IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.
Principal Bench, New Delhi

COURT NO. III

DATE OF HEARING : 21/09/2017.
DATE OF DECISION : 18/10/2017.

Customs Appeal No. 51373 of 2017

[Arising out of the Order-in-Original No. ALW-EXCUS-000-COM-002-17-18 dated 01/05/2017 passed by The Commissioner of Central Excise, Alwar.]

M/s Moon Light Exim (P) Ltd. Appellant

Versus

CCE & ST, Alwar Respondent

Appearance

Shri B.L. Narsimhan, Advocate – for the appellant.

Shri Govind Dixit, Authorized Representative (DR) – for the Respondent.

CORAM: **Hon'ble Shri S.K. Mohanty, Member (Judicial)**
Hon'ble Shri B. Ravichandran, Member (Technical)

Final Order No. 57221/2017 Dated : 18/10/2017

Per. B. Ravichandran :-

The appeal is against order dated 01/05/2017 of Commissioner of Central Excise, Alwar. The appellants are engaged in the manufacture and export of recycled non-ferrous and ferrous metals. They were registered as 100% EOU and are having private bonded warehouse. The appellants availed the benefit of Notification 53/1997-CUS dated 03/06/1997 on imported goods for the purpose of manufacture of articles for export out of India. The appellants imported goods valued at Rs. 3,85,36,338/- and claimed exemption of Customs duty to the extent of Rs. 2,05,59,822/-. Proceedings were initiated against the appellant to demand and recover Customs duty forgone, on the ground that they have not fulfilled the condition of the above said notification as they have failed to export goods in terms of the LOP given to them and bond executed. The show cause notice dated 22/10/2008 was adjudicated by the Commissioner vide order dated 22/11/2011. The Original Authority held that the appellant is liable to pay Customs duty of Rs. 2,05,59,822/-. He also imposed equivalent amount of penalty under Section 112 (a). The goods imported by availing concession under Notification 53/1997-CUS were ordered to be confiscated with the permission to redeem on payment of Rs. 25 lakhs in terms of Section 125 of the Customs Act, 1962. The appellant filed appeal against this order, which was decided by the Tribunal vide final order No. 54591 of 2016 dated 28/10/2016. The Tribunal remanded the matter back to the Original Authority with the following observation :-

> "9. The impugned order has not given the proportionate benefit of the exports made by the appellant though it is a fact that their net foreign exchange earnings are not positive. However, considering the contents of Circular No. 29/2003-Cus dated 3.4.2003 issued by CBEC [its clause 7 (vii)] and considering Condition 3 (d) of notification No,

52/2003-Cus dated 31.3.2003 (though this notification was issued rescinding the notification No. 53/1997-Cus.) and considering the CESTAT Bangalore decision in case of CC Vs. Natural Stone Exports Ltd (supra) and CESTAT Delhi decision in the case of Nikhil Industries Pvt. Ltd. (supra) and CESTAT Mumbai decision in the case of Mavi Industries Ltd. (supra), we are of the considered view that the appellant is entitled to the proportionate benefit of exports made against which they claim to have realized the foreign exchange. The impugned order did not give the assessee appellant the benefit of exports saying that they did not produce any documentary evidence showing realization of export proceeds. The duty liability against the appellant is only to the extent of the gap between the foreign exchange realised on the exports made and the foreign exchange outgo for the imports made by the appellants as per the clarifications in the Circular No. 29/2003-Cus. (supra) and the contents of the Notification No. 52/2003-Cus. referred above.

10. We find that the impugned order has also ordered confiscation of the raw material for which redemption fine of Rs. 25 lakhs has been imposed under Section 125 of Customs Act. There is no need of any confiscation of the goods if the assessee has used the said goods for manufacturing export goods. But for the remaining goods which were not used for manufacturing export goods they are liable to make payment of customs duty foregone on account of duty free imports allowed to them as an EOU in terms of Notification No. 53/1997-Cus and the relevant bond filed by the appellant.

10.1 The impugned order also imposes penalty equivalent to the demand of Customs duty confirmed amounting to Rs. 2,05,59,822/-. In the light of above findings and discussions, this penalty is also liable to be set aside.

10.2 As per above discussion, we are holding that liability of duty against the appellant would be limited to the gap between the foreign exchange outgo for the imports and the foreign exchange earned on account of exports made. To hold the assessee liable for the duty foregone in case of all the imports is illogical, which is clear from the contents of the Notification 52/2003-Cus. (supra) and the case laws cited above ; and it naturally flows that the appellant is entitled to the proportionate benefit of the exports made and foreign exchange realised though for which they had not produced the documentary evidence before the adjudicating authority.

11. Considering the above discussions and the case laws cited the impugned order is hereby set aside and the matter is remanded back to the Commissioner, Central Excise, Jaipur-I who shall decide it afresh in the light of the findings made above within four months of receipt of this order after giving opportunity of personal hearing and that of production of necessary evidence/documents. Misc. application is also disposed of".

2. The case was re-adjudicated resulting in the impugned order. The Commissioner again confirmed the demand of Customs duty of the above-mentioned amount and imposed equivalent amount of penalty under Section 112 (a). However, he did not order for confiscation of the goods.

3. Contesting the above findings in the denovo proceedings, the learned Counsel for the appellant submitted on the following lines :-

(a) impugned order traveled beyond the scope of remand directions of the final order dated 28/10/2016 of the Tribunal. Instead of restricting the demand of Customs duty to the gap between foreign exchange outgo for the imports and the foreign exchange earned on account of exports made, the Original Authority again examined the scope of applicability of notification and the implication of exim policy etc. In fact the Original Authority again determined the eligibility of the appellant to claim proportionate benefit of the exports made. This is legally untenable ;

(b) the Original Authority held that the documents produced were not sufficient in the absence of originals and also raised doubt regarding genuineness of certain documents. If opportunity was provided, the appellant would have produced all the required supporting evidence and also dispelled any doubts about authenticity of these documents. The Original Authority should have examined the contemporaneous documents submitted by the appellant even if in some cases the originals were not submitted ;

(c) The Original Authority acted contrary to settled position of law that FOB value of exports will include deemed exports. The Tribunal in the case of **Shree Rohini Enterprises vs. CCE – 2017 (346) E.L.T. 461 (Tri. – Ahmd.)** maintained by the Hon'ble Apex Court at **2017 (346) E.L.T. A137 (S.C.)** held that value of deemed export is also to be taken into account for determination 50% of the FOB value of goods which will be permitted to be sold in DTA. Reliance was placed on various other decisions on this issue ;

(d) the show cause notice did not at all allege anything about the process undertaken by the appellant being not amounting to manufacture. This issue has been discussed in the impugned order which is beyond the proposal made in the show cause notice. Even otherwise it is clear that all DTA clearances were made on payment of applicable Central Excise duty with the approval/supervision of Central Excise authorities. In such situation, there is no question of now disputing the process and duty paid clearances. Reliance was placed on decisions of the Tribunal and also Circular dated 06/05/1997 of the Board ;

(e) admittedly, the fact of import of all materials and use of such materials for specified purpose are in the knowledge of the Department. In the first order-in-original the Commissioner has given a categorical finding to the effect that the appellants maintained all statutory returns and records and filed the same with the Jurisdictional Authorities and there was no suppression on their part. Once the Original Authority categorically held that the appellants maintained all records and submitted quarterly progress report and annual report with the Jurisdictional Excise authorities, the question of invoking extended period does not arise. Accordingly, no penalty also can be imposed on them. In fact, the penalty imposed on them is clearly held liable to be set aside by the Tribunal in the remand direction. In the denovo proceedings, the Original Authority ignoring the directions of the Tribunal again imposed penalty by reproducing the findings of the first adjudication order.

4. The learned AR contested the grounds of appeal. He submitted that the appellants did not establish the exports with clear supporting evidence. These evidences are to be filed to the satisfaction of the Adjudicating Authority and if called for the original records are required to be filed. The Commissioner did not act contrary to the directions of the remand order of the Tribunal. In the written submission, the learned AR stated that the Original Authority examined the remand order of the Tribunal and since the matter has to be decided afresh, proceeded to examine all evidences and to pass a fresh order. The remand is a open remand and no restriction was placed on the Original Authority in deciding the issue afresh. Further, relying on certain case laws, the learned AR submit that the remand direction should be clear, precise and not ambiguous and confusing. Given the facts of the case, it is submitted that the Original Authority has acted within his powers in re-deciding the case.

5. We have heard both the sides and examined the appeal records carefully. The remand directions of the Tribunal were reproduced earlier in this order. On a close examination of the present impugned order, we are clear that the Original Authority passed the order in respect of certain aspects showing indifference, if not defiance, towards the remand directions of the Tribunal as contained in the final order dated 28/10/2016. One apparent thing which is clear is that in para 10.1 of the final order, the Tribunal categorically held that the penalty is also liable to be set aside. The reasons are also recorded in the order.

The Original Authority in the remand order (para 32) verbatim reproduced para 33 of the earlier impugned order and proceeded to impose same amount of penalty. It is clear that the remand directions are not complied with in this aspect.

6. Further, we are not in agreement with the submissions of the learned AR to the effect that the remand directions are for deciding the case afresh in all aspects. A plain reading of the final order of the Tribunal makes it abundantly clear that the only role for the Original Authority in re-deciding the case is to find out the duty liability against the appellant limited to the gap between the foreign exchange outgo for the imports and foreign exchange earned on account of exports made. This is clear from para 10.2 and in the concluding para 11 of the final order of the Tribunal. The remand direction clearly stated that the Commissioner "shall decide it afresh in the line of the findings made as above". We find no ambiguity or lack of clarity in such remand directions.

7. The impugned order had clearly traveled beyond the scope of show cause notice itself. There is no ground raised by the Revenue regarding the question of 'manufacture' with reference to the processes undertaken by the appellant. Even then the Original Authority elaborately discussed the provision of Section 2 (f) of Central Excise Act, 1944 and held that segregation of waste and scrap does not amount to manufacture in terms of Section 2 (f) of the Act. We hold that there is no basis or reason for the Original Authority to examine this aspect at all when there was

no allegation made in the show cause notice. Even otherwise we note that Board vide circular dated 06/05/1997 clarified that a broader view is called for in respect of interpretation of the provision of EOU notification and the exemption may not be restricted only to cases where "manufacture under Section 2 (f) of Central Excise Act is involved". We also refer to the decision of the Tribunal in **Unitech International Ltd. vs. CCE, Vapi – 2012 (281) E.L.T. 109 (Tri. – Ahmd.), Tirumala Impex vs. CCE, Visakhapatnam – 2010 (251) E.L.T. 240 (Tri. – Bang.)** and **Stone Age Ltd. vs. CCE, Jaipur – I – 2016 (342) E.L.T. 286 (Tri. – Del.)**. As such, there is no merit in the finding of the Original Authority on this account.

8. The Original Authority again, acting beyond the scope of remand direction, held that FOB value of exports will include only physical exports out of country and shall not include deemed exports. We note that this matter has come up before the Tribunal on many earlier occasions. In **Shree Rohini Enterprises** (supra) it is clearly held that EOU is entitled to make clearance to DTA. The value of deemed export is also to be taken into account for determining the FOB value to arrive at the quantum of sale to the domestic market. The Tribunal relied on various earlier decisions on the same issue. As such, we find no merit in the contrary findings recorded in the denovo order.

9. The only issue left for consideration is the non-submission of documents by the appellant in support of their claim for

export/deemed export. The Original Authority in the impugned order raised serious doubts regarding genuineness of certain documents submitted by the appellant. He recorded that the photocopies of documents submitted by the appellant are attested by the person of another company and also there were some over-writings and corrections on these documents. The learned Counsel for the appellant submitted that they have provided all the documents to the Adjudicating Authority. All the records were duly maintained by the appellants and the statutory records were also filed to the concerned authorities. They have submitted bank realization certificates, copies of challans evidencing payment of duty for DTA clearance against foreign exchange and statement showing details of all sales alongwith sample invoices. We find that in case of any doubt, the Original Authority could have referred to the concerned bank authorities to counter verify the genuineness of the documents. Further, the fact of export or DTA clearance against foreign exchange realization can also be collaborated by various other contemporaneous documents, which the appellant submits, will establish to the satisfaction of the Original Authority, the facts as claimed by the appellant.

10. In view of the above discussion and analysis, we set aside the impugned order and remand the matter to the Original Authority to comply with the directions as contained in the final order dated 28/10/2016 of the Tribunal. The Original Authority has to only determine the duty liability of the appellant which

should be limited to the gap between the foreign exchange outgo for the imports and foreign exchange earned on account of exports made. The Tribunal has already held that the appellant cannot be held liable for duty forgone in case of all the imports. Proportionate benefit of the exports made on foreign exchange realization should be allowed. What is needed is only verification of documentary evidence in this regard. We make it clear that the confiscation and penalty has already been set aside by the Tribunal in the final order, mentioned above.

11. The impugned order is accordingly set aside and the Original Authority is again directed to calculate duty liability, if any, of the appellant in accordance with the above observation.

(Order pronounced in open court on 18/10/2017.)

(S.K. Mohanty)
Member (Judicial)

(B. Ravichandran)
Member (Technical)

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