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

<u>Appeal(s) Involved:</u>

E/1058 to 1068/2009-DB

[Arising out of No. 100-110-2009 dated 31/08/2009 passed by CCE(Appeals-I), Bangalore]

Nuthatch Nutricare Technologies, No-11, Byraveshwara Industrial Estate,andhrahalli, Mainroad, Peeny Aindustrial Area, Bangalore	Appellant(s)

Versus

C.C.E.-Bangalore-ii PB 5400 CR BUIDING...QUEENS ROAD, BANGALORE, KARNATAKA 560001	Respondent(s)

<u>Appearance:</u>

Shri PRADYUMNA G.H. ADVOCATE NO.371, 8TH MAIN SADASHIV NAGAR banglaore Karnataka 560080	For the Appellant
Shri K. Murali, Superintendent(AR)	For the Respondent

Date of Hearing: 08/03/2019

Date of Decision:30/04/2019

CORAM:
HON'BLE SHRI S.S GARG, JUDICIAL MEMBER
HON'BLE SHRI C.J. MATHEW, TECHNICAL MEMBER

<u>Final Order No. 20375-20385 /2019</u>

Per : S.S GARG

Appellants have filed these 11 appeals directed against the common impugned order dt. 31/08/2009 passed by the Commissioner(Appeals) whereby the Commissioner(Appeals) has upheld the Orders-in-Original passed by the Asst. commissioner and rejected the appeals of the appellant. Since the issue involved in all the 11 appeals is same, all the 11 appeals have been taken up together for discussion and disposal. The details of all the 11 appeals are given herein below:-

Sl.No.	OIO No. and date	Duty demanded (Rs.)
1	1/2009 dt. 20/01/2009	2,79,732
2.	2/2009 dt. 20/01/2009	15,918
3.	3/2009 dt. 20/01/2009	67,568
4.	4/2009 dt. 20/01/2009	2,82,307
5.	5/2009 dt. 20/01/2009	4,903
6.	6/2009 dt. 20/01/2009	2,50,768
7	7/2009 dt. 20/01/2009	5,690
8	8/2009 dt. 20/01/2009	86,504
9	9/2009 dt. 20/01/2009	10,976
10	10/2009 dt. 20/01/2009	38,012
11	11/2009 dt. 20/01/2009	2,48,219
	Total	**12,90,597**

2. Briefly the facts of the present case are that the appellants are manufacturers of seasoning powder and health drink falling under Chapter 21 of the CETA, 1985. They are registered under Central Excise. For manufacture of seasoning powder, the appellant had procured raw materials such as beef red, shrimp red, beef concentrate, shrimp concentrate, chicken concentrate and liquid flavor, sugar etc. free of duty availing exemption under Notification No.43/2001-CE(NT) dt. 26/06/2001. On scrutiny of the export documents i.e. ARE1 and shipping bills etc., it was noticed by the Department that the appellants have cleared the goods for export as per Customs Notification No.93/2004-Cus dt. 10/09/2004 which is issued for exports affected under Advance License under DEEC Scheme. In the said Notification at condition No.(v), it is stated that the export obligation as specified in the said license (both in value and quantity terms) is discharged by exporting resultant product, manufactured in India, which are specified in the said license and in respect of which facility under Rule 18 or Sub-rule (2) of Rule 19 of Central Excise

Rules, 2002 has not been availed. As the DEEC Scheme debars the exporters from procurement of inputs free of duty under sub-rule (2) of Rule 19 of Central Excise Rules, 2002, the appellants were issued show-cause notices proposing to demand the duty already availed as exemption under Notification No.43/2001-CE(NT) dt. 26/06/2001. The adjudicating authority after following the principles of natural justice has held that as the duty-free goods procured under Notification No.43/2001-CE(NT) dt. 26/06/2001 having been used in the manufacture of final products exported against fulfillment of obligation under Advance License, the Central Excise duty forgone on the goods procured duty-free would become recoverable. Aggrieved by the Order-in-original, appellants filed appeals before the Commissioner(Appeals) who rejected the same. Hence the present appeals.

3. Heard both sides and perused records.

4.1. Learned counsel for the appellant submitted that the impugned order is not sustainable in law as the same has been passed without properly appreciating the facts as well as the legal provisions. He further submitted in the written submissions that there are undisputed facts which are as under:-

I. The appellants were holder of Central Excise Registration for the manufacture of 'seasoning powder and health drink' falling under Chapter 21 of the Central Excise Tariff.

II. They had been issued Advance Authorisation by the Directorate General of Foreign Trade for the duty-free import of an item by name 'Monosodium Glutanate Fine Crystals' in terms of Notification No.93/2004-Cus dt. 10/09/2004.;

III. As per the condition of the above customs notification read with the conditions stipulated in the Advance Authorisation, the appellants were required to export resultant final product viz. 'seasoning powder' and fulfill export obligation;

IV. Apart from 'Monosodium Glutanate Fine Crystals' imported against Advance Authorisations as per Notification No.93/2004-Cus dt. 10/09/2004, the appellants had procured raw materials such as beef read, shrimp read, beef concentrate, shrimp concentrate, chicken concentrate, sugar, packing material etc. from domestic manufacturers without payment of duty as per Notification No.43/2001-CE(NT) dt. 26/06/2001 issued under Rule 19(2) of Central Excise Rules, 2002.

V. The above mentioned raw materials were procured without payment of Central Excise duty against different Annexure-I issued by the Deputy Commissioner of Central Excise having jurisdiction over the appellants' unit subject to the observance of the requisite conditions and mainly the condition that the duty-free raw materials would be used for the manufacture /export of the final product viz. 'seasoning powder'.

VI. There is no dispute about the fact that the appellants had manufactured and exported the final product viz. 'seasoning powder'.

4.2. He further submitted that it is an admitted fact that the appellants had procured raw materials without payment of excise duty on the strength of Annexure-I issued by the Deputy Commissioner having jurisdiction over their unit under Notification No.43/2001-CE(NT) dt. 26/06/2011. The said Annexure-I was issued after the Department was satisfied that the appellants had fulfilled all the requirements to procure goods without payment of duty under Notification No.43/2001. He also submitted that Notification No.43/2001-CE dt. 26/06/2001 issued under rule 19(2) of the Rules is to be read mutatis mutandis with Central Excise (Removal of Goods at

Concessional Rate of Duty for the Manufacture of Excisable Goods) Rules, 2001 and as per the said Rules, the manufacturer who receives such duty-free goods shall consume the subject goods for the intended purpose and shall maintain proper accounts. He also submitted that as per Rule 6 of the said Rules, where the subject goods are not used by the manufacturer for the intended purpose, the manufacturer shall be liable to pay the amount equal to the difference duty leviable on such goods but for the exemption contained therein along with interest and the provisions of Section 11A and Section 11AB of Central Excise Act shall apply for such recovery. He further submitted that the appellants were allowed to procure duty-free goods to be used for manufacture of export goods and the appellant actually used the said goods for manufacture and export of final product i.e. 'seasoning powder' and it is not the case of the Department that duty-free raw materials were not properly used for the intended purpose or that the manufactured goods were not exported using the said duty-free raw materials. He also submitted that when no contravention of the conditions of Annexure-I or conditions cited in the Rule 6 of Central Excise (Removal of goods at Concessional Rate of Duty for the Manufacture of Excisable Goods) Rules, 2001 had been alleged, then the demand of duty on the raw material on the ground that the terms and conditions of a separate customs notification stood violated has no merit. He further submitted that the appellants have not violated any conditions of Notification No.43/2001-CE dt. 26/06/2001 and therefore the demand of duty under Section 11A by both the authorities is not legally tenable. He further submitted that the item imported without payment of duty by the appellant against Advance Authorisation in terms of Notification No.93/2004-Cus. dt. 10/09/2p004 was 'Monosodium Glutamate Fine Crystals' and those procured under Notification No.43/2001-CE(NT) dt. 26/06/2001were raw materials such as beef read, shrimp read, beef concentrate, shrimp concentrate, chicken concentrate, sugar, packing materials etc. It is his further submission that no doubt that condition No.(v) of notification

No.93/2004-Cus dt. 10/09/2004 stipulates that while availing benefit of the said notification, facility under Rule 18 or sub-rule (2) of Rule 19 of Central Excise Rules, 2002 could not be availed. But this conditions applies to procurement of the same goods under Rule 19(2) as those allowed to be procured against Advance Authorisation. He further submitted that there is no restriction in Notification No.93/2004-cus. dt. 10/09/2004 that an exporter cannot avail facility under Rule 19(2) OF THE Rules and procure goods other than the ones mentioned in the Advance Authorisation and when such goods procured without payment of duty under Notification No.43/2001-CE(NT) dt. 26/06/2001 are also consumed towards the manufactured goods and those goods are exported, then the demand of Central Excise duty citing violation of Customs Notification No.93/2004-Cus is not tenable under law. He further submitted that if at all, there is a violation, then it is the violation of Notification No.93/2004-Cus. dt. 10/09/2004, then it is open for the Department to deny the benefit of Customs duty exemption and the Customs authorities should initiate action against the appellant but in no case, excise duty could have been demanded because there is no violation of the conditions of the Notification No.43/2001 dt. 26/06/2001. Further he submitted that for violations of customs notification, only the jurisdictional Customs authorities are competent to take action. But in the present case, the excise duty has been demanded without alleging violation of Notification No.43/2001-CE dt. 26/06/2001. It is his further submission that the imposition of penalties under Rule 25 is also not sustainable in law because the conditions for imposition of penalty under Rule 25 are not fulfilled at all in the present case.

5. On the other hand, the learned AR defended the impugned order and submitted that the appellants have procured raw material without payment of duty under Notification No.43/2001-CE dt. 26/06/2001 issued under Rule 19(2) of the Central Excise Rules, 2002.

He further submitted that the Advance Authorisation scheme clearly debars the exporters from availing the facilities under Rule 18 or Rule 19(2) of the Central Excise Rules, 2002 and therefore the assessee is not eligible for duty free procurement under Rule 19(2). He further submitted that though there is a violation of Notification No.93/2004 but the jurisdictional excise officer is competent to initiate action to recover the duty foregone while purchasing the raw material under Notification No.43/2001. In support of his submission, he relied upon the following decisions:-

i. International Tractors Ltd. [2011(267) ELT 429 (GOIL)]
ii. International Tractors Ltd. Vs. CCE&ST [2017(354) ELT 311 (del.)]
iii. Videocon International Vs. CC, Mumbai [2003(158) ELT 771 (Tri. Mum.)]
iv. Mewar Polytex Ltd. Vs. UOI [2010(260) ELT 494 (SC)]
v. Sonal Garments India Pvt. Ltd. [2012(280) ELT 305 (GOI]
vi. CC(Import), Mumbai Vs. Dilip Kumar & Co. [2018(361) ELT 577 (SC)]

6. After considering the submissions of both the parties and perusal of the material on record, we find that in the present case, the appellant had been issued Advance Authorisation by DGFT for duty-free import of item viz. 'Monosodium Glutamate Fine Crystals' in terms of Notification No.93/2004-Cus. dt. 10/09/2004. Further the appellant also procured other raw materials from domestic manufacturers without payment of duty as per Notification No.43/2001-CE dt. 26/06/2011 issued under Rule 19(2) of the Central Excise Rules, 2002. Further we find that that there is no dispute that the appellants have manufactured and exported the final product i.e. 'seasonign powder' by using the various raw materials which were imported as well as procured from DTA. Further we find that there is no violation of the Notification No.43/2001 by the appellant as the appellant has fulfilled all the conditions of the said Notification. Further we find that if at all, there is a violation then it is the violation of the Notification

No.93/2004-Cus. dt. 10/09/2004 for which only the Customs authorities can initiate action to deny the benefit of Customs duty exemption and not the Excise authorities to demand duty under Section 11A. In the present cases, the Excise authorities have initiated action for violation of Notification No.43/2001-CE dt. 26/06/2001 which is not sustainable in law. Further we find that the decisions relied upon by the learned AR are not applicable in the present case and they are distinguishable on facts.

7. In view of our discussion above, we find that the demand of duty by the Central Excise authorities for violation of Notification No.93/2004 dt. 10/09/2004 is not sustainable in law and therefore we set aside the same by allowing all the appeals of the appellant with consequential relief, if any.

(Order was pronounced
in Open Court on **....................**)

S.S GARG
JUDICIAL MEMBER

C.J. MATHEW
TECHNICAL MEMBER

Raja…