG Scheme if they surrender or refund SHIS, with applicable interest in case SHIS has been utilised." However, the Customs

Notification No. 102/2009-Cus. dated 11.09.2009, as amended, specifically provides that the surrender of the unutilised SHIS scrip or the refund of the utilised SHIS scrip should be done before availing Zero Duty EPCG authorisation. In the present case M/s Devtara Industries availed the Zero Duty EPCG authorisations for payment of duty on 28.05.2013. Thus, the relaxation does not apply. In any case, this condition of the Notification has to be applied prospectively from 22.06.2012. Importantly, the relevant condition to be fulfilled was that having been issued the Zero Duty EPCG authorisations, M/s Devtara Industries is not issued the SHIS scrips in the same year they obtained the Zero Duty EPCG authorisations means that the benefit of the said duty exemption Notification No. 102/2009-Cus. dated 11.09.2009, as amended, is not available to them."

5. Accordingly, the show cause notice proposed to demand the customs duty of Rs. 8,42,261/- under Notification No. 102/2009-Cus. read with para 28 of the Act alongwith interest. Further, proposing to appropriate the amount already deposited Rs.9,57,021/- with further proposal to confiscate the capital goods (machine) imported under the said authorisation with further proposal to impose penalty. Individual penalty was also proposed on the Partner Sh. Umesh Tyagi. The show cause notice was adjudicated vide order-in-original dated 31.05.2017 and the proposed demand was confirmed and appropriated alongwith interest as proposed. Further, the machine imported under the Zero duty EPCG scheme was ordered to be confiscated with option to redeem on payment of redemption fine of Rs.5 lakhs. Further, penalty of Rs. 3 lakhs on the appellant's firm under Section 112/114AA and also on Sh. Umesh Tyagi, Partner. Being aggrieved, the appellant and its Partner preferred appeal before the Commissioner (Appeals) who was pleased to dismiss the appeals upholding the order-in-original.

6. Being aggrieved, the appellants filed appeals before this Tribunal.

7. Learned Counsel appearing for the appellant states that there is no malafide on the part of the appellant as is evident from the following chronology of events-

23.04.2013

Applied for zero duty EPCG authorisation.

09.05.2013

EPCG No. 0530160789 granted by DGFT.

02.05.2013

Applied for SHIS script.

28.05.2013

Filed Bill of Entry No. 2246923 for import of machine under EPCG scheme, invoice valued at Rs.32,22,346/-.

23.08.2013

SHIS script No. 0510363429 issued amounting to Rs.47,74,743/- by DGFT.

07.09.2013

Sold / transferred script to M/s Kajaria Ceramics Limited.

11.03.2014

Statement of Sh. Umesh Tyagi, Partner recorded under Section 108, wherein he undertook to repay the duty and interest.

21.03.2014

Duty with interest and unutilised portion totalling Rs.9,52,021/- repaid by TR-6 challan No. 544.

7.1 Learned Counsel points out from the aforementioned chronology of events that it is not the case of the Revenue that appellant after availed one benefit had malafidely applied for the second benefit which was not permissible in law. As the appellant was in doubt whether they will be granted 'zero duty benefit' had applied for the SHIS for grant of script prior to the issue of zero duty EPCG authorisation. However, the office of DGFT also erroneously granted benefit under both the schemes in the same financial year. Further, the appellant on the first opportunity on understanding that he is not entitled to both the schemes, immediately repaid the benefit of one of the schemes with interest. Thus, there is no case of malafide made out against the appellant.

7.2. Learned Counsel relies on the Public Notice No. 30/2015-2020 dated 08.09.2016, wherein Government of India, Ministry of Commerce & Industry, DGFT have issued Notification as to procedure to be followed in cases of incorrectly issued simultaneous benefits of Zero Duty EPCG and SHIS in Foreign Trade Policy 2009-14. It is mentioned in this Public Notice, that Directorate have received references from DRI and various exporters, on the subject of incorrectly issued simultaneous benefits of Status Holder Incentive Scheme (SHIS) and Zero Duty EPCG Authorisation under Foreign Trade Policy 2009-14. Further, the Government appreciating the contributory mistake by the assessee and the Government decided to allow flexibility to the extent specified in the public notice with option to return either benefit. Wherein in para E, it is provided on account of different interpretations on the issue in the past, it has been decided in consultation with DoR that any erroneous benefit under both the schemes will be considered as bonafide error and no penal action can be taken against exporter/ importer by RAs and field formations of customs, including DRI.

8. Learned Authorised Representative relies on the impugned order and urges that it is not a case of inadvertence but there appears to be malafide on the part of the appellant.

9. Having considered the rival contentions and appreciating that there is no malafide on the part of the appellant, and further in view of the indulgence / realisation by the Government appreciating the difficulty faced by the trade,

there being confusion on the same. Accordingly, I allow the appeals and set aside the confiscation, fine and penalty imposed on the appellants. The appellants are entitled to consequential benefits, in accordance with law.

10. Thus, the appeals are allowed.

(Pronounced on 21.01.2022).

