IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL SOUTH ZONAL BENCH, CHENNAI

C/163 & 164/2009

(Arising out of Order-in-Original No. 8802/2009 dated 23.3.2009 passed by the Commissioner of Customs (Seaport – Export), Chennai)

M/s. Regency Ceramics Ltd.
M/s. Regency Glazes Ltd. Appellants

Vs.

Commissioner of Customs (Export), Chennai Respondent

Appearance

Shri B.V. Kumar, Advocate for the Appellant
Shri K. Veerabhadra Reddy, JC (AR) for the Respondent

CORAM

Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)
Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of Hearing : 07.11.2017
Date of Pronouncement: 21-11-2017

Final Order No. 43005-43006/2017

Per Bench

The issue involved in both these appeals are connected, they are heard together and are disposed by this common order.

2. The appellant M/s. Regency Ceramics Ltd. (M/s. RCL), Hyderabad and M/s. Regency Glazes Ltd. (M/s. RGL are

engaged in manufacture of ceramic tiles. M/s. RCL obtained an EPCG license dated 4.8.2004 for import of capital goods. The case of the department is that on investigation and visit of the factory premises of M/s. RCL in September 2007, certain capital goods listed below were not available and installed in the factory and instead were found installed in the premises of M/s. RGL. The capital goods which were not found available are as under:-

(a) Automatic Rotating Screen MOD 930 – 8 (Nos.) – Press Section with the following accessories:-

(i) Self-cleaning system with impellor and grease lubricated bearings – 8 Nos. and

(ii) Rotating screen feeding control device – 8 Nos.

(b) Automatic Rotating Screen MOD 1130- 2 Nos. (Press Section)

3. Statements were recorded from Shri Suryaprakasha Rao, Assistant General Manager of M/s. RCL who submitted that these capital goods were shifted and installed in the premises of M/s. RGL in the month of September 2007 vide inter office note dated 2.9.2007. It was deposed that the imported machinery / capital goods were initially installed in the premises of M/s. RCL and later, since the Government allocated housing around the industrial area of the plant, and therefore to avoid pollution and environmental hazards, the matter was discussed with the management and after taking consent from the management, the capital goods were

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relocated to M/s. RGL situated close by to prevent future environmental hazards. The department was of the view that the capital goods have been installed at unapproved premises immediately after import and thus violated conditions of Notification No.55/2003-Cus. dated 1.4.2003. A show cause notice was issued proposing to demand duty on the capital goods which were removed and installed in violation of the conditions in the Notification. After due process of law, the adjudicating authority denied the benefit of the Notification confirmed demand of duty of Rs.2,86,80,223/- along with interest and ordered confiscation of the capital goods valued at Rs.7,77,77,987/- installed in the premises of M/s. RGL with option to redeem the same on payment of fine of Rs. One crore under section 125 of the Customs Act, 1962. A mandatory penalty equal to duty was also imposed along with separate penalty of Rs. 10 lakhs on M/s. RGL under section 112(a) of the Customs Act, 1962. Being aggrieved, the appellants are now before the Tribunal.

4. On behalf of the appellants, ld. counsel Shri B.V.Kumar argued in detail by adverting to various documents. He submitted that both the units are adjacent to each other and are sister units. The EPCG license dated 4.8.2004 was granted in favour of M/s. RCL and the capital goods were imported and installed in the premises of M/s. RCL only. The allegation of the

department that immediately after import, the capital goods were diverted and installed in the premises of M/s. RGL is factually wrong. To support his contention that after import, the alleged capital goods were installed in premises of M/s. RCL, the ld. counsel relied upon the Installation Certificate issued by Chartered Engineer dated 11.11.2004. He drew our attention to the Handbook of Procedures in relation to the EXIM Policy. That pas per para 5.9 of the said Handbook of Procedures, it is sufficient that the licensee / appellant furnishes an installation certificate issued by an independent Chartered Engineer confirming the installation of capital goods at the factory of the license holder within six months from the date of completion of imports. The appellant has complied with this condition as provided in the Handbook of Procedures. It is submitted by him that it may be true that the notification provides to submit the installation certificate issued by AC / DC, within prescribed time. That appellant has also produced installation certificate issued by Assistant Commissioner duly that there was delay on the part of the appellant in obtaining such a certificate. However, the appellant has furnished the certificate dated 24.8.2007 wherein the Assistant Commissioner has certified that the capital goods imported by M/s. RCL is installed in their premises. Though the department contends that the copy of this certificate was not furnished to the concerned authorities, it is seen from the said installation certificate that copy of the installation certificate was forwarded to DGFT as well as the Commissioner of Customs (Sea Cargo), Chennai. That this certificate issued in 2007 would establish that the capital goods were originally installed in the premises of M/s. RCL and not in the premises of M/s. RGL as contended by the department. He added that later in September 2007, it became necessary for the appellant to shift the capital goods to the premises of M/s. RGL to prevent environmental hazards. This was a decision taken by the management and with the consent of the management and vide Inter Office Note dated 2.9.2007, the capital goods were shifted and installed in the premises of M/s. RGL.

5. He added that even prior to the said date of shifting of the capital goods, the appellant had fulfilled the export obligation and DGFT had issued certificate dated 18.10.2007 acknowledging the fulfillment of export obligation as per the impugned EPCG license dated 4.8.2004. That since the appellant has fulfilled the export obligation, as is evidenced from the DGFT certificate, it cannot be said that there is any violation of the conditions of the EPCG license. The Chartered Accountant also has certified giving details of the fulfillment of export obligation and receipt of foreign exchange on the exports. A show cause notice was issued by the DGFT for the

very same reason of diverting the machinery to a premises other than the premises mentioned in the license. The appellant had contested the show cause notice and Order-in-Original dated 9.4.2008 was passed by the Jt. DGFT. He adverted to para 11 of the said order of Jt. DGFT and submitted that it was observed by Jt. DGFT that M/s. RGL is only a supporting manufacturer and therefore the Jt. DGFT held that prima facie there was no violation of any condition of the license except the fact that the license holder had not intimated the department / DGFT about the installation of the machinery in the premises of the supporting manufacturer i.e. M/s. RGL. The factum of production of the Chartered Engineer's certificate as envisaged in the Handbook of Procedures was also taken into consideration in the said order and being a procedural lapse, not being a serious one, leading to revenue loss to the country, the same was condoned without any further action in this regard on the appellant. It was also noted in the said order that the appellant had fully complied the export obligation by using the imported capital goods and fulfilled the purpose for which the license was granted. That appellant used imported goods for the manufacture and export of the end-product, ceramic tiles, for the value of Rs.25,80,66,744/-. Thus, the ld. counsel stressed upon the argument that the allegation that capital goods after import had been shifted and installed in the premises of M/s.RGL is factually incorrect. Only in September 2007, the same was shifted to the premises of M/s. RGL which is only a sister concern and engaged in the manufacture of ceramic tiles. The diversion happened only after fulfillment of export obligation as per the license. That the infraction, if any, is only a technical lapse and not substantial so as to demand such huge duty on the capital goods by denying the benefit of the Notification. To support his contention, he relied on the following case laws:-

(a) *Navjothi International Vs. Commissioner of Customs, Chennai – 2004 (177) ELT 875 (Tri. Chennai)*

(b) *Indian Seamless Metal Tubes Ltd. Vs. Commissioner of Central Excise, Goa – 2017 (348) ELT 577*

(c) *Himalayan Co-op Milk Products Union Ltd. Vs. Commissioner of Central Excise – 2000 (122) ELT 327 (SC)*

(d) *Indus Ind. Media Communication Pvt. Ltd. Vs. Commissioner – 2016 (337) ELT A92 (SC)*

(e) *Oblum Electrical Industries Pvt. Ltd. Vs. Commissioner of Customs, Bombay – 1997 (94) ELT 449 (SC).*

(f) *Mangalore Chemicals & Fertilizers – 1991 (55) ELT 437 (SC)*

6. Against this, the ld. AR Shri K. Veerabhadra Reddy reiterated the findings in the impugned order. He pointed out that in the EPCG license, the premises for installing the capital goods is shown as the premises of M/s. RCL and the name of

M/s. RGL is not shown in the license as supporting manufacturer. That therefore the argument of the appellant that M/s. RGL is the supporting manufacturer cannot be accepted. The ld.AR submitted that the documents evidencing the electricity consumption taken by M/s. RGL as well as the power consumption would show that the capital goods were installed in the premises of M/s. RGL immediately after the import. The contention of the appellant that the export obligation was fulfilled cannot be a ground for condoning the violation of the conditions in the Notification. It is also submitted by him that the certificate of installation issued by the Chartered Engineer is only a condition prescribed in the Handbook of Procedures whereas the notification stipulates that the installation certificate should have been issued by the AC / DC. The appellants have not produced certificate of installation within the prescribed period as stated in the Notification and that there is no document to show that the authority for issuing such certificate has extended the time. That therefore the installation certificate dated 24.8.2007 cannot be accepted as evidence. The appellants had diverted the capital goods to the premises of M/s. RGL without obtaining permission from the proper authority and without payment of appropriate customs duty which is contravention of condition No. 4 of the Notification No. 55/2003 dated 1.4.2003.

In such circumstances, the demand of duty as well as consequent confiscation of the capital goods is just and proper. The ld. AR controverted the order passed by the Jt. DGFT stating that in cases of violation of condition of Notification, it is within the jurisdiction of the customs authorities to conduct enquiry, although the license is issued by the DGFT. Being an admitted case of diversion and M/s. RGL having not been recognized as a supporting manufacturer as per the EPCG license, the violation of condition is blatant and therefore the order passed by the Commissioner has to be sustained. He relied upon the decision of the Tribunal in the case of Atlas Dye Chem Industries Vs. Commissioner of Customs, Ahmedabad – 2008 (224) ELT 104 and the judgment of the Hon'ble Supreme Court in the case of Gaur Impex Vs. Commissioner – 2010 (249) ELT A28 (SC).

7. Heard both sides.

8. We find that the main plank of the department's allegations is that the imported capital goods were installed at non-approved premises immediately upon import and hence conditions of duty exemption Notification No. 55/2003-Cus. dated 1.4.2003 have been violated. Another major wrong doing / omission alleged by the department is that the certificate of installation of the capital goods required to be issued by the jurisdictional Deputy/Assistant Commissioner of

Central Excise was not produced and instead installation certificate issued by a Chartered Engineer was produced, which is not in conformity with the legal provisions. These two allegations form the edifice for the proceedings that have been initiated against the appellant seeking to deny the benefit of Notification No. 55/2003-Cus. confirming the demand of differential duty ofRs.2,86,80,223/- with interest thereof, ordering confiscation of the imported capital goods and imposition of penalties under section 114A and 112(a) of the Customs Act. From the facts on record, we do not find any allegation that the goods imported, though not installed at approved premises were otherwise not used for the intended purposes or for that matter were otherwise sold or disposed of in a clandestine manner. In this circumstance, what is therefore required to be adjudged is only whether the acts and omissions on which the proceedings have been initiated by the department or such that they constitute non-adherence or violation of mandatory or substantial procedural requirements, the breach of which would justify the action initiated against the appellants.

8.1 No doubt, Notification No. 55/2003-Cus., requires in para 2(4) thereof, that the capital goods imported etc. are to be installed in the importers factory or premises and that a certificate from the jurisdictional Deputy / Assistant

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Commissioner is produced confirming the installation and use of the goods in such factory or premises, within six months from the date of completion of import. There is also a provision for grant of extended period of time by the said DC/AC of Customs for production of such certificate. At the same time, the parent provision for Export Promotion for Capital Goods (EPCG) Scheme is available in page 5 of the then EXIM Policy and Handbook of Procedures 2002 – 2007. Under the head "Monitoring of Export Obligation" in para 5.9, it is mandated that the license holder shall produce to the concerned licensing authority, a certificate from the jurisdictional Central Excise authority or by an independent Chartered Engineer, confirming installation of capital goods at the factory of the license holder etc. within six months from the date of completion of imports. From the view point of this particular provision in the Handbook of Procedures, the appellant cannot be faulted for having produced a certificate from the Chartered Engineer dated 11.11.2004. But, of course, the corresponding Notification No. 55/2003-Cus. does require that such installation certificate should be issued only by the jurisdictional AC/DC. Ostensibly while such certificate from the jurisdictional DC/AC was not produced within the prescribed period, nonetheless, the certificate was subsequently produced by the appellants, as has been recorded in para 19 of the

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impugned order. It is evident that the appellant had informed the adjudicating authority that Central Excise Department had issued the installation certificate dated 24.8.2007. However, this document does not seem to have been taken cognizance of by the adjudicating authority. The said certificate annexed at page 142 of the compilation submitted by the appellant has been perused. It is noted that the certificate dated 24.8.2007 has been issued by the Assistant Commissioner of Central Excise & Customs, Division -II, Kakinada certifying that the capital goods imported by M/s. RCL are installed in the factory premises of M/s. RCL, Yanam, East Godavari District, Andhra Pradesh and is in use. The Annexure giving the list of the Bills of Entry wise of capital goods, which is also endorsed by the said Assistant Commissioner is seen.

8.2 With these facts before us, only to vindicate the claim of the appellant, that they had not directly installed the imported capital goods after their import in the premises of M/s. RCL, but had been installed in the premises of M/s. RGL much later. This conclusion is fortified by a show cause notice dated 7.12.2007 issued by the Jt. DGFT, Hyderabad referring to an alert letter received from the Commissioner of Central Excise and Customs, Vishakapattinam vide letter dated 26.11.2007 informing them that they had found the imported machinery under the concerned EPCG license lying in the premises of M/s.

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RGL and that they had been seized for violating conditions of license and conditions of Notification No. 55/2003-Cus. In reply to the Jt. DGFT, vide letter dated 22.2.2008, the appellants have submitted that they had installed the machinery at M/s. RCL. However, when basic raw material is crushed / grinded, lot of dust particles in the form of air-borne dust appears and that these particles may spoil the tiles. Hence management decided to shift the machinery to M/s. RGL and that the process takes place there. The letter also submits that both the companies are under same management and that M/s. RGL do not undertake any other work but are an exclusive ancillary unit for M/s. RCL. In an order dated 9.4.2008, issued by the Jt. DGFT, all these aspects have been considered and have taken note of this letter dated 11.12.2003 addressed to the Central Excise authorities wherein the following facts found by him have been highlighted:-

> From the preliminary investigation, I could see the following facts :
>
> 1. The firm had fulfilled the export obligation.
>
> 2. The firm had submitted all the documents to our office.
>
> 3. The firm had not sold the machinery to any other party on any consideration.
>
> 4. The firm had only installed the machinery in the supporting manufacturer premises at Adavipalem, Yanam.
>
> 5. The entire raw material were supplied by the licence holder to the supporting manufacturer.
>
> 6. All the intermediate products manufactured by M/s.Regency Glazes Ltd. Were supplied 100% to

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M/s.Regency Ceramics Ltd. Only for manufacturing the end product, ceramic tiles.

7. Both the licence holder and supporting manufacturer are situated in the same place i.e. Yanam.

In view of the above, I could see prima facie that the firm has not violated any condition of the licence excepting the fact the licence holder has not intimated us about the installation of the machinery in the premises of the supporting manufacturer i.e. M/s.Regency Glazes Ltd. According to para 5.3.2 of Hand Book, the licencee can install the machinery in the premises of the supporting manufacturer and such a facility is allowed under Foreign Trade Policy / Hand Book. Although they have submitted the Chartered Engineer Certificate regarding installation of the machinery, the same may be taken as a supporting document but not the relevant document because Installation Certificate has to be obtained from the Central Excise Authorities and the Chartered Engineer as the case may be. It is also noted that at times we accept the Chartered Engineer Certificate along with Central Excise Certificate to ascertain the fact of installation of the machinery.

I will be deciding the case very shortly and I may also take suitable action against them for technical violation under the FT (DR) Act, 1992. However, it cannot be construed as a violation with an intention to cheat the Government resulting in unjust enrichment at the cost of the exchequer. However, this technical violation is solely due to lack of knowledge of import export policy and procedures. Therefore, we may have to give benefit of doubt to the exporter.
Till my adjudication order is finalised, I request that the licencee may be allowed to run their factory so that production and exports do not stop for a procedural lapse on their part in the absence of any revenue loss to the country. I have also asked them to appear before you and give statement so that you can also decide your case as per Central Excise Act. I would also like to inform you that the party has not come to our adverse notice in the past and therefore I would request you that the company may be allowed to run their production schedule uninterruptedly pending my adjudication and your investigation. I would also request you to refer para 2.42.1 of FTP for consequential action."

8.3 In the said order, Jt.DGFT has further held that when the export obligation has been fully met by using the imported

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capital goods and the purpose for which the license was granted has fully met, the lapse on the part of the appellant is only a technical one not leading to any revenue loss or any other unintended action of the licensee. We also find on record a letter dated 23.7.2008 of the Jt. DGFT addressed to the appellants informing that the export obligation against their EPCG license has been discharged by imposing a nominal penalty of Rs. One lakh and that the goods has been regularized since they have paid the amount of Rs. One lakh towards penalty vide adjudication order dated 9.4.2008.

8.4 From the discussion, herein above, we are of the view that the appellants have produced sufficient certification not only from the Chartered Engineer but also from the jurisdictional Assistant Commissioner of Central Excise that the capital goods imported by them against the concerned EPCG license had very much been installed and put in use initially at their own manufacturing premises as required. Only much later, they decided to shift the capital goods to their sister unit M/s. RGL, which also was located in Yanam itself. This unilateral shifting of the capital goods, though done without the permission from DGFT authorities, and/or customs authorities, has nonetheless been regularized by way of adjudication of the matter by the Jt. DGFT, Hyderabad by imposing a nominal penalty vide order dated 23.7.2008. As

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observed by the adjudicating authority in para 21.7 of the impugned order, that "...... law is clear that on the singular point the customs authorities cannot sit in judgment over the decision of the licensing authorities ....". The procedural lapse on the part of the appellant having been adjudged by the licensing authority by way of imposing nominal penalty and the shifting regularized and most importantly the export obligation having been done completely in full, demand of duty liability, confiscation and imposition of penalties for the procedural lapse, would surely be unnecessary after the matter has been regularized by the licensing authority, namely Jt. DGFT.

8.5 Applying the ratio of the law laid down by the Hon'ble Supreme Court in the case of Mangalore Chemicals (supra), the acts and omission of the appellant is nothing but a non-observance of a procedural condition of technical nature and not a substantive condition. The impugned order cannot then be sustained and will have to be set aside, which we hereby do. Appeals are allowed with consequential relief, if any, as per law.

(Pronounced in court on 21-11-2017)

(Madhu Mohan Damodhar)	**(Sulekha Beevi C.S.)**
Member (Technical)	Member (Judicial)

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सहायक पंजीकार / Assistant Registrar
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