IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI
PRINCIPAL BENCH, COURT NO. I

Customs Appeal No. 124 -125 of 2012

[Arising out of Order-in-Original No. 49/2011 dated 31.12.2011 passed by the Commissioner of Customs, New Delhi]

M/s. Stella Industries Pvt. Ltd. **Appellant**

Vs.

Commissioner of Customs **Respondent**
New Delhi

Appearance:

Ms Nupur Maheshwari, Advocate for the Appellants
Shri Govind Dixit, DR for the Respondent

CORAM:

Hon'ble Mr. Justice (Dr.) Satish Chandra, President
Hon'ble Mr. V. Padmanabhan, Member (Technical)

Date of Hearing : 12.07.2017
Date of Decision : 04.08.2017

FINAL ORDER NO. 55697 -55698/2017

Per: V. Padmanabhan:

The appeals are filed against the impugned Order-in-Original No. 49/2011 dated 31.12.2011.

2. Brief facts of the case are as under:

i) The appellant had exported a consignment of 'Eau De Perfume' vide shipping bills No. 1401711 and 1401712 both dated

9.7.2004. The goods were exported under shipping bills claiming DEPB benefit under S.No. 520/62 of the DEPB Schedule notified by the Director General of Foreign Trade in terms of the provisions of the Export Import Policy 2002-2007. The said consignment was stuffed at New Delhi and re-stuffed at ICD Dronagiri.

ii) The said container was opened for examination on 29.7.2004 by the customs officers and representative samples of 12 brands of goods declared as ‘Eau De Perfume’ were drawn from the consignment, however, the description on the outer bottles of the drawn samples was ‘Eau De Toilette’, ‘Fragrance De France’ and ‘Vaporizer’. Hence, the samples were drawn and send for testing to Chemical Examiner, Customs Laboratory, New Customs House Mumbai.

iii) The Chemical Examiner, Customs Laboratory, New Customs House Mumbai reported that Ethyl Alcohol contained in the samples of 12 brands was more than 70% i.e. between 71.31% to 83.6%.

iv) In view of the above facts, SCN dated 18.1.2005 was issued to the Appellant alleging that SION for ‘Eau De Perfume’ under the policy is fixed as containing 70% alcohol, 20% perfumery compound or 10% each of aromatic chemicals and essential oils.

That the DEPB credit is available only when the percentage of alcohol is upto 70%. However, the test reports of the samples drawn reveal that the alcohol content is more than 70%. Hence, DEPB credit of Rs.87,811/- was disallowed and to be paid along with interest under section 28AB of the Act. Also penalty under Section 114 of the Act was proposed to be imposed. The SCN also proposed to confiscate the export goods valued at Rs.7,98,285/- The consignment was provisionally released on execution of Bond and Bank Guarantee of Rs.2,00,000/-. The SCN also proposed to encash the Bank Guarantee.

iv) Further SCN dated 6.6.2006 was issued to the Appellant for denying DEPB credit for the previous period on the ground that the 'Eau De Perfume' exported by the appellant does not confirm to SION fixed under the policy. Hence, DEPB credit of Rs.11,58,438/- was proposed to be recovered under Section 28 of the Act along with the proposal to confiscate the goods under Section 113(d) and (i) of the Act and penalty under section 114 of the Act.

3. After the due process of adjudication, vide the impugned order, the duty demands as proposed above were upheld. The export goods covered by the impugned shipping bills were confiscated and allowed to be redeemed on payment of redemption fine. Penalties were also

imposed on M/s. Stella Industries, exporters as well as Shri Rohit Wassan, Executive Director. Aggrieved by the impugned order, the present appeals have been filed.

4. With the above background, we heard Ms Nupur Maheshwari, learned Advocate for the appellants and Shri Govind Dixit, learned DR for the Revenue.

5. Heard both sides and perused the material on record. The appeals have been filed mainly on the following grounds:

(i) Customs have no jurisdiction to deny DEPB credit and recover the same as duty of customs. DEPB licenses are issued by the Licensing Authority under the Foreign Trade (Development & Regulation) Act. Therefore, suspension or cancellation of such licenses, revoking the license or taking any other action solely lies with the Licensing Authority under the Foreign Trade (Development and Regulation) Act. Here reliance is placed on the following cases:

a. ***CC vs. Sterling Foods***
[2011 (269) ELT 341 (Kar)];

b. ***Veyem Exports vs. CCE***
[2011 (265) ELT 379 (Tri-Bang)];

c. ***Mercantile India vs. CC***
[2007 (214) ELT 540 (Tri-Chen) maintained at
[2009 (237) ELT A 21 Mad]

d. ***Rammapati Exports vs. CC***
[2006 (203) ELT 107 (Tri-Kol)];

e. Kobian ECS India P Ltd.vs CCE
[2003 (157) ELT 662 (Tri-Mum)]

f. Adani Exports Ltd. vs. CC
[2006 (199) ELT 613 (Tri-Bang)]

g. Dr. Reddy's Laboratories Ltd. vs. CC
[2012 (284) ELT 545 (Tri-Bang)]

h. King Exports vs. CC
[2011 (266) ELT 388 (Tri-Del)]

(ii) The Courts have further held that the Customs Authorities can raise demand under Section 28 of the Act only when the DEPB credit is utilized. In the present case, the DEPB credit remains unutilized. Hence, the show cause notice is not sustainable.

(iii) The appellant further submits that export benefits granted by DGFT cannot be treated as duty under Section 28 of the Act. Here, reliance is placed on the following cases:

a. Kobian ECS India P Ltd. vs CCE
[2003 (157) ELT 662 (Tri-Mum)]

b. Rammapati Exports vs CC
[2006 (203) ELT 107 (Tri-Kol)

c. Mercantile India vs CC
[2007 (214) ELT 540 (Tri-Chen) maintained at [2009 (237) ELT A21 (Mad)]

(iv) There was no mis-declaration by the Appellant. That the Appellant never mentioned the description 'Eau De Toilette' on the outer bottles as stated in the Show cause notice. The learned

Commissioner has also agreed to it. However, the learned Commissioner has held there has been mis-declaration by the Appellant on the basis of the test reports read with the SION which according to him clearly indicate that the Appellant was exporting 'Eau De Toilette' perfumes instead of 'Eau De Perfume.

(v) It is submitted that extended period of limitation is not invokable and the demand for the past period cannot be raised against the Appellant on the basis of samples drawn on 9.7.2011.

(vi) In view of the above facts, the goods are not liable for confiscation and no penalty can be imposed on the Appellant and appellant No. 2.

6. On going through the records of the case, we find that the demand has been raised in the impugned order in two parts:-

(i) pertaining to the shipping bills 1401711 and 1401712 both dated 9.7.2004, which consignment was intercepted and examined.

(ii) With reference to goods already exported vide several shipping bills in the past period.

At the outset, we consider the two specific shipping bills. These shipping bills were filed claiming the DEPB benefit as applicable for 'Eau De Perfume'. In terms of EXIM Policy and SION for 'Eau De Perfume', the benefit will be available only if the export goods contained upto 70% alcohol, 20% perfumery compound and 10% aromatic chemical and essential oils.

7. However, test reports of the sample drawn reveal that the alcohol contend was more than 70%. Consequently, it is evident that the appellant will not be eligible for the benefit of DEPB credit amounting to Rs. 87,811/- in respect of above two shipping bills. The export goods also will be liable for confiscation for mis-declaration under section 114 of the Customs Act.

In the impugned order, the adjudicating authority has raised the demand for Rs.87,811/- under section 28 ibid along with interest under section 28 (AB) ibid. It has been contended strenuously by the appellant that Customs have no jurisdiction to deny DEPB credit and recover the same as duty of Customs.

8. We have perused the case laws cited by the appellants wherein it has been held that Customs authorities can raise the demand under section 28 of the Act only when DEPB credit is utilized. In respect of two impugned shipping bills, we note that DEPB benefit amounting to Rs.87,811/- has not been credited by the licensing authority. As such, we see no justification in raising the demand for this amount under section 28 along with interest. At best, Customs authorities can take up the matter with the Licensing authority under the Foreign Trade Development Regulation Act for non-grant of such DEPB credit. From

the record, we find this has already been done. However, in view of mis-declaration by the appellant, the order for confiscation of the export goods is upheld but the demand raised under section 28 is set aside.

9. Now we turn to the second part of the demand involving goods which have been already exported under various shipping bills. Customs duty demand of Rs.11,58,438/- has been raised along with interest and imposition of penalty. The basis for raising such a demand is the averment by the Executive Director in his statement to the Investigating officer to the effect that in the past also they have exported identical goods as have been attempted to have been exported in two shipping bills. On the above statement, Customs authorities have concluded that goods exported in the past also were made of alcohol content more than 70%. From the record, we also note that no sample of the goods covered by earlier consignments have been drawn by the Customs Authorities. Further, there is no reference to any test reports of such earlier samples.

In the past consignments, the appellant had declared the export goods as "Eau De Perfume' and claimed the benefit of DEPB. To allege that such export consignments did not satisfy the conditions prescribed for availing such DEPB benefit, it is incumbent upon the Customs authorities to bring evidence on record to that effect. Mis-declaration has to be established on the basis of positive evidence and cannot be by implication that the goods were same as what was exported later. In the absence of any kind of evidence with reference to goods exported earlier, we are of the view that the allegations of mis-declaration in the earlier consignment cannot be upheld. For the same reason, the benefit of DEPB already claimed by the appellant in respect of such exports cannot be denied. Consequently, the duty demand amounting to Rs. 11,58,438/- as well as all other penal proceedings ordered consequent to Show cause notice dated 06.06.2006 cannot be sustained and are set aside.

10. In view of the above discussions, following order is passed. The impugned order with reference to shipping bills 1401711 and 1401712 both dated 9.7.2004 is modified as follows:

(i) DEPB credit of Rs.87,811/- (Rupees Eighty-seven thousand and eight hundred eleven only) claimed for export under shipping bill No. 1401711 and 1401712 both dated 9.7.2004 is disallowed.

(ii) Confiscation of export goods upheld under section 113 (d) and (i) of Customs Act 1962 and are allowed to be redeemed on payment of Redemption Fine of Rs. 3,00,000/- (Rupees Three lakh only) under section 125 ibid.

(iii) Penalty of Rs. 2,00,000/- (Rupees two lakh only) and Rs. 25,000/- (Rupees Twenty-five thousand only) imposed on M/s.

Stella Industries and its Director Shri Rohit Wasan under section 114 of the Customs Act, 1962 read with Chapter 4 of EXIM Policy 2002-2007 are upheld.

(iv) Duty demand of Rs.11,58,438/- as well as penalty imposed pursuant to Show cause Notice dated 6.6.2006 are set aside.

(Pronounced in the open Court on 04.08.2017)

(Justice (Dr.) Satish Chandra) **(V. Padmanabhan)**
President **Member (Technical)**

ss