

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
CHENNAI**

REGIONAL BENCH – COURT NO. III

EXCISE APPEAL No.41383 of 2019

EXCISE APPEAL Nos.41837-41849 of 2019

[Arising out of Order-in-Appeal No.139/2019 (CTA-I) dated 16.04.2019 passed by the Commissioner of GST & Central Excise (Appeals-I), Chennai]

M/s.General Optics (Asia) Limited

Appellant

R.S.No.84/1, Nallavadu Road,
Thavalakuppam,
Puducherry 605 007.

Vs

The Commissioner of GST & Central Excise,

Respondent

Puducherry Commissionerate,
No.1, Goubert Avenue (Beach Road),
Puducherry 605 001.

APPEARANCE:

Shri Raghavan Ramabhadran, Advocate
For the Appellant

Shri Arul C. Durairaj, Superintendent (AR)
For the Respondent

CORAM:

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

Date of Hearing : 22.04.2022
Date of Pronouncement: 18.05.2022

FINAL ORDER Nos. 40183-40196 / 2022

PER : SULEKHA BEEVI, C.S.

Brief facts of the case are that the appellants are engaged in manufacture of various precision optical instruments and their components, assemblies and sub-assemblies all falling under Chapter 90 of the First Schedule to the CETA, 1985. They import various raw materials, components without payment of duty under Notification

No.52/2003-Cus. dated 31.03.2003 and procure indigenous goods without payment of duty under Notification No.22/2003-CE dated 31.03.2003 for the manufacture of final products. The appellants effected clearances of their final products for exports as well as Domestic Tariff Area (DTA) sales within India in terms of paragraph 6.8 of the Foreign Trade Policy (FTP) for the year 2009-2014 which was in force from time to time. They were served with 15 show cause notices for the periods from May 2008 to June 2017 proposing to demand the total differential duty of Rs.8,55,74,670/-. There were five issues involved in these noticees –

- (i) It appeared that the appellant had exported goods to DTA exceeding the limit of 50% of on board value of exports and thus they were not eligible for exemption under Notification No.51/96-Cus. dated 23.07.1996.
- (ii) Clearance of the goods not similar to goods exported and therefore it appeared that the appellant was not eligible for exemption under Notification No.23/2003-CE.
- (iii) For sale under Para 6.8 (h) of EXIM Policy, full rate of duty is to be paid when Customs Exemption Notifications are not applicable.
- (iv) Education Cess and Secondary higher Education Cess are to be paid for the second time in respect of DTA clearance and
- (v) The appellant did not submit a certificate signed by an authority not belong the rank of Deputy Secretary to the Govt. of India under Customs Notification No.21/2002 (as amended by

Customs Notification No.20/2007) and Customs Notification No.12/2012.

After due process of law, the original authority confirmed duty of Rs.4,06,05,026/- under Section 11A of Central Excise Act, 1944. The demand confirmed pertained to the second issue only and the demands pertaining to all other issues were dropped. The adjudicating authority also imposed penalty of Rs.40,60,500/- under Rule 25 of the Central Excise Rules, 2002. Aggrieved by the confirmation of demand under issue (ii) above as well as the penalty imposed, the appellant filed appeal before the Commissioner (Appeals) who vide order impugned herein upheld the order of the adjudicating authority. Hence this appeal.

2.1 On behalf of the appellant, Ld. Counsel Shri Raghavan Ramabhadran appeared and argued the matter. He filed written submissions also.

2.2 Ld. Counsel submitted that during the impugned period, the appellant also made DTA clearances in terms of para 6.8(a) of Foreign Trade Policy. All DTA clearances were made to Public Funded Research Institutions ('PFRIs'). The Appellant duly discharged applicable duties on all clearances after availing eligible exemptions.

Goods sold by the Appellant in DTA are 'similar' to goods exported by the Appellant.

2.3 He submitted that the Impugned Order confirms demand of differential excise duty upon denying benefit of Notification No. 23/2003 dated 31.03.2003 on the sole ground that goods sold to DTA are not 'similar' to goods exported by the Appellant. It is submitted

that this finding is incorrect for the reasons stated *infra*.

Goods sold in DTA are 'similar' to the exported goods. The permission granted by the Development Commissioner in this regard under Notification 23/2003-CE has also been accepted in OIO.

2.4 The Appellant is claiming exemption under Sl. No. 2 of Notification 23/2003. As per the said Notification, the Appellant is entitled to benefit of exemption [quantum of exemption specified in Column (3)] on satisfaction of the corresponding condition specified therein [specified in Column (4)].

2.5 The relevant condition to be satisfied for availing benefit is extracted hereunder:

"...(i) the goods are cleared into Domestic Tariff Area in accordance with sub-paragraphs (a), (b), (d) and (h) of Paragraph 6.8 of the Export and Import Policy;

(ii) exemption shall not be availed until Deputy Commissioner of Customs or Assistant Commissioner of Customs or Deputy Commissioner of Central Excise or Assistant Commissioner of Central Excise, as the case may be, is satisfied with the said goods including Software, Rejects, Scrap, Waste or Remnants;

(a) being cleared in Domestic Tariff Area, other than scrap, waste or remnants **are similar to the goods which are exported** or expected to be exported from the units during specified period of such clearances in terms of Export and Import Policy..."

2.6 From the above, it may be seen that benefit of the Notification is available when goods sold in DTA are in accordance with Para 6.8 of Exim Policy and when such goods are similar to goods exported. This clearance is after due satisfaction of appropriate authority mentioned therein.

2.7 DTA clearances are governed by Paragraph 6.8 of the Foreign

Trade Policy (as applicable from time-to-time). During the Impugned Period, the Appellant effected sale of manufactured goods in DTA in accordance with Paragraph 6.8(a) of the Foreign Trade Policy. For ease of reference, the relevant excerpt from Paragraph 6.8(a) is reproduced hereinbelow:

“(a) Units, other than gems and jewellery units, may sell goods upto 50% of FOB value of exports, subject to fulfilment of positive NFE, on payment of concessional duties. Within entitlement of DTA sale, unit may sell in DTA, its products similar to goods which are exported or expected to be exported from units.....”

2.8 From the above, it may be seen that DTA sale can be undertaken only upon obtaining permission from the Development Commissioner.

2.9 The Appellant is only authorized to manufacture 'Precision Optical Components, Instrument assemblies / Sub-Assemblies'. This authorization [known as Industrial License or LOP] is issued by the Secretariat for Industrial Approvals ('SIA'), Department of Industrial Development under the Ministry of Industry. Therefore, it is amply clear that all goods manufactured by the Appellant are Precision Optical Components, Instrument Assemblies / Sub-Assemblies only.

2.10 In terms of Paragraph 6.8(a), the Appellant has also been obtaining periodical permissions from the Development Commissioner, MEPZ to clear manufactured goods in DTA. As per these permissions, only goods which are manufactured by the Appellant in terms of LOP can be sold in DTA.

2.11 The Department does not dispute the fact that the Appellant manufactured and cleared goods in compliance with the LOP and permissions issued by the Development Commissioner. In fact, the OIO

has accepted the veracity of the permission granted by the Development Commissioner, MEPZ at paragraph 15.1, internal page number 13 therein (Page No 116 of Appeal Book Volume I). Therefore, from a bare perusal of the LOP and permissions issued by the Development Commissioner, it can be seen that the goods sold in DTA are 'similar' to goods exported by the Appellant and they are cleared only in accordance with the Development Commissioner's approval. In this regard, reliance is placed on *Axiom Cordages v. CCE – 2021 (5) TMI 665 – CESTAT Mumbai* to submit that grouping of goods by the Development Commissioner is sufficient to show that goods sold in DTA are similar to goods exported by the Appellant. This decision has been affirmed by the Hon'ble Supreme Court in *CCE v. Axiom Cordages – 2022-VIL-17-SC-CE*.

2.12 In this regard, reliance is also placed on the decision in *Ginni International Ltd. v. CCE – 2002 (139) ELT 172 (Tri-Del)*, which was upheld by the Hon'ble Supreme Court in *2007 (215) ELT A102 (SC)* in support of the proposition that the Revenue cannot go beyond the permission granted by the Competent Authority. Thus, it is submitted that the Impugned Order is incorrect and merits to be set-aside.

3. The Department, having accepted the Development Commissioner's certificate for the other issue, cannot seek to turn a blind eye to the said certificate for deciding whether goods cleared to DTA are similar to those goods that are exported. Hence, it is submitted that the demand is liable to be set aside.

Previous period CESTAT order in Appellant's own case is squarely

applicable.

4.1 In this regard, reliance is placed on Order-In-Original No. 29 to 46/2009 (C) dated 24.03.2009 in the Appellant's own case, passed by the Learned Commissioner of Central Excise, Puducherry. Based on the LOP and permissions granted by the Development Commissioner and after relying upon CBEC Circular No. 85/95-Cus., dated 26.07.1995, the said Order held that goods sold in DTA are 'similar' to goods exported inasmuch as they all are 'Precision Optical Components'. This decision was challenged by the Revenue before this Hon'ble Tribunal. Thereafter, this issue was settled in favour of the Appellant in *General Optics (Asia) Ltd. v. CCE – 2018 (363) E.L.T. 658 (Tri-Chennai)*. The decision attained finality since the Department did not challenge the said Order.

4.2 It is also relevant to note that the OIO, *vide* paragraph 11, records that adjudication of the present case was kept in call-book and was not taken up for adjudication in light of challenge to Order-In-Original No. 29 to 46/2009 (C) dated 24.03.2009 before this Hon'ble Tribunal. Thus, having waited so long and accepted the Order, it is submitted that the Department cannot go back and say it is applicable selectively (i.e. only for Cover and Cuvette glass).

Revenue does not have any contrary evidence to disprove the Chartered Engineer's certificate. Hence, due weightage must be given when its veracity is not disputed.

5.1 Without prejudice to the foregoing, it is submitted that the Appellant has furnished Chartered Engineer Certificate dated 12.03.2019 certifying that the goods sold in DTA are 'similar' to goods

exported by the Appellant inasmuch as they fall within the licensed product category 'Precision Optical Components, Instrument Assemblies / Sub-Assemblies'.

5.2 However, the Impugned Order summarily brushes aside the submission based on Chartered Engineer certificate on the ground that – (a) That production of the certificate is an afterthought since it was produced a day before the personal hearing; and (b) That the certificate is vague and without technical evidence.

5.3 It is submitted that the Chartered Engineer Certificate clearly provides its findings only after examining all the sample products. Hence, the finding that the certificate is vague is without basis.

5.4 It is submitted that the evidentiary value of Chartered Engineer certificate cannot be summarily dismissed when its veracity has not been impeached. Further, it is submitted that exemption cannot be denied when the Department does not have any evidence to show that goods sold in DTA are dissimilar to goods exported. In this regard, reliance is placed on:

- i. General Optics (Asia) Ltd. – 2018 (363) ELT 658 (Tri-Chennai);*
- ii. Hindustan Lever Ltd. - 2011 (268) ELT 252 (Tri.Chennai);*
- iii. Abi showtech- 2019-TIOL-1246-CESTAT-MAD;*
- iv. Abi Turnamatics – 2019 (366) ELT 1048;*
- v. Meghmani Industries – 2010 (261) ELT 411 (Tri-Ahmd.);*
- vi. Indian Hume Pipe Co. Ltd. – 2017 (358) ELT 732 (Tri-Chennai).*

6. Thus, it is submitted that the demand confirmed *vide* the Impugned Order merits to be set-aside fully on this ground itself.

Without prejudice, the Appellant is entitled to benefit of Notification No. 51/96-Cus., dated 23.07.1996. Thus, demand, if any, ought to be limited to Rs. 51,36,532/-

7.1 Even though the OIOs, *vide* paragraph 15.2, held that the Appellant is eligible for benefit of Notification No. 51/96-Cus. dated 23.07.1996 on all goods sold in DTA, the OIOs failed to consider the benefit in quantifying the demand. Therefore, the Appellant filed an application for rectifying this clerical error *vide* letter dated 21.01.2019. However, no Order has been passed in this regard.

7.2 Therefore, assuming without acceding that the Appellant is not entitled to exemption under Notification 23/2003, it is prayed that the duty payable should be computed after factoring the benefit available to the Appellant under Notification No. 51/96-Cus. dated 23.07.1996. It is submitted that this Hon'ble Tribunal, in the Appellant's own case in *General Optics (Asia) Ltd. v. CCE – 2005 (191) ELT 1192 (Tri-Chennai)* held that Appellant is entitled to exemption under the said Customs Notification in respect of DTA sale. This decision was upheld by Hon'ble Supreme Court in *2007 (215) ELT A102 (SC)* and has thus attained finality.

7.3 In any case, as stated *supra*, the eligibility to exemption under the said Customs Notification has already been decided in favour of the Appellant *vide* the OIOs. The Department did not prefer any appeal against the OIOs. Thus, the eligibility to exemption under Notification No. 51/96-Cus. Dated 23.07.1996 has already attained finality.

8. Section 3 of the CEA, 1944 lays down that the duty of excise levied and collected on excisable goods manufactured by 100% EOUs

shall be equal to aggregate of duties of customs which would be leviable under the Customs Act, 1962. Based on the foregoing submissions, even if exemption under Notification 23/2003 is denied, it is submitted that the excise duty payable by the Appellant must be determined after factoring the exemption under Notification No. 51/96-Cus. dated 23.07.1996. Thus, it is prayed that the demand, if any, may be restricted to Rs. 51,36,532/-.

9. It is also argued by Ld. Counsel that there is inordinate delay in adjudicating the show cause notices. However, no penalty is imposable on the appellant as the demand itself is not sustainable.

10. He relied upon the decision in the case of *BR Steel Products Pvt. Ltd. Vs CCE Navi Mumbai* – 2021 (5) TMI 899 -CESTAT Mumbai. In the said case, the Tribunal had examined the meaning of the word “similar”. He prayed that the appeal may be allowed.

11. Ld. A.R Shri Arul C. Durairaj supported the findings in the impugned order.

12. Heard both sides.

13. At the outset, it has to be stated that the Tribunal in the appellant’s own case had occasion to consider the very same issue. The Revenue in the said case had alleged that some of the goods cleared by the appellants to DTA are not similar to the goods which are

exported by them. It was alleged that cover and coveter glasses are not having optical properties and these as such cannot be considered as "similar goods" exported by the appellant assessee. After analyzing the issue, the Tribunal held that these are "similar goods" and allowed the appeal filed by appellant. The Tribunal analyzed the issue and held that the goods broadly fall under the category of optical components. It was also noted that Revenue was not able to bring out any evidence to support their claim that they were not optical items or optical components. The appeal filed by the appellant was thus allowed.

14. In the present case, the appellants contend that the goods exported by them as well as cleared to DTA are precision optical components and are similar to the goods exported. The department alleges that goods are not similar and that the earlier case applies only in respect of cover and coveter glasses and therefore not applicable to the present case. The goods other than cover and coveter glasses which fall under the current show cause notices are listed out in para-16 of the OIO. The reason stated by original authority for confirming the demand is that the appellant did not submit any conclusive technical proof to prove that the goods cleared are "similar goods" as envisaged in the notification. Apart from this, there is no other discussion given thereto. The Commissioner (Appeals) also has reiterated that the appellant has not produced any technical proof to show that the goods are not 'similar'.

15. It is to be seen that appellant is authorized to manufacture precision optical components, instrument assemblies / sub-assemblies. Such authorization is given by the Secretariate of Industrial Approvals from the Department of Industrial Development under the Ministry of Industry. The goods can be cleared only when the Development Commissioner grants permission for the same. The licence or permission so granted thus makes it clear that appellants are engaged in manufacture of precision optical components / instruments, assemblies etc. The notification is available only when the goods sold in DTA are in accordance with para-6.8 of EXIM Policy and are 'similar' to the goods exported. The DTA clearances are governed by para 6.8 of FTP and the appellants have obtained permission from the Development Commissioner for making such DTA clearances. The argument of the Ld. Counsel that such permission is granted only when Development Commissioner is satisfied that the goods are similar is not without substance.

16. When the appellants have been given permission to clear the goods in DTA by the DC, the department cannot then vaguely allege that they are not similar goods. In the present case, the appellant has furnished a Chartered Engineer certificate dt. 12.03.2019 certifying that the goods are similar and fall within the category of precision optical components. The said certificate has been brushed aside by the Commissioner (Appeals) stating that it is merely an after-thought. The Commissioner (Appeals) has failed to note that it is an opinion given

by an expert and unless there is some evidence to rebut such opinion, the certificate issued by the Chartered Engineer cannot be discarded in toto. Such certificate issued by a technical expert in the relevant field has to be given due credence. On perusal of the order passed by the adjudicating authority apart from saying that the appellant has not produced any technical proof to show that the goods sold in DTA and exported are similar goods, there is nothing to establish that these goods do not fall under the category of "precision optical components/instruments/assemblies". The notification uses the word 'similar goods' and not identical goods.

17. The Tribunal in the case of *BR Steel Products Pvt. Ltd.* (supra) had discussed the meaning of "similar goods". The same is reproduced as under :

"10. In view of the above, we find that the judgments have given wider meaning to the word 'Similar'. It would mean similar, same class of or same kind of goods. In the instant case, the goods exported and the goods cleared are described as ceramic colours. In view of the ratio of the various judgements cited above, there is not even an iota of doubt in our minds, the goods cleared by the appellant in DTA are nothing but the goods which are similar to the goods exported well within the meaning assigned to the same in paragraph 6.8 of FTP. It has been demonstrated that the manufacturing activity is same for both type of colours. The similarity of the goods is established beyond reasonable doubt by the test report got conducted on the impugned goods for the subsequent period and relied upon, as is evident from the Order-in-Original, dated 31.12.2012 (adjudicating the SCN issued for the period Feb 2011 to Jan 2012). We find that facts of the case here are in a narrower compass compared to the cases discussed as above, the difference in goods only being that of concentrated or diluted. Both of them are named ceramic colours only. Test reports indicated that they have similar composition as rightly held by the Learned Commissioner for the subsequent period. Therefore, there is no doubt that the goods exported and the goods cleared by the appellants are similar in terms of Para 6.8 of FTP. Moreover, the fact that Development Commissioner has issued permission is not denied. We hold that in view of the judgement in *Novapan Industries (Supra)*, the Order-In-Original should hold good

for the earlier period also. It is pertinent to note that the department did not bring forth any change in the circumstances or the quality of the goods exported and cleared in DTA by the appellant. We find that the department has wrongly tried to differentiate between the goods on the basis of physical characteristics or the price of the same. In view of the ratio of the cases discussed above, similarity of goods being not in doubt, the difference in value is inconsequential. We hold that the goods are 'Similar'."

18. In the case of *Axiom Cordages* (supra) it was held that grouping of goods by the Development Commissioner is sufficient to show that the goods cleared to DTA are similar goods. The said decision has been affirmed by the Apex Court. The department does not dispute the permission letters issued by the Development Commissioner for clearance of goods to DTA. On such score, the allegation that the goods do not fall into the category of precision optical components or that they are not similar goods is without any factual or legal basis.

19. After appreciating the facts and evidence placed before us and also the relevant case law, we are of the considered opinion that the allegation raised in the SCN that the goods are not "similar goods" is without any basis. The demand cannot sustain. Impugned order is set aside. Appeals are allowed with consequential relief, if any, as per law.

(Pronounced in court on 18.05.2022)

(SULEKHA BEEVI C.S.)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)