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

REGIONAL BENCH - COURT NO. 3

EXCISE Appeal No. 11609 of 2016-DB

[Arising out of Order-in-Original/Appeal No VAD-EXCUS-001--COM-005-16-17 dated 31.05.2016 passed by Commissioner of Central Excise, CUSTOMS (Adjudication)-VADODARA-I]

Polymer Technologies International **.... Appellant**
Block No.,310/c, Village.sim of Dabhasa,
Taluka; Padra, VADODARA, GUJARAT

VERSUS

Commissioner of Central Excise & ST, Vadodara-i **.... Respondent**
1st Floor...Central Excise Building,
Race Course Circle, Vadodara, Gujarat-390007

WITH

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Shri Hasmukh I Patel **.... Appellant**
M/s. Polymer Technologies International
Block No.,310/c, Village.sim of Dabhasa,
Taluka; Padra, VADODARA, GUJARAT

VERSUS

Commissioner of Central Excise & ST, Vadodara-i **.... Respondent**
1st Floor...Central Excise Building,
Race Course Circle, Vadodara, Gujarat-390007

APPEARANCE :

Shri JC Patel, Advocate for the Appellant
Shri AR Kanani, Superintendent, Superintendent (AR) for the Respondent

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

DATE OF HEARING : 25.10.2023
DATE OF DECISION: 23.02.2024

FINAL ORDER NO. 10476-10477/2024

RAMESH NAIR :

Briefly the facts of the case are that during the period 2009-2010 to June-2012, the Appellant, Polymer Technologies International, were functioning as 100% EOU and were manufacturing "Intraocular Lens" falling under Chapter 90 of the Central Excise Tariff. The Appellant, Shri Hasmukh I. Patel, was employee and authorized signatory of the 100% EOU. In respect of the goods cleared into DTA, the Appellant were availing exemption under Notification No. 23/2003-CE dated 31-3-2003.

2. In June 2012, the Appellant were granted permission to exit from EOU scheme and the Assistant Commissioner of Central Excise, Vadodara issued "No Dues Certificate" and thereafter Final Exit Order dated 24-7-2012 was passed. Almost three years after the Appellant exited from EOU, a Show Cause Notice dated 2-6-2015 was issued to the Appellant wherein it was contended that during the period 2009-2010 to June-2012, the Appellant had wrongly availed exemption under Notification No.23/2003-CE dated 31-3-2003 from Excise duty equal to Special Additional duty (SAD) of 4% leviable under Section 3(5) of the Customs Tariff Act, 1975, in respect of Intraocular Lens cleared into DTA.

2.1 It was contended in the show cause notice that under Sr. No.1 of Notification no. 23/2003-CE, Excise duty on goods cleared into DTA, which is equal to the SAD leviable under Section 3(5) of the Customs Tariff Act 1975, was exempted subject to Condition 1 which stipulated that the goods should not be exempted by the State Government from payment of sales tax or Value added Tax (VAT); that Intraocular Lens were exempted from VAT under Sr. No.3 (18) of Schedule I read with Section 5(1) of the Gujarat Value Added Tax Act. The said Sr. No.3 (18) reads as follows:

> "3. Aids and Implements used by handicapped persons
> (18) Intra-ocular lens used for cataract operation."

2.2 The show cause notice accordingly demanded Central Excise duty equal to SAD amounting to Rs.89.51 lakhs under Section 11A (1)/A(5) of the Central Excise Act 1944 read with B-17 Bond executed by the Appellant at the time of taking EOU license.

2.3 The Appellant replied to the said show cause notice by their letters dated 15-6-2015 and 20-5-2016 and contested the Show Cause Notice both on merits and limitation. On merits it was submitted that the goods were otherwise exempted from SAD if imported into India and consequently under the Proviso to Section 3 (1) of the Central Excise Act 1944, the excise duty payable equal to SAD will be NIL.

2.4 After considering the reply and giving personal hearing in the matter, the Principal Commissioner of Central Excise, Vadodara vide Order-in-Original dated 31-5-2016 confirmed the demand for duty of Rs.89.51 Lakhs with interest and further imposed penalties on the Appellant against which the present appeals of the appellant have been preferred.

3. Shri J.C.Patel, learned counsel appearing on behalf of Appellant, submits that since goods in question, if imported, are exempted from SAD, excise duty equal to SAD payable under Proviso to Section 3(1) of the Central Excise Act 1944, is NIL, consequently exemption from Excise duty equal to SAD under Notification No.23/2003-CE is not required; even otherwise, the Notice issued under section 11A(5), which stood omitted with effect from 14-5-2015, is not maintainable having been issued under non-existing provision and further that notice is barred by limitation of one year; that Appellant have duly disclosed in the ER-2 Returns that they were availing benefit of Notification No.23/2003-CE and that Appellant have been

subjected to audit from time to time; the Audit report records that the Appellant were availing Notification No.23/2003. Reliance in this behalf was placed on the following decisions:

(a) Virgo Valves & Controls P. Ltd v CCE – 2022 (5) TMI 1302-CESTAT Mumbai

(b) DharampalLalchand Chug v CCE- 2015(323) ELT 753

(c) John Deere (I) P Ltd v CCE – 2014 (311) ELT 189

4. Shri AR Kanani, Superintendent learned AR appearing for the revenue relied upon the finding given in the impugned order.

5. We have carefully considered the submissions made by both the sides and perused the records. The issues arise for consideration in the present Appeals are as follows:

a) Whether Excise duty equal to Special Additional Duty of customs (SAD) under Section 3(5) of the Customs Tariff Act 1975 was payable on "Intraocular Lens" cleared by the Appellant in DTA during 2009-10 to June 2012 when the Appellant were 100% EOU,

b) Whether the Show Cause Notice dated 2-6-2015 issued under Section 11A (1)/ (5) of the Central Excise Act 1944 is without jurisdiction since the said Section 11A (5) stood omitted with effect from 14-5-2015 and,

c) Whether the notice is barred by time; larger period of limitation will apply.

6. The Show Cause Notice and the impugned Order-in-Original (OIO) proceed on the basis that exemption under Notification No.23/2003-CE

dated 31-3-2003, from Excise duty equal to Special Additional duty (SAD) is not available since condition No.1 of the said Notification is not fulfilled. Condition 1 stipulates that the goods should not be exempted by the State Government from payment of sales tax or Value added Tax (VAT). The Show Cause Notice and OIO proceed on the basis that Intraocular Lens were exempted from VAT under Sr. No.3 (18) of Schedule I read with Section 5(1) of the Gujarat Value Added Tax Act. The said Sr. No.3 (18) reads as follows:

> "3. Aids and Implements used by handicapped persons
> (18) Intra-ocular lens used for cataract operation."

The case of the department is that the goods are exempted from VAT as "Aids and implements used by handicapped persons" and therefore not eligible to exemption from excise duty equal to SAD under Notification No.23/2003-CE. As against this it is the submission of the Appellant that upon import "Aids and implements used by handicapped persons" are exempted from SAD under Sr. No.14 of Notification No. 20/2006-CUS dated 01-03-2006 up to 16-3-2012 and thereafter under Sr. No.11 of Notification no. 21/2012-Cus dated 17-3-2012 and consequently the Excise duty equal to SAD payable under the Proviso to Section 3 (1) of the Central Excise Act 1944, will be NIL. Consequently, the exemption under Notification No.23/2003-CE is not required and further that the goods cleared in DTA, if imported, were also exempt from SAD under Sr. No.1 of Notification No. 29/2010-CUS dated 27-2-2010 up to 16-3-2012 and thereafter under Sr. No.2 of Notification No. 21/2012-Cus dated 17-3-2012 since the same are pre-packaged goods for retail sale to which provisions of Legal Metrology Act and Rules apply. Therefore, excise duty equal to SAD payable under the Proviso to Section 3 (1) of the Central Excise Act 1944, will be NIL.

Consequently, the exemption under Notification No.23/2003-CE is not required.

6.1 It is thus clear that exemption from Excise duty equal to SAD under Notification No.23/2003-CE is not required since the said goods if imported are exempt from SAD and therefore Excise duty equal to SAD payable under the Proviso to Section 3 (1) of the Central Excise Act 1944, will be NIL.

6.2 Further the Show Cause Notice dated 27-5-2015, which is purportedly issued under Section 11A(1)/A (5) of the Central Excise Act 1944 was barred by time and not maintainable in law. If the Notice is purported to be issued under Section 11A(1), the same is barred by time, having been issued beyond the period of one year then specified in Section 11A (1). If the Notice is purported to be issued under Section 11A (5), the same is not maintainable in law, since the said Section 11A (5) stood omitted with effect from 14-5-2015. The show cause notice having been issued under a non-existing provision is not maintainable in law.

6.3 In any event, the said Section 11A (5) read with Section 11A (4) applies in cases of fraud, collusion, wilful mis-statement, suppression of facts or contravention with intent to evade, none of which is present in this case. In the ER-2 Returns it is duly disclosed that the Appellant were availing Notification No.23/2003-CE. The Appellant have been subjected to audit from time to time. The Audit report records that the Appellant were availing Notification No.23/2003. The department was therefore fully aware that the Appellant were availing benefit of Notification no.23/2003. Moreover, No Dues certificate was also issued by the department at the time of exit from EOU. Accordingly, it is not a case of fraud, collusion, wilful mis-statement, suppression of facts or contravention with intent to evade and the larger period of limitation is inapplicable in the present case. Reliance is placed in this behalf on the following decisions:

(a) Virgo Valves & Controls P. Ltd v CCE – 2022 (5) TMI 1302-CESTAT Mumbai

In this judgment it is held that where De-bonding was done after verification by Central Excise and issuance of No dues certificate, the larger period of limitation cannot apply.

(b) DharampalLalchand Chug v CCE- 2015(323) ELT 753

In this judgment it is held that even demand in terms of the Bond has to be within limitation period.

(c) John Deere (I) P Ltd v CCE – 2014 (311) ELT 189

In this decision it was held that where benefit of Notification No.23/2003-CE was not available for excise duty equal to SAD on the ground that VAT was exempt, it was held that the larger period of limitation cannot apply when the department was aware that the EOU was availing Notification No .23/2003-CE.

7. In view of foregoing, impugned order is not tenable both on merits and on limitation. Accordingly, the impugned order is set aside. Appeals are allowed.

(Pronounced in the open court on 23.02.2024*)*

(Ramesh Nair)
Member (Judicial)

(Raju)
Member (Technical)

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