CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
BANGALORE

Appeal(s) Involved:

C/21334/2016-SM

[Arising out of Order-in-Appeal No. 423/2016 dated 08/06/2016 passed by the Commissioner of Customs, Bangalore-I (Appeals), Bangalore]

GEA Westfalia Separators India Pvt. Ltd. Unit 2, No. 7B, Bammasandra Industrial Area Bangalore – 562 107 Karnataka	**Appellant(s)**

Versus

C.C.E.-Bangalore-I Post Box No. 5400, CR Buildings, Bangalore – 560 001, Karnataka	**Respondent(s)**

Appearance:

Shri. Krishnamurthy K, Consultant Skandalaya Old #4, New #7, Justice Sundarm Road, Mylapore, Chennai Tamilnadu	For the Appellant
Smt. Kavitha Podwal, Superintendent (AR)	For the Respondent

Date of Hearing: 30/07/2018
Date of Decision:14/09/2018

CORAM:
HON'BLE Shri. P DINESHA, JUDICIAL MEMBER

Final Order No. 21348/2018

Per: P. DINESHA

This is an assessee's appeal. A show-cause notice was issued by the Revenue on 18.11.2013 alleging that the appellant/licensee had imported goods with CIF value of Rs. 32,96,401/- (Rupees Thirty Two Lakhs Ninety Six Thousand Four Hundred and One only) without payment of duty of Rs. 7,16,570/- (Rupees Seven Lakhs Sixteen Thousand Five Hundred and Seventy only) availing duty exemption under DEEC license; but the appellant had not furnished any evidence for having fulfilled export obligation which tantamount to violation of conditions of Notification No. 93/2004 dated 10.09.2004 (as amended). The appellant was also show-caused as to why duty along with applicable rate of interest should not be demanded. The above show-cause notice culminated in the Order-in-Original dated 27.02.2015 against which the appellant preferred an appeal before the Commissioner of Customs (Appeals) Bangalore which was also dismissed. Hence the assessee is prosecuting this appeal before this forum.

2. Heard Shri. Krishna Murthy, Consultant for the appellant and Smt. Kavitha Poduwal, DR for the Revenue, I have considered rival contentions, perused the documents and also gone through the decisions relied on during the course of arguments.

3. It is the case of the appellant that it executed a bond before the Assistant Commissioner as per Notification No. 93/2004 (supra) and imported goods without payment of duty vide a Bill of Entry No. 198117 dt.

13.03.2009. It is their case *inter alia* that the appellant converted their DTA unit into an Export Oriented Unit (EOU) vide the Letter of Permission dated 12.03.2009 issued by the Development Commissioner, Cochin Special Economic Zone, Bangalore; that as per the Foreign Trade Policy, the unfulfilled export obligation under Advance Licence are to be subsumed in their export obligation under EOU and that they had filed necessary documents in Appendix 14-I-O to the JDGFT on 03.05.2010 which is still pending adjudication; that therefore the action of the adjudicating authority as well as the first appellate authority in ordering confiscation of goods under Section 111(o) of the Customs Act, imposing redemption fine in lieu of confiscation and demanding customs duty and penalty under Section 112(a) of the Customs Act, was not proper.

4. Per contra, learned DR appearing for the Revenue supported the findings of the authorities below and specifically pointed out that the appellant though had executed a bond undertaking to pay the duty exempted along with interest in case its export obligation was not discharged, but, the appellant has not furnished any evidence of discharging export obligation namely Export Obligation Discharge Certificate (EODC) from the licensing authority till date. She further submitted that the authorities having no other option, proceeded to demand the duty since the appellant did not furnish EODC even after two years and eight months after the obligation period. In response learned consultant placed reliance on the decision of Bombay High Court in the case of *GKN Sinter Metals Pvt. Ltd. Vs. Union of India – 2010 (249) E.L.T. 481 (Bom.)* and drew my attention

specifically to paragraph 12 & 13 of the above judgment, which reads as follows:

"12. In the present case, it is not in dispute that the petitioner has fulfilled the export obligation substantially and wherever there is little short fall, the petitioner has sought regularization and issuance of EODC by offering to pay customs duty proportionately to that extent. In fact, advance licence No. 3110022667 has already been redeemed by DGFT, but still duty amounting to Rs. 56,72,534/- has been recovered under that advance licence (see page 56 of the Petition). Similarly, in respect of advance licence No. 3110006115, the export obligation fulfilled is to the extent of 94% and for the balance export obligation proportionate customs duty with interest has been paid and application for regularization and issuance of EODC is pending before DGFT (see page 56 of the petition). Similarly, in respect of other advance licences the export obligation has been substantially complied with and for the balance the petitioner has offered to pay the proportionate customs duty with interest and application for regularization and issuance of EODC is pending before the DGFT. The fact that the matter is pending before DGFT is not disputed by the respondents. If there is delay in regularization and issuance of EODC by the DGFT, the customs authorities cannot penalise the petitioner by resorting to coercive action.

13. It is not the case of the respondents that the petitioner with a view to defeat the interests of the revenue was trying to dispose of the assets and, therefore, coercive action was necessitated. In fact, the specific case of the respondents is that the customs duty has been coercively collected under Section 142 of the Customs Act, 1962 read with the provisions of the Customs (Attachment of Property of Defaulters for Recovery of Government Dues) Rules, 1995, because the petitioner has not *produced the EODC."*

5. Further, he also placed reliance on an order of this very Bench in the case of *Bells Controls Ltd. Vs. CC, Bangalore – 2006 (198) E.L.T. 41 (Tri.-Bang.)* and invited the attention to paragraph 5 which reads as follows:

"5. We have gone through the records of the case carefully. The adjudicating authority has demanded the entire duty foregone from the appellants for non-fulfillment of export obligation. The adjudication order was passed on 30-9-2002. However from the record, we find that as on 11-12-2001, the total export made by the appellants comes to Rs. 1,55,47,697/-. The appellant was faced with a lot of problem in fulfilling the export obligation. Even the second extension has not been granted by the JDFT on account of non-payment of composition fee of Rs. 5,000/-. We do not find any evidence of contumacious conduct on the part of the appellants. Due to recession in the industry and also labour problem, they were not in a position to fulfill the export obligation in time. However, in terms of Public Notice No. 48/97-2002, dated 7-11-2002, the appellant was entitled to seek extension of export obligation period of six months from the date of Public Notice for fulfillment of certain conditions. In any case, even by 11-12-2001 they had more than fulfilled the export obligation. While deciding the case, these factors should have been taken into account by the adjudicating authority. It appears that the adjudicating authority has strictly gone by the letter of law and demanded entire duty foregone and further imposed fine and penalties. The Commissioner in his adjudication order

has not at all taken into account the exports effected by the appellants after the first extension period, even though the appellants furnished the above information in their reply to the show cause notice. In these circumstances of the case, we feel that it is not fair to take very harsh measures against a struggling exporter in spite of the fact that he fulfilled the export obligation albeit belatedly. We set aside the demand of duty and imposition of penalties. As regards the confiscation of the detained goods, the appellants have not challenged the same. Hence we uphold that portion of the order confiscating the detained goods valued at Rs. 6,11,767.55. The appeals are disposed of in the above terms."

6. I find from the documents placed on record which has also been observed by the learned Commissioner (Appeals) at paragraph 3 of the impugned order as to the grounds urged before him by the assessee, that the assessee had categorically claimed that their obligation against the Advance Licence got subsumed from the export obligation of the EOU. I also find that it is not the case of the Revenue that the above application filed by the appellant before the JDGFT has not been rejected by the licensing authority. It is therefore an admitted position that the said application is still pending before the licensing authority. It is also not the case of the Revenue that the statement of the appellant that its export obligation got subsumed in the export obligation of the EOU, was wrong nor have they examined the case of the appellant from this angle. When a claim is made by the assessee, the same has been thrown out without examining the claim of the assessee

and without finding that such claim/s is/are wrong or illegal. As found by the Hon'ble Bombay High Court, it is not even the case of the Revenue that the appellant with a view to deviate the interest of the Revenue was trying to dispose of the assets, therefore, coercive action was necessitated.

7. For the above reasons, I am of the considered opinion that the impugned order cannot be sustained and hence I set aside the same. Further I remand the matter back to the file of the adjudicating authority to pass order afresh and also direct the appellant to request the licensing authority to process its request as expeditiously as possible. It is needless to point out that the adjudicating authority while disposing the matter afresh shall consider all such pleadings of the appellant as to justify that its export obligation against the advance license got subsumed in the export obligation of its EOU. The appeal is allowed for statistical purposes, by way of remand.

(Order Pronounced in Open Court on **14/09/2018**)

(P. DINESHA)
JUDICIAL MEMBER

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