CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNALSOUTH ZONAL BENCH CHENNAI

Appeal Nos.C/240/2009 & E/611/2009

[Arising out of Order-in-Original No.49/2009 (C) dt. 26.03.2009 passed by the Commissioner of Central Excise, Pondicherry]

Coromandel Granite Company Ltd. — Appellant

Versus

Commissioner of Central Excise,
Pondicherry — Respondent

Appeal No.C/242/2009

[Arising out of Order-in-Original No.49/2009 (C) dt. 26.03.2009 passed by the Commissioner of Central Excise, Pondicherry]

Commissioner of Central Excise,
Pondicherry — Appellant

Versus

Coromandel Granite Company Ltd. — Respondent

Appearance:

Shri S. Murugappan, Advocate
For the Assessee

Shri B. Balamurugan, AC (AR)
For the Revenue

CORAM :

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

Date of hearing: 08.08.2017
Date of Pronouncement : 18-09-2017

Customs, Excise & Service Tax Appellate Tribunal

Appeal Nos.C/240,242/2009
E/611/2009

FINAL ORDER No. 42090-42092/2017

Per Bench

The facts of the case are that M/s. Coromandel Granite Company Ltd. (hereinafter referred to as assessee) obtained Letter of Permission (LOP) from Development Commissioner for setting up EOU for production and export of polished Granite Slabs, Tiles and Monuments. After import of goods under notification No.13/1981-Cus. dt. 09.02.1981 and 53/1997–Cus. dt. 03.06.1997 and procurement of indigenous goods under Notifications No.183/1981-CE dt. 02.06.1981 and 1/1995-CE dt. 04.05.1995, the assessee started commercial production from 22.07.1998. Due to labour problem, the unit was locked out in December 2001 and permanently closed from July 2002. For not complying with the prescribed export obligation, the Development Commissioner imposed a penalty of Rs.2 lakhs on the assessee in terms of an order dt. 20.03.2002.After closure of the unit, LOP was cancelled by the Development Commissioner in terms of his letter dt. 02.09.2005. Subsequently, the Central Excise officers visited the unit in 2006, seized available machinery and initiated action for recovery of duties. It was also brought to the notice of the department that the original import documents were destroyed during 1996 in a fire accident at Chennai office. Show Cause Notice dated

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22.12.2006 was issued demanding customs duty in respect of all the imports made during the period and also excise duty in respect of all the procurements made during the period on the ground that the unit did not comply with the required export obligation. After due process of law, Order-in-Original dt. 28.12.2007 was passed by Commissioner confirming the duty liabilities and imposing penalties. On appeal before the CESTAT, the case was remanded to the adjudicating authority vide Final Order No.610/2008 dt. 24.06.2008 for re-quantification of duty and re-consideration of the issue of fine and penalty. In de novo adjudication, the Commissioner vide impugned order dt. 26.03.2009 confirmed the demand of Rs.3,86,36,099/- in respect of capital goods, consumable tools and spares imported by the assessee along with interest liabilities thereon. She also confirmed demand of duty of Rs.8,22,148/- in respect of indigenous capital goods and consumable tools/spares procured by the assessee along with interest liability. Adjudicating authority imposed a penalty of Rs.90,00,000/- under Section 112 (ii) of Customs Act, 1962. Aggrieved by the order, the assessee has once again come to this forum vide Appeal C/240/2009 & E/611/2009. Department is also aggrieved with the impugned order on the grounds that no order has been passed for confiscating subject goods under Section 111 (o) of Customs Act, 1962 and that adjudicating authority has also failed to impose penalty under Rule 173Q of Central Excise Rules, 1944. Hence Appeal C/242/2009.

2. On 08.08.2017, when matter came up for hearing, on behalf of assessee, ld. Advocate Shri S. Murugappan reiterated the grounds of appeal. He also made written and oral submissions which can be summarized as follows :

(i) The adjudicating authority has confirmed entire duty liability, inter alia, for the reason that assessee did not fulfil prescribed export obligation. . It is further contended that duty payment has no nexus to export obligation, which is fixed under Foreign Trade Policy and the FTDT Act, which has separate penal provisions for non-fulfilment of the same.

(ii) Further, it is not the case that assessee had not exported at all. During the period 1993-94 to 1997-98, they had achieved 94.87% of export obligation and during the period 1998-99 to 2002-03, it was 78.87%. NFEP achievement for the above periods also has been 82.69% and 96.21% respectively. However, adjudicating authority has dismissed these facts by stating that notification does not allow exemption for partial fulfilment of export obligation.

(iii) Assessee have not removed imported goods clandestinely in the domestic tariff area. Except for those which were not available, due to wear and tear others were not found by the officers in the premises itself in 2006. There is no allegation from department that assesseehas removed the goods without permission from the concerned authorities.

(iv) After expiry of Notification 53/97, the provisions relating to EOU have been complexly liberalized. There is no requirement of minimum export obligation and only requirement is net foreign exchange earnings. It is contended that any action against assessee should have been taken only under the liberalized provisions contained in Notification No.52/2003- dt. 31.3.2003.

(v) In spite of CESTAT guidelines given in their earlier order dt. 24.06.2008, the Adjudicating authority has not properly considered the grant of depreciation in respect of capital goods.

(vi) In respect of appeal C/242/2009, ld. advocate submits that the prayer of department for confiscation of the goods has no legal basis. So also there is no nexus for imposition of penalty under Rule 173Q. In fact, assessee are seeking for setting aside of the entire order including the penalty imposed under Section 11AC.

3.1 On the other hand, Ld. A.R Shri B. Balamurugan submits that assessee had not been able to achieve the export obligation in terms of value of goods exported for the periods 1993-94 to 1997-98 and from 1998-99 2002-03.

3.3 Further, on expiry of the LOP, the assessee did not apply for debonding. Hence conditions imposed as per B-7 bond executed by them has not been complied with and hence the assessee is required to pay entire duty forgone.

3.4 In the circumstances, the confirmation by the Commissioner (Appeals) of duty liability of Rs.3,86,36,099/- in respect of capital goods, consumable goods and spares imported by the appellant and duty liability of Rs.8,22,148/-in respect of indigenous capital goods and consumable tools/spares is very much in order.

3.5 In respect of departmental appeal C/242/2009, ld. A.R reiterates the grounds of appeal. In particular, he submits that SCN had proposed confiscation of detained goods under Section 111 (o) of the Customs Act and imposition of penalty under Section 112 of Customs Act and penalty under Rule 173Q of Central Excise Rules, 1944. However, the Commissioner has not made any observation in respect of confiscation of the goods. So also, when adjudicating authority confirmed the duty demanded in Rule 196 of Central Excise Rules, she should have imposed penalty under provisions of Rule 173Q of CER. Department is aggrieved by the non-confiscation of the subject goods under Section 111 (o) of Customs Act and non-imposition of penalty under rule 173Q of the Rules.

4. Heard both sides and have gone through the facts of the case.

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5.1 We find that the matter has come up before this forum for the second time. On the earlier occasion, the Tribunal vide Final Order No.610/2008 dt. 24.06.2008 had remanded the matter with directions to supply copies of relevant documents to the assessee and as against quantification of duty Tribunal had directed the Commissioner to consider the assessee's plea based on the terms of the relevant notifications. It was made clear by the Tribunal that dispute stands limited to quantification of duty and imposability of fine and penalty. Assessee, however, is aggrieved with the de novo adjudication and is once again before this forum.

5.2 This being so, the core issue that requires to be considered by us will again be limited to the correctness or otherwise of the quantification of duty and imposability of fine and penalty.

5.3 In terms of the LOP, the assessee have to achieve a minimum export obligation of NFEP of 40% for a period of 10 years. Only because this obligation was not achieved, the Development Commissioner on 23.02.2005, imposed penalty of Rs.2,00,000/- and finally on 29.05.2005 had cancelled the LOP. What would then be the liability of the assessee with regard to paying up the duty forgone in

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respect of both duty-free imports as well as duty-free procurement from DTA? We find that, assessee having failed to achieve value addition or export obligation or both, they will become liable to pay duties on the capital goods/spares/consumables, imported or indigenously procured by them availing the exemption in terms of relevant Notifications No.13/81-Cus., 53/97-Cus., 123/81-CE and 1/95-CE.

5.4 This being the case, the assessee cannot wriggle out of the aforesaid liability to make good the duties forgone in respect of the above procured goods.

5.5 The only aspect that then remains to be adjudged is whether the duty liability confirmed against the assessee is in order or otherwise.

5.6 As per the impugned order, in respect of capital goods, consumable tools and spares imported, the duty liability of Rs.3,86,36,099/- has been confirmed. So also, in respect of capital goods and consumable tools/spares procured indigenously, the demand of duty of Rs.8,22,148/- has been confirmed.

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5.7 One argument of the assessee which was raised before the Tribunal on last occasion also, is that depreciation has not been extended to the capital goods/tools etc. for the purpose of arriving at dutiable value. This controversy has been discussed by the adjudicating authority in para-23 of the impugned order where she has conceded that as per the Notification No.13/91-Cus. the customs duty is to be included on the depreciation value thereof. However, the adjudicating authority has not allowed depreciation on the grounds that the said facility can be extended only when the unit has been permitted provisional/final debonding by the Development Commissioner, but that in the present case assessee had not sought debonding even after cancellation of LOP. We are not able to agree with such a view. There have been innumerable decisions/judgments of higher appellate courts which have laid down that duty liability in such cases is required to be worked out on the depreciation value only. In our considered opinion, when the capital goods, tools etc. have been obtained and used by the assessee right from 1988, till permanent closure of the factory in July 2002, and, subsequent cancellation of LOP on 02.09.2005, it would be unjust and unfair to deny depreciation for the period of four years' exposure to natural elements as also for wear and tear that would have resulted due to their extensive use. It is also noted that machinery available in the

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factory premises had been placed under seizure on 29.08.2006. It is also not the case that assessee had siphoned off capital goods etc. and that they were not found as on the date of seizure. We therefore hold that for the purposes of determining the duty liability in respect of both imported and indigenously procured goods, depreciation for the period from their import/procurement, upto the date of cancellation of the LOP and the duty liability should be calculated accordingly. The matter is therefore once again remanded to the adjudicating authority, however only for the limited purpose of requantifying the duty liability after grant of depreciation as per guidelines issued and followed by the department for calculation of ~~duty~~ depreciation. So ordered.

5.8 Considering that the matter is very old, it would be desirable that the de novo adjudication proceedings be completed within a period of 3 months from the date of receipt of this order.

5.9 Coming to the issue of penalty, adjudicating authority has imposed penalty of Rs.90,00,000/- under Section 112 (ii) of Customs Act, 1962. However considering that travails faced by assessee, in particular, the fact that while having not fulfilled export obligation in toto, they have however achieved NFEP of 82.69% and 96.21% for the relevant periods, as also the fact that the dispute has resulted in protracted legal proceedings, we are of the considered opinion that the penalty should be reduced to **Rs.25,00,000/-** (Rupees Twenty five lakhs only). So ordered.

5.10 Coming to the department's appeal, in view of discussions herein above, we are not able to find any merit in their prayers for confiscation of goods and imposition of further penalty under Rule 173Q, for which reason, Appeal C/242/2009 is dismissed.

5.11 Appeals are disposed of on above terms.

(Pronounced in court on 18-09-2017)

(Madhu Mohan Damodhar)
Member (Technical)

(Sulekha Beevi C.S)
Member (Judicial)

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Customs, Excise & Service Tax Appellate Tribunal

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