CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
AHMEDABAD
REGIONAL BENCH, COURT NO. 1

CUSTOMS APPEAL NO. 10717 OF 2023 -DB

(Arising out of 010-AHM-CUSTM-000-COM-11-23-24 dated 27/07/2023 passed by Commissioner of CUSTOMS, Central Excise & Service Tax (Appeals)-Ahmedabad)

AMNS PORTS HAZIRA LIMITED **Appellant**

Formaly Known As Essar Bulk Terminal Pvt Ltd. AMNS
House, AMNS Township, 27th K.M. Surat,
Hazira Road, Hazira, Surat, Gujarat- 394270

Vs.

COMMISSIONER OF CUSTOMS-CUSTOMS AHMEDABAD **Respondent**

Office of the Pr. Commissioner of Customs,
1th Floor, Customs House, Opp. Old High Court,
Navrangpura, Ahmedabad, Gujarat- 380009

WITH

CUSTOMS APPEAL NO. 10734 OF 2023 -DB

(Arising out of 010-AHM-CUSTM-000-COM-11-23-24 dated 27/07/2023 passed by Commissioner of CUSTOMS, Central Excise & Service Tax (Appeals)-Ahmedabad)

KAUSHIK HOTHI **Appellant**

B-701, Neelkanth
Residency Near Galaxy Circle
Green City Road Pal Surat – 335009

Vs.

COMMISSIONER OF CUSTOMS-CUSTOMS AHMEDABAD **Respondent**

Office of the Pr. Commissioner of Customs,
1th Floor, Customs House, Opp. Old High Court,
Navrangpura, Ahmedabad, Gujarat- 380009

Appearance:
Present for the Appellant :Shri Vishal Agrawal, Advocate and Ms. Dimple Gohil, Advocate
Present for the Respondent: Shri Tara Prakash, Deputy Commissioner (AR)

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

Final Order No. 11633-11634/2024

DATE OF HEARING: **24/04/2024**
DATE OF DECISION: **24.07.2024**

RAMESH NAIR

These appeals lie against proceedings initiated against M/s. AMNS Ports Hazira Ltd. and its employee, Shri Kaushik Hothi, in relation to the Ship Unloader, Barge, and Railmount goods imported against Bill of Entry No. 2215226 dtd. 27.02.2019 by availing the benefit of Customs Notification No. 16/2015-Cus. dtd. 01.04.2015, as amended by Customs Notification No. 79/2017-Cus. dtd. 13.10.2017. Vide impugned Order-in-Original No. AHM-CUSTM-000-COM-11-23-24 dtd. 27.07.2023 the Ld. Commissioner has rejected the IGST exemption availed by the Appellant under EPCG Scheme as per Notification No. 16/2015-Cus. dtd. 01.04.2015, as amended by Notification No. 79/2018-Cus. dtd. 13.10.2017. By the impugned order demand of custom duty in liew of IGST of Rs.12,12,48,161/- was confirmed, the capital goods imported by the Appellant have been held to be liable for confiscation under Section 111(m) and 111(0) of the Act; Penalty of Rs, 12,12,48,161/- alongwith penalty equal to the applicable interest has been imposed on the appellant under Section 114A of the Act, in addition, penalty of 10,00,000/- was imposed on Shri Kaushik Hothi under Section 112(a) and (b)(iii) of the of Customs Act, 1962 and penalty of 5,00,000 under Section 114AA of the Act. Aggrieved from the impugned order passed by the learned Commissioner, the appellants have filed these appeals.

2. Shri Vishal Agarwal, learned counsel with Ms. Dimple Gohil Ld. Advocate appearing for the appellants submits that Appellant is provider of 'port services' and for providing such services, it had imported capital goods viz, Ship Unloader, Barge and Railmount under EPCG Authorization No. 5230026626 dtd. 21.01.2019 by filing Bill of Entry No. 2215226 dtd. 27.02.2019 and claimed exemption from Basic Customs Duty and IGST under Notification No. 16/2015-Cus dtd. 01.04.2015, as amended. Under the terms of the said Authorization, the appellant was required to fulfil an export obligation equivalent to 6 times the duty saved on import of capital goods of FOB basis within a period of 6 years i.e. by 20.01.2025.

3. He further submits that the gravamen of the case of the Revenue is that the Appellant had allegedly availed the exemption of IGST in terms of above Notification despite being aware that, as per Explanation C(II) in the said Notification, payment received in rupee terms towards export of services could be counted towards fulfilment of export obligation only if exemption from payment of IGST had not been availed. However, under the terms of said authorization, the appellant was required to meet its export obligation within period of 6 years i.e by 20.01.2025. Accordingly, no proceedings could have been initiated in respect of the exports undertaken by the Appellant towards fulfilment of export obligation until the expiry of export obligation period.

4. Without prejudice he also submits that as per Para 5.04(a) of the Foreign Trade Policy, the Export Obligation can be fulfilled by an Authorisation holder through export of goods which are manufactured by him or his supporting manufacture/services rendered by him, for which the EPCG authorisation has been granted.

5. He further submits that under para 9.50 of the FTP, 'Services' include all tradable services covered under General Agreement on Trade in Services (GATS) and earning free foreign exchange. An authorization holder can fulfil its export obligation by rendering services i.e. all tradable services covered under GATS and thereby earning free foreign exchange. Further, to qualify as a service provider, the authorization holder has to be a supplier of service of any one of the modes prescribed in Para 9.51 pf the FTP.

6. He argued that it is an admitted fact that the Appellant is a provider of port service and has obtained the Authorization for the import of capital goods for providing such port services. Further, there is also no dispute on the status of the Appellant as a "Service provider" inasmuch as in terms of Para 9.5 of the FTP, the Appellant can render the services under any one of the modes prescribed therein and fulfil its export obligation. However, it is the department's case that for the services rendered, the Appellant has received payment in rupee terms and consequently, the Appellant is not eligible to claim the benefit of the Notification. Appellant is a provider of port services such as unloading of import cargo, loading of export cargo, provider of vessel related services such as hiring of

barges and tugs, berthing services etc. These services are inter alia provided to foreign vessels.

7. He also submits that during the Export Obligation (EO) period, it has provided vessel related services to foreign vessels which have carried cargo to/and from India and has fulfilled the Export Obligation by earning convertible foreign exchange. The Appellant has raised invoices on the Indian Agents of Foreign Vessels. The Indian Agents acting as intermediaries of the foreign vessels have paid the consideration to the Appellant in Indian Rupees, out of the total remittance receivable by them from foreign vessels. The Indian agents acting as intermediary has paid the Appellant out of such foreign remittances receivable by them in foreign exchange and has satisfied the required terms towards fulfilment of its Export Obligation. He placed reliance on the decision of Hon'ble Supreme Court in the case of J.B. Boda & Co. Pvt. Ltd. Vs. CBDT [(1997)1 SCC 719].

The appellants also filed written submissions dated 19 July, 2024 which is taken on record and considered.

8. Shri Tara Prakash, Ld. Assistant Commissioner (AR) appearing on behalf of the Revenue reiterates the findings of the impugned order.

9. We have carefully considered the submissions made by both the sides and perused the records. We find that the Appellant had imported capital goods i.e Ship Unloader, Barge and Railmount under EPCG Authorization dtd. 21.01.2019, availing benefit of Zero Duty Export Promotion Scheme (EPCG). The said consignment was cleared vide Bill of Entry No. 2215226 dtd. 27.02.2019 and Nil BCD and Nil IGST was paid availing the benefit of Customs Notification No. 16/2015-Cus. dtd. 01.04.2015, as amended by Customs Notification No. 79/2017-Cus. dtd. 13.10.2017. Also, as per the EPCG Authorization, the export obligation was to be fulfilled by providing the Port related services covered under Appendix 5D of the Foreign Trade Policy 2015-20 issued vide DGFT Public Notice No. 04/2015-2020 dtd. 03.05.2016. The allegation of the department in the present matter is that Customs Notification No. 16/2015-Cus. dtd. 01.04.2015 was amended by Customs Notification No. 79/2017-Cus. dtd. 13.10.2017 to the effect that after amendment, as per para 3(c)(II)(d) of the said amended Custom Notification, payment received

in Rupee terms (INR) for such services as notified in Appendix 5D shall also be counted towards discharge of export obligation under the EPCG, only in Authorization where exemption for Integrated Tax and Goods and Services (IGST) compensation cess is not availed.

10. We find that the EPCG License was issued to the Appellant on 21.01.2019 and under the terms of the said License, the Appellant was required to meet its export obligation within a period of 6 years, i.e by 20.01.2025. We also find that this fact has neither been disputed in the show cause notice nor in the impugned order passed by the Ld. Commissioner. The department has to initiate the proceedings only after the expiry of the licencing period. Therefore in our view any proceeding prior to this period is purely premature and the impugned order confirming demands before the expiry of the licencing period is not justified and correct in law. Such actions, therefore, cannot be sustained. In this regard we also find the support from the following judgments.

(i) *Oriental Granite Ltd.* v. *CC, Hyderabad* - 2001 (131) E.L.T. 430 (Tri.-Chennai)

(ii) *Semcon Devices Pvt. Ltd.* v. *CCE, Hyderabad* - 2007 (220) E.L.T. 267 (Tri.-Bang.)

(iii) *I.F.G. Ltd.* v. *CC & CE, Goa* - 2002 (145) E.L.T. 348 (Tri.-Mumbai)

(iv) *Bluegold Maritech (International) Ltd.* v. *CC, Guntur* - 2007 (207) E.L.T. 397 (Tri.-Bang.)

(v) *Transparent Technologies Pvt. Ltd.* v. *CCE, Belgaum* - 2006 (200) E.L.T. 118 (Tri.-Bang.)

(vi) *C.L.P Zippers (P) Ltd.* v. *CCE, Jalandhar* - 2005 (192) E.L.T. 730 (Tri.-Del.)

(vii) *Pashupati Fabrics Limited* v. *CCE, Lucknow* - 2005 (184) E.L.T. 41 (Tri.-Del.)

(viii) *Eon Polymers Ltd.* v. *CCE, Jaipur* - 2001 (135) E.L.T. 1316 (Tri.-Del.)

(ix) *T.V. Raja Reddy* v. *CE & C, Guntur* - 2001 (138) E.L.T. 793 (Tri.-Chennai)

(x) *Vishal Footwear Ltd.* v. *CC, New Delhi* - 1999 (114) E.L.T. 60 (Tribunal).

11. We also find that in the present matter, appellant vide letter dtd. 06.03.2020 and 23.09.2019 addressed to the Additional Commissioner and vide letter dtd. 04.08.2023 addressed to the Principle Commissioner requested reassessment/amendment of the said disputed Bill of Entry, to enable it make payment of IGST amount, as the entire situation was revenue neutral.

12. We find that Para 5.2 of Circular No. 16/2023-Cus dtd. 07.06.2023 state that as per the Hon'ble Supreme Court's judgment in the case of Union of India & Ors. Vs. Cosmo Films Ltd. 2023 (72) G.S.T.L. 417 (S.C.) / (2023) 5 Centax 286 (S.C.), importer of goods, who do not meet the pre-import conditions, are required to pay GST and Compensation Cess, as the case may be. However, the Hon'ble Court also permitted the assesses to claim refund or avail Input Tax Credit, while specifically stating that a Bill of Entry rather than a challan would be prescribed documents for this purpose.

13. We also noticed that in the present matter IGST amount paid by the Appellant on import of goods was available as ITC (Input Tax Credit) to the Appellant and hence there was a revenue –neutral situation. As per the submission of Appellant they have paid GST in cash of Rs. 6,77,32,906/- for the month of March 2019 and Rs.15,96,30,184/- for the month of April,2019. Thus against total liability of IGST of Rs. 12,12,48,161/-, the appellant have paid total GST of Rs.22,73,63,090/- in cash which is much more than the IGST payable which was available to the appellant as ITC. The revenue is at liberty to verify the above data. In such case the entire exercise of payment of IGST and availment of ITC of IGST amount is revenue neutral. The Tribunal and courts in number of cases held that in case of revenue neutral the demand does not exist, some of the judgments are referred below:

(a) Larsen & Toubro Ltd. v. CCE, Pondicherry - 2008 (227) E.L.T. 65 (Tri.-Chennai). It was found in that case that the differential amount of duty demanded from the assessee would be available to them as rebate and hence the demand was set aside on the ground of revenue neutrality.

(b) India Pistons Ltd. v. CCE, Chennai - 2008 (221) E.L.T. 295 (Tri.-Chennai). It was held in that case that the duty paid by the assessee was available as MODVAT credit to their sister unit and hence there was a revenue-neutral situation. On this basis, the demand was set aside.

(c) CCE, Pune v. Coca-Cola India Pvt. Ltd. - 2007 (213) E.L.T. 490 (S.C.). In this case, it was found that the excise duty payable on beverage bases/concentrates by the assessee was available as MODVAT credit to the buyers (manufacturers of beverages and aerated waters) under Notification 5/94-C.E. (N.T.) and, therefore, the demand was set aside on the ground of revenue neutrality.

14. In view of the above judgments, it is clear that if IGST is paid by the Appellant, same shall be available as Input Tax credit to the Appellant and to that extent net liability of GST shall stand reduced while paying the GST by the Appellant. Therefore it is an exercise of revenue neutral for this reason demand does not exist. We therefore set aside the demand on the point of revenue neutrality also.

15. For these reasons, we hold that confiscation of the imported goods cannot sustain and it is hereby set aside. On the basis of discussions above, we also hold that penalty imposed on both the appellants is unwarranted. The impugned order is set aside. Appeals are allowed with consequential relief, if any, as per law.

(Pronounced in the open court on **24.07.2024** *)*

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

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