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

Appeal(s) Involved:

C/585/2008-DB

[Arising out of No. Order-in-Appeal No.132/2008 dated 31/03/2008 passed by the Commissioner of Customs (Appeals), Cochin.]

M/s. MIRACLE FOOD PROCESSORS INTERNATIONAL LTD.
P.B NO-73, PERINTHALMANNA,
MALAPPURAM.
KERALA

Appellant(s)

Versus

The Commissioner of Customs
CUSTOM HOUSE,
WILLINGDON ISLAND
COCHIN – 682 009.
KERALA

Respondent(s)

Appearance:

Mr. Kuriyan Thomas, Advocate
MENON & PAI
P.B. NO.1911
IS PRESS ROAD,
COCHIN – 682 018.
KERALA

For the Appellant

Mrs. D. S. Sangeetha,
Joint Commissioner (AR)

For the Respondent

Date of Hearing: 29/10/2019

Date of Decision: 28/11/2019

CORAM:

HON'BLE SHRI S.S GARG, JUDICIAL MEMBER
HON'BLE SHRI P. ANJANI KUMAR, TECHNICAL MEMBER

Final Order No. 21184 /2019

Per : P. ANJANI KUMAR

Brief Facts of the case is that the appellants are manufacturers of fruit concentrates/coconut water concentrates etc.; the appellants obtained an EPCG license, 2134281 dated 24.05.1995**,** for the export of fruit concentrates as per which the appellant was entitled to import a Fruit Dehydration Plant (Spray Evaporation Machine – SPV 10) from Germany at a concessional rate of duty @15% (Under Notification No. 110/95 Cus dated 05.06.1995) subject to the condition that it achieved an export obligation of Rs.7,37,34,784 (US$ 21,34,960) within a period of five years from 1996; export obligation and the duty concession were calculated on the basis of that the CIF value of the machine imported was Rs.1,84,33,696/- ' (US$ 5,31,330); Bill of entry 2169 dated 6.5.1996 was filed by the appellants, on the basis of the above referred Invoice Rs. 1,82,51,186; Total Concessional Duty Paid was Rs. 27,65,055 and a Bank Guarantee for Rs.41,47,582 was submitted.

2. The Assistant Commissioner of Customs, Cochin, by letters dated 20.11.1998 and 14.12.1998 sought evidence from the appellant to establish the fulfillment by the appellant of the pro-rata export obligation for the 2nd and 3rd Year; the Assistant Commissioner vide, OIO No: EPCG 4/96 GR VII dated 3.5.1999 confirmed the demand to the extent of Rs.12,44,275 along with interest; appellants filed an appeal before the Commissioner (Appeals); during the pendency of the appeal, the appellants made a representation dated 18.01.20001 and 09.02.2001, to the Commissioner of Customs for reassessment of the Bill of Entry owing to the inflated price reckoned in the same; the same was declined vide communication dated 15.03.2001, stating that no reassessment can be done after issuance of out of charge; the appellant approached the Hon'ble High Court, vide WP 20897 of 1999, who directed the Appellate Commissioner to consider the issue of valuation also while considering the appeal. Appellate Commissioner allowed the appeal by way of remand, directing the original authority to re-determine the value of goods imported and for reassessment; Tribunal dismissed the appeal filed by Revenue against the order challenging the power of the Appellate

Commissioner to remand; no further challenge was preferred by the revenue.

2.1. The original authority, without following the directions of the Appellate Commissioner, vide OIO No: 1/2007 dated 25.1.2007, rejected the claim of re-determination stating that no re-determination could be done as goods are given out of charge by Customs; the order was challenged before the Appellate Commissioner, who, vide Order in appeal No: 132/08 dated 31.03.2008, confirmed the order of the original authority. Hence, the present appeal is filed.

2.3. The Assistant Commissioner of Customs issued SCN dated 16.7.2001 for Rs.29, 03,307 for the rest of the Pro-rata EO pertaining to 3rd and 4th years to the importer. the issue is pending with Comr.(A); while the appeal was pending before the appellate Commissioner, appellants filed application before Settlement Commission against the above referred OIO: EPCG 4/96 GR VII dated 3.5.1999 and the above referred 2nd SCN dated 16.7.2001 by claiming that the initial Assessment was Provisional Assessment. Settlement Commission rejected the application vide Order No: 6/02-Cus dated 26.4.2002, stating that the initial Assessment was not provisional. Commission observed that the initial application as well as the petition filed before the admission hearing, did not exhibit disclosure of additional duty liability which had not been disclosed in the B/E filed at the time of clearance of the impugned goods; the duty liability disclosed even under the concessional Customs Notification No. 110/95 on the B/E was Rs.27,65,055, whereas the duty disclosed in the present application even on merit rate (37.5%) was only Rs. 20,14,647, which was revised in the petition before the hearing to Rs. 25,80,717, by seeking re-determination of Assessable Value; during the hearing, the applicant sought for Bench’s permission to seek further re-determination of assessable value and consequential duty liability and has accordingly filed a Petition dated 12.4.2002 admitting a liability of Rs. 32, 25,896; by seeking re-determination of Assessable Value, during the hearing, the applicant sought Bench’s permission to seek further re-determination of assessable value and consequential duty liability and has accordingly filed a Petition dated 12.4.2002 admitting a liability of Rs.

32,25,896; it is very clear from the manner of revision of assessable value and duty liability repeatedly just to get their application admitted, that the *bona fide* of their very acceptance/admission of additional duty liability of Rs. 32,25,896 is questionable and hence the very basis of "full and true disclosure "claimed to have been made by the applicant becomes doubtful (Para 10)

3. The learned counsel for the appellant claims that they paid only U$ 4,31,330 to the German Supplier; the appellant imported the machine in 1996 and paid an amount of Rs.27,65,055 towards duty (@ 15%) and submitted a Bank Guarantee for Rs.41,47,582 (total duty liabilityRs.69,12,637); it was subsequently learned by the appellant that the machine was not worth so much as it did not achieve even 50% of the assured capacity; the matter was taken up with the manufacturers of the machine at Germany - M/s Winter Umwelttechnik, Germany; who were convinced of the fraud played by the supplier of the machine and paid compensation to the appellant to the tune of Rs.21,27,922; as per the agreement with the said manufacturer (approved by the Government of India) they supplied the appellant an identical machine for the correct value of US$ 1,70,244 (Rs.53,72,392); the appellant paid an amount of Rs.55,55,330; the appellant offered shares for the value of Rs.88,00,000 to M/s Winter Umwelttechnik, Germany; the appellants arrived at the value of Rs.21,27,922, by considering the total of the amounts received from M/s Winter Umwelttechnik, Germany and the value of the machinery supplied free and deducting the value of the shares offered to the said company.

3.1. The learned counsel for the appellant states that it is the case of the appellant that once the value of the imported machine is reckoned on the basis of the value actually paid by the appellant to the foreign supplied (US$4, 31,330) as reduced by the amount received by the appellant from the German manufacturer (Rs.21, 27,722) then it becomes clear that the appellant had to pay only about Rs 48 Lakhs towards duty liability, at the full rate under the Customs Tariff; against this, the appellant has paid an amount of Rs.69,12,637 (by cash **+** Bank Guarantee); appellant, therefore, paid duty on the machine imported, more than the full rate of duty that would have been payable had the value been correctly taken; consequently, the appellant cannot be said to be a person who has availed the benefit of concessional rate of duty applicable for EPCG License holders and hence, it is not required to fulfill any export obligation as per the provisions of the EXIM Policy, 1992-97.

3.2. The learned counsel for the appellants contends that the Assistant Commissioner confirmed a duty demand on the assumption that the appellant had availed of a concessional rate of duty while clearing the goods at the time of their import in 1996; this assumption is factually wrong as the appellant got back a part of the amount paid for the machine that was imported; considering the reduced value of the machine, the appellant has already paid more amounts than the applicable duty at the tariff rate; it follows that the appellant had not availed of the benefit of the concessional rate of duty applicable to EPCG license holders; corresponding requirement of fulfilling an export obligation too did not apply and hence there was no basis for confirming a differential duty;

3.3. The learned counsel for the appellants contends that they produced before the Department the entire set of documents which would establish that the payment made by it towards the import of the machinery in question is only an amount of Rs.1,26,88,264; The tariff rate of duty applicable to the imported machine at the relevant point of time was 37.5% ad valorem; Thus the duty payable at the tariff rate was Rs.47,58,099; as against this the appellant has already paid an amount of Rs.69,12,637-00 towards duty(Rs.27,65,055/-+ Bank Guarantee for Rs.41,47,582.00); on payment of this amount the appellant must be deemed to be a person who has not availed the benefit of the EPCG Scheme and hence there cannot be any further insistence on fulfillment of any export obligation by the appellant.

3.4. The learned counsel for the appellants further contends that the Appellate Commissioner vide order dated 18.06.2004 directed re-determination of the value of the imported goods based on the subsequent events; the said direction had become final as the revenue did not challenge the direction as regards re-determination of value; even the limited challenge before Tribunal on the aspect of the power of the Appellate Commissioner to remand was dismissed; therefore, it was not open for the original authority and the Appellate Commissioner not to comply with the order of the Appellate Commissioner to re-value the goods; duty of customs is on the value of goods actually imported and it being not disputed that the value of goods imported was less than what was actually assessed, no duty could be demanded based on the wrong valuation.

3.5. The learned counsel for the appellants contends that the directions of commissioner appeals on revaluation of goods having become final, judicial propriety mandates that it is followed and was binding on the original authority; refusal for revaluation by the Original Authority and reiterating the communication dated 15.03.2001 of the Jurisdictional Commissioner is judicial impropriety; Appellate Commissioner remanded the case and so order-in-original demanding duty and interest got set-aside; Oder-in-original passed after the remand by the Appellate Commissioner, did not raise any demand of duty or interest on the appellant; therefore, there is no valid demand for invocation of the bank guarantee of Rs.41,47,582/ which is kept alive by the appellant pursuant to the order dated 21.12.2009 of this Hon'ble Tribunal need to be released. He relies upon the decision rendered in the case of ***Reiter India Pvt. Ltd. vs. CC (Import), Nhava Sheva: 2014 (309) ELT 277 (Tri.-Mum.)***.

4. Learned AR for the Department, submits a detailed written submission made Commissioner (AR), per contra submits that the original subject matter of the issue is relating to Recovery Action by issuing SCN on the failure of prescribed Export Obligation in time; the impugned Assessable Value has already been accepted by the EPCG Committee and DGFT after perusal of the declaration and documents submitted by the importer and accordingly the Export Obligation has been fixed; hence, the Assessable value and consequential Export obligation is to be revised by the EPCG Committee after due examination of the plea and supportive documents produced by the importer; in the instant issue, the EPCG Committee/DGFT has rejected the request & grounds raised by the importer on 5.2.2001 after due scrutiny of the records; under the background, the importer should not be allowed to revise the AV on his own disregarding the background to the issuance of an EPCG Licence and its decision by the Committee consisting of a team of experts and experienced persons in the field. Hon'ble High Court of Bombay, in the case of Bhilwara Spinners Ltd 2011 (267) ELT 49 (Bom) observed that Since the decision to convert the Licence was taken by the DGFT with the approval of the EPCG Committee (which includes customs authorities), the Commissioner of Customs/Commissioner of Central Excise were bound by the decision of the EPCG committee and could not have challenged the decision; CBEC Circular: 46/2004 dated 26.07.2004 also instructed the Customs Authorities not to take unilateral action on the matter of Valuation pertaining to EPCG; in the instant case, as the EPCG Committee has consciously rejected the request of the appellant for revision of the Assessable Value, Customs Authorities cannot take different stand on the same facts & circumstances.

4.1. Learned AR further submits that there is no legal provisions for re-assessment after five years of issuing 'Out Of Charge' under Customs Act, 1962; the initial assessment of the Bill of Entry was made on 6.5.1996, which is an appealable quasi-judicial order; the assessable Value was not challenged at all within the stipulated time limit; the importer has come up with the request for re-determination of assessable Value and re-assessment after a lapse of 5 years from the date of assessment of Bill of Entry; initial assessment was not made under provisional assessment and the importer has not paid the duty for the initial assessment under protest; appellant's claim of provisional assessment was rejected by Settlement Commission. He relies upon the following cases.

(i). CCE, Kanpur Vs Flock (India) Pvt. Ltd. [2000 (120) ELT (285]

(ii). Priya Blue Industries Ltd. Vs C (P) 2004 (172) ELT 145 (SC.).

(iii). UOI Vs kirloskar Pneumatic Co 1996 (84) ELT 401 (it was held that writ cannot be invoked for directing the authorities to act contrary to law.

4.2. Learned AR, further submits that the SCNs have been issued to the Appellant based on the contravention of the conditions of the EPCG Notification No. 110/95 dated 05.06.1995 and the terms and conditions are documented in the form of Bond specifying the terms and conditions for both the parties; therefore, the subject matter is nothing but the subject of Contract; the appellant having entered into a contract, cannot be allowed to wriggle out of his promise made voluntarily, in the absence of any statutory illegality committed by the other party to the contract. The Hon'ble Supreme Court, in the case of State of MP V MV Vyavsaya & Co AIR 1997 SC 993, ruled that a person who solemnly enters into a contract cannot be allowed to wriggle out of it by resorting to Article 226; in the case of Bareilly Development Authority Vs Ajai Pal Singh 1989 AIR 1076, the Hon'ble SC ruled that there is a line of decisions where the contract entered into between the State and the persons aggrieved is non-statutory and purely contractual rights are governed only by the terms of the contract, not writ or order can be issued under Article 226 of the Constitution of India so as to compel the authorities to remedy breach of contract pure and simple. He also relies on :

(i). Radhakrishna Agarwal & Others Vs State of Bihar & Others 1977 3 SCR 249
(ii). Premji Bhai Parmar & Others etc Vs Delhi Development Authority & Others 1980 2 SCR 704
(iii). DFO Vs Biswanath Tea Company Ltd 1981 3 SCR 662.

4.3. Learned AR, also submits that when the subject matter is exclusively dealing with Recovery Action on the failure of the Export obligation, the subject of re-assessment which was not at all dealt in the recovery action Notice is beyond the scope of SCN and no to be entertained; Hon'ble Supreme Court, in the case of Hindustan Polymers Co Ltd 1999 (106) ELT 12 (SC), held that the Tribunal should not, in this case, have passed an order which proceeded upon a basis that is altogether different from that of the demand made upon the appellants.

4.4. Learned AR, submits that the case law cited by the appellants is irrelevant; case of RBF RIG Corporation, Mumbai (2011) SCC 573 is not applicable, as in the referred case, the importer is entitled to get "Essentiality Certificates" from the DGH (Director General of Hydrocarbons) on the basis of the "Recommendatory letters" of ONGC that the impugned import goods are required for the Petroleum Operations; as both the DGH and ONGC delayed to issue the due Certificates and letters, the Importer paid full Customs Duty and approached HC; HC vide Interim order directed ONGC AND DGH to issue the due Certificates on 30.7.2002; both the authorities issued the due certificates/letters; subsequently HC in the Final Order directed the Customs Authorities to dispose of the Refund claim of the Importer by considering the "Essentiality Certificates" issued by the DGH; thus, after analyzing the merit of the issue (Delay on the part of DGH & ONGC in issuing Certificate/Letter in the absence of any fault on the part of importer), there was a Specific Direction from HC to consider the "essentiality certificates' while disposing the refund claim. in the instant case on hand, the importer failed to fulfill to fulfill EO, and reasons put forth for non-fulfilment of EO & revising the AV also have not been considered by DGFT; hence, the High Court of Kerala has not issued any direction to the DGFT to issue EODC or to revise Assessable Value; instead, directions have been issued to Customs Authorities to consider the plea of additional grounds on Valuation; at the same time, the HC categorically made it clear that it has not considered the merits of the contentions taken by the respective parties in the Original Petition; under the circumstances, the direction of "Consideration" cannot be equated with "Positive consideration"; consideration of the direction definitely is subject to concerned statutory provisions; Commissioner (A) also referred the matter to Original adjudicating authority, who is the proper officer to dealt with Assessment, for appropriate legal decision "if necessary"; therefore, the question of Judicial indiscipline does not arise at all.

4.5. Learned AR, moreover, submits that various Authorities have decided as follows on the request of the appellant:

(i). High Court of Ernakulum did not consider the merit of the contentions of the parties concerned.

(ii). Settlement Commission held that the *bona fide* of the Appellants' disclosure is Questionable, Doubtful & under Cloud (iii). EPCG Committee of DGFT rejected the request of revising the Assessable Value declared by the importer for the capital goods.

(iv). Secretary, Ministry of Commerce, on an Appeal filed against the decision of EPCG, did not consider the request of revising the Value of the impugned machinery.

(v). Commissioner (A) dated 18.6.2004 referred the valuation matter to the Proper officer for redetermination of AV with remarks "if necessary".

(vi). Adjudicating Authority and the Appellate Authority, vide impugned order, rejected the submission of the importer for revising the Assessable Value

He submits lastly that the Revenue has taken a stand as per Law and in consonance with various departments; under the facts and circumstances and taking into account of the legal position on the issue, the Appeal preferred by the importer is liable for rejection in the absence of any merits.

5. Heard both sides and perused the records of the case.

6. The main arguments of the appellant are that:

(i) The value of the machines imported by them under EPCG should be valuated as per the actual value of the machine imported again and not the original machine.

(ii) Learned Commissioner (A)'s order was remanded to the original authority for reconsideration of the value and as the department has not appealed against this issue, the order attains finality.

(iii) once the value of the machine is redetermined the amount already paid by them is more than the normal applicable duty payable on the impugned goods even if the concessional under EPCG Scheme is not availed and therefore, the import should be treated as having not availed the benefit of concessional rate of duty under EPCG scheme.

7. We find that learned AR forcefully rebutted all the claims of appellants on the following grounds.

(i) There is no provision under law to consider the appellant's claim for redetermination or reassessment of the Bill of Entry after a considerable period of more than 5 years. More so, due to the fact that the assessment was not provisional.

(ii) In the scheme of EPCG, customs alone cannot revise the value of the impugned goods and thus, the export obligation. The EPCG Committee which also contains a Member from Customs has gone into the request of the appellant and concluded that the appellant has not made any case for reconsider the value. The appeal filed by the appellant, against the decision of EPCG Committee, before the Joint Secretary was also rejected.

(iii) The appellant's contention that Hon'ble High Court at Ernakulam, vide Order in Writ Petition No.20897/1999, has directed the authorities that they shall consider the request of revaluation by the appellants. The appellant's contention that the Commissioner (A), in his order No. 121/2004 dated 18.6.2004, has only referred to the lower authority for redetermining the value and for reassessment of goods. The lower authority again passes an order No.1/2007 dated 25.1.2007 after considering the submissions of the appellant and rejecting the claim of determination of assessable value for assessment. The same was upheld by Commissioner (A) vide Order-in-Appeal No.132/2008.

(iv) The appellants meanwhile approached the Settlement Commission in respect of subsequent show-cause notice dated 16.7.2001 and the Settlement Commission have not only rejected the application but also passed remarks that the appellants have not established the bona fides of the claims.

7.1 We find that the appellants have failed to fulfill the export obligation and accordingly, Customs Department has issued a show-cause notice to recover the applicable duty on the imported goods. We find that the representation of the appellants could not succeed before the EPCG Committee and the appellate authority. This being the fact of the case, we find that Customs Authorities, as submitted by the Commissioner (AR), cannot take an independent decision. We further find that the Bill of Entry is dated 6.5.1996 and the appellants sought to revalue the goods and approached the Commissioner with a request dated 18.1.2001 and 9.2.2001 for re-assessment of the Bill of Entry. Commissioner has rejected the request vide letter dated 15.3.2001. We find that the appellants sought to rely on the case of Reiter India Pvt. Ltd. (supra). We find that the facts of the case discussed therein are quite different from those in the instant case. In the case of M/s. Reiter India Pvt. Ltd. (supra), the import was on 25.5.2011 and refund was filed in September 2011 i.e., within a period of six months. In the instant case, it is beyond 5 years. Moreover, in the case of Reiter India Pvt. Ltd. (supra), the imports were not under EPCG as is in the present case. We find merit in the argument of the Commissioner (AR) that the Bill of Entry was not provisionally assessed and the appellants have not appealed against the Bill of Entry. We find that on this count the legal position on reassessment is enunciated in the cases of CCE Kanpur vs. Flock India Pvt. Ltd. (supra) and Priya Blue Industries Ltd. (supra). We find that Hon'ble Apex Court of India has recently enunciated the same principle in the case of ITC Ltd. in Civil Appeal No.293-294/2009. The Hon'ble Apex Court observed that:

> *"47. When we consider the overall effect of the provisions prior to amendment and post-amendment under Finance Act, 2011, we are of the opinion that the claim for refund cannot be entertained unless the order of assessment or self-assessment is modified in accordance with law by taking recourse to the appropriate proceedings and it would not be within the Ken of Section 27 to set aside the order of self-assessment and reassess the duty for making refund; and in case any person is aggrieved by any order which would include self-assessment, he has to get the order modified under Section 128 or under other relevant provisions of the Act."*

7.2 We also find that the appellants have submitted a Bond at the time of import binding themselves to the conditions envisaged in the Notification No.110/95 dated 5.6.1995. We find that the Department was within its rights to impose the conditions of the Bond for violation of the provisions therein. We find that the impugned show-cause notice is about the recovery of duty foregone in terms of the conditions of the Notification. The appellants having not appealed against the assessment of the Bill of Entry and having not requested for provisional assessment, cannot demand the same while replying to the show-cause notice. Such a request, is beyond the scope of the provisions of Customs Act. We find that nothing could have stopped the appellants from appealing against the Bill of Entry within the limitation. Moreover, the appellants have also lost the case with the EPCG Committee. Once a machine is imported in terms of the EPCG license wherein certain export obligation has been fixed by the DGFT authorities and particularly, in the case when the EPCG Committee has rejected the appeal made by the appellant, Customs cannot revalue the goods and reduce the export obligation accordingly. We find that the appellants have shown no case for redetermination of the value of the imported goods in terms of the provisions of Customs Act either. On either count, the appellants submissions are weak.

7.3 Further, we find that the appellants have submitted that Hon'ble High Court at Ernakulam has directed that the valuation as requested by the appellants may be considered. However, we find that the Hon'ble High Court has given a clear finding that they were not going into the merit of the issue. In such circumstances, the direction of the Hon'ble High Court has to be read to mean that such consideration by the competent authority shall be subject to the provisions of law. Moreover, a direction given for consideration does not necessarily mean that the request of the appellant should be accepted. A direction is only to the extent that the request shall be considered as far as the law permits for the same. Therefore, we do not find any infirmity in the lower authorities coming to a conclusion that the redetermination, of the value because of the reasons discussed above, was not possible in the facts and circumstances of the case and under the provisions of law.

8. In view of the above, we find that the appeal is devoid of any merit and is liable to be rejected.

(Order was pronounced in Open Court on **28/11/2019.)**

S.S GARG
JUDICIAL MEMBER

P. ANJANI KUMAR
TECHNICAL MEMBER

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