

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE
TRIBUNAL,
SOUTH ZONAL BENCH, CHENNAI
COURT HALL No. III**

EXCISE APPEAL No. 41627 OF 2019

(Arising out of Order-in-Appeal No.CMB-CEX-000-APP-117-19 dated 17.07.2019 passed by Commissioner of GST & Central Excise (Appeals), Coimbatore, No.6/7, A.T.D. Street, Race Course Road, Coimbatore 641 018.)

M/s. Datafield India Private Limited

.... Appellant

No.119/1B, Mudalialayam Road,
Arasur Post,
Coimbatore 641 407.

Versus

The Commissioner of GST & Central Excise,

...Respondent

Coimbatore Commissionerate
No.6/7, A.T.D. Street, Race Course Road,
Coimbatore 641 018.

APPEARANCE :

Mr. R. Meenakshi Sundaram, Advocate
For the Appellant

Mr. M. Ambe, Deputy Commissioner (A.R.)
For the Respondent

CORAM :

HON'BLE MS. SULEKHA BEEVI C.S., MEMBER (JUDICIAL)
HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)

DATE OF HEARING : 04.07.2023

DATE OF DECISION : 10.07.2023

FINAL ORDER No.40540/2023**ORDER : Per Ms. SULEKHA BEEVI, C.S.**

Brief facts are that the appellant holds Central Excise Registration and is a 100% EOU which is engaged in the manufacture of telephone cords falling under Chapter 8517 of CETA 1985. They imported raw materials without payment of Customs duty, Special Customs Duty (SCD) and Additional Customs duty (ACD). The manufactured goods were exported as well as cleared into Domestic Tariff Area (DTA). For such clearances into DTA, the appellant availed concessional rate of 50% Customs duty, SCD and ACD under Notification No.2/95 dated 04.01.1995. In terms of the said notification for effecting DTA clearances, the appellant had to furnish details of foreign exchange earnings as percentage of export to the Development Commissioner, MEPZ, Chennai. Accordingly, the appellant had submitted necessary details, vide their letters dated 10.01.1998 and 01.02.1999. Appellant got the approval from the Development Commissioner, MEPZ, Chennai to avail the exemption (partial) under Notification 2/95 dated 04.01.1995 for their DTA clearances. As per para 9.5 of EXIM Policy 1997-02, if net of foreign exchange earned as a percentage of exports is between 10% to 25%, an assessee can clear 30% of value of production and exceeding 25%, an assessee can clear 40% of value of production under DTA sales. If net foreign exchange percentage is less than 10%, then an assessee is not permitted / eligible to clear the goods in DTA sales. On examination by audit as to the details furnished

by appellant to MEPZ vide letters dated 10.01.1998 and 01.02.1999 for obtaining approval, it was seen that the appellant had deducted a sum of Rs.53,04,928/- being the imported raw materials consumed for DTA clearances. Thus, the value of raw materials was reduced. Consequently, the value addition achieved by appellant was boosted to 30%. Based on such net foreign exchange percentage, the appellant got permission from MEPZ to clear 40% of value of production in DTA at concessional rate of duties under Notification No.2/95. It appeared to the department that the appellant has contravened the conditions stipulated under Notification No.2/95 read with EXIM Policy 1997-2002 in as much as they had furnished incorrect details to MEPZ and wrongly obtained approval for clearance of goods to DTA sales. Show cause notice dated 24.04.2012 was issued for the period 1997-98 proposing to recover the differential duty along with interest and for imposing penalties. After due process of law, the original authority confirmed the duty demand along with interest and imposed equal penalty under Section 11 AC of the Central Excise Act, 1944 read with Section 174 of CGST Act, 2017. The proposal to impose penalty under Rule 173Q of CER, 1944 was dropped. On appeal, the order was upheld by the Commissioner (Appeals). Hence the appellant is now before the Tribunal.

2. On behalf of the appellant Ld. Counsel Sri Meenakshi Sundaram appeared and argued the matter. The main argument put forward was on the ground of limitation. It is submitted that show cause notice has been issued invoking extended period of limitation alleging that

appellant has suppressed facts with intention to evade payment of duty. The said allegation is totally baseless and there are no grounds for invoking the extended period. It is submitted that the appellant, a 100% EOU after fulfilment of export obligation made a request for permission to sell final products in DTA. Along with the said application, the appellant has enclosed the details and documents about the total production, export quantity of sales, import of raw materials and procurement of raw material from other 100% EOUs during the period from 01.04.1997 to 31.03.1998. These documents / statements were countersigned by the Superintendent of Central Excise and also submitted before the Development Commissioner, MEPZ, Chennai. The appellant therefore has not suppressed any facts from the department.

3. After verifying the details and the documents furnished by the appellant, the Development Commissioner, MEPZ by proceedings dated 21.09.1998 and 05.03.1999 has granted permission to sell goods into DTA. On the basis of such permission, the appellant has made the DTA sales and paid Customs Duty / SCD and ACD in terms of Notification No.2/95 dt. 04.10.1995 which allows concessional rate of duty.

4. The Ld. Counsel asserted that while applying for permission to sell goods in DTA, the appellant has submitted the following documents :

(a) Statement showing the details of import materials

(b) Statement showing the export sales during the period

(c) Statement showing the cost of completed finished goods

(d) Statement of value addition.

These documents are certified by the Chartered Accountant and verified and countersigned by Superintendent of Central Excise. Further, all the details were available in the books of accounts maintained by the appellant and the demand has been raised on the basis of figures available in the accounts maintained by the appellant. There was no information or document obtained or seized from any third party to allege suppression with an intention to evade payment of duty so as to invoke the larger period of limitation.

5. It is stressed by the Ld. Counsel that the permission is granted on the basis of the records, documents and certificate furnished by the 100% EOU and after thorough examination and in-depth verification of facts. The figures furnished by the unit duly authenticated by the authorized signatory is counter-checked and certified by the Chartered Accountant. The same is subjected for counter signature of the jurisdictional Range officer. During the material time, 100% EOUs were allowed to function only under the strict supervision of the jurisdictional Range Officers. It is mandatory that all reports and returns filed to the MEPZ is to be countersigned by the Jurisdictional Range Officer which is done after due verification. In the appellant's case, all these formalities were complied with and then the permission was granted by MEPZ, on the basis of which the appellant had cleared the goods to DTA availing the concessional rate of duty as per Notfn 2/95. Hence the allegation put forward by the department that the appellant has

obtained approval for clearance of goods to DTA sales by willfully suppressing facts is false and incorrect.

6. It is also argued by the Ld. Counsel that once the Development Commissioner, MEPZ gives permission to an 100% EOU to sell the goods in DTA, the department cannot go beyond such permission. To support this argument, Ld. Counsel relied upon the decision of this Bench of the Tribunal in Final Order No.40141-40142 of 2022 dated 21.04.2022. Similar decision was passed by the Allahabad Bench in Final Order No. 70112 of 2022 dt. 17.06.2022.

7. The Ld. Counsel urged that the appellant having declared all the details and not having suppressed any facts, the demand raised invoking extended period requires to be set aside. The Circular issued by the Board No.96/1/2017 dt. 19.1.2017 was also referred to by the Ld. Counsel, to argue that the Board has clarified that while invoking extended period, it must be ensured that the necessary and sufficient conditions exist. Further, there are umpteen number of decisions of various courts wherein it is held that unless there is evidence to establish any positive act on the part of appellant to suppress facts with an intention to evade payment of duty, the extended period cannot be invoked. Ld. Counsel prayed that the appeal may be allowed.

8. Ld. A.R Sri M. Ambe appeared for Revenue and supported the findings in the impugned order. It is submitted by Ld. A.R that the net foreign exchange calculated by the appellant is incorrect and it has projected a higher percentage of foreign exchange. NFEP has been the basis the approval for DTA clearance. Para-9 of the impugned order

was adverted to by the Ld. A.R to submit that only if the net foreign exchange earnings is above 10%, the appellant would be able to obtaining permission to make DTA clearance at concessional rate of duty. Appellant has wrongly deducted the value of imported raw materials consumed for DTA sales to the tune of Rs.53,05,028/- which has resulted in projecting the value to 30.6%. If such deduction is not made, the net foreign exchange earnings for the relevant period would be only 3.95%. The appellant had adopted an incorrect calculation and therefore has resulted in incorrect projection of net foreign exchange. The show cause notice has been correctly issued demanding differential duty on this ground. He prayed that the appeal may be dismissed.

9. Heard both sides.

10. The main allegation in the show cause notice is that the appellant had contravened the conditions of Notification No.2/95 dt. 04.01.1995 read with EXIM Policy 1997-2002 in as much as they had furnished incorrect details to MEPZ and obtained approval for clearance of goods to DTA sales. For making DTA clearances, the appellant has to furnish details of foreign exchange earnings as percentage of exports to the Development Commissioner, MEPZ, Chennai. Accordingly, the appellant had submitted details vide their letters dt. 10.01.1998 and 01.02.1999 and got approval from the Development Commissioner, MEPZ, Chennai to avail exemption (concessional rate of duty) under the Notification. It is the case of the department, as per para 9.5 of the EXIM Policy 1997-2002, if Net Foreign Exchange (NFEP) earned as a percentage of export is between 10% to 25%, an assessee can clear

30% of value of production and exceeding 25%, the assessee can clear 40% of value of production under DTA sales. If the net foreign exchange percentage earned is less than 10%, then the assessee is not permitted to clear the goods in DTA. During audit, it was noticed that appellant had deducted an amount of Rs.53,04,928/- being the consumption of raw materials imported and thereby reduced the value of consumption of imported raw materials. That consequently, the value addition achieved has been boosted to 30.6%. On the contrary, without such deduction, the NFEP was worked out to be 3.95%. The calculation adopted by assessee and the department is as under :

ANNEXURE TO PARA I/IIIA			
DETAILS FURNISHED BY THE ASSESSEE TO MEPZ 4/97 to 12/97 & 1/98 to 3/98	CORRECT METHOD	ACTUAL EXPORT EARNING & ELIGIBILITY OF DTA CLEARANCE.	
Raw material opening balance	48,79,221	48,79,221	48,79,221
RM purchase	1,85,21,819	1,85,21,819	1,52,98,841
less C.B	67,53,750	67,53,750	67,53,750
	1,66,47,290	1,66,47,290	1,34,22,312
1/5th of Capital goods	24,26,217	24,26,217	24,26,217
	1,90,73,507	1,90,73,507	1,58,48,529
R.M used for DTA sales	53,05,028	Not eligible for deduction	Not eligible for deduction
Imported inputs consumed	1,37,68,479	1,90,73,507	1,58,48,529
Export sales	1,98,58,920	1,98,58,920	1,19,16,336
Value addition	(A-B) X 100	(A-B) X 100	(A-B) X 100
	A	A	A
	= 19858920-13768479	= 19858920-19073507	11916336-15848529
	19858920	19858920	11916336
	= 30.6%	3.95%	-33%
	Got DTA sale of 40% of value of production	Not eligible for DTA sales	Not eligible for DTA sales

11. The formula for calculation is $NFEP = A - B/A \times 100$ where 'A' is the FOB value of exports and 'B' is the sum total of CiF value of imported inputs. According to department, the value of input procured from other EOU also has to be included in 'B'. It is thus alleged that if the deduction of Rs.53,05,028/- is avoided, the NFEP would be only 3.95%. The Ld. Counsel has argued that only CiF value has to be included and therefore the value of goods procured indigenously need not be included.

12. Be that as it may, Ld. Counsel has put forward strong arguments on the ground of limitation. It is noted that they have filed all the details with regard to the import of raw materials, statement showing export clearances, statement showing cost of finished products and also the statement of value addition. Only after thorough scrutiny of all such documents, the Development Commissioner, MEPZ, Chennai has granted permission for DTA clearance. This being the case, the allegation that the appellant has wilfully suppressed the facts with an intention to evade payment of duty is without any factual basis. The appellant has also furnished details of the calculation done by them when requested by the department.

13. The Hon'ble Supreme Court in the case of *Cosmic Dye Chemicals Vs Collector of Central Excise, Bombay* - 1995 (75) ELT 721 (SC) held that the word suppression of facts is qualified by the word 'wilfull' and therefore there should be intent to evade payment of duty.

“7. Now coming to the facts of this case, the appellant’s case is that he thought *bona fide* that he need not include the value of the Rapidogens in his declaration, for the reason that the said product was fully exempt from duty under Notification No. 180/61, dated November 23, 1961. Certain facts are brought to our notice in support of this plea. It is also brought to our notice that on the date of filing of his declaration, two High Courts had taken the view that the goods exempted from duty are not includible within the definition of ‘excisable goods’ as defined in clause (d) of Section 2. No doubt, two other High Courts had taken a contrary view. The appellant’s factory is in the State of Maharashtra and the Bombay High Court had not taken a view one way or the other. In all the circumstances, the appellant says, he was under the *bona fide* impression that he need not mention the value of the Rapidogens manufactured by him in his declarations.

8. In the above circumstances and because the facts establish that the mis-statement of facts in the declaration filed by the appellant - or the suppression of facts therein, as the case may be - cannot be called wilful, the appeal is allowed. No order as to costs.”

14. In the case of *Continental Foundation Jt Venture Vs CCE Chandigarh* – 2007 (216) ELT 177 (SC), it was held that mere omission to give correct information is not suppression of facts unless it was deliberate to stop payment of duty. After appreciating the facts and applying the above Apex Cour decisions we are of the view that the demand is time barred.

15. In view of the foregoing, we find that the demand raised invoking the extended period cannot sustain and requires to be set aside which we hereby do. Appeal is allowed on the ground of limitation with consequential relief, if any, as per law.

(Pronounced in court on 10.07.2023)

Sd/-

(VASA SESHAGIRI RAO)
Member (Technical)

Sd/-

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

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