IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, CHENNAI

Customs Appeal No. 130 of 2012

(Arising out of Order-in-Original No. 02/COMMR/CE/2012 dated 25.4.2012 passed by the Commissioner of Central Excise, Tirunelveli)

M/s. Subburaj Textile Mills Pvt. Ltd. **Appellant**
Madurai Road, Sankarnagar
Tirunelveli – 627 357.

Vs.

Commissioner of GST & Central Excise **Respondent**
Central Revenue Building
NGO 'A' Colony
Tirunelveli – 627 007.

APPEARANCE:

Shri S. Murugappan, Advocate for the Appellant
Smt. K. Komathi, ADC (AR) for the Respondent

CORAM

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

Final Order No.40213/2023

Date of Hearing: 08.03.2023
Date of Decision: 30.03.2023

Per M. Ajit Kumar,

This is an appeal filed by M/s. Subburaj Textile Mills Pvt. Ltd. (STML) against Order in Original No. 02/COMMR/CE/2012 dated 25.4.2012 passed by the Commissioner of Central Excise, Tirunelveli.

2. The facts of the case are that the appellants were engaged in the manufacture of cotton yarn and were operating under the 100% EOU (HEOU) scheme from two premises. Both these units were de-bonded from HEOU status on 8.6.2008 and 26.8.2008. At the time of de-bonding, STML had declared the imported / indigenous capital goods

available in the factory premises and paid requisite duty. They exited from the HEOU scheme to operate under the EPCG scheme as per order issued by MPEZ on 05.09.2008. Subsequently their unit was visited by the Internal Audit of the Central Excise Department on 23.12.2008 for a routine audit, when non-inclusion of indigenous and imported capital goods in their declaration at the time of exit from the HEOU, was noticed and pointed out by the Audit team. The appellant later applied for EPCG authorization for the non-declared goods and after paying the duty involved on the said capital goods and after obtaining the EPCG authorization, have intimated the department along with copies of the EPCG licenses on 26.3.2009. The Headquarters Preventive Unit of the Central Excise Commissionerate at Tirunelveli visited the unit on 26.8.2009. On verifying the imported capital goods list, it was noticed that of the two non-declared imported capital goods, the imported 'Elite Compact Set' containing 9936 pieces was found attached to the ring frames of the unit. The appellant could not produce the second imported capital good i.e. 'marathon alternator' for verification to the preventive team. Since STML had become a DTA unit and had obtained EPCG licenses for availing concessional rate of customs duty under Notification No. 64/2008-Cus. dated 9.5.2008 while not disclosing certain capital goods to MEPZ, Chennai and the DGFT, Madurai, the said imported Elite Compact Set containing 9936 pieces was detained under Memo dated 27.8.2009 for further necessary action. It further appeared from the EPCG licenses issued on 13.3.2009 and letter dated 2.2.2009 of MEPZ that EPCG licenses were issued against the above mentioned two imported machinery and indigenous capital goods at the time STML was not operating under the HEOU scheme. Therefore, customs duty had been incorrectly paid on the two imported machinery. It appeared to Revenue that STML had deliberately withheld the details of the imported machinery from the knowledge of the Department with an intent to evade payment of customs duty at the time of debonding. Hence, STML were issued Notice dated 17.08.2009 with respect to indigenous capital goods and Notice dated 12.3.2010 for imported capital goods, asking them to show cause why the duty should not be demanded from them along with interest, why the detained goods should not be confiscated and why suitable penalty should not be imposed on them. Vide the impugned order the original authority had held that in terms of Para 6.18(d) of FTP, an HEOU may be permitted by the Development Commissioner to exit from the scheme at any time on payment of duty on capital goods under the prevailing EPCG scheme for DTA units which is available only at the time of exit from the HEOU scheme as a onetime option. After conversion of a unit to DTA does not allow the benefit of concessional rate of duty as applicable under EPCG scheme in respect of capital goods already lying with them at time of debonding which had not been declared by them. He went on to confirm Customs duty of Rs.93,90,126/- on the imported capital goods and Central Excise duty of Rs.3,09,900/- on the indigenously procured goods. He also ordered for payment of appropriate interest and imposed penalties. He did not order for confiscation of the detained goods, as the notice for detention of goods was time-barred in terms of Section 110(2) of the Customs

Act, 1962. Aggrieved by the impugned order, the appellants are before us.

3. Shri S. Murugappan, Learned Counsel appeared on behalf of the appellant and has submitted a time chart of the events leading to the passing of the above impugned order. The same is reproduced below:-

Dates	Events
8.8.2008	In-principle de-bonding permission given by Development Commissioner
8.5.2008 & 9.5.2008 9.8.2008 & 10.8.2008	Verification of stock of machinery done by Excise officials
5.9.2008	After payment of applicable duties final exit order issued by Development Commissioner
23.12.2008	Internal Audit of Excise Department, after auditing the unit pointed out omission to include a few indigenous and imported machineries at the time of exit from the scheme
19.1.2009	Letter to Development Commissioner for grant of NOC
2.2.2009	Letter from Development Commissioner to DGFT enclosing list of capital goods
14.2.2009	Letter from the appellants to DGFT for grant of EPCG license
16.2.2009	Letter from Superintendent conveying the audit objections
13.3.2009	Two EPCG licenses issued covering indigenous as well as imported machineries which were left out
17.3.2009	Reminder from the Superintendent regarding submission of EPCG license or else for payment of duty with interest
24.3.2009	Duties were paid under the EPCG scheme
26.3.2009	Intimation sent to the Superintendent regarding payment of applicable duties under EPCG licenses
17.8.2009	Demand issued by the Assistant Commissioner demanding duty on the indigenous machineries covered by EPCG license
26.8.2009	Central Excise Preventive officers visit the unit and recording of statement from the officials of the appellant
27.8.2009	Detention memo issued detaining the imported machinery covered by the subsequent EPCG license
26.9.2009	Duty of Rs.3,30,690/- paid by the appellants on the indigenous goods voluntarily
26.9.2009	Duty of Rs.2,06,905/- paid on imported alternator voluntarily as the same was scrapped after a fire accident and sold as scrap
11.9.2009	Two Show Cause Notices issued by DGFT for cancellation of licenses and imposition of penalties based on the communication from central excise
3.10.2009	Duty payment details intimated to the Superintendent
12.3.2010	Show Cause Notice issued demanding duty of Rs.1,16,52,745/- on the imported machinery covered by EPCG license along with interest and with proposal for imposition of penalty
28.7.2010	Orders issued by DGFT for the two Show Cause Notices issued by them earlier. In terms of these orders, penalties alone were imposed on the company and its directors

25.4.2012	Impugned order passed confirming duty demand with interest and imposing penalties.

4. He stated that there was no suppression of facts in this case and the omission to include certain imported and indigenous goods in the list at the time of debonding was rectified immediately after it was pointed out by the internal audit of the department. That they have all along been issued with two EPCG licenses which was not withdrawn at any stage during the proceedings. In fact, the department had expressly taken into account the fact that the final exit order had been issued on 5.9.2008 and yet forwarded the list of omitted capital goods to the licensing authority for consideration based on which EPCG licenses were issued to them. Therefore, it was the understanding of departmental officers as well as of DGFT authorities at all relevant times that things done or omitted to be done can be corrected in terms of EOU scheme, notwithstanding the fact that final exit orders had been issued five months earlier. Hence the Show Cause Notice has no legs to stand as the EPCG licenses are very much in existence. Without the EPCG license being withdrawn, in a manner known to law, the impugned proceedings were premature and without jurisdiction. There is no evidence for the allegation that the appellant concealed certain goods in the list at the time of applying for 'no due' certificate. There was no allegation of suppression till the Preventive team visited the unit although even Audit knew and had pointed out the omitted goods. Hence he strongly contended that the Show Cause Notice issued in this case was time-barred. He stated that when applicable duties have been discharged under EPCG licenses which have not been cancelled, the Customs Authorities will lack jurisdiction to revisit the issue and

demand duties by denying the benefit. He referred to the order-in-original's both dated 28/07/2010 passed by the JDGFT, Madurai issued from file EPCG/ ECA/ SCN/JDGFT/ MDU/ AM10/ 5604 and 5615, copies of which were provided. He stated that the said Authority had after examining the matter related to non-declared goods referred to him by the Central Excise Authorities, not suspended their IEC or cancelled their EPCG authorization's but had only imposed a penalty on them for which they were taking action separately. He relied upon the following judgments in their favor:-

a. Taparia Overseas Pvt. Ltd. Vs. Union of India reported in 2003 (161) ELT (Bom.)

b. Bansilal Jeasingh Vs. Union of India and Ors. reported in 1988 (36) ELT 52 (Bom.)

Further, he stated that the impugned order invokes section 11A of the Central Excise Act, 1944 which is irrelevant for the demand of customs duty and was not even invoked in the Show Cause Notice. He hence prayed that the impugned order may be set aside with consequential relief.

5. Smt. K. Komathi, learned AR appearing for the Department has also taken us through the facts of the case. She stated that this is a case born out of suppression of facts i.e. non declaration of some capital goods by STML at the time of debonding goods while exiting of the HEOU scheme. This was followed by the appellant approaching the JDGFT, for issue of the EPCG authorization concerning the non-declared capital goods, by suppressing facts of an ongoing enquiry by Central Excise authorities and without getting an NOC from the department. Then by a mis-statement the counter signature on the

duty worksheet for non-declared goods by the officials after conclusion of audit was sought to be passed off as the NOC by the department. A copy of this worksheet was forwarded by the appellant themselves, and not by the department, to the JDGFT purporting it to be an NOC by the department, to mislead him. There was no letter issued by the department to JDGFT recommending the EPCG license. In fact, the duty payment details, which are required to be known begore issuing any NOC if at all, was informed to the department by the appellant only after reminders and after the EPCG authorization had been obtained surreptitiously by the appellant. Further the marathon alternator imported by them while being a HEOU was cleared on 15/04/2009 from their unit before completing their EPCG obligations and without the permission of the department, without payment of full duty and without observing the legal formalities in this regard. Thus, their intention in evading duty by suppression of facts and mis-statement is very clear and would not have been unearthed but for the investigation by the Preventive department. This being so the issue of notice under the extended period of time in terms of the proviso to section 11A(1) of the Central Excise Act read with section 28 of the Customs Act 1962 has correctly been invoked against the appellant and the impugned order needs to be upheld. The Learned AR has referred to the judgment of the Hon'ble High Court of Bombay in the case of IG Petrochemicals Ltd. Vs. CCE, Belapur reported in 2016 (338) ELT 17 (Bom.) which involved a similar matter regarding non-declaration of entire capital goods that got noticed subsequently at the time of audit. In the said case, the Hon'ble High Court has upheld the duty and penalty imposed. She hence prayed that the impugned order may be upheld.

6. Heard both sides. The main issues for consideration are:-

a) Whether the SCN's has been issued correctly, evoking the larger time period in terms of the proviso to section 11A(1) of the Central Excise Act read and proviso to sub-section (1) of section 28 of the Customs Act 1962.

b) Whether the demand and interest will sustain when applicable duties have been discharged under EPCG license which have not been cancelled.

c) Whether the penalty will sustain.

7. We take up the first issue and find that this is a case where there has been omission/ no-declaration of capital goods at the time of the appellant debonding from a HEOU unit while exiting the EPCG scheme. Had Audit not pointed out the shortage in the declaration they would have saved on the duty amount on the imported + indigenous capital goods and also would not have been burdened with an export obligation for the export of cotton yarn worth USD 1121218.75 + USD 82,156.84 under the EPCG scheme, as seen from the Order's of the JDGFT dated 28.07.2010 supra. This gain could prima facie be held to be a reason for the appellant knowingly avoiding the declaration of the said capital goods at the time of debonding from a HEOU. However, while this may point a quivering needle of suspicion at the appellants intent, it is not a sufficient condition to sustain the charge of having suppressed the facts knowingly. The appellant has tried to defend the matter by saying that the issue of certain goods not having been

declared at the time of debonding, is a case of omission of goods, which was pointed out by Central Excise Audit and made good by them but the issue of 'suppression' came up only after the visit by the Preventive team when the facts were already known. It is in the interest of any business entity to have a good accounting system that records all transactions of money, goods and services that the company undertakes along with sufficient checks and balances to ensure accuracy. Transactions are the lifeblood of a company and they have to be recorded and reproduced accurately in a desired format whenever called for. Apart from satisfying statutory requirements, it also helps the management of the company in keeping a tight monitoring of its activities. It is difficult to dismiss a non-declaration of high value goods held in stock as a mere omission. The capital goods journal entries should have captured transactions related to the import/ purchase details accurately and listed it out at the time of debonding. The action of the appellant post the discovery of the 'omission' also does not inspire confidence. The fact of the appellant approaching JDGFT, without getting an NOC from the department for the 'omitted' goods; trying to pass off the signature of officials on the copy of the post audit worksheet to the JDGFT purporting it to be an NOC by the department, to mislead him into issuing the EPCG authorization are not innocent acts. It becomes clear that there was no letter issued by the department to JDGFT recommending the issue of EPCG license, which is what resulted in a notice being issued by the JDGFT to the appellant for suspension of his IEC. Further as pointed out by the Learned AR the fact that the duty payment details on the said capital goods, which are required to be known before issuing any NOC if at all, was informed to the department by the appellant only after reminders and after the EPCG authorization had been obtained by them, disproves their contention that there has been no suppression or mis-statement on their part. Further the 'marathon alternator' imported by them while they were a HEOU, was not only not declared it was cleared on 15/04/2009 from their unit before completing their EPCG obligations and without the permission of the department, without payment of full duty and without observing the legal formalities in this regard. Hence there was non-declaration and clandestine clearance in this case.

8. These facts cannot be viewed lightly and when seen together form a pattern. Proving 'intent' in an offence of this nature can be culled out largely from inferences drawn from the acts or illegal omission or commissions committed by those charged of illegality. We note that all these activities took place after the audit team visited the unit and these post-audit irregularities were unearthed only after investigation by the Preventive team. They clearly bring out the suppression of fact and mis-statement by STML. Hence the appellants contention that this was a case of omission of goods, which was pointed out by Central Excise Audit and made good by them but the issue of 'suppression' came up only after the visit by the Preventive team when the facts were already known, is not acceptable. The question whether the SCN's could have been issued evoking the larger time limit in terms of the proviso to section 11A(1) of the Central Excise Act and proviso to sub-section (1) of section 28 of the Customs Act 1962 is thus answered in favor of Revenue. Further the appellant has stated that the impugned

order invokes section 11A of the Central Excise Act, 1944 which is irrelevant for the demand of customs duty and was not even invoked in the Show Cause Notice. We find that SCN dated 17/08/2009 pertaining to indigenous goods has invoke section 11A of the Central Excise Act correctly and hence their contention is not correct.

9. Coming to next, we will address the issue whether the demand under the impugned order will sustain when applicable duties have been discharged under EPCG license which have not been cancelled. We find that in this case different government agencies are involved, who work in tandem but in their respective areas as mandated by law, to facilitate a unit work under the scheme. While the schemes and its benefits involved are devised under the Foreign Trade Policy (FTP), applicable duties as imposed are to be paid under the Customs/ Central Excise Acts. In the case of HEOU's the goods are also warehoused as per the provisions of section 68 of the Customs Act. It is seen that a HEOU may be permitted to exit from the scheme by the Development Commissioner at any time, on paying to Custom authorities applicable duties and taxes and compensation cess on capital goods under the EPCG Scheme for DTA Units. The question is whether the unit that has found to have committed illegalities with the intent to evade payment of duties, can avail of subsequent concession on left out capital goods, under the EPCG scheme once it ceases to be a HEOU. A unit proposing to exit the HEOU scheme has to intimate the Development Commissioner and the Customs authorities in writing of his intention. The Unit is required to assess duty liability as per the relevant provisions of law under the Customs Act and the FTP, relevant to the

proposed exit and submit details of such assessment to Customs authorities. The Customs authorities will examine the details given and confirm the duty liabilities actually payable, subject to the condition that the unit has achieved positive NFE. After payment of duty and clearance of all dues, the unit shall obtain a "No Dues Certificate" from Customs authorities. On the basis of the "No Dues Certificate" so issued by the Customs authorities, the unit can apply to the Development Commissioner for final exit.

10. In the instant case as discussed above we have found that the appellant had intentionally not declared certain capital goods. This being so by not intimating the Customs authorities in writing of his intention to avail the EPCG facility for the said non-declared goods, STML have rendered the process of verifying whether the unit has achieved positive NFE in the revised circumstances and whether they have paid all relevant duty and dues, redundant. In the normal circumstances an EPCG license will not be issued to a HEOU, without a specific 'No Dues Certificate' and report on the unit having achieved a positive NFE. What the appellant could not achieve through the front door cannot be permitted to be achieved through the back door. Trying to mis-state and pass off the countersigned left out items list of an audit report, as a NOC from the department would amount to fraud. We find that the irregularities committed by the appellant are not mere procedural but an illegality that strikes at the heart of the scheme. Concessional duty schemes depend on proper checks being maintained, especially in a case like this where huge duty concessions are given and there are more than one govt. department involved, who

are dependent on each other's actions for the proper implementation of the scheme. The proper procedure discussed above, has been devised to ensure that cleverly concealed duty leaks do not happen in the gaps between the functioning of the departments. These procedures are meant to detect and deter fraud and dishonest behavior of all kinds, protecting the exchequer from revenue loss. Hence STML cannot avail the facility of utilizing an EPCG authorization, obtained through suppression and mis-statement, to settle its duty dues.

11. The appellant has referred to certain case laws in their favor. We find that the judgment of the Hon'ble Bombay High Court in the Taparia Overseas case (supra) relates to the case of transfer of license to a transferee without notice of fraud by original license holder. In the present case the facts are different as the fraud is committed by a unit for its own benefit and is hence not applicable in their case. The judgment of the Hon'ble Bombay High Court in the case of Bansilal Jesasingh (supra) relates to case where imports were made on a valid license which was subsequently cancelled due to fraud. The facts are distinguishable since in this case the unit had exited the HEOU scheme by already availing the one-time benefit of migrating to the EPCG scheme. Hence on the date of debonding they were not in possession of a EPCG authorization that covered the disputed goods. The demand for duty and interest thus sustains.

12. Considering the facts as discussed and after examining the judgments cited by the appellant, we hold that the answer to the question stated at para 7(b) above, is also answered in favor of Revenue.

13. It is also seen from Order in Original passed by the JDGFT, Madurai dated 28.07.2010 (supra) against the appellant, that the Learned Authority has concluded that the unit and its directors have misrepresented / suppressed facts for obtaining EPCG authorization without obtaining proper 'No Objection Certificate' from the Central Excise Authorities for the left-out capital goods. Hence apart from the imposition of a penalty he has also directed the payment of duty with interest to the Central Excise/ Custom authorities.

14. We find that the issue whether penalty will sustain, is not an issue once it has been found that the appellant has committed illegalities with an intent to evade payment of duty. The matter is also covered by the judgment of the Hon'ble High Court of Bombay in the case of I G Petrochemicals Ltd. (supra) cited by Revenue, upholding the penalty in a case where the HEOU had not declared its capital goods in entirety at the time of debonding. Hence the answer to the question stated at para 7(b) above, is also answered in favor of Revenue.

15. Based on the discussions above, we reject the appeal.

(Pronounced in open court on 30.03.2023)

(**M. AJIT KUMAR**)
Member (Technical)

(**SULEKHA BEEVI C.S.**)
Member (Judicial)

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