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

Appeal No.C/41548/2015

[Arising out of Order-in-Original No.260/2015-AIR dt. 31.03.2015 passed by the Commissioner of Customs, Chennai VII]

Srini Pharmaceuticals Ltd. — Appellant

Versus

Commissioner of Customs,
Chennai-VII — Respondent

Appearance:

Shri S. Sankaravadivelu, Advocate
For the Appellant

Shri S. Govindarajan, AC (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: 05.10.2017
Date of Pronouncement : 23-10-2017

FINAL ORDER No. 42353/2017

Per Bench

The facts of the case are that Srini Pharmaceuticals Ltd., the appellants herein, are engaged in the manufacture of bulk drugs and bulk intermediates for which they procure raw materials both

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indigenously as well as by import. Appellant obtained advance licenses for import of various raw materials, i.e. chemicals, without payment of applicable customs duties under Notification No.43/2002-Cus. dt. 19.4.2002. Against the said advance licences some quantity of raw material was also procured from independent sources by obtaining invalidation from DGFT authorities. These imported / indigenously procured raw materials were used for manufacture of specified products mentioned in the licences. There was no Standard Import Output Norms (SION) for the export products. Hence DGFT had issued the advance authorizations as per the adhoc norms on the condition that the appellant would pay duty and interest on the utilized raw materials / inputs, imported over and above the finally approved norms. DGFT authorities subsequently fixed special norms and communicated the same to the appellant. The appellant vide their letter dt. 2.5.2005 requested the DGFT for clubbing of advance licences and export obligation discharge in respect of some of the advance licences, which was rejected by the DGFT. In this background, it appeared to the department that customs duty forgone on that quantity of excess inputs quantified on pro-rata basis valued at Rs.1,34,71,080/-, amounting to Rs.55,56,183/- along with interest liability thereon is payable by the appellant. Accordingly, proceedings were initiated by way of SCN dt. 3.10.2007, inter alia proposing confiscation of the alleged excess inputs, demand of customs duty forgone and the imposition of penalty on the appellant under Customs Act. The SCN also proposed denial of benefit of Exemption Notification No.43/2002-Cus. dt. 19.4.2002 and appropriation of amount of Rs.10,90,969/- and Rs.5,44,482/- voluntarily paid by the appellant towards duty and interest liability respectively. In adjudication, vide the impugned order dt. 31.03.2015, the proposals of the SCN were confirmed. Redemption fine of Rs.10 lakhs was imposed under Section 125 ibid in lieu of confiscation of the alleged excess goods and a penalty of Rs.5 lakhs was imposed under Section 112 (a) of the Customs Act, 1962.

2. The matter has been rolling on board from 2015. In a hearing on 05.10.2016, on the submission made by appellant that letter dt. 18.06.2015 issued by DGFT was required to be considered as confirmation of discharge of export obligation, Ld. D.R contended that at that point of time when the obligation was not discharged, the reason of issuance of that letter is not known to law. To resolve the dispute, this Bench vide Interim Order No.93/2016 dt. 05.10.2016 had requested the ld. Commissioner to get clarification by 30-11-2016 from the DGFT as to whether there was discharge of export obligation

and acceptable to law. The matter was posted for 4.1.2017 when Revenue made prayer for adjournment to get instructions from the Commissioner. On the next hearing on 03.03.2017, the same plea was made by the Revenue and the matter was adjourned as last opportunity to get proper instructions. The next hearings of 17.03.2017 and 23.05.2017 had also been adjourned. In the next hearing on 04.08.2017, the case was yet again adjourned, on request of the department, to 23.08.2017. However, even on 23.08.2017, the department sought further time for implementation of the Misc. order dt. 5.10.2016. The matter has finally been heard on 05.10.2017.

3. The Ld. Advocate for appellant Shri S.Sankaravadivelu, reiterated the submissions made by them on 23.08.2017 and also submitted fresh written submissions dt. 05.10.2017. The submissions and contentions of the ld. Advocate can be broadly summarized as under :

(i) The DRI had visited the appellant's unit for investigation on 22.06.2017 when the request made by them to DGFT (on 02.05.2015) to consider clubbing of the advance authorizations for payment of duty and interest on excess raw material utilized was still pending.

(ii) It is not a case of diversion of duty free materials imported for other purposes to demand duty. Even the Foreign Trade Policy /

Handbook of Procedure provides for payment of duty and interest only on unutilized imports. In the appellant's case, there is no availability of the utilized inputs, as all these raw materials were consumed in the manufacture of final products. As stated supra originally more raw materials were consumed per unit of final products as compared to later stages of production. Hence the consumption was more than the final norms. The JDGFT/DGFT cannot reject their application for clubbing and considering these facts, DRI in all fairness collected the differential duty and interest, only on the excess raw materials, arrived at after clubbing these Advance Authorisation.

(iii) Appellants were continuously following up their request for clubbing of the advance licenses with JDGFT, Hyderabad. On 25.09.2008, the appellants had written a detailed letter to the DGFT/JDGFT to consider the request for clubbing of the Advance Authorisation, particularly keeping in view the transitional provisions under para 4.28 of the Handbook of Procedure Vol-I read with para 4.20 of Handbook of Procedure Vol – I (2008 - 09).

(iv) Considering the appellant's request and on verification payment of differential duty and interest with Customs and on collection of composition fees, the Office of JDGFT, on 19.05.2011 issued the

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Export Obligation Discharge Certificate (EODC) after permitting clubbing of the Advance Authorisation.

(v) The communication dated 19.05.2011 of the JDGFT was submitted to the learned Original Authority on 20.05.2011 and even though the Order-in-Original was passed on 30.05.2011, the authority has not considered the same.

(vi) On appeal, the Hon'ble CESTAT vide Final Order No.40117 dated 05.04.2013 directed the Original Authority to consider the communication dated 19.05.2011 of the JDGFT and pass appropriate order.

(vii) The learned Original Authority, instead of causing verification with the JDGFT, inferred that the communication dated 19.05.2011 was not the EODC and confirmed the demand of duty, interest and imposed penalty. (vii) The appellants has brought it to the notice of the JDGFT that the Customs is not accepting the JDGFT communication dated 19.05.2011, as the proof of discharge of Export Obligation. In turn, the Office of the JDGFT vide their letter date 18.06.2015 confirmed their communication dated 19.05.2011 is the EODC.

(viii) The learned A.R also wanted confirmation and hence, the Hon'ble Bench vide Interim Order No.93/2016 dated 05.10.2016 directed the A.R. to get the clarification through the Original Authority by 30.11.2016 and the case to be posted for hearing on 04.01.2017.

(xii) Based on the submissions, Ld. Advocate contends that the duty liability on the excess raw materials arrived at after clubbing of advance authorizations, worked out at Rs.10,90,969/- was paid by them at the time of investigation itself along with interest and now there is no further duty liability that will accrue. No penalty will also to be imposable in the matter.

4. On the other hand, Ld.A.R, Shri S. Govindarajan submits that although the office of Commissioner of A.R had sought clarification in the matter from the Custom House, Meenambakkam, Chennai, they have not received any decisive reply in the matter. Reminder had been sent on 14.03.2017 also, however they have received reply dt 07.09.2017 from which it emerges that the issue pertains to DEEC (Group-7D) of Custom House, Seaport and hence it has been referred to them. Ld. A.R however reiterates the adjudication.

5. Heard both sides and have gone through the facts.

6.1 Discernably, at the time of the investigation by DRI and the issue of SCN dt. 03.10.2007, the request made by the appellant to the DGFT to consider clubbing of advance authorizations to enable payment of duty and interest on the "net excess raw material utilized after clubbing" was still pending. No doubt, the DGFT had initially vide letter dt.08.06.2006/13.06.2006 had rejected the request of the appellant to consider for clubbing of the licences. However, appellant had once again requested the DGFT vide letter dt. 05.02.2007 to reconsider their request. Yet another letter was sent by them to the DGFT on 14.03.2017.

6.2 The SCN has listed out, in the annexures thereto, details of imports bill of entry wise under each of the advance authorizations in Worksheet- I (pages 75-77 of the appeal book). So also, Worksheet-II (page 78-83 of the appeal book) contains list of shipping bills and the relevant advance authorizations. Worksheet-III (pages 84-85 of the appeal) is a consolidation of the item wise imports under various advance authorisations.

6.3 We find that vide a letter dt. 19.05.2011 the DGFT have conveyed that export obligation against advance licences have been clubbed in terms of para 4.20.3 and regularized in terms of para 4.28 of Hand Book of Procedure (Vol-I) 2009-14. This letter along with Annexures thereto is found in pages 118 to 133 of the appeal book (in terms of advance licences Nos.0910011985 dt. 14.11.02, 0910014487 dt. 29.05.03, 0910015735, dt. 11.09.03, 0910017460, dt. 17.02.04, 0910018594, dt. 25.05.04). DGFT vide their letter dt.03.12.2010 (available at page 134 of appeal book) has informed the appellant that the export obligation against advance licences 0910010290 dt. 13.06.2002 has been regularized in terms of para 4.28 of Hand Book of Procedure (Vol-II) 2002-07. A corrigendum dt.25.2.2011 has been issued to the EOU regularization letter in respect of appellant to amend the name of customs authorities to be read as Dy./Asst. Commissioner of Customs, DEEC Section Air Caro Complex, Begumpet, Hyderabad.

6.4 Further DGFT letter dt. 18.06.2015 found at page 136 of the appeal book clarifies that nature of clubbing and regularization of export obligation is already conveyed in their earlier letter dt. 19.05.2011. Relevant portion of the said letter is reproduced below :

> "2. This is to inform you that vide this office letter dated 19.05.2011, the above five advance licences have been clubbed in terms of para 4.20.3 of Hand Book of Procedures 2009-2014 and regularised in terms of para 4.28 of Hand Book of procedures 2009-2014. Regularisation takes place when there is payment of duty involved and once the applicable duties, etc. are paid, licences are regularised. Once it is regularised, it amounts to discharging the party from all obligations including export obligation. It also means that you are discharged from all obligations including export obligation.
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> 3. It is also clarified that this office letter dated 19.05.2011 discharges the export obligation against all the five advance licences mentioned therein. "

6.5 It is this communication that was objected to by the Ld. A.R in the hearing on 05.10.2016 and in consequence vide the Tribunal

Misc.Order No.93/2016 dt. 05.10.2016, the Commissioner was requested to get clarification from the DGFT as to whether there was discharge of export obligation acceptable to law by 30.11.2016.

6.6 The main ground of the appellant in their grounds of appeal is that consequent to the approval granted by DGFT for clubbing of the advance licences and regularization of export obligation, the quantity of excess raw materials utilized will necessarily have to be calculated as the net excess quantity after clubbing of the advance authorizations. Appellant further contends that based on their own working, even at the stage of DRI investigation, they have paid up an amount of Rs.10,90,969/- towards duty forgone on such net excess quantity arrived at and further had also paid up an amount of Rs.5,44,482/- towards interest liability thereon.

6.7 There is considerable merit in this ground of appeal put forth by the appellant, especially when viewed in the context of the letters of DGFT, discussed above, conveying permission for clubbing of licences and regularization of export obligation. Only in the interest of expediting decision in this appeal, and only based on the request made by the departmental representatives themselves, was a request made by this Bench on 05.10.2016 to the concerned Commissioner for causing verification of these averments. Surely that did not involve any complicated procedural and protracted procedural impediments to cause ascertainment requested for. All that was required to confirm the veracity of copies of the letters submitted by the appellant as having been issued by the DGFT. In case, once the fact of the permission for clubbing of advance authorization and regularization of export obligation has been approved by the DGFT, it only remains to rework the net duty liability and interest thereon, and, to ascertain whether such liability worked out are in sync with that paid by the appellant and appropriated in the impugned order. Sadly, that has not happened. We are pained to note that there has been no progress in the matter. On the other hand, we find ourselves today on 05.10.2017, exactly at the same place where we started, a year ago to the day on 5.10.2016, on which date the interim order had been issued.

6.8 Even at this stage, we find from the letter dt. 07.09.2017 that the Review Cell of Air Cargo Customs, Chennai has only transferred the responsibility to the Asst. Commissioner (DEEC) Group-7D of Chennai Seaport Customs. The end result is akin to the story of "*Where Everybody Blames Somebody when Nobody did what Anybody could have done*". We also note that even in the nine hearings that have happened in this appeal in the last one year, for

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reasons we are not aware, three different ARs have appeared on behalf of the department.

6.9 This is certainly not in keeping with the mission of National Litigation Policy which aims to transform the Government into an efficiency and responsible litigant.

7. In the event, we are constrained to remand the matter to the original authority for de novo consideration. In such de novo proceedings, the authority, after verifying the veracity of the permission of the communications issued by the DGFT allowing clubbing of advance authorisations and regularization of export obligation, shall recalculate the net duty and interest liability required to be paid on the net excess raw materials utilized after clubbing of the advance authorization. In case, such reworked demand matches the amount already paid up by the appellant, there shall be no further duty and interest liability demandable. However, in case there is any additional amount of duty liability over and above what has been paid up by the appellant, that should be clearly reasoned and conveyed to the appellant in a speaking order. Needless to say, the appellant should be given sufficient opportunity to present their case, including the submission of additional documents, if required. Keeping in mind the delay that have already occurred in this matter, the adjudicating

authority is directed to complete the de novo adjudication within a period of 3 months from the date of receipt this order. Ordered accordingly.

8. A copy of this decision should also specifically endorsed to the Chief Commissioner of Customs, Chennai Zone for his information.

Appeal is disposed of in the above terms.

(Pronounced in court on 23.10.2017)

(Madhu Mohan Damodhar)
Member (Technical)

Sulekha Beevi

(Sulekha Beevi C.S)
Member (Judicial)

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Customs, Excise & Service Tax Appellate Tribunal

प्रमाणित प्रति / Certified True Copy
27/10
सहायक पंजीकार / Asst. Registrar
सीमाशुल्क उत्पादशुल्क एवं सेवा कर
अपील अधिकरण / (CESTAT)
चेन्नै / CHENNAI