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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066

CUSTOMS APPEAL BRANCH

Appeal No. C/996/2004 - CU[DB] Date **17/01/2011**

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
M/S BALLARPUR INDUSTRIES LTD.,
103, MILESTONE, PUNE-SOLAPUR HIGHWAY
BHIGWAN, PUNE.

M/S BALLARPUR INDUSTRIES LTD., Appellant

Vs

C.C.(PREVENTIVE) Respondent

I am directed to transmit herewith a certified copy of **Final order C/23/ 2011 CU[DB]** dated 13.01.11 passed by the Tribunal under **Section 129, (B) of the Customs Act,1962 & Financial Act 1994 relating to Service Tax**

Assistant Registrar
(Customs Appeal Branch)

Copy to :

1. Respondent
C.C.(PREVENTIVE)
NEW CUSTOM HOUSE, NEAR
I.G.I. AIRPORT, NEW DELHI
110037.
2. Adv. / Consult
MR.A.R.MADHAV RAO
B-6/10, SAFDARJUNG ENCLAVE,
NEW DELHI-29
3. C.D.R
4. Bar association. CESTAT. New Delhi
5. Director Publications. Customs. Excise. I.P. Estate. New
6. M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -
7. Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
8. M/s. Deeparchie Publications. M-93. Marg. 46. Saket. New Delhi 110017
9. Taxmann Allied Service Pvt Ltd.. 59/32. New Rohtak Road. New Delhi -
10. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road, Ahmedabad-15
11. LAWCRUX Advisors Pvt Ltd. LAW House.1-8.Sector - 10. Faridabad 121003 (Haryana)
12. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
13. Office Copy
14. Guard file

Assistant Registrar
(Customs Appeal Branch)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST BLOCK NO.II, R.K. PURAM, NEW DELHI-110066.
DIVISION BENCH

Customs Appeal No.C/996/2004-Cus

Date of Hearing: 11.01.2011
Date of Decision: 11.01.2011

(Arising out of Order-in-Original No.11/HKM./CC/DRI/NCH/2004 dated 23.8.2004 passed by the Commissioner of Central Excise (Adjudication), New Delhi)

For approval and signature:
Hon'ble Mrs.Archana Wadhawa, Member (Judicial)
Hon'ble Mr.M.Veeraiyan Member (Technical)

1	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	Yes
2	Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	Yes
3	Whether Their Lordships wish to see the fair copy of the Order?	Seen
4	Whether Order is to be circulated to the Departmental authorities?	Yes

M/s.Balarpur Industries Ltd. Appellant

Vs.

CCE (Adj.), New Delhi Respondent

Present for the Appellant: Shri B.L.Narsimhan, Advocate
Present for the Respondent: Shri K.P.Singh, SDR

Coram: Hon'ble Mrs.Archana Wadhawa, Member (Judicial)
Hon'ble Mr.M.Veeraiyan, Member (Technical)

Final **ORDER NO.** C/23/11

PER: M.VEERAIYAN

This is an appeal against the order of the Commissioner (Appeals) no.11/HKM/CC/BRI/NCH/2004 dt.23.8.04 by which a demand of Rs.33,74,866/- stands confirmed against M/s.Sinar

MAS Pulp and Paper (I) Ltd. (since amalgamated with Balarpur Industries Ltd.), hereinafter referred to as the appellants.

2. Heard both sides. Synopsis of arguments stands submitted on behalf of the department on 29.06.10 which was reiterated by the learned SDR.

3.1. The relevant facts, in brief, are that the DRI, in November,2002 commenced investigation about the genuineness of the DEPB licences of exporters – licence holders like Sephali Marketing (P) Ltd. (SMPL), M/s.R.A.International (RAI), M/s.Angel Marketing Finance (P) Ltd. (AMFPL). The investigation revealed that these exporters misdeclared the description of export products and inflated the export invoice value and obtained DEPB licences for ineligible and excessive duty credit. The DEPB~~s~~ licences were transferred on sale to different parties M/s.ZYG Pharma (P) Ltd., M/s.Kalpana Industries, Kolkata, M/s.SKF Bearing (P) Ltd., M/s.Kamani Oil Industries Ltd., M/s.Neel Kamal and Bans and the present appellants, who utilized the same for duty free imports.

3.2. The present appellant has purchased the DEPBs licences owned by AMFPL and utilized the same for duty free import of consignments using the same. The commissioner by the impugned order disallowed the DEPB credit of Rs.1,2,75,836/- granted to AMFPL. He also imposed penalties on AMFPL and other connected persons. As the appellant has procured DEPB scrip and utilised credit to the tune of Rs.33,74,866/-, he confirmed demand of customs duty of Rs.33,74,866/- against the appellant.

3.3 The Commissioner has also dealt with the issues relating overvaluation of export by SMPL and RAI and disallowed the credit granted to the said exporters – licence holders and demanded customs duty from other transferees like Kamani Oil industries, and ZYG Pharma (P) Ltd.

4.1. Learned Advocate for the appellant submits that M/s. Kamani Oil Industries filed appeal against demand of Rs.17,24,983/- confirmed by the very same impugned order and the Tribunal vide order dated 20.1.2006 in appeal No. C/820/04 reported in 2006 (196) ELT 21 allowed the appeal.

4.2. He also submits EZY pharma (P) Ltd. field appeal No.C/869/04 chaellenging the demand of Rs.17,65,298/- which has also been allowed vide final order No.130/06-Cus dated 28.4.06 following the decision in the case of Kamani Oil Industries arising out of the same impugned order cited supra. The Tribunal in its order dt.28.4.06 ~~allowed~~ also held that the duty demand could not have been made for the extended period under proviso to Section 28 as the appellant, as transferee of licence was not guilty of any offence as mentioned in the proviso to Section 28.

5. Learned SDR submitted that the DEPB scrips have been obtained by mis representation and fraud by the licence holders. Therefore, the said licenses are not valid licences and they cannot validly be transferred to the other persons like the present appellant. As fraud nullifies every thing, subsequent transaction, even if bonafide does not validate the licences obtained by fraud. He also submits that the appellant has not

chosen to initiate any civil/criminal proceedings against the seller of DEPB scrips. Therefore, the credit has been held to have been wrongly ~~and demand~~ utilised and duty stands demanded.

6. We have carefully considered the submissions from both sides and perused the records. At the outset, we find that the impugned order dealt with more than one DEPB licence holders who were the exporters who have allegedly indulged in fraud to get ineligible DEPB scrips. AMFPL was among them. From the order of the Commissioner, we also find that ~~in the unlike~~ in the cases of exporters like SMPL and RAI, the licenses issued by the DGFT have been got cancelled by the DGFT. The reasons for not getting the licences issued to AMFPL cancelled is not forthcoming.

7.1 It is not in dispute that the appeals filed by two of the transferees namely, ZYG pharma (P) Ltd. and Kamani Oil stand~~s~~ allowed by the Tribunal. In fact their appeals against demand of duty stand~~s~~ allowed in spite of the fact the licences used by them for imports were subsequently got cancelled by DGFT. In the above decision, it has been categorically held that the demand against such transferee cannot be made invoking the extended period of limitation as there was no evidence of fraud or collusion against the transferee.

7.2. The relevant portion of the order in the case of ZYG pharma Pvt.Ltd. is reproduced below:

> *"3. The contention of the appellant is that the demand in extended period was not attracted in the present case at all since the appellant was not guilty of any fraud or*

suppression or mis-statement of facts. The appellant had only purchased validly issued tradable licence and used the same for payment of duty. Learned Counsel has pointed out that the finding in the impugned order is that the exporter who obtained the DEPB licence had committed fraud and misdeclared the value of exported goods. It is being emphasized that there was no fraud or suppression or mis-statement of facts by the present appellant. Learned Counsel has pointed out that another similar case involving the same DEPB licence had come up before this Tribunal and the Tribunal held in the case of M/s.Kamani Oil Industries vs. C.C., New Delhi-2006-TIOL-410 that no duty demand could be raised against the purchaser of DEPB licence since he was not guilty as mentioned in the proviso to Section 28.

4. We have perused the record and heard learned SDR also. The appellant's case remains covered by the earlier decision in the case of M/s.Kamani Oil Industries (supra). Since the appellant was not guilty of any offence as mentioned in the proviso, the duty demand could not have been made for the extended period under the proviso to Section 28. Therefore, the appeal succeeds on the ground of limitation and is allowed, with consequential relief, if any."

8. The case of the present appellant is better placed than the cases of M/s.Kamani Oil and ZYG Pharam Pvt.Ltd. There is no finding of suppression against the appellant and in fact no penalty has been imposed on the appellant. As the show cause notice dt.10.12.03 has been issued demanding duty paid using credit in July, 1999, the same is beyond the normal period of limitation which is not justified.

9. In view of the above, following the earlier decisions of the Tribunal in the cases of Kamani Oil and ZYG Pharma (P) Ltd. which are ~~in~~ appeals arising out of the same impugned order, we

set aside the demand raised against the appellant and allow the appeal with consequential relief, as per law.

(Pronounced in the open court)

(ARCHANA WADHAWA)
MEMBER (JUDICIAL)

(M.VEERAIYAN)
MEMBER (TECHNICAL)

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