

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SCO 147-148, SECTOR 17-C, CHANDIGARH-160017

DIVISION BENCH
COURT NO.1

Appeal No. E/60097/2016 & C/60155/2016

Sr. No	Case No	Impugned Order Detail's	Date of Impugned Order	Passed By	Appellant	Respondent
1	E/60097/2016-DB	OIO-08-CE-CHD-II-2016	29/02/2016	Commissioner of Central Excise-CHANDIGARH-II	Ind Swift Ltd	C.C.E. & S.T.-CHANDIGARH-II
2	C/60155/2016-DB	OIO-08-CE-CHD-II-2016	29/02/2016	Commissioner of Central Excise-CHANDIGARH-II(Appeal)	Ind Swift Ltd	C.C.E. & S.T.-CHANDIGARH-II

Date of Hearing: 26.10.2018
Date of Decision:

Appearance

Shri. Surjeet Bhadu, Shri. Veer Singh, Advocates- for the appellant
Shri. Vijay Gupta, AR- for the respondent

CORAM: **Hon'ble Mr. Ashok Jindal, Member (Judicial)**
Hon'ble Mr. Anil G. Shakkwar, Member (Technical)

FINAL ORDER NO: 63504-63505 / 2018

Per Ashok Jindal:

The appellant is in appeal against the impugned order wherein, the Customs duty as well as Central Excise duty has been demanded on account of procuring the inputs without payment of duty and has been used in export of goods without any permission from Development Commissioner to procure the said inputs.

2. The brief facts of the case are that the appellant is 100% EOU, engaged in the manufacture of Medicaments. The appellant was procuring duty free indigenous and imported raw material against CT-3 in terms of the Notification No. 22/2003-CE and 52/2003-CUS both dated 31.03.2003 read with provisions of chapter 6 of the Foreign Trade Policy 2009-2014. The appellant had executed B-17 bond for surety. The appellant for the manufacture and export of products on the basis of maximum utilization of plant and machinery had procured a LOP dated 22.11.2004 issued by the

Assistant Commissioner, Special Economic Zone, Noida. The LOP was given for manufacturing of Pharmaceutical products and patent & Proprietary Medicaments with annual capacity of 600 Million Tablets & 150 Million Capsules. The LOP was amended on 07.02.2005, wherein 62 new products were entered, thereafter, entry list was also entered in the LOP vide letter dated 03.09.2007. Further, vide letter dated 25.05.2008, 20 new products were added in the LOP. Another request was made by the appellant on 03.11.2008, for addition of 44 new products. The appellant again moved an application dated 02.05.2011 to include 32 products in the original LOP. In the mean time, the NSEZ without adding the items requested by the appellant, extended the validity of the LOP for five years up to 12.05.2016. The appellant under the belief that the said applications to include new products will be issued the amended LOP from the date of filing the application. The appellant imported the raw material as well as sourced indigenously duty free under proper CT-3 and procurement certificate issued by the department and used the same in manufacture of goods which were admittedly exported. The Assistant Development Commissioner on 08.08.2013 made the addition of 74 new products w.e.f 08.08.2013 and not from the retrospective dates when the applications were made. During the said gap period, the appellant manufactured the product out of the duty free inputs and cleared the said finished goods for export under bond. The imported duty free inputs were procured by the appellant under Notification No. 52/2003-CUS dated 31.03.2003 which were allowed by the jurisdictional Central Excise authorities for issuance of procurement Certificate. After import, the said goods were entered in the records and receipt was intimated to jurisdictional central excise authorities which were physically verified and certificate of re-warehousing was issued. All the process was carried out under cover of bond and the jurisdictional Central Excise authorities was having physical control of the appellant. For indigenous duty free inputs were allowed to be imported

under Notification No. 22/2003-CE dated 31.03.2003 read with Customs (Import of Goods at Concessional Rate of Duty) Rules, 1996. The appellant applied for issuance CT-3 certificate to the jurisdictional Central Excise authorities for import of duty free inputs and CT-3 were issued for each consignment .After import the said consignment brought into the factory and the jurisdictional Central Excise authorities who caused physical verification. The said inputs were used by the appellant for manufacture of their final product and the final product were exported under bond. These facts are not in dispute. However, in the meantime, the department initiated proceedings for recovery of duty saved on inputs used for manufacture of 64 products (out of total 74 products) which were approved by the development commissioner vide letter dated 08.08.2013. The appellant applied for regularization of the gap period of the 64 items to the Policy Relaxation Committee and Policy Relaxation Committee vide its meeting dated 15.03.2016 directed the Development Commissioner to allow broad banding in respect of those items for which permission of drug controller were obtained prior to commencement of production from the date of approval of drug controller. In pursuance of the said principle approval, the Development Commissioner vide letter dated 07.09.2016 granted retrospective approval to 59 products out of 74 products. Further, the Development Commissioner sought certain clarification from the Policy Relaxation Committee and thereafter, vide order dated 21.03.2017, held that there has not been violation of substantive law and there is procedural lapse and condone the delay by imposing penalty of Rs. 1 lakh. During the pendency of proceedings before the Development Commissioner, the show cause notice issued to the appellant on 21.07.2014 for recovery of duty saved by the appellant for import of duty free goods by the appellant during the gap period. The matter was adjudicated by the adjudicating authority on 29.02.2016 confirmed the

demand of duty saved by the appellant on inputs procured duty free. Against the said order, the appellant is before us.

3. The Id. Counsel for the appellant submits that there is no condition in Notification No. 22/2003-CE and Notification No. 52/2003- Cus both dated 31.03.2003, which requires for mentioning of each final product in the LOP. The exemption of duty free procurement of the inputs is allowed to "an EOU" and there is no requirement in the Notifications above that the EOU shall get the prior permission of the Development Commissioner. During the gap period, the appellant had followed entire process of the Notifications. Thus, there is no violation of any condition of exemption notification. To support this contention, he relied on the decision of this Tribunal in the case of ***Dendyal Magaswargiya Sahakari Soot Frini Ltd. vs.CCE, Kolhapur cited as 2014-TIOL-1527-CESTAT, Mum,*** wherein it has been held that accrued vested right cannot be taken away merely because there is a delay in issuing the letter of permission by the Development Commissioner. He also relied on the decision of this Tribunal in the case of ***Commissioner of C.Ex., Thane-I Vs. Global Wool Alliance P. Ltd. reported in 2012 (278) ELT 249 (Tri. Mum.)***. He also took support in the decision of this Tribunal in the case ***Commissioner of Cus. & C. EX., Guntur Vs. Vijaya Shrimp Farms Ltd. reported in 2014 (300) ELT 564 (Tri. Bang.)***. He also relied on the decision of this Tribunal in the case of ***Arjun Industries Ltd. Vs. Commissioner of Central Excise, Jaipur reported in 2005 (183) ELT 446 (Tri. Del.)*** to say that duty free import of capital goods and inputs allowed in terms of EOUs Scheme and whey validity of Letter of Permission (LOP) was extended by export promoting authorities namely, Assistant Development Commissioner, Noida, Revenue authorities also required to grant permission to appellant for harmonious functioning of EOU Scheme and duty demand in respect of imported machinery not sustainable. He also

submits that the show cause notice and order are not maintainable on one more ground that the same has been issued in violation of the Board Circulars No. 21/95-CUS dated 10.03.1995 and Circular No. 122/95-CUS dated 28.11.1995, wherein, it provides that no show cause notice shall issued by the department to an EOU as the decision of the Development Commissioner is pending. In the present case, the Development Commissioner has forwarded case to the Board of Approval vide his letter dated 21.02.2014 for broad banding of 74 products, wherein a show cause notice has been issued on 21.07.2014 during the pendency of proceedings before the Development Commissioner, therefore, in terms of CBEC circular and the decision of this Tribunal in the case of **Tegs Masrado Pvt. Limited vide Final Order No. A/60029/2018-EX(DB) dated 09.01.2018**, the proceedings against the appellant are not sustainable.

4. He further submits that demand issued against the appellant is barred by limitation as a demand for the period of 19.11.2007 to 07.08.2013 has been confirmed by the issuance of the show cause notice dated 21.07.2014, whereas the appellant was procured all the inputs on the strength of CT-3 certificate and all the procurement their inputs are in the knowledge of the Revenue. To support this contention, he relied on the decision of this Tribunal in the case of **Moserbaer India Ltd. Vs. CC reported in 2015 (325) ELT 236 (SC) and CCE, Vs. Emcure Pharmaceuticals Ltd. reported in 2014 (307) ELT 180 (Tri)**. He also relied on the decision of the Apex Court in the case of **Blue Star Ltd. reported in 2015 (318) ELT 11 (SC)**.

5. He further submits that the Id. Adjudicating authority has mis-understood of the legal agreement as bond. It is his submissions that the agreement entered into by the appellant creates a contractual liability and the same shall be recovered by invoking the jurisdiction of competent civil court. To support this contention, he relied on the decision of **M/s Wahid**

Sandhar Sugars Ltd. Fatehbad vide Final Order No. 199/2016-CHD dated 25.02.2016.

6. He further submits that there was no revenue loss as goods has been final exported by the appellant. Therefore, he prayed that the impugned order is to be set aside.

7. On the other hand, the Id. AR opposed the contention of the Id. Counsel who submits that Notification No. 22/03-CE dated 31.03.2003 specifies the procedure and condition for bringing in the goods in connection with manufacture and packaging of articles etc. for export of goods or services, into export oriented units i.e. user industries and one such condition is that all excisable goods brought are used by the user industry for the purpose specified therein and another condition is that the user industry is to comply with the conditions of the notification and the Foreign Trade Policy and bind itself to pay on demand. For this purpose, a bond and legal agreement are executed by the user industry and as per Foreign Trade Policy, LOP/LOI are issued and the products to be manufactured and exported are specified therein. But in the present case, the appellants have manufactured and exported the goods which were not specified in the LOP during a particular time period. Since, the final products were not specified, they were not entitled to bring inputs both indigenous and imported without payment of duty. The adjudicating authority has rightly demanded duty from the appellant for duty free procurement of inputs.

8. Heard the parties and considered the submissions.

9. On careful consideration of the submissions made by both the sides, we find that in this case the appellant was having the 100% EOU to manufacture of said products vide LOP dated 22.11.2004. All the products exported by the appellant have been allowed finally by Development

Commissioner vide its order dated 21.03.2017. The similar issue came up for consideration of this Tribunal in the case of Global Wool Alliance P. Ltd. (Supra) wherein this Tribunal observed as under:

"8. We have carefully considered the rival submissions. As rightly observed by Commissioner, it is not a case where the assessee did not have the permission to clear the goods into DTA. The assessee was first given the authorisation on 3-9-1998 for clearance of wool noil and tops and then on 24-12-1998 to clear worsted yarn/grey fabrics. The said authorisation continued to be issued right up to 18-4-2001 for the various products manufactured by the assessee and also specified the entitlement of assessee to clear specified quantity of goods. It is not a case where the assessee exceeded the limits of entitlement. Merely for the reason that there was a gap in obtaining the authorisation/permission for certain periods between two authorisations/permissions from the Development Commissioner, the benefit of Notification 2/95-C.E. cannot be denied. As regards wool waste and scrap, the Commissioner has rightly observed that as per 9.30 of the EXIM policy the assessee was entitled to clear the same into the DTA to the extent of 5% and the quantity cleared by the assessee is well within this limit. The finding of the Commissioner clearly reveals that the quantities of the various products cleared by the assessee into DTA is well within the quantity specified in the authorisations given by the Development Commissioner and it covers the period both prior to the issue of show-cause notice, as also during the period mentioned in the show-cause notice. There has only been a delay in getting the authorisations from the Development Commissioner; otherwise the clearances are in accordance with the authorisations given even though subsequently. Neither the EXIM policy nor Notification 2/95-C.E. stipulate a condition that the prior authorisation is required for effecting clearance into DTA. Even if it is assumed that prior authorisation is required, so long as the authorisation is available to the assessee though subsequently, it regularises the clearances affected into DTA and for this technical procedure lapse, the substantive benefit of Notification 2/95 dated 4-1-1995 cannot be denied. Therefore, we have to conclude that the clearances affected by the assessee into DTA are as per the permission given by the Development Commissioner even though in some cases the permissions came later.

10. Further, in the case of Dendyal Magasvargiya Sahakari Soot Frini Ltd. (Supra) again held by this Tribunal that accrued vested right cannot be taken away merely because there is a delay in issuing the letter of permission by the Development Commissioner.

11. In view of the above case laws, we find that the amendment in letter of permission (LOP) has granted to the appellant with the delay,

therefore, merely on procedural of lapse benefit of notifications cannot be denied to the appellant. On this sole ground the impugned order is liable to be set aside.

12. We further take note of the fact that during the impugned period, the appellant has applied for addition of items in question before the Development Commissioner vide their application dated 03.11.2008 and 02.05.2011, the same were pending disposal before the Development Commissioner and during pending the proceedings before the Development Commissioner, the impugned show cause notice has been issued to the appellant which in-violation to the CBEC circular no. 21/95-CUS dated 10.03.1995. As per the said circular, the demand of duty should be confirmed only after the definite conclusion arrived at by the Development Commissioner. Admittedly, the impugned order has been passed by the adjudicating authority before the conclusion arrived by the Development Commissioner, therefore, in the light of the decision of this Tribunal in the case of Tegs Masrado Pvt. Ltd. (Supra), wherein this Tribunal observed as under:

"10. On going through the above records, we find that while remanding the matter in the earlier round of litigation it was held by this Tribunal that proceedings could be initiated against the appellant only after the recommendation of the Development Commissioner and the Development Commissioner has dropped the proceedings against the appellant. Moreover, as per the CBEC Circular No. 21/95-Cus dated 10.03.1995, the demand of duty is required to be confirmed only after definite conclusion arrived at by the Development Commissioner and the CBEC Circular is binding on the authorities below. Therefore, in the absence of a definite conclusion by the Development Commissioner, no proceedings can be initiated against the appellant.

Admittedly, Id. Development Commissioner has dropped the proceedings against the appellant therefore, the proceedings initiated by the adjudicating authority in the impugned order are contrary to the order of this Tribunal dated 19.09.2001 and also against the spirit of the CBEC Circular No. 21/95-Cus dated 10.03.1995. It is pertinent to mention here that order of the Development Commissioner dated 10.12.2002 and 02.08.2011 have not been challenged by the Revenue or concerned department therefore, the same has attained finality. Moreover, the orders passed this

Tribunal dated 19.09.2001 and 08.08.2003 have also not been challenged by the Revenue and the same have also attained finality.

11. In view of the analysis, the proceedings against the appellant are not sustainable. Accordingly, the impugned order is set-aside.

In the result, the appeal is allowed with consequential relief, if any."

We also set aside the impugned order.

13. We further take note of the fact that Notification no. 52/2003-CUS and Notification No. 22/03-CE dated 31.03.2003 permit to import and procured the inputs duty free which has been used by 100% EOU for export of the goods used in manufacture of goods exported.

14. In view of the above observations, we do not find any merit in the impugned orders, the same are set aside.

In result, the appeals are allowed with consequential relief, if any.

(Order pronounced on)

Anil G. Shakkarwar
Member (Technical)

Ashok Jindal
Member (Judicial)

rt