CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

WEST BLOCK NO.2, R.K. PURAM, NEW DELHI-110066

<u>BENCH-DB</u>

COURT –III

<u>Customs Appeal No.C/161/2011-CU [DB]</u>

[Arising out of Order-in-Original No.06/Commr./Cus./IND/2010 dated 29.12.2010 passed by the Commissioner, Customs, Central Excise and Service Tax, Indore]

M/s. Laxmi Exports …Appellant

Vs.

C.C.E. & S.T., Indore … Respondent

Present for the Appellant : Mr.Alok Barthwal, Advocate
Mr. Manish Saharan, Advocate
Present for the Respondent : Mr. Yogesh Agarwal, D.R.

Coram: HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. V.PADMANABHAN, MEMBER (TECHNICAL)

Date of Hearing : 15/05/2017
Pronounced on : 14/09/2017

FINAL ORDER NO. 56544/2017

PER: S.K. MOHANTY

This appeal is directed against the impugned order dated 29.12.2010 passed by the Commissioner, Central Excise, Customs and Service Tax, Indore.

2. Brief facts of the case are that the Appellant is an export house, engaged in export of various commodities. Based upon

export performance, it was issued the licences under Target Plus Scheme (TPS Licence). Against such licence, the Appellant procured the goods i.e. Steel Slabs from M/s Amulya Exports Ltd. (M/s AEL), an SEZ Unit, without payment of duty. The Appellant then sent the said goods to M/s Metalman Industries (M/s MIL) under job work for further manufacture of steel plates from slabs. Intimation of manufacture under job work was duly filed by the appellant before the jurisdictional Central Excise authorities. The Appellant also appointed M/s MIL as consignment agent for sale of the finished goods.

2.1 The Appellant was later issued with the show cause notice dated 05.02.2010, alleging that the imported goods were not utilized for the specified purpose and the Appellant in connivance with M/s Amulya Exports and M/s Metalman Industries, made attempt to falsify the books of accounts by making illusory entries related to purported financial transactions. This has been allegedly done to establish that the conditions of licence were fulfilled by it. The goods were imported against non-transferable licence and the goods were under obligation not to be sold. M/s MIL has not utilized the goods in any further manufacturing activity. The licences were sold un-authorizely to M/s MIL by gaining a premium. The licences were illicitly used by M/s MIL to procure goods from M/s Amulya Exports. The goods were not used by the supporting manufacture i.e. M/s MIL in any further manufacturing activity for possible conversion into resultant product, in as much as, no records were produced by M/s MIL, showing receipt and utilization of such goods in the manufacture of finished goods on job work basis or indicating its clearances on payment of duty. Thus, the exemption from custom duty is not available to Appellant, due to non-fulfillment of conditions of relevant notifications/ scheme under the TPS. That by adopting such practice, the Appellant has collided with M/s AEL and M/s MIL in diverting the said imported goods as such, without utilizing for the intended purpose, for which those were imported. That in order to circumvent payment of dues, the books of accounts was manipulated/ fabricated, showing un-authorized transfer/ sale of TPS licence. Accordingly, the SCN proposed to confirm the Customs duty demand of Rs. 1,44,89,822/- along with imposition of equivalent amount of penalty.

3. The said proposed demands were confirmed by the adjudicating authority, holding that as per the condition of the licence, the name of supporting manufacturer should be mentioned on the licence. The Appellant did not produce any contract for the job work entered into by them or the challan/documents detailing specification of job work to be carried out. The documents/title of goods i.e. invoices, L.R.s and record of receipt and disposal were not produced by the Appellant, which shows that the supporting manufacturer did not receive the goods, nor utilized such goods for conversion into resultant possible product. That the rate of Rs. 9,700/- per

MT for job work is unreasonable from the angle of value addition, as the purchase price was Rs.16,669/- per MT. The expression "Target Plus licence sale" and the money received is against sale of licence. The amounts paid by the Appellant to M/s AEL were rotated in accounts of M/s MIL. The imported goods have been sold in the open market as such, without following the conditions of the TPS Licence and the actual user condition was not followed. That such arrangement was made to circumvent payment of duty. Feeling aggrieved with the impugned order, the Appellant has filed this appeal before the Tribunal.

4. Sh. Manish Saharan, the ld. Advocate appearing for the appellant has referred to the various correspondences exchanged between the Appellant and M/s AEL and that between M/s MIL and the Appellant. The documents include the appointment letter dated 27.01.2007 of M/s MIL as job worker and later on, appointing him as consignment agent for sale of finished goods. Those documents were also submitted before the investigating officers during the investigation itself, forming part of relied upon documents. Further, vide letter dated 12.02.2007, addressed to the Assistant Commissioner of Customs, SEZ, the appellant had requested for endorsement of name of job worker M/s MIL, since the goods were to be sent to them for job work and cenvat credit was to be availed by M/s MIL. He also submits that the accounts pertaining to transaction of job work, freight for transportation and sale of

finished goods by M/s MIL on behalf of Appellant were also furnished to the officers and the said fact has not been denied by the Revenue. He submits that the allegations in the show cause notice and the findings recorded by the Adjudicating authority based upon such allegations are contrary. That at the one hand the Show cause notice and the impugned order states that the licences were sold by the Appellant and on the other hand, it states that the goods were diverted in the open market. That if the licences were sold by the Appellant, then in that case, there was no question of sale of goods in open market. The chain of correspondences and records clearly show that the goods were used for the intended purpose. That the Revenue has relied upon financial accommodation that first the payment was made by M/s MIL to appellant and then Appellant to M/s Amulya. He submits that the manner of payment cannot be a ground to hold the sale of licence or diversion of goods. That the reliance placed upon job work charges cannot be a ground for making allegation against the Appellant as the same was on commercial level and Revenue has not pointed out as to how the charges are not correct. There are no evidence that M/s MIL diverted the imported goods, as extensive investigation was made and not a single buyer of diverted goods were found. The show cause notice and the adjudicating authority have not provided single evidence to substantiate the charges. No statement of any person or transportation or money receipts is there, which can show that the imported goods were diverted. He submits that the non-maintenance of job work accounts by the job worker cannot be a ground to demand duty from the Appellant. That the goods after job work, were cleared by M/s MIL on payment of duty. The goods were sold M/s Metalman, being their consignment sale agent and provided them all the invoices of sales and sell Pattis. That the Revenue has not denied any of the fact that the goods were sold on behalf of Appellant by M/s MIL in open market. The Revenue is relying upon manner of financial transaction between Appellant and M/s AEL and M/s MIL, which are of no consequence, as the facts and records clearly show that the imported goods were subjected to the job work and were cleared thereafter on behalf of Appellant. He also submits that at the time of import of goods, there was no provision of mentioning the job worker/supporting manufacturer's name on licence. The goods were imported in 2006 – 07, whereas the provision of endorsement of name of job worker in the licence came into effect only vide DGFT Public Notice dated 06.02.2008 and 15.02.2008. It was decided to get the job work done and hence, the request for endorsement was filed. The Bill of Entry could not be produced, on the ground that there were no provisions to endorse the same. It is undisputed fact that the goods were consigned to M/s MIL and that the finished goods were not manufactured from any other raw material. That Revenue has nowhere doubted the sale of goods by M/s MIL in capacity of consignment sale agent of Appellant. The sale price of goods manufactured from imported goods has not been doubted. There is no investigation that the licence or the goods were transferred. From the chain of correspondences, the facts of job work of imported goods and their sale is absolutely clear. From the list of vehicles furnished by M/s AEL for transportation of goods to M/s MIL, it transpires that each of the vehicle number was mentioned on delivery challan, which was seized from the Appellant. He submits that the following facts are undisputed:

(i) the goods were imported against licences.

(ii) The Show Cause Notice does not object to the fact that the sale of the goods is incorrect.

(iii) There is no allegation that the goods after importation were diverted elsewhere or used for any other purpose.

(iv) the records clearly shows that such transactions are not fake.

(v) The sale Parties i.e sales details provided by M/s MIL to Appellant for sale are not fake. In that case it is no doubt about the fact that the actual user condition has been followed.

(vi) The Appellant applied for endorsing Bill of Entry in name of MIL as job worker which is not denied by the department.

(vii) If at all there is any discrepancy in record of MIL or there is any transfer of fund between MIL and AEL it does not affect facts.

(viii) If entry of goods being job work has not been done by MIL it does not mean the goods were diverted.

(ix) No inculpatory statement of any person related with the Appellant or any employee of M/s MIL and M/s AEL. Further Shri Pandya, employee of MIL in his statement has clearly stated the facts.

(xi) Statement of Shri Manohar Singh Rana, Manager Excise of M/s MIL was recorded wherein he stated that goods are also procured from SEZ and MS / SS Slabs (Steel Slabs) are sent for conversion into plates on Jobwork basis to jobworker M/s Bhanu Iron & Steel Co. Ltd., Pithampur.

(xii) There is no charge in the Show Cause Notice that the goods cleared by M/s MIL on behalf of Appellant were sold on prices less that market price or that the goods cleared by M/s MIL cannot be manufactured from imported goods or that such goods were manufactured from any other imported goods. The letter dt. 23.02.2007 of Appellant to M/s MIL regarding receipt of sale details and to send copy of each invoice, details of VAT paid including the name of Bank Cheque details and name of sales tax office where the amount has been deposited shows the facts.

(xiii) The Financial transactions on principal to principal basis. There is no condition in licence or customs laws as how the transactions were to be made.

(xiv) There is no statement of transporters that the goods consigned from M/s AEL, SEZ were taken elsewhere other than M/s MIL.

(xv) There is no allegation that the goods sold by M/s MIL on behalf of the Appellant were not manufactured from the subject imported goods.

5. He submitted that in view of such factual positions, it is clear that the goods were utilized as stipulated in TPS Licences and there has been no violation of the condition of the licence. He prayed for setting aside the impugned order.

6. *Per contra*, Shri Yogesh Agarwal, the ld. DR for the Revenue supported the impugned order and further submitted that no contract/ agreement for job work between Appellant and M/s Mil was produced and no records of job work was kept by M/s MIL. That the documents of disposal of goods by M/s

MIL were not produced. The licence was not endorsed for mentioning name of supporting manufacturer. The rate of job work of Rs. 9700/- per MT was quiet unreasonable looking to the import value of Steel slabs of Rs. 16669/- per MT. The expression "Target Plus sale" entered in ledger account of the Appellant against the receipt of Rs. 85 lakhs from M/s MIL actually means sale of Target Plus licence. The imported goods could not be loaned, sold, transferred or disposed off in terms of policy. From the above fact, it is clear that the goods were sold in open market as such, without following the conditions/ provisions of TPS licence. M/s AEL have indulged in manipulation of accounts, which is evident from the financial flow back of money in the accounts of M/s MIL related to such transactions. M/s MIL and M/s AEL have facilitated in illicit diversion of goods as such, without undertaking any further processing thereupon and aided purported transactions through their accounts.

7. We have heard the ld. Counsel for both the sides and perused the records and written submissions filed by them.

8. We find that the demand has been confirmed and penalties imposed on the ground that the steel slabs under Target Plus licences were diverted in the open market by the Appellant and were not used for the intended purposes i.e. further manufacturing. The reliance has been placed upon non-production of job work records by the supporting manufacturer

M/s MIL and that the licence did not have endorsement of the name of the supporting manufacturer. Further, the amount paid by the Appellant to M/s AEL towards purchase of M/s steel slabs was transferred by M/s AEL to M/s MIL. The ground was taken that the job work charges were unreasonable in comparison to the price of steel slab and that the Appellant record shows the receipt of Rs. 85 lakhs as against 'Target plus sale'. We find that the Appellant during the course of investigation, had produced copy of correspondence between it and M/s MIL towards job work of steel slabs and also the copy of letter, requesting the Assistant Commissioner, Customs for endorsement of name of M/s MIL as supporting manufacturer, so that M/s MIL can avail the Cenvat credit of such goods. We also find from the bunch of correspondences, which were submitted during investigation that the Appellant had appointed M/s MIL as consignment sale agent. Also the sale pattis containing details of sales and the details of buyers of goods were furnished to the officers. Further, we also find that even though allegation of diversion of goods has been made against the Appellant, but no investigation has been made as to where the goods were cleared or who are the buyers. None of the evidence which can show the diversion of goods has been brought on record. Though the non maintenance of job work record and transfer of payment made by Appellant to M/s AEL back to M/s MIL has been alleged, but the charges of diversion of goods cannot be substantiated on this ground alone. Further, there is no dispute about the vehicles used for transportation of imported goods from M/s AEL to M/s MIL and the clearance of finished goods from M/s MIL. The identity of the finished goods having been produced from imported raw-material has not been doubted by the authorities. Regarding job work charges of M/s MIL, except alleging that the same is not reasonable, no other evidence has been brought on record. We find that at the one hand, the allegation is made that the licence was sold by the Appellant and on the other hand, it has been alleged that the goods were diverted, which shows that the allegations against Appellant are themselves contradictory. No evidence has been adduced as to how the alleged diversion of imported goods took place and how the consideration for such alleged diversion was received.

9. The transactions were duly recorded in books of accounts of the parties. The documents show that the ownership of goods right from purchase of Steel Slabs from M/s Amulya, till its conversion into sheets and sale to the buyers, has remained with the Appellant. The sale details made available by the Appellant has not been disputed. We also find that the rule for endorsement of name of supporting manufacturer on licence came into effect only from February' 2008, whereas the consignment was imported in 2006 – 07 and therefore, could not have been made applicable in the present case. Further, it is not disputed that the goods were not consigned to M/s MIL by the Appellant for undertaking the job work activities. The

duty payment on converted goods manufactured from imported goods has not been disputed, nor is the clearances of such goods disputed. Revenue has not produced single instance that the imported goods were diverted elsewhere. There is no statement of any person or records from the Appellant or M/s MIL or M/s AEL, which can show that the goods were diverted elsewhere or that the goods were not used for intended purpose. The Director of the Appellant company had informed the investigating officers regarding the facts of the transaction and no inculpatory statement of any person is available on record. The transportation of imported goods to the job worker or the finished goods clearance from his premises is not in dispute. The financial transactions as recorded in books of accounts of M/s Amulya and MIL are also not disputed. The duty payment on such finished goods manufactured from imported goods is accepted by the Department. We find that in absence of any evidence of diversion of imported goods or dispute regarding the identity of finished goods manufactured from such imported goods, the demand against the Appellant cannot be sustained. The Revenue has also alleged that the job charges of Rs. 9,700/- are at the higher side, looking to the cost of steel slabs, which is Rs. 16,669/- per MT. We find that even after the sale of such goods, the Appellant was getting profit from sale of goods, which is evident from fact that the appellant continued with its existing business practice further. Otherwise also, assuming that the job work charges were higher, it is not the ground to show that the imported goods were diverted or the licence was transferred, which is the basic allegation for demand. Our above views are also based upon the judgment of Hon'ble Supreme Court in case of OUDH SUGAR MILLS Vs. UOI-1978 (2) ELT (J172) (SC) and the Hon'ble Punjab & Haryana High Court in the case of CCE, LUDHIANA Vs. RAKESH NAYYAR - 2010 (255) ELT 234 (P & H). Thus, when the procurement of imported goods against licence and clearance of finished goods has not been disputed, we do not find any reason to uphold the demand against the Appellant.

10. In view of above discussions and analysis, we are of the considered opinion that the impugned order passed against Appellant is not sustainable. Accordingly, after setting aside the impugned order, we allow the appeal in favour of the appellant.

[Pronounced in the open Court on 14/09/2017]

(V.PADMANABHAN)
MEMBER (TECHNICAL)

(S.K. MOHANTY)
MEMBER (JUDICIAL)

Anita