(2021) 09 CESTAT CK 0039

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Customs Stay Application No. 40142 Of 2021, Customs Appeal No. 40225 Of 2021

M/s.ITC Limited APPELLANT

Vs

Commissioner Of Customs RESPONDENT

Date of Decision : 28-09-2021

Acts Referred:
Customs Act, 1962 — Section 25, 28, 28AA, 111(o), 112(a), 114A, 125, 142, 142(2)

Citation : (2021) 09 CESTAT CK 0039

Hon'ble Judges : Sulekha Beevi C.S., J;P. Venkata Subba Rao, Technical Member

Bench : Division Bench

Final Decision : Allowed

Judgement

1. In this appeal, the appellant is challenging the order of the Commissioner of Customs (IV) dated 28.09.2018, Impugned order whereby the Commissioner denied the benefit Exemption Notification No.102/2009-Cus. dt. 11.09.2009 as amended to imports by the appellant through various Customs locations made under twelve (12) zero duty Export Promotion Capital Goods, EPCG licenses for imports on the ground that condition 2(4) of the Notification which reads as follows was not fulfilled:

"4. That the importer is not issued, in the year of issuance of zero duty EPCG authorization, the duty credit scrips under SHIS scheme under para 3.16 of the Foreign Trade Policy. SHIS scrips which are not issued in a particular year for the reason that zero duty EPCG authorization has been issued in that year shall not be issued in future years also".

2. The learned Commissioner also confiscated the capital goods imported under these licences under section 111 (o) of the Customs Act, 1962 holding that appellant had wrongly claimed and availed the benefit of Customs Notification No.102/2009-Cus. The value of the capital goods so confiscated is Rs.141,02,93,240. He allowed redemption of the goods so confiscated on payment of a redemption fine of Rs.5 Crores under section 125 of the Customs

Act, 1962. He confirmed the demand of Customs duty foregone amounting to Rs.34,70,06,234/- which he held to have been evaded by the appellant by wrongly claiming the benefit of the aforesaid exemption notification. He imposed a penalty of Rs.1 crore upon the appellant under Section 112 (a) of the Customs Act, 1962. He dropped the proposal in the show cause notice to impose penalty under Section 114A of the Act. He ordered that the bond and bank guarantee, if any, furnished by them at the time of provisional release of the seized goods to be invoked and enforced for recovery of the Customs duty, interest and penalty.

3. Aggrieved, the appellant filed this appeal along with the miscellaneous application seeking stay of the order before this Bench. On 16.04.2021, when the matter came up for hearing, Misc. Order No.40042/2021 dt. 16.04.2021 was passed by Tribunal granting time to the appellant to make the mandatory pre-deposit required under Section 129E to admit an appeal in this Tribunal and report compliance. The appellant made the pre-deposit. Meanwhile, the appellant had approached the Hon'ble High Court of Madras by way of W.P.No.8353 of 2021 challenging the detention notice issued by the Customs authorities on 17.03.2021 for coercive recovery of demands confirmed by the impugned order. The Hon'ble High Court was pleased to grant ad interim stay till 04.06.2021 with a direction to this Tribunal to pass orders in the said stay application. As the appellant has now made the pre-deposit any further recovery stands automatically stayed and we take up the matter for final disposal.

4. We have gone through the case records and considered the submissions made on both sides. The background and the factual matrix which lead to this dispute are as follows. Several export promotion schemes are formulated by the Ministry of Commerce under the Foreign Trade (Development & Regulation) Act, 1992 and the Foreign Trade Policy framed thereunder which provide for duty free imports of capital goods, raw materials, etc. The Director General of Foreign Trade, DGFT with its head office in Delhi and Regional Offices in various other cities issues the licences, authorisations or scrips under these schemes to the exporters. The charge of duties of Customs, is however, under the Customs Act, 1962 which does not provide for waiver of the taxes through schemes or licenses issued by the DGFT under the FT(D&R) Act. Therefore, whenever a scheme is formulated by the Ministry of Commerce/DGFT, a corresponding exemption notification is issued under Section 25 of the Customs Act to grant exemption from duties of customs. Such exemptions can be full or partial, conditional or unconditional. If goods imported under a promotion scheme of DGFT are exempted, evidently, the importer will have to fulfil the conditions laid down in the scheme which are mirrored in the exemption notification issued under the Customs Act. Many of these conditions are post import conditions, for example, that the licencee shall export goods worth so and so. If the licencee defaults in fulfilling such conditions, duty has to be recovered from it. The only way duties can be recovered under the Customs Act is by issuing an SCN under section 28 which lays down a time limit of two years (prior to 2016, it was one year). The demand can be raised during an extended period of five years if the short payment is on account of (a)

Collusion; (b) Wilful mis-statement; or (c) suppression of facts. No demand can be raised beyond five years under any conditions. Evidently, the failure to fulfil conditions of the notification cannot be termed collusion, wilful mis-statement or suppression of facts and therefore, usually the normal period of limitation applies. The time given under the DGFT schemes to fulfil obligations is often much longer than two years or even five years. Therefore, no demand can be raised under section 28 even in case of default. This challenging legislative asymmetry between the time limit for demand under section 28 and the time given to fulfil obligations under the schemes by DGFT, is dealt with by two methods by the Customs:

(a) By assessing all goods imported under the schemes provisionally and finalising the assessment only after the obligations are fulfilled or the period of fulfilling obligations is completed and the exporter failed to fulfil the obligations;

(b) By obtaining a bond from the importer/exporter (with bank guarantee or security in some cases) binding itself to fulfil all the conditions of the exemption notification (which, as explained above, mirror the conditions under the scheme) and if it fails to do so, pay the differential duty. Usually, when a bond is executed and not honoured, a civil suit has to be filed to recover the bond amount. However, as per Section 142(2) of the Customs Act, "Where the terms of any bond or other instrument executed under this Act or any rules or regulations made thereunder provide that any amount due under such instrument may be recovered in the manner laid down in sub-section (1), the amount may, without prejudice to any other mode of recovery, be recovered in accordance with the provisions of that sub-section". Section 142 deals with recovery of arrears of taxes and the bond can be enforced under this section. As a matter of practice, recovery as per section 142(2) is specifically included in the bonds at the time of executing them.

In the present case, the assessments were Not provisional but the bonds were executed. The impugned order directs that the duty be recovered by enforcing the bonds.

5. The appellant has businesses in various fields viz. food products, personal care products, stationery products, paper boards and cigarettes, printing and packaging garments, hotels etc. It procures inputs and capital goods from both domestic and overseas suppliers. Intelligence gathered by the Directorate of Revenue Intelligence, DRI Ahmedabad indicated that it had wrongly availed the benefit of Customs Notification No.102/2002-Cus. in respect of the capital goods imported by them under zero duty EPCG Scheme. In terms of Condition 2 (4) of the said notification as it stood during the relevant time, the benefit of exemption was not available to an importer who has been, in the year of issuance of zero duty EPCG authorisation, issued the duty credit scrips under Status Holder Incentive Scheme, SHIS under para 3.16 of the Foreign Trade Policy, FTP. The appellant had in all obtained twenty (20) zero duty EPCG authorizations during the period 2011-12 and 2012-13 which allowed it to import capital goods duty

free of duty subject to some conditions and meet export obligations by exporting the goods manufactured using the capital goods. SHIS is another scheme of the DGFT which allows duty credit scrips to importers who hold the specific status holder as per the FTP.

6. The allegation in the SCN is that EPCG scheme with zero rate of duty on capital goods is only available if no scrips under SHIS were issued to the appellant. When applying for the zero duty EPCG scheme in Form 'ANF 5A', the appellant had wrongly declared that they have not availed the benefit of SHIS scheme when they have actually been issued SHIS scrips.

7. A show cause notice was issued by the DRI officers to ITC Unit, Kolkata answerable to Commissioner of Customs, Chennai. Another SCN on similar issue was issued answerable to the Commissioner of Customs, Jawaharlal Nehru Custom House, Nava Sheva in respect of the goods imported in his jurisdiction. A third SCN was issued by DRI answerable to the Commissioner of Customs, ICD Tughlakabad (Export) in respect of the goods imported in that jurisdiction. A fourth SCN was issued by DRI answerable to Commissioner of Customs, Air Cargo Complex (Exports) New Customs House, Delhi in respect of the goods imported in his jurisdiction. A fifth SCN was issued by DRI to the appellant answerable to CC Chennai VII Air Cargo Commissionerate, Chennai. A sixth SCN was issued answerable to CC Hyderabad Commissionerate and the seventh SCN was issued to them answerable to CC Kolkata (Port). The Commissioner of Customs (Chennai-IV), Chennai was appointed by the Board as the common adjudicating authority in respect of all these SCNs and he disposed of all the seven SCNs by the impugned order.

8. By the order impugned, the Commissioner has accepted the appellant's contentions in respect of 8 of the EPCG authorisations. Therefore, imports made under 12 EPCG authorisations form subject matter of the instant appeal which were issued to the appellant's Paperboards and Specialty Papers Division during the period June 10, 2011 to March 22, 2012. During the same financial year 2011-12, 12 Status Holder Incentive Scrips ("SHIS") were also issued to the same division of the appellant. According to the appellant, before applying for the said scrips, its officers met the Joint Director General of Foreign Trade ("JDGFT"), Hyderabad and thereafter addressed to him a letter dated January 28, 2011 enquiring whether the appellant could avail SHIS scheme on exports made in excess of export obligation under zero duty EPCG authorisations. By a letter dated February 9, 2011, JDGFT responded in the affirmative and stated that the benefit would be given to the appellant only upon receipt of ratification from the Director General of Foreign Trade ("DGFT"), New Delhi. The appellant was issued 10 scrips but decided not to utilise the said 10 SHIS and they lapsed on May 8, 2013.

9. According to the appellant, there were differences in understanding of the scope of the issue of SHIS Scrips and EPCG licences which was pointed out by the Comptroller and Auditor General and also noticed by the DRI and it was a

problem on a large scale. DGFT examined the matter in consultation with the Department of Revenue and issued the following Public Notice No.30/2015-2020 dt. 08.09.2016 to resolve the issues of incorrectly issued zero duty EPCG and SHIS under FTP 2009-14. This Public Notice reads as follows :

"Public Notice No.30/2015-2020

New Delhi dated the 8th September, 2016

Subject : Notification of procedure to be followed in cases of Incorrectly issued simultaneous benefits of Zero Duty EPCG and SHIS in FTP 2009:14 by the Director General of Foreign Trade in exercise of powers conferred under Para 2.04 of the Foreign Trade Policy 2015-2020.

This Directorate had received references from Directorate of Revenue Intelligence and various exporters, on the subject of incorrectly issued simultaneous benefits of Status Holder Incentive Scheme (SHIS) and Zero Duty EPCG Authorization under Foreign Trade Policy 2009-14. The issue involves Para 5.1 (b) of FTP and Para 3.10.3(b) of HBP 2009-14. The representations have been examined by this Directorate in consultation with Department of Revenue and it has been decided that exporters who have been issued or availed such simultaneous benefits of these schemes shall be allowed flexibility, to the extent specified in this public notice, to choose one of the two schemes. The option to return either benefit shall be subject to the following :-

A. Return of SHIS

In case of return of SHIS (including splits), the unutilized SHIS (part or whole) may be surrendered by the original holder to whom such SHIS was issued by surrender of the original SHIS scrip.

The amount of SHIS that has been utilized, by the original applicant to whom SHIS was issued (who has not transferred the SHIS) shall be refunded in cash (with interest at the rate prescribed under Section 28AA of Customs Act from the date of issue of SHIS by the original applicant.

The amount of SHIS that has been transferred by original applicant shall be treated as amount of SHIS utilized and treated accordingly including for purpose of refund and interest payment by original applicant.

In cases where SHIS was issued based on exports of immediately preceding year and then zero duty EPCG was also issued, and the exporter opts to return the SHIS, the power under Para 2.58 of FTP 2015-20 in consultation with relevant Committee would be exercised by DGFT to relax the FTP/HBP provisions requiring the 'prior' return of SHIS.

B. Return of zero duty EPCG/Post Export EPCG

When zero duty EPCG (i.e. all relevant authorisation) has to be returned, the amount equivalent to the duty forgone shall be refunded in cash with interest at the rate prescribed -

(a) Rate in EPCG notification if EPCG returned was correctly availed.

(b) Rate Under Section 28AA of Customs Act if EPCG returned was incorrectly availed) by the exporter.

The unutilized zero duty EPCG (whole or part) may be surrendered. Further, instead of return of zero duty EPCG (i.e. return of all the relevant authorizations), the exporter may opt to convert zero duty EPCGs issued till 17.4.2013 to 3% EPCGs (subject to eligibility) by paying the differential duties plus applicable interest (at the rate prescribed under Section 28AA) from date of clearance of the goods till the date of payment. In such cases, SHIS scrip need not be surrendered. This option shall not be available when the zero duty EPCG is already redeemed by DGFT.

When zero duty Post Export EPCG is to be returned, the authorization(s) shall be surrendered. If any related duty credit scrip(s) against such Zero duty Post Export EPCG authorisation(s) have been issued the same if unutilized may be surrendered by the original holder (by surrendering the original duty credit scrips). The amount of such Post Export EPCG scrip(s) that has been utilized by the original applicant shall be refunded in cash (with interest at the rate prescribed under Section 28 AA of Customs Act from the date of issue of the PE EPCG). The amount of PE EPCG Scrip(s) that has been transferred shall be treated as amount of Post Export EPCG scrip(s) utilized and treated accordingly including for purposes of payment of interest by exporter.

C. Mode of payment

The amount shall be paid back to Government in cash. The facility of debiting the amount in valid freely transferable duty credit scrip issued under Foreign Trade Policy or in valid SHIS scrip held by the original holder to whom it was issued, shall be allowed for paying the refund part. However, interest shall be always paid in cash.

D. Time Frame

A time frame of 9 months from provision of option by DGFT is allowed to exporters for the above.

E. No penal action in cases of incorrect issuance.

On account of different interpretations on the issue in the past, it has been decided in consultation with DoR that any erroneous issuance of SHIS/Zero Duty EPCG Authorisation will be considered bonafide error and no penal action shall be taken against exporters by RAs / field formations of Custom, including DRI. The Annexure provides the proper interpretation on the issuance of SHIS and Zero Duty EPCG/PE-EPCG benefits.

F. Consequential Action by CBEC

The CBEC would be issuing a separate Circular for guidance of its field formations.

Effect of this Public Notice: The exporters who have incorrectly availed simultaneous benefit of zero percent EPCG and SHIS have been provided an option to surrender one of the benefits subject to certain conditions.

Sd/-

(Anup Wadhawan)

Director General of Foreign Trade

E-Mail:dgft@nic.in

[issued from F.No.01/61/180/41-AM/13/PC3(Pt.)]"

10. The effect of this Public Notice was that the exporters who have incorrectly availed simultaneous benefit of zero percent EPCG and SHIS have been provided an option to surrender one of the benefits subject to some conditions. Correspondingly, CBEC issued Circular No.45/2016- Cus. dt. 23.09.2016 directing that pending issues related to simultaneous issuance or availing of zero duty EPCG and SHIS shall be decided in terms of the above public notice.

11. It is undisputed that the appellant has not utilised the SHIS scrips and returned them to the JDGFT, Hyderabad who had issued them and that they were cancelled by the JDGFT. Therefore, there is no dispute that the appellant had surrendered the benefits under the SHIS scheme as envisaged under the Public Notice.

12. Learned Commissioner holds in the impugned order that the surrender is subject to the conditions mentioned in the Public Notice and the appellant had not fulfilled the following condition in para A of the Public Notice:

In cases where SHIS was issued based on exports of immediately preceding year and then zero duty EPCG was also issued, and the exporter opts to return the SHIS, the power under Para 2.58 of FTP 2015-20 in consultation with relevant Committee would be exercised by DGFT to relax the FTP/HBP provisions requiring the 'prior' return of SHIS.

According to the Learned Commissioner, this para requires the appellant to obtain a policy relaxation under para 2.58 of the Foreign Trade Policy in respect of the SHIS which they have not done. They simply surrendered them to the JDGFT Hyderabad who cancelled them. Since they have not obtained a policy relaxation under para 2.58 of FTP, they have violated the above condition of the Public Notice and therefore, are not entitled to its benefit. Since they are not entitled to the benefit of the Public Notice, the capital goods imported under Notification No.102/2002-Cus has to meet all the conditions of the notification. In terms of Condition 2(4) of the said notification as it stood during the relevant time, the benefit of exemption was not available to an importer who has been, in the year of issuance of zero duty EPCG authorisation, issued the duty credit scrips under Status Holder Incentive Scheme. Therefore, the benefit of the exemption notification is not available to the appellant. Therefore, the entire duty has to be recovered denying the benefit and since a demand under section 28 was found to be not sustainable, the bond executed by the appellant should be invoked and the duty recovered. The confiscation and penalties imposed in the impugned order are consequent upon the denial of the benefit of the exemption notification.

13. Learned Authorised Representative of the Department reiterated the arguments of the impugned order and asserted that an exemption notification must be strictly construed and relied on the following case laws:

(i) Star industries Vs. Commissioner of Customs (Imports)Raigad reported in 2015 (324) ELT 656 (SC)

(ii) Commissioner of Central Excise, Pondicherry Vs. Honda Siel Power Products Ltd reported in 2015 (323) ELT 644 (SC)

(iii) Commissioner of Customs (Import), Mumbai Vs. Dilip Kumar & Company reported in 2018 (361) ELT 577 (SC)

14. We proceed to decide this issue first as it is the root of the dispute in the present appeal. Other aspects are consequential. We agree with the learned departmental representative that the exemption notifications must be strictly construed. So should the Public Notice in dispute and the para 2.58 of the Foreign Trade Policy. The disputed condition in the Public Notice reads as follows:

In cases where SHIS was issued based on exports of immediately preceding year and then zero duty EPCG was also issued, and the exporter opts to return the SHIS, the power under Para 2.58 of FTP 2015-20 in consultation with relevant Committee would be exercised by DGFT to relax the FTP/HBP provisions requiring the 'prior' return of SHIS.

15. A plain reading of the above condition only states what power would be exercised by the DGFT. Nowhere does it say that the licencee has to apply for, let alone obtain, a policy relaxation from the Policy Relaxation Committee. Once the Public Notice was issued by the DGFT in consultation with the Department of Revenue, it is not open for the Respondents in this case to read something extra into the Public Notice and deny its benefit on the ground that what has been read into it by the Respondents was not fulfilled by the appellant.

16. For the sake of better clarity, we also examine Para 2.58 of the Foreign Trade Policy. It reads as follows:

2.58 Exemption from Policy/Procedures DGFT may in public interest pass such orders or grant such exemption, relaxation or relief, as he may deem fit and proper, on grounds of genuine hardship and adverse impact on trade to any person or class or category of persons from any provision of FTP or any Procedures. While granting such exemption, DGFT may impose such conditions as he may deem fit after consulting the Committees as under:

S.No.

Description

Committee

a

Fixation/ modification of product norms

Norms Committees

b

Nexus with Capital Goods (CG) and benefits under EPCG Schemes

EPCG Committee

c

All other issues

Policy Relaxation Committee

We do not find anything in para 2.58 also to indicate that an exporter/importer has to apply for relaxation to the Policy Relaxation Committee or that there is form or manner in which it has to be applied for. Therefore, we find that the impugned order has gone beyond the scope of the Public Notice and read into it additional words and came to conclusion that the appellant had to apply to the Policy Relaxation Committee and obtain relaxation in order to avail the benefit of the Public Notice. Undisputedly, the appellant surrendered the scrips to the JDGFT, Hyderabad who had issued the scrips and he confirmed having cancelled them. If the appellant had to apply to the Policy Relaxation Committee, he would have told them so. How the application of the appellant surrendering the scrips was processed by the JDGFT Hyderabad and whether he submitted it to the DGFT Delhi and obtained clearance from the Policy Relaxation Committee or this was not considered necessary are matters pertaining to the internal working between JDGFT Hyderabad and DGFT Delhi. Nothing has been brought on record by the Revenue to show that the Policy Relaxation Committee has refused to grant relaxation. The only allegation is that the appellant has not applied for and obtained a relaxation which is not the requirement either under para 2.58 of the FTP or under the Public Notice. Having surrendered that SHIS scrips to the JDGFT, Hyderabad, completely unused the appellant has completed his end of the responsibility. By cancelling the scrips, the JDGFT has done its job. Nothing else is required to avail the benefit of the Public Notice and nothing can be read into it. Once the benefit of the Public Notice is available, the allegation that condition no. 2(4) has been violated by the appellant by obtaining both EPCG and SHIS scrips cannot sustain. The Public Notice prescribed a procedure to be followed in such cases and the appellant has followed so. No demand can therefore sustain and nor can the consequential orders confiscating the goods and imposing penalties.

17. In view of the above, we hold that impugned order cannot sustain and needs to be set aside and we do so. Appeal is allowed with consequential relief, if any, to the appellant. Stay application also stands disposed off.

(Pronounced in court on 28.09.2021)

