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

C/237/2007

(Arising out of Order-in-Appeal C. Cus. No.253/2007 dated 26.4.2007 passed by the Commissioner of Customs (Appeals), Chennai)

M/s. Medopharm Appellant

Vs.

Commissioner of Customs, Chennai Respondent

Appearance

Shri N. Viswanathan, Advocate for the Appellant
Shri A. Cletus, Addl. Commissioner (AR) for the Respondent

CORAM

Hon'ble Shri D.N. Panda, Judicial Member
Hon'ble Shri Madhu Mohan Damodhar, Technical Member

Date of Hearing / Decision: **07.02.2017**

Final Order No. 40242/2017

Per D.N. Panda

It is submission on behalf of the appellant that it is an advance licence holder to import raw material free of customs duty as well as anti-dumping duty for use thereof in the manufacture of final product meant for export. Such Licence was issued to the appellant under paragraph 4.1.7A of the EXIM Policy 2002 – 2007. When the appellant sought to avail exemption from anti-dumping duty in terms of Notification No. 43/2002-Cus. Dated 19.4.2002, that was denied by customs holding that the appellant is only entitled to avail the exemption of customs duty in terms of Notification No. 56/2003-Cus. dated 1.4.2003. By such denial, appellant was aggrieved.

1.2 Appellant's further contention is that when it is an advance licence holder to import raw material free of duty for use in manufacture and export the finished goods, it did not cause dumping of the raw material since the raw material imported were used in manufacture of the finished goods and such finished goods exported. Therefore, there is no reason to deny the exemption from anti-dumping duty to the appellant under Notification No. 43/2002-Cus. dated 19.4.2002. Appellant placed both the notifications as under for appreciation of intention thereof:

Notification No. 43/2002-Cus., dated 19-4-2002

Duty Exemption/Remission Scheme — Exemption to Import against Advance Licence issued thereunder

"In exercise of the powers conferred by sub-section (1) of Section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts materials imported into India, against an Advance Licence issued in terms of sub-paras (a) and (b) of paragraph 4.1.1 of the Export and Import Policy (hereinafter referred to as the said licence), from the whole of the duty of customs leviable thereon which is specified in the First Schedule to the Customs Tariff Act, 1975 (51 of 1975), and from the whole of the additional duty, safeguard duty and anti-dumping duty leviable thereon respectively under Sections 3, 8 and 9A of the said Customs Tariff Act, subject to the following conditions namely :-

(i) that the description, value and quantity of materials imported are covered by the said licence and the said licence is produced before the proper officer of customs at the time of clearance for debit;

(ii) that where import takes place after fulfilment of export obligation, the shipping bill number(s) and date(s) and quantity and FOB value of the resultant product exported are endorsed on the said licence.

Provided that where import takes place before fulfilment of export obligation, the quantity or FOB of the resultant product to be exported are endorsed on the said licence;

(iii) that the importer at the time of clearance of the imported materials executes a bond with such surety or security and in such form and for such sum as may be specified by the Assistant Commissioner of Customs or Deputy Commissioner of Customs binding himself to pay on demand an amount equal to the duty leviable, but for the exemption, on the imported materials in respect of which the conditions specified in this notification have not been complied with, together with interest at the rate of twenty four per cent per annum from the date of clearance of the said materials.

Provided that bond shall not be necessary in respect of imports made after the discharge of export obligation in full;

(iv) that the imports and exports are undertaken through sea ports at Mumbai, Kolkata, Cochin, Magdalla, Kakinada, Kandla, Mangalore, Marmagoa, Madras, Nhava Sheva, Paradeep, Pipavav, Sikka, Tuticorin, Visakhapatnam, Dahej, Mundhra, Nagapattinam and Okha or through any of the airports at Ahmedabad, Bangalore, Bhubaneswar, Mumbai, Kolkata, Coimbatore, Delhi, Hyderabad, Jaipur, Madras, Srinagar, Trivandrum, Varanasi, Nagpur and Cochin or through any of the Inland Container Depots at Agra, Bangalore, Coimbatore, Delhi, Faridabad, Gauhati, Guntur, Hyderabad, Jaipur, Jallandhar, Kanpur, Ludhiana, Moradabad, Nagpur, Pimpri (Pune), Pitampur (Indore), Surat, Tirupur, Varanasi, Nasik, Rudrapur (Nainital), Dighi (Pune), Vadodara, Dauladtabad, (Wanjarwadi and Maliwada), Waluj (Aurangabad), Anaparthy (Andhra Pradesh), Salem, Malanpur, Singanalur, Jodhpur, Kota, Udaipur, Ahmedabad, Bhiwadi, Madurai, Bhilwara, Pondicherry and Garhi Harsaru or through the Land Customs Station at Ranaghat and Singhabad :

Provide that the Commissioner of Customs may by special order and subject to such conditions as may be specified by him, permit import and export from any other Seaport/Airport/Inland Container Depot or through any Land Customs Station;

(v) that the export obligation as specified in the said licence (both in value and quantity terms) is discharged within the period specified in the said licence or within such extended period as may be granted by the licensing Authority by exporting resultant products, manufactured in India which are specified in the said licence and in respect of which facility under rule 18 or rule 19 of the Central Excise Rules, 2002 has not been availed :

Provided that an Advance Intermediate Licence holder shall discharge export obligation by supplying the resultant products to ultimate exporter in terms of sub-para (b) of para 4.1.1 of the said Export and Import Policy;

(vi) that the importer produces evidence of discharge of export obligation to the satisfaction of the Assistant Commissioner of Customs or Deputy Commissioner of Customs within a period of 30 days of the expiry of period allowed for fulfilment of export obligation, or within such extended period as the said Assistant Commissioner of Customs or Deputy Commissioner of Customs may allow;

(vii) that the said licence and the materials shall not be transferred or sold;

(viii) that in relation to the said Licence issued to a Merchant Exporter,-

(a) the name and address of the supporting manufacturer is specified in the said licence and the bond required to be executed by the importer in terms of condition (ii) shall be executed jointly by the Merchant Exporter and the supporting manufacturer binding themselves jointly and severally to comply with the conditions specified in this notification; and

(b) exempt materials are utilised in the factory of such supporting manufacturer for discharge of export obligation and the same shall not be transferred or sold or used for any other purpose by the said Merchant Exporter.

2. Where the materials are found defective or unfit for use, the said materials may be re-exported back to the foreign supplier within three years from the date of payment of duty on the importation thereof :

Provided that at the time of re-export the materials are identified to the satisfaction of the Assistant Commissioner of Customs or Deputy Commissioner of Customs as the materials which were imported.

Explanation. - In this notification,-

(i) "Export Import Policy" means the Export and Import Policy 2002-2007, published vide notification of the Government of India in the Ministry of Commerce No. 1/2002-2007, dated the 31st March, 2002;

(ii) "Licensing Authority" means the Director General of Foreign Trade appointed under Section 6 of the Foreign Trade (Development and Regulation) Act, 1992 (22 of 1992) or an officer authorised by him to grant a licence under the said Act.

(iii) "Materials" means -

(a) raw materials, components, intermediates, consumables, catalysts, computer software and parts which are required for manufacture of resultant product;

(b) mandatory spares within a value limit of 10 per cent of the value of the licence which are required to be exported along with the resultant product;

(c) fuel, oil and catalysts required for manufacture of resultant product; and

(d) packing materials required for packaging of resultant product."

[Emphasis supplied]

<u>Notification No. 56/2003-Cus., dated 1-4-2003</u>

Advance licence for annual requirement with actual user condition — Exemption to import made thereagainst

In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts materials imported into India against an Advance License for Annual Requirement (hereinafter referred to as the said license), with Actual User Condition in terms of Paragraph 4.1.7A of the Export and Import Policy from the whole of the duty of customs leviable thereon which is specified in the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) and from the whole of the additional duty leviable thereon under section 3 of the said Customs Tariff Act, subject to the following conditions, namely, -

(1) that the said licence shall be issued to a manufacturer exporter or merchant-exporter holding Export House, Trading House, Star Trading House or Super Star Trading House Certificate issued by the Licensing Authority.

(2) that the said licence is issued for an export product group specifying the Cost Insurance Freight Value (CIF value) of import permitted against it and the Free on Board Value (FOB value) of export obligation to be achieved. The said licence shall be valid for import of any input required for the manufacture of export product, which is covered under the said export product group specified in the Hand Book of Procedure Volume II of Export and Import Policy;

(3) that an Actual User Duty Exemption Entitlement Certificate (hereinafter referred to as the said certificate) is issued to the holder of the said licence by the Licensing Authority in the form specified in the Schedule annexed to this notification. At the time of import, the full details of value, quantity, technical

characteristics and other particulars, of the inputs imported against the said licence shall be entered in part 'C' of the said certificate by the proper officer;

(4) that the importer at the time of clearance of the imported materials executes a bond with such surety or security and in such form and for such sum as may be specified by the Deputy Commissioner of Customs or Assistant Commissioner of Customs, binding himself to pay on demand an amount equal to the duty leviable, but for the exemption, on the imported materials in respect of which the conditions specified in this notification have not been compiled with, together with interest at the rate of fifteen per cent per annum from the date of clearance of the said materials:

Provided that the bond shall not be necessary in respect of imports made after the discharge of export obligation in full;

(5) that the said licence and the said certificate are produced before the proper officer of customs at the time of clearance for debit;

(6) that the imports and exports are undertaken through sea ports at Mumbai, Calcutta, Cochin, Magdalla, Kakinada, Kandia, Mangalore, Marmagoa, Madras, Nhava Sheva, Paradeep, Pipavav, Sikka, Tuticorin, Visakhapatnam, Dahej, Nagapattinam , Okha and Mundhra or through any of the airports at Ahmedabad, Bangalore, Bhubaneshwar, Mumbai, Kolkata, Coimbatore, Delhi, Hyderabad, Jaipur, Madras, Srinagar, Trivandrum, Varanasi, Nagpur and Cochin or through any of the Inland Container Depots at Agra, Bangalore, Coimbatore, Delhi, Faridabad, Gauhati, Guntur, Hyderabad, Jaipur, Jallandhar, Kanpur, Ludhiana, Moradabad, Nagpur, Pimpri (Pune), Pitampur. (Indore), Surat, Tirupur, Varanasi, Nasik, Rudrapur (Nainital), Dighi (Pune), Vadodara, Daulatabad (Wanjarwadi and Maliwada), Waluj (Aurangabad), Anaparthy (Andhra Pradesh), Salem, Malanpur, Singanalur, Jodhpur, Kota. Udaipur, Ahmedabad, Bhiwadi, Madurai, Garhi Harsaru, Bhilwara and Pondicherry or through the Land Customs Station at Ranaghat, Singhabad and Raxaul.

Provided that the Commissioner of Customs may by special order or a public notice and subject to such conditions as may be specified by him, permit import and export through any other sea port, airport, or Inland Container Depot or through a land customs station;

(7) that sourcing of the imported materials from Private Bonded Warehouses set up under paragraph 2.28 of the Export and Import Policy would be allowed;

(8) that the export obligation is discharged within eighteen months from the date of issue of the said licence or within such extended period as may be granted by the Licensing Authority by exporting resultant products manufactured in India. At the time of export, the full details of value, quantity, technical characteristics, and other particulars, of the resultant export product (hereinafter referred to as resultant product) shall be entered in part 'E' of the said certificate by the proper officer;

(9) that the importer produces evidence of discharge of export obligation to the satisfaction of the Deputy Commissioner of Customs or Assistant Commissioner of Customs, within a period of 30 days of the expiry of period allowed for fulfilment of export obligation, or within such extended period as the said Deputy Commissioner of Customs or Assistant Commissioner of Customs, may allow;

(10) that the exempt materials shall not be disposed of or utilised in any manner except for utilisation in discharge of export obligation or for replenishment of such materials and the materials so replenished shall not be sold or transferred to any other person;

(11) that in relation to the said license issued to a manufacturer-exporter or merchant exporter, -

(a) the name and address of the supporting manufacturer is specified in the said licence and the said certificate and the bond required to be executed by the importer in terms of condition (4) shall be executed jointly by the Merchant-Exporter and the supporting manufacturer binding themselves jointly and severally to comply with the conditions specified in this notification; and

(b) exempt materials are utilised in the factory of such supporting manufacturer in terms of condition (10).

Customs, Excise & Service Tax Appellate Tribunal Mumbai

Explanation : In this notification, -

(i) "Export and Import Policy" means the Export and Import Policy 2002-2007, published vide notification of the Government of India in the Ministry of Commerce and Industry No. 1/2003, dated the 31st March, 2003, as amended from time to time;

(ii) "Licensing Authority" means the Director General of Foreign Trade appointed under section 6 of the Foreign Trade (Development and Regulation) Act, 1992 (22 of 1992) or an officer authorised by him to grant a licence under the said Act;

(iii) "materials" means, -

(a) raw materials, components, intermediates, consumables, computer software and parts required for manufacture of resultant product specified in Part" E" of the said certificate by the proper officer;

(b) mandatory spares within a value limit of 10% of the value of the licence which are required to be exported along with the resultant product; and

(c) packaging materials required for packing of resultant product.

[Emphasis supplied]

2.1 Appellant further submitted that DGFT issued an office memorandum on 02.09.2008 to entitle the appellant to the benefit of Notification **No.43/2002-Cus. dated 19.4.2002,** explaining that the Foreign Trade Policy does not differentiate the advance licence issued under para 4.1.1 and 4.1.7A of the EXIM policy of the relevant period. Recommendation was made by that Authority to the Department of Revenue to amend customs Notification No. **56/2003-Cus. dated 1.4.2003** to allow anti-dumping duty, exemption on import of raw material to the licences issued under para 4.1.7A also.

2.2 Appellant further explained that para 4.1.1 of the EXIM Policy which reads as under, grants the same benefit that is intended by para 4.1.7A of the said Policy.

Para 4.1.1

"An Advance Licence is issued to allow duty free import of inputs, which are physically incorporated in the export product (making normal allowance for wastage). In addition, fuel, oil, energy,

catalysts etc. which are consumed in the course of their use to obtain the export product, may also be allowed under the scheme. Duty free import of mandatory spares upto 10% of the CIF value of the licence which are required to be exported/ supplied with the resultant product may also be allowed under Advance Licence. Advance Licence can be issued for:-

a) Physical exports:- Advance Licence may be issued for physical exports to a manufacturer exporter or merchant exporter tied to supporting manufacturer(s) for import of inputs required for the export product.

b) Intermediate supplies:- Advance Licence may be issued for intermediate supply to a manufacturer-exporter for the import of inputs required in the manufacture of goods to be supplied to the ultimate exporter/ deemed exporter holding another Advance Licence.

c) Deemed exports:- Advance Licence can be issued for deemed export to the main contractor for import of inputs required in the manufacture of goods to be supplied to the categories mentioned in paragraph 8.2 (b), (c), (d) (e) (f),(g) (i) and (j) of the Policy.

In addition, in respect of supply of goods to specified projects mentioned in paragraph 8.2 (d) (e) (f),(g) and (j) of the Policy, an Advance Licence for deemed export can also be availed by the sub-contractor of the main contractor to such project provided the name of the sub contractor(s) appears in the main contract. Such licence for deemed export can also be issued for supplies made to United Nations Organisations or under the Aid Programme of the United Nations or other multilateral agencies and paid for in foreign exchange".

Para 4.1.7A

"Advance licence can also be issued on the basis of annual requirement for physical exports.

Export House, Trading House, Star Trading Houses and Super Star Trading Houses shall be entitled for the Advance Licence for annual requirement. However, if the status holders are holding the certificate as merchant exporter, they are also entitled to the Advance Licence for Annual Requirement provided they agree to the endorsement of the name(s) of the supporting manufacturer(s) on the relevant licence.

The entitlement under this scheme shall be upto 200% of the FOB value of export in the preceding licensing year. Such licence shall have positive value addition."

3. It is further grievance of the appellant that the Notification No. **56/2003-Cus. dated 14.2003** is redundant in view of the specific Notification No. **43/2002-Cus. dated 19.4.2002**. He also says that the superfluous notification No. **56/2003-Cus. dated 1.4.2003** needs to be struck down.

4. Lastly appellant prayed that in the event the benefit of exemption of anti-dumping duty is not given to the appellant, it should not be deprived of the drawback benefit permissible to it since its finished goods were exported which comprised the imported raw material.

5. On the other hand, Revenue's submission is that the grant of notification is always subject to satisfaction of the conditions thereof. Notification No.**56/2003-Cus. dated 1.4.2003** grants duty exemption to the advance licence issued under para 4.1.7A of the Exim policy 2002-2007. But the Notification No. **43/2002-Cus. dated 19.4.2002 granted antidumping duty exemption only to advance licences issued under paragraph 4.1.1 of the Exim policy.** Both the notifications operated on their own field. When there was specific prescription by the Notifications, there is no ambiguity in interpretation or application thereof to the appropriate situation. There should not be confusion by the appellant. **Appellant was issued the advance licence under paragraph 4.1.7A of the Exim Policy.** That has barred it to the benefit of anti-dumping duty exemption.

6. Contention of the learned counsel that subsequent Notification No. 56/2003-Cus dated 01.04.2003 is redundant was repelled by learned DR submitting that the said Notification was issued with its own object and both the notifications are independent. A subsequent notification

cannot be said to be a superfluous notification or redundant. When that was issued legislature conveyed their intention to serve the purpose thereof without any confusion. Appellant has choosen a way to be unduly benefitted by a wrong claim being issued licence under para 4.1.7A of EXIM policy and governed by Notification No.56/2003-Cus dated 01.04.2003.

7. Heard both sides and perused the records.

8.1 There is no doubt that appellant was issued advance licence under para 4.1.7A of EXIM policy. Such licences are governed by Notification No.56/2003-Cus dated 01.04.2003 to get Customs duty exemption on import of raw materials. The specific distinction brought out by learned AR that both the Notifications serve each other's purpose is appreciable. The time gap between the two Notifications also indicates that both the Notifications were issued during two different periods to serve their specific purpose. While Notification No. 43/2002 dated 19.4.2002 served the purpose of advance licence issued under paragraph 4.1.1 of the EXIM Policy, the Notification No. 56/2003-Cus. dated 1.4.2003 dealt with the advance licence issued under para 4.1.7A of the said Policy. When the object of both the paragraphs of the policy is looked into, that brings out difference between the two. Paragraph 4.1.1 deals with normal cases whereas paragraph 4.1.7A is very specific to deal with annual requirement of physical imports. That brought out a clear distinction between the intention of para 4.1.1 and

4.1.7A. Therefore Notification No.56/2003 was not substitute of Notification No.43/2002.

8.2 The object of Office Memorandum issued by Ministry of Commerce relied by learned counsel has not resulted in issuance of customs notification by Ministry of Finance authorizing that the benefit of Notification No. 43/2002-Cus. dated 19.4.2002 is also admissible to the advance licences issued under para 4.1.7A which is specifically governed by Notification No.56/2003-Cus dated 01.04.2003. For appreciation of such intention, the Office Memorandum reading as under is reproduced below:

F. No. 01/94/180/22/AM09/PC-4/12247
GOVERNMENT OF INDIA
MINISTRY OF COMMERCE & INDUSTRY
DIRECTORATE GENERALOF FOREIGN TRADE
UDYOG BHAVAN,NEW DELHI – 110 011.

Dated 2.9.2003

OFFICE MEMORANDUM

Sub: Exemption of Anti-dumping duty for annual requirements

The undersigned is directed to forward herewith a copy of letter dated 14.5.2008 received from Sri K. Chandra of Chennai seeking clarification on the above subject.

Since Advance Authorisation for Annual Requirement is an Advance Authorisation issued on the basis of Annual Performance of the preceding year. Foreign Trade Policy does not differentiate on the duty component for exemption whether it is against Advance Authorisation for Physical Exports, Deemed Exports, Intermediate supplies or for Annual Requirement. Basic aim of Advance Authorisation for Annual Requirement is to reduce the interface of exporters with (Regional Authorities) issuing the Authorisations to allow flexibility to meet EO vis-à-vis production scheduling. Though the Customs Notification for Advance Authorisation allows exemption from BCD, Additional Customs Duty, Anti-dumping duty etc. Customs Notification No. 56/2003 dated 1.4.2003 (as amended) for Advance Authorisation for Annual Requirement needs amendment for allowing exemption from Anti-Dumping Duty as well, in line with Foreign Trade Policy Provisions.

The Department of Revenue are therefore requested to consider appropriate amendment in the above customs Notification about exemption of Anti-dumping duty for Advance Authorisation for Annual Requirement also.
This issues with the approval of DGFT.

Encl: as above

(C. Gangadharan)
Dy. Director General of Foreign Trade
Tel: 23061562 / Ext. 250
e-mail: c.gangadharan@nic.in

To

Shri Navneet Goel
Director (Drawback)
Department of Revenue
Ministry of Finance
Jeevandeep Building
Parliament Street, New Delhi.

Copy to: M/s. K. Chandra, C/o Medopharm, No. 25, Puliyur II Main Road, Trustpuram, Kodambakkam, Chennai – 600 024 for information please.

[Emphasis supplied]

9. In view of the above factual observations and intention of the Notifications as well as policy we may say that the appellant being governed by para 4.1.7A of the EXIM policy, fails to get anti-dumping duty exemption under Notification No. 43/2002-Cus. dated 19.4.2002, Accordingly its appeal fails.

10. So far as claim of drawback is concerned, it is left open to the appellant to approach the appropriate authority, if so advised, to claim the drawback. Although the adjudication proceeding was strange to the drawback claim made at this stage, that being a legal issue, subject to test of evidence and application law, it is left to the appropriate authority to

consider such claim in accordance with law.

11. In the result, appeal is dismissed.

(Dictated and pronounced in open court)

14-02-2017 13/2/2017

(MADHU MOHAN DAMODHAR)
Technical Member

(D.N. PANDA)
Judicial Member

Rex

Customs, Excise & Service Tax Appellate Tribunal

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