

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

CUSTOMS APPEAL No. 40757 OF 2016

(Arising out of Order-in-Original No.43069 dated 30.11.2015 passed by Commissioner of Customs, Chennai IV Commissionerate, No.60, Rajaji Salai, Custom House, Chennai 600 001)

The Commissioner of Customs,
Chennai-IV Commissionerate,
Custom House, No.60, Rajaji Salai,
Chennai 600 001.

... Appellant

Versus

M/s.Danieli India Ltd.
Technopolis,
5th Floor, B Wing, Block BP,
Plot No.IV, Sector – V, Salt Lake,
Kolkata 700 091.

...Respondent

APPEARANCE :

Ms. Anandalakshmi Ganeshram, Superintendent (A.R)
For the Appellant

Mr. Pulak Saha, Consultant
For the Respondent

CORAM :

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

DATE OF HEARING : 06.07.2023
DATE OF DECISION : 11.07.2023

FINAL ORDER No.40545/2023**ORDER : Per Ms. SULEKHA BEEVI, C.S.**

Brief facts are that a show cause notice was issued consequent to the investigation conducted by the D.R.I. Ahmedabad which indicated that M/s.Danieli India Ltd., Kolkatta, the respondent herein, is engaged in manufacturing various equipments used in steel plants and have wrongly availed the benefit of exemption Notification No.102/2009-Cus. dt. 11.09.2009 in respect of the capital goods imported by them under the Zero Duty Export Promotion Capital Goods (EPCG) Scheme in contravention of the condition 2 (4) of the said Notification No.102/2009. After due process of law, the original authority dropped the proceedings proposed in the SCN. Aggrieved, the department is now before the Tribunal.

2. Ld. A.R Ms. Anandalakshmi Ganeshram appeared and argued for the Department. It is submitted that the impugned order is not legal and proper in dropping the case against the respondent. It was revealed during investigation that respondent had been issued with Status Holder Incentive Scheme (SHIS) scrips and Zero Duty EPCG Authorization simultaneously during the year 2011-12. The SHIS scrips had been issued to the respondent on 06.04.2011 and thereafter Zero Duty EPCG Authorization had also been issued between 23.03.2012 and 29.03.2012.

3. The condition 2(4) of Notification dated 11.09.2009 reads as under :

“that the importer is not issued, in the year of issuance of zero duty EPCG authorization, the duty credit scrips under SHIS scheme under para 3.16 of the Foreign Trade Policy. SHIS scrips which are not issued in a particular year for the reason that zero duty EPCG authorization has been issued in that year shall not be issued in future years also.”

4. The said notification was amended vide Notification No.42/2012-Cus. dated 22.06.2012 wherein condition No.2 (4) was amended to read as :

“that the importer is not issued, in the year of issuance of zero duty EPCG authorization, the duty credit scrips under SHIS scheme under para 3.16 of the Foreign Trade Policy. [Provided that this condition shall not be applicable where already availed SHIS benefit that is unutilized is surrendered or where benefits availed under SHIS scrips that is utilized is refunded, with applicable interest, before availing zero duty EPCG authorization. SHIS scrips which are surrendered or benefit refunded or not issued] in a particular year for the reason that zero duty EPCG authorization has been issued in that year shall not be issued in future years also].”

5. It is thus argued by the Ld. A.R that prior to 22.06.2012, exemption under Notification No.102/2009-Cus. dated 11.09.2009 was not admissible to an importer who has been issued duty credit scrips under the Status Holder Incentive Scheme as well as the Zero Duty EPCG Authorization Scheme. The benefit of the exemption under notification would be available only after surrendering of the SHIS scrips.

6. In the present case, the respondent has obtained SHIS scrip and Zero Duty EPCG Authorization during the year 2011-12 itself. They have imported capital goods availing the exemption under EPCG

authorization vide Notification No.102/2009-Cus. dt. 11.09.2009 as amended by Notification No.42/2012 dt. 22.06.2012. The respondent would be eligible to avail the exemption of the notification only if the SHIS benefit that is unutilized is refunded with applicable interest before availing the zero duty EPCG authorization. In the present case, the SHIS scrip was sold and transferred by the respondent to another firm who utilized it for their imports. The respondent has not refunded the unutilized amount of the SHIS scrip issued to them prior to obtaining zero duty EPCG authorization. Respondent has contravened conditions prescribed in Notification No.102/2009 and the demand raised ought to have been confirmed by the adjudicating authority. She prayed that the appeal may be allowed.

7. Ld. Consultant Sri Pulak Saha appeared and argued for the respondent. It is submitted that the adjudicating authority was legally correct in holding that the provisions of the Customs Notification No.102/2009-Cus. dt. 11.09.2009 is not applicable to the present case as the respondent was issued SHIS scrip during the 2011 for the exports of year 2009-10 and the respondent has not availed simultaneous benefit and there has been no contravention of condition 2 (4) of the notification. Ld. Consultant adverted to condition 2 (4) of the notification and submitted that the said condition was amended by Notification No.92/2010 dt. 10.09.2010

which has been referred to in the SCN. Prior to that, the said condition 2 (4) reads as under :

“That the importer does not avail, in the year of import of the goods, the benefit of the Status Holder Incentive Scheme under Para 3.16 of the Foreign Trade Policy”.

8. The procedure for EPCG was prescribed in para-5 of the Handbook of Procedures Volume V1. As per para 5.1A of the HBP (v1), states that *“Zero Duty EPCG Scheme shall also not be available to applicants, who avail in that year, the benefit of Status Holder Incentive Scheme under Paragraph 3.16 of FTP.”*

9. The procedure for issuance of SHIS is prescribed in para 3.10 of HBP(v1). Para 3.10.3 effective from 23.08.2010 to 04.06.2012 reads as under:

“The last date of filing the application shall be 31st March 2011/2012/2013 for SHIS scheme for exports made during 2009-10/2010-11/2011-12 respectively.”

Further, in view of fourth sub para of Para 5.1A of HBPv1:

- a) Para 9.3 of HBPv1 shall not be applicable for SHIS scheme in cases where the SHIS application (say for exports made during 200910) has been filed after the prescribed date (i.e. after 31st March 2011) and Zero Duty EPCG authorization has been issued to the applicant by any RA during the year 2010-11 (from 1.4.2010 till 31.3.2011)
- b) Similarly for SHIS Applications for exports made during 2010-11 & 2011-12 filed late (i.e. after the prescribed dates of 31st March 2012/2013 respectively). Para 9.3 shall not be applicable in cases where Zero duty EPCG authorization has been issued to the applicant by any RA during the year 2011-12 (from 1.4.2011 till 31.3.2012) or 2012-13 (from 1.4.2012 till 31.3.2013) as the case may be.

- c) In case SHIS Application is filed within the prescribed date (for exports made during 2009-10/2010-11/2011-12 as the case may be, including any supplementary claim under Para 9.4 of HBPv1) and where Zero Duty EPCG Authorisation has been issued to the applicant by any RA during the relevant year (i.e. during 2010-11/2011-12/2012-13 respectively, as the case may be), SHIS application shall be summarily rejected in view of fourth subpara of Para 5.1A of HBPv1”.
- d)

10. It is submitted by the Ld. Consultant that the show cause notice has been issued under the misconception that SHIS scrips and Zero Duty EPCG Authorization have been issued in the same year. The facts have been clearly discussed by the Commissioner from para 24 onwards. It is argued by the Ld. Consultant that the department has proposed to demand duty denying the benefit of notification alleging that the SHIS scrip was physically received by them in 2011-12 and the EPCG authorization was also issued in the year 2011-12. Actually, the SHIS scrips were received in 2011-12 for the exports made in the year 2009-10. There is no simultaneous availment of benefit under SHIS and Zero Duty EPCG Authorization Scheme. In para-37, the Commissioner has discussed that the department has proceeded to issue notice by adopting literal meaning of the terms “year of issuance” used in the notification No.102/2009.

11. The respondent had written letter to the DGFT requesting for clarification as to whether there has been simultaneous issuance of Zero Duty EPCG Authorisation. The respondent has received clarification by e-mail dt. 28.07.2014 wherein it has been clarified

that availing SHIS against exports of 2009-10 and zero duty EPCG during 2011-12, do not violate the provision stipulated by Public Notice No.12 dated 26.7.2013. The Commissioner has taken note of this clarification issued by DGFT and also held that spirit and intent of the notification has to be taken into consideration along with Hand Book of Procedures and the Foreign Trade Policy for the relevant years. He prayed that the appeal may be dismissed.

12. Heard both sides.

13. The issue to be decided is whether the respondent is entitled for the benefit under the Notification No.102/2009-Cus. dt. 11.09.2009 as amended by Notification No.42/2012 dt. 22.06.2012 or whether there is violation of conditions of the said notification as alleged by the Department.

14. Relevant conditions of the notification has already been reproduced. The basis for issuing the SCN is that respondent has received SHIS scrips as well as Zero Duty EPCG Authorization scheme in the same year i.e. 2011-12. From the records as well as the arguments it is brought out that SHIS scrips corresponds to the exports made by respondent in the year 2009-10 whereas the Zero Duty EPCG authorization scheme is issued in 2011-12. The respondent has requested for clarification from the DGFT as to

whether there has been violation of notification. Vide e-mail dated 28.07.2014, the reply has been received stating that as the SHIS benefits are for the exports made in the year 2009-10, and the Zero Duty EPCG Authorization is issued in the year 2011-12, there is no violation of the provisions as clarified in Public Notice No.12 dt, 26.7.2013. The public notice clarified the situation as under :

“c) In case SHIS Application is filed within the prescribed date (for exports made during 2009-10/2010-11/2011-12 as the case may be, including any supplementary claim under Para 9.4 of HBP(VI) and where Zero Duty EPCG Authorisation has been issued to the applicant by any RA during the relevant year (i.e. during 2010-11/2011-12/2012-13) respectively, as the case may be) SHIS application shall be summarily rejected in view of fourth sub para of Para 5.1A of HBPv1.”

15. From the above it can be seen that if SHIS application is filed for the year 2009-10, Zero Duty EPCG Authorisation cannot be issued to an importer for the year 2010-11.

16. In the present case, the respondent has not availed any Zero Duty EPCG Authorization for the period 2010-11. The Zero Duty EPCG Authorization is for the period 2011-12. Thus, there is no violation of the conditions. The Commissioner has analyzed the entire issue and given detailed discussion. Relevant paragraphs are being worth of reproduction which read as under :

“25. The allegation in the show cause noticee is that the noticee applied for SHIS in the year 2010-11 and were issued the scrip in the year 2011-12 and they obtained the EPCG in the year 2011-12 which is not permissible as per the condition laid down in the notification No.102/2009-Customs as amended from time to time.

“26. The contention of the notice is that the SHIS scrip physically received by them in 2011-12 is the benefit due to them in the relevant year i.e.2010-11 for the exports made in the year 2009-10. They were issued EPCG Authorisation only in the year 2011-12. There is no violation of the FTP or the condition of the Customs Notification as they did not apply for EPCG in the year 2010-11 which is the relevant year for SHIS benefits with regard to exports made in 2009-10. Therefore, issue of SHIS scrip in 201-12 for exports made in 2009-10 and issue of EPCG authorisations in 2011-12 is in line with the Para 3.10.3 (b) of FT read with Public Notice No.12 dated 26.07.2012 and hence not hit by the condition No.5 of the Notification No.102/2009.

... ..

30. The subject exemption notification No.102/2009-customs was issued to implement the Foreign Trade Policy of the Government of India and thus it incorporates condition, if any, laid down in the foreign trade policy read with the procedures prescribed to implement the same. Hence it is absolutely essential that the conditions prescribed in the notification are read in terms of the said policy, the procedures, the public notices issued to clarify the same and any other clarification issued in this regard y the DGFT as well as by the CBEC.

... ..

36. Had the issue of the zero duty authorizations or the SHIS scrip in this case been in contravention of the policy and the procedures as stated above the concerned office of the DGFT could have cancelled the said SHIS or could have rejected the application for the EPCG authorizations which has not been done by them. It thus shows that the subject scrip/authorizations have been issued in compliance with the policy and the procedures. The SCN or the records don't show that any proceedings have since been initiated against the Noticee by the O/o JDGFT in this regard. On the contrary, the Noticee has produced a specimen copy of the letter of redemption of the EPCG Authorization No.0230007780 dated 27.3.2012 issued by the RLA which confirms the fact that there is no irregularity in this case.

37. The notice has proceeded by the literal meaning of the terms “year of issuance” and proposes to deny the exemption under notification No.102/2009, but the term “year of issuance” has to be viewed from the provisions of the Foreign Trade Policy read with Procedures and public notice No.12 issued by DGFT/RA. The term “year of issuance” has to be related to the period for which the SHIS vis-à-vis EPCG benefits being availed by an exporter and not physical issue of or application for the licences or scrips since the purpose of such restrictions in the policy is to prevent simultaneous availment of the benefit of the two schemes. Therefore, the interpretation of the condition 2 (4) adopted in the notice that there cannot be any availment of EPCG in the year of issuance of SHIS is not correct keeping in view the policy, it's purpose, procedures and the clarifications issued in this regard.

38.3 Given the facts of the case and the purposive interpretation of the Notifications governing the SHIS and the EPCG schemes and appreciating that

there was no simultaneous availment of the licences/scrips issued under these two schemes, for which categorical clarifications have been issued by the O/o the JDGFT which is based on the PN issued by the DGFT, I am of the firm view that the intent of the two governing notifications to promote exports should not be settled on technicalities & semantics which also remains unfounded on merits.”

17. After appreciating the facts and provisions of law, we are in full agreement with the view taken by the Commissioner. The appeal filed by the department is without merits. Impugned order is sustained. Appeal filed by department is dismissed.

(Pronounced in court on 11.07.2023)

sd/-

(VASA SESHAGIRI RAO)
Member (Technical)

sd/-

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

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