

Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad
REGIONAL BENCH- COURT NO.3

Customs Appeal No.10099 of 2013

(Arising out of OIO-08/COMMISSIONER/2012 dated 27/09/2012 passed by Commissioner of CUSTOMS-JAMNAGAR(PREV))

Amar Cold Storage

.....Appellant

Hiravati Marine Products P. Ltd., Jawar Naka, Porbandar, Gujarat

VERSUS

C.C.-Jamnagar(prev)

.....Respondent

Sharda House...Bedi Bandar Road, Opp. Panchavati, Jamnagar, Gujarat

APPEARANCE:

Shri R. Subramanya, Advocate for the Appellant

Shri Dinesh Prithiani, Assistant Commissioner (AR) for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. RAJU
Final Order No. A/ 11348 /2022

DATE OF HEARING: 02.11.2022

DATE OF DECISION: 04.11.2022

RAMESH NAIR

The brief facts of the case are that an intelligence was received by the department that the appellant are engaged in the manufacturing of 'Surimi' and exporting the same in the name of processed, preserved and frozen surimi under the DEPB credit declaring the product under Sr. No.2 of the group code no. 66 of Fish & Fish Products of the DEPB Schedule. A case was made out by the department on the ground that the product manufactured and exported by the appellant falls under Sr.No.1 of group code no.66 under the description of Fish & Fish Products including frozen meat and thus the appellant have wrongly taken benefit by availing DEPB. A show cause notice was adjudicated by the adjudicating authority whereby, it was ordered for recovery of Rs.79,78,420/- under proviso to section 28(1) of the Customs Act, 1962 along with interest under Section 28AB and also imposed penalty of Rs.50 lakhs under Section 114(ii) of the Customs Act, 1962. Being aggrieved by the Order-In-Original, the appellant filed present appeal.

02. Shri R. Subramanya, learned counsel appearing on behalf of the appellant submits that there was a dispute about the classification of the goods under DEPB Schedule and with reference to the said dispute even the appellant was also issued a show cause notice 03.04.2007 by Office of Joint Director General of Foreign Trade, Rajkot making the same allegation and wrong availment of excess amount of DEPB amounting to Rs.79,78,420/-

thereafter, on appellant's persuasion with DGFT- Delhi through 'The Seafood Exporters Association of India' the DGFT vide letter dated 9th January, 2009 clarified that the appellant is entitled for DEPB on export of 'Surimi' as DEPB Entry at Sr. No.2/66 of the then DEPB Rate Schedule. He submits that after this clarification issued by DGFT in favour of the appellant, the DGFT vide letter dated 21.05.2012 withdrawn the show cause notice dated 03.04.2007. He submits that as per the above sequential development and clarification by DGFT, the issue is no longer under dispute accordingly, the demand of DEPB credit is not admissible.

03. On the other hand Shri Dinesh Prithiani, learned Assistant Commissioner (AR) appearing on behalf of the revenue reiterates the finding of the impugned order. He submits that the decision was taken to classify the appellant's product under Sr.No.1 by the DEPB Committee vide corrigendum dated 06.01.2006 whereas, the clarification given in respect of appellant is only by way of letter and on that basis it cannot be accepted that the product of the appellant is classifiable under Sr.No.2 of group code of 66 of DEPB Schedule. He placed reliance on the following decisions:-

- 2010 (252) ELT 19 (AP)- Sravani Impex P Ltd.
- 2005 (183) ELT 424 (Guj.)- Suresh Dhansiram Agarwal

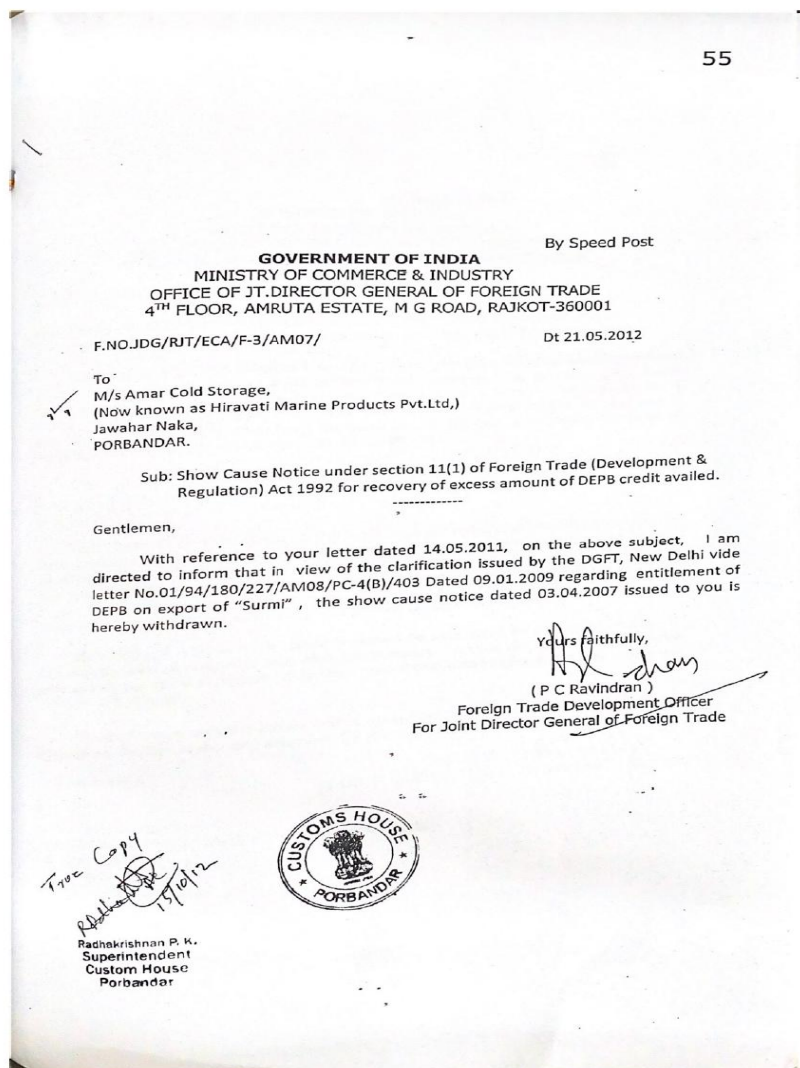
04. We have carefully considered the submissions made by both the sides and perused the records. We find that earlier this matter was remanded by this tribunal to pass a denovo order after consideration of DGFT's clarification vide letter dated 09.01.2009. The adjudicating authority though considered the said letter dated 09.01.2009 but the same was discarded on the ground that the decision by the DEPB Committee earlier will prevail. We find that the DGFT vide letter dated 09.01.2009 clarified the issue in dispute particularly in the appellant's case only. The said clarification is reproduced below:-

"Please refer to your letter dated 1st October, 2007 regarding DEPB entitlement on export of "Surimi" under DEPB entry SI. No.2 of the Marine Products and the GRC decision vide meeting dated 2.11.2007 in the above matter. Accordingly after receiving details from all concerned, the matter was discussed in detail in 3rd DEPB Committee Meeting held on 29.07.2008. The DEPB Committee noted that consequent upon the action initiated by the Customs Authorities asking for refund of excess benefit of DEPB availed by the firm M/s Hirawati Marine Product Pvt. Ltd. (formerly M/s. Amar Cold Storage) in view of claim under DEPB entry at S. No.2 instead of 1, the firm approached the Grievance Redressal Committee (GRC) of the Department of Commerce. The DEPB Committee also noted that GRC in its meeting held on 2.11.2007 stated that the marine product (exported by Ms. Amar Cold Storage) namely, "Surimi" would fall under S. No. 2/66 of DEPB Rate Schedule as notified on 15.4.1998 and also the product being the same should be classified under

S.No.2 of the revised notification dated 11.11.1998, 1.04.2000 and 01.04.2002. DEPB Committee members also noted that "Surimi" is a processed product which was earlier accepted by DEPB Committee in its meeting held on 21.11.2006. However as per the then decision, clarification was issued allowing DEPB benefit on "Surimi" as DEPB entry for "fish" product and not the "meat" product on or after 1.4.2002 thereby leaving the export of Surimi during the period 1998 to 31.3.2002 undecided. Committee members also noted that in terms of Public Notice No.47 dated 9.2.2004, subsequently the word "meat" was removed from the description given at St. No. 1 and 2/66 because confusion was due to the word "meat" appearing in SINO.1 & 2/66 of DEPB rate schedule for the period from 1.4.1997 to 31.3.2002. In view of the above facts and intention thereof, the Committee felt that the entry appearing in the DEPB Rate Schedule for the period 1998 to 31.3.2002 being erroneous So far as fish products (such as Surimi) being interpreted as "meat product", is concerned, The Committee was of the view that Surimi having fish product it cannot be classified as "Meat Product" and is not covered under ITC (HS) Code meant for Meat products. The DEPB Committee also noted that "Surimi" and "Surimi Products" being fish products, are covered under Chapter 3 of ITC (HS) Code and could not be classified under SI.No. 1/66 of DEPB rate schedule. It was also pointed out that "Meat" is classified under Chapter 2 of ITC (HS) Code.

Accordingly, it is clarified that Ms. Hirawati Marine Product Pvt. is entitled for DEPB on export of "Surimi" as per DEPB entry SI.No.2/66 of the then DEPB Rate Schedule".

From the above clarification, it is clear that DGFT has taken a decision that the appellant's export product namely "Surimi" is classifiable under DEPB entry Sr.No.2/66 even for the period prior to 01.04.2002. We find that on the basis of the above clarification, the DGFT withdrawn the show cause notice dated 03.04.2007 issued to the appellant. The letter dated 21.05.2012 issued by the DGFT is scanned below:-



In view of the above change of circumstances by way of clarification issued by the DGFT and withdrawal of the show cause notice, there was no scope for adjudicating authority to deviate from the decision taken by the DGFT to classify the goods under DEPB Entry at Sr.No.2/66 therefore, the adjudicating authority has no authority to sit over the policy decision taken by the DGFT. We are therefore of the view that the clarification given by the DGFT will prevail over the allegation made by the Customs Department therefore, the entire adjudication order passed discarding the decision taken by the DGFT cannot be sustained.

05. Accordingly, we set aside the impugned order and allow the appeal.

(Pronounced in the open court on 04.11.2022)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)