CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, WEST ZONAL BENCH : AHMEDABAD

REGIONAL BENCH - COURT NO. 3

CUSTOMS Appeal No. 11485 of 2015

[Arising out of Order-in-Original/Appeal No CCESA-VAD-APP-II--SSP-127-2014-15 dated 31.03.2015 passed by Commissioner of Central Excise, Customs and Service Tax-SURAT-II]

Vision Polymers P.Limited **.... Appellant**
P. No. 33, GIDC, Panoli, Ankleshwar,
BHARUCH, GUJARAT

VERSUS

Commissioner of Central Excise & ST,Surat-ii **.... Respondent**
New C.Ex Building, Opp. Gandhi Baug,
Chowk Bazar,Surat,Gujarat-395001

APPEARANCE :

Shri S. Suryanarayanan, Advocate for the Appellant
Shri Himanshu P Shrimali, Superintendent (AR) for the Revenue.

CORAM: HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)

DATE OF HEARING: 04.01.2024
DATE OF DECISION:09.01.2024

FINAL ORDER NO. 10074/2024

RAMESH NAIR:

The brief facts of the case are that the appellant was 100% EOU thereafter they got their unit de-bonded and exited from 100% EOU on 13.09.2011. At the time of de-bonding, as regards the customs duty, they proposed to the department that they are in the process of obtaining EPCG license therefore, under the license no customs duty is required to be paid. The customs department has issued no dues certificate and accordingly, the unit was de-bonded. Later on, the audit raised objection that the appellant did not have EPCG license therefore, unit could not have been de-bonded and the departmental authority has erroneously issued no dues certificate. On pointing out by the department the appellant have paid required customs duty and also paid interest however, show cause notice dated 24.01.2013 was issued by the department proposing the demand of customs duty of Rs. 17,54,676/- and proposing appropriation of the same as the same was paid by the appellant. The demand of interest was also made since the same was paid, was also proposed to be appropriated. Demand of Central Excise duty was also proposed for Rs. 5,84,558/-leviable on the closing stock of finished goods however the same was paid, it was proposed to appropriate the same. Similarly, interest on such customs duty which paid was proposed to be appropriated. Against the proposed demand, penalty under Section 112 of Customs Act and Section 11AC of Central Excise Act, 1944 was also proposed to be imposed. The Adjudicating Authority confirmed the demand and appropriated the amount of duty and interest already paid and in addition, equal amount of penalty was also imposed. The capital goods were confiscated with an option to redeem the same on payment of fine of Rs. 5,00,000/-. Being aggrieved with the above order, the appellant filed appeal before the Commissioner (Appeals), who concurring with the views taken by the Adjudicating Authority, upheld the entire order by dismissing the appeal of the appellant, therefore the present appeal.

2. Shri Himanshu P. Shrimali, learned Superintendent (AR) appearing on behalf of the Revenue reiterates the findings of the impugned order.

3. On carefully consideration of the submissions made by both the sides and perusal of record, I find that despite the fact that appellant did not have the EPCG license and they got their 100% EOU de-bonded without payment of duty, therefore it will be well within the knowledge of the appellant that duty is payable and they avoided to pay the duty. Therefore, it is clearly a malafide on the part of the appellant. As regards the submission of the learned Counsel that their case is covered by proviso to sub-section (2) to

Section 28 and show cause notice cannot be issued, for ease of reference, the said provision is reproduced below:-

> **"Section 28. [Recovery of [duties not levied or not paid or short-levied or short- paid] or erroneously refunded. -**
>
> (1) Where any [duty has not been levied or not paid or short-levied or short-paid] or erroneously refunded, or any interest payable has not been paid, part-paid or erroneously refunded, for any reason other than the reasons of collusion or any willful mis-statement or suppression of facts-
>
> (a) the proper officer shall, within [two years] from the relevant date, serve notice on the person chargeable with the duty or interest which has not been so levied [or paid] or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice;
>
> **[Provided** that before issuing notice, the proper officer shall hold pre-notice consultation with the person chargeable with duty or interest in such manner as may be prescribed;]
>
> (b) the person chargeable with the duty or interest, may pay before service of notice under clause (a) on the basis of,-
>
> (i) his own ascertainment of such duty; or
> (ii) the duty ascertained by the proper officer,
>
> the amount of duty along with the interest payable thereon under section 28AA or the amount of interest which has not been so paid or part-paid.
>
> **[Provided** that the proper officer shall not serve such show cause notice, where the amount involved is less than rupees one hundred.]
>
> **(2)** The person who has paid the duty along with interest or amount of interest under clause (b) of sub-section (1) shall inform the proper officer of such payment in writing, who, on receipt of such information, shall not serve any notice under clause (a) of that sub-section in respect of the duty or interest so paid or any penalty leviable under the provisions of this Act or the rules made thereunder in respect of such duty or interest:
>
> **[Provided** that where notice under clause (a) of sub-section (1) has been served and the proper officer is of the opinion that the amount of duty along with interest payable thereon under section 28AA or the amount of interest, as the case may be, as specified in the notice, has been paid in full within thirty days from the date of receipt of the notice, no penalty shall be levied and the proceedings against such person or other persons to whom the said notice is served under clause (a) of sub-section (1) shall be deemed to be concluded.]
>
> **(3)** Where the proper officer is of the opinion that the amount paid under clause (b) of sub-section (1) falls short of the amount actually payable, then, he shall proceed to issue the notice as provided for in clause (a) of that sub-section in respect of such amount which falls short of the amount actually payable in the manner specified under that sub-section and the period of [two years] shall be computed from the date of receipt of information under sub-section (2).

(4) Where any duty has not been [levied or not paid or has been short-levied or short-paid] or erroneously refunded, or interest payable has not been paid, part-paid or erroneously refunded, by reason of,-

(a) collusion; or
(b) any willful mis-statement; or
(c) suppression of facts,

by the importer or the exporter or the agent or employee of the importer or exporter, the proper officer shall, within five years from the relevant date, serve notice on the person chargeable with duty or interest which has not been [so levied or not paid] or which has been so short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice.

(5) Where any [duty has not been levied or not paid or has been short-levied or short paid] or the interest has not been charged or has been part-paid or the duty or interest has been erroneously refunded by reason of collusion or any willful mis-statement or suppression of facts by the importer or the exporter or the agent or the employee of the importer or the exporter, to whom a notice has been served under sub-section (4) by the proper officer, such person may pay the duty in full or in part, as may be accepted by him, and the interest payable thereon under section 28AA and the penalty equal to [fifteen per cent.] of the duty specified in the notice or the duty so accepted by that person, within thirty days of the receipt of the notice and inform the proper officer of such payment in writing."

From the above provision, it is observed that the provision for non-issuance of show cause notice is applicable only when the assessee paid the duty and interest and informed in writing to the department. Whereas, in the present case, firstly the extended period was informed on the ground that there is suppression of facts and malafide on the part of the appellant and secondly, the appellant have not declared to the department that they want to close the case on payment of duty and interest and therefore, the appellant is not entitled for relief as provided under sub-section (2) of Section 28 of the Customs Act, 1962. However, as the appellant have admittedly paid duty and interest but the option for payment of reduced penalty under sub-section (5) of Section 28 of Customs Act has not been extended either by the Adjudicating Authority or by the Commissioner (Appeals) therefore, only for limited purpose of option for reduced penalty in terms of sub-section (5) of Section 28, the matter needs to be remanded. The Adjudicating Authority may reconsider the redemption fine imposed against the confiscation of capital goods. As regards the payment of duty and interest, since the same is not contested, it is maintained.

4. Accordingly, the appeal is allowed by way of remand to the Adjudicating Authority for a limited purpose as discussed above.

(Pronounced in the open court on 09.01.2024*)*

(Ramesh Nair)
Member (Judicial)

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