CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL REGIONAL BENCH AT HYDERABAD

Division Bench

Court – I

Customs Appeal No. 738 of 2012

(Arising out of OIA No. 02/2011 (G) (D) CUS dt.23.12.2011 passed by Commissioner of Customs, Central Excise & Service Tax (Appeals), Guntur)

Commissioner of Customs (Preventive)
Vijayawada ......**Appellant**
D.No.55-17-3, 2nd floor, C-14, Road No.2,
Industrial Estate, Krishna Dist., AP – 520 007

VERSUS

Dinesh Granite Exports
Pidathalagudipadu Village, Santhanutalapadu
Mandal, Prakasam Dist., AP – 523 225 ......**Respondent**

Appearance
Shri Sandeep Kumar Payal, AR for the Appellant.
None for the Respondent.

Coram:
HON'BLE MR. SOMESH ARORA (JUDICIAL)
HON'BLE MR. A.K. JYOTISHI, MEMBER (TECHNICAL)

FINAL ORDER No. A/30347/2024

Date of Hearing: 12.06.2024
Date of Decision: 06.08.2024

[Order per: A.K. JYOTISHI]

M/s Dinesh Granite Exports (hereinafter referred to as the Respondent) are a 100% EOU Unit. The Department, based on certain communications between the Respondent and the Department, came to the conclusion that the Respondent has not fulfilled the conditions of Notification No. 22/2003-CE dt.31.03.2003 in respect of procurement of indigenous goods without payment of duty and Notification No. 52/2003-CUS dt.31.03.2003 in respect of imported goods and are therefore liable to pay duty and also for penalty for availing exemption notification without fulfilling the conditions stipulated therein.

2. The Department alleged that when the Respondent unit was visited by the Range Superintendent on 31.12.2007, they did not find any capital

goods in the premises and certain consumables were also not found. The Department also alleged that Respondents had not informed regarding commencement of production, and not submitted any returns as required, etc. Subsequently, on verification of the rewarehousing register which is required to be maintained by the Respondent in respect of duty free import of capital goods, consumables, etc., as also for the indigenous goods, certain discrepancies were noticed and the unit was asked to clarify vide letter dt.03.03.2008. It was pointed out that they have not been able to explain regarding non-availability of goods vis-à-vis CT3 issued by the Department for procurement of the same. They recorded a statement of one Mr. Mohammed Gayaz, authorized agent for the Respondent on 30.12.2008, wherein he admitted about importation of capital goods and consumables, which were procured indigenously. However, the Respondents have not made any exports of goods manufactured in their company and in fact, they were making third party exports by procuring goods from M/s Veerabhadra Minerals Pvt Ltd. He also stated that production started in the month of May, 2005. However, due to some labour problem, etc., they had transferred the balance consumables as well as the capital goods to one M/s Veerabhadra Minerals Pvt Ltd, which is also a 100% EOU, under intimation to the Development Commissioner, VSEZ, Visakhapatnam as well as to the Assistant Commissioner of Customs & Central Excise, Nellore vide their letter dt.05.12.2007.

3. Thereafter, on the basis of records available, it was noticed that indigenous goods procured against CT3 without payment of duty amounting to duty foregone of Rs.24,40,895/-, and imported capital goods obtained without payment of duty under Notification No. 52/2003-CUS amounting to duty foregone of Rs.11,64,049/-, the Respondent had not given any intimation for receipt of these imported goods into the factory. It was clearly pointed out that the capital goods imported vide Bill of Entry No. 685590 dt.06.03.2008, were not found in the bonded premises during the visit of Range Staff on 02.09.2008. Therefore, they came to the conclusion that the Respondent had never installed both the machinery imported and procured indigenously, nor commenced any production, nor exported any goods and have not fulfilled the export obligation and hence, not achieved the positive Net Foreign Exchange (NFE) and thereby, contravened the provisions of Notifications 22/0223-CE & 52/2003-CUS.

4. On adjudication, the Adjudicating Authority observed that SCN was issued to the Respondent for non-achievement of positive NFE and since the competent authority i.e., DGFT, after imposing penalty of Rs.1 lakh, had regularized the same and granted further extension of EOU status for a further period of one year with a condition that Respondent should effect physical exports within a period of one year, which they have fulfilled in terms of certain documents submitted by the Respondents as well as letter dt.02.03.2011 from the Superintendent confirming that during the period September, 2010 to February, 2011, they had exported goods worth Rs.2.51 Crores and thereby achieved positive NFE for the said period. Therefore, he held that there was no contravention of provisions of Notifications 22/2003-CE & 52/2003-CUS and dropped the demand except for a small amount of Central Excise Duty of Rs.26,112/-. He also made observations that certain goods were transferred to other 100% EOU and therefore, it was only a procedural mistake. He has also gone through the contravention of provisions of condition 4(4b) of Notification 52/2003-CUS and condition 2(2b) of Notification 22/2003-CE.

5. Against the said order, the Department went in Appeal to the Commissioner (Appeals). The ground on which the Department went in Appeal is that the findings of the Adjudicating Authority with regard to non-contravention of provisions of Notifications 22/2003-CE & 52/2003-CUS is incorrect. The Department specifically alleged that the Adjudicating Authority has not given findings on non-achievement of positive NFE during the period 15.05.2005 to 30.04.2010, charge of non-installation of capital goods, charge of non-usage of imported and indigenously procured goods which resulted in non-production and non-fulfillment of export obligation. It was the case of the Department that the Respondent had committed gross violation by resorting to removal of goods illicitly, by not accounting for materials obtained free of duty etc., and in case of issues pertaining to non-achievement of NFE, Development Commissioner need to be consulted but not the ones like these where breach of provisions of warehouse and notifications have been alleged and that the Adjudicating Authority has erred by holding that the illicit removal of goods obtained without payment of duty as procedural lapse. The Commissioner (Appeals) has mainly relied on the fact that there is provision for removal of consumables and capital goods, both imported and indigenously procured, to another EOU in terms of

notification cited supra and that there is a clear finding that there was an intimation dt.05.12.2010 on record. Subsequent visits to the Respondent Unit on 31.12.2007 & 21.02.2008 were much after date of intimation i.e., 05.12.2007. He also noted that Appeal is silent on the fact whether the goods were available with M/s Veerabhadra Minerals Pvt Ltd, to whom the goods were repeatedly removed and that there is nothing on record which suggests that goods were removed before giving intimation, as was required under the provisions. Therefore, Commissioner (Appeals) rejected the Appeal filed by the Department against OIO dt.04.03.2011.

6. The Department is now in Appeal before this Tribunal against the OIA mainly on the following grounds:-

a) The Appellate Authority has erred in holding that "there was no contravention of provisions of Notifications 22/2003-CE & 52/2003-CUS as the assessee has fulfilled the stipulated conditions imposed by the Development Commissioner, VSEZ", in view of the fact that the notice is for the period 15.05.2005 to 30.04.2010, whereas, the Adjudicating Authority's findings pertain to fulfillment of conditions for extension of EOU status for further period of one year i.e., 15.05.2010 to 14.05.2011 in the block period of five years from 15.05.2010 to 14.05.2015.

b) The Development Commissioner has clearly held that Respondent had failed to achieve positive NFE during the period 15.05.2005 to 30.04.2010. Therefore, there is clear violation of Customs & Central Excise Notifications for the period 15.05.2005 to 30.04.2010.

c) The charges of non-installation of capital machinery, non-use of materials imported and indigenously procured, which resulted in non-production and non-fulfillment of export obligation, have not been dealt with by the Original Adjudicating Authority. These omissions have violated various conditions of notifications.

d) It is not merely a case of non-fulfillment of export obligation but clear breach of warehousing provisions by removing goods from bonded premises, etc., as also non-accountal of certain duty-free imported and indigenous goods.

e) There is a clear contravention of condition 4(4b) of Notifications 22/2003-CE & 52/2003-CUS in as much as the Respondents failed to maintain proper accounts of removal and receipt of goods. There is also violation of Para 2(2b) of Notification 22/2003-CE in as much as the Unit has transferred indigenously procured capital goods and consumables to other 100% EOU.

7. Learned AR reiterates the grounds for filing Appeal by the Department and relies on certain circulars issued by the Board in support of the demand under the facts of the case. They have also relied on the following case laws:-

a) Big Bags India Pvt Ltd Vs CC, Bangalore [2008 (228) ELT 400 (Tri-Bang)]
b) Ravish Kamath Vs CC, Bangalore [2009 (234) ELT 238 (Kar)]
c) Ravish Kamath Vs Commissioner [2016 (338) ELT A26 (SC)]

8. Nobody appeared on behalf of the Respondents. However, on record, we find that there is a letter dt.07.09.2023 from the Respondents furnishing certain documents pursuant to the observations and Order of this Tribunal dt.16.08.2023, where they were directed to produce certain documents.

9. The Respondents, in this case, were having a valid LOP and were required to manufacture and export certain quantity in terms of the said LOP. The case of the Department is that when they visited the Unit, they did not find any imported capital goods and certain consumables. Similarly, they did not find any indigenously procured materials in respect of certain CT3s issued to the Respondent from time to time by the Department. It is also on record that when they recorded the statement, the concerned person informed them that certain capital goods and consumables were transferred to another EOU i.e., M/s Veerabhadra Minerals Pvt Ltd. Admittedly, there is provision for transfer of capital goods, consumables, etc., to another EOU in terms of extant Export-Import Policy. There is nothing on record whether any further verification was conducted to find out as to whether these duty-free imported capital goods/consumables as well as indigenously procured materials, which were not found in the premises of the Respondent, were in fact lying in the premises of M/s Veerabhadra Minerals Pvt Ltd. Therefore, it is very obvious that in so far as the issue relating to non-accountal and

removal of duty-free capital goods and consumables, etc., is concerned, there is a clearcut violation as except for an intimation letter sent to the Development Commissioner, there is nothing on record to say that they had intimated about the procurement of the same and its installation or storage in the factory. The Department's contention that there was no intimation regarding commencement of production or receipt of these materials in respect of which CT3 certificates were issued has also not been effectively explained by the Respondents. Thus, in the totality of the facts, it is obvious that there was absolutely no communication regarding the receipt and installation of imported capital goods and usage of consumables. In fact, from the documents submitted by the Respondents, we find that in the annual progress report for the Unit, for the period 2010-11, the date of commencement of production is shown as 17.02.2009. Additionally, in that annual progress report, the Respondents have not shown any opening balance of imported capital goods including spares. These documents would indicate that there was no production prior to 17.02.2009 and the fact that there were no imported capital goods or raw materials, consumables, etc., in the premises prior to 01.04.2010.

10. We have also perused the Notifications 22/2003-CE & 52/2003-CUS, which are in the nature of exemption notifications, subject to fulfillment of certain conditions. These notifications clearly provides for execution of bond for proper accounts of receipt, storage and utilization of such goods in addition to achieving positive NFE and also to comply with other conditions stipulated in the notifications as well as in the foreign trade policy. On failure in terms of the said bond, they will be liable to pay on demand an amount equal to duty leviable on goods along with interest, etc. Therefore, when the facts have been clearly brought out by the Department in their Appeal before the Commissioner (Appeals) indicating that the Original Authority has not dealt with the matter in terms of violations of various provisions of notifications, they have merit on such grounds in as much as the Commissioner (Appeals) only dealt with two major issues. Firstly, he has found no evidence to the effect that the goods were available or otherwise in the premises of M/s Veerabhadra Minerals Pvt Ltd and secondly, that there was an intimation to the Development Commissioner as well as the Assistant Commissioner of Customs. We do not find any intimation to the Assistant Commissioner of Customs, however, from the response of the Assistant

Commissioner dt.10.12.2007, it could be presumed that he was also aware about the intimation dt.05.12.2007 whereby the Respondents had intimated about the transfer of certain capital goods to M/s Veerabhadra Minerals Pvt Ltd in terms of Para 6.13 & 6.15(b) of the Foreign Trade Policy. Further, even though on subsequent visit, which was on 31.12.2007, only 25 days after intimation, they noticed that there were no goods available in the Unit. There is also an interpretation that since the notifications and the Policy only provide for intimation for transfer of capital goods, consumables, etc., to another EOU, it does not amount to seeking prior permission for removal. However, in the facts of the case it is to be noted that there was a categorical response from the Department asking them not to remove goods vide their letter dt.10.12.2007. The Respondents have not brought anything on record to suggest as to when they had transferred these goods to M/s Veerabhadra Minerals Pvt Ltd and whether said facts were brought to the notice of Department when they received letter dt.10.12.2007.

11. We find that the whole issue is regarding non-accountal of certain goods, both imported and indigenously procured, supposedly procured by the Respondents in terms of various CT3s issued from time to time by the Department and non-fulfillment of certain conditions of the Notifications. One has to appreciate that both these notifications are self-contained exemption notifications and in order to avail the exemption from payment of Customs duty or Central Excise duty, the 100% EOU has to fulfill several conditions including achievement of positive NFE. In so far as the issue of NFE is concerned, the Department's case is that Respondents have not achieved positive NFE during the notice period but only subsequent to that. However, we find from the Order dt.18.05.2010 of the Development Commissioner submitted by the Respondent that non-achievement of positive NFE has been regularized by the competent authority on payment of penalty, subject to certain conditions and admittedly, those conditions have been fulfilled by the Respondent in the said period. Therefore, this ground is no longer in breach in so far as the conditions required to be fulfilled by the Respondent is concerned. Further, we find there are certain other conditions and especially various intimations like intimation for commencement of production, accountal of warehoused goods, movement of warehoused goods to another warehouse, non-accountal of utilization of capital goods, raw materials, consumables, etc., for which they had procured CT3 from the

Department. Thus, several issues which have bearing on admissibility or otherwise of the Notifications in respect of which the Respondents have claimed exemption have apparently not been fulfilled and thus, these factual aspects should have been examined in detail by the Commissioner (Appeals), based on the evidence adduced by both sides, when the Department preferred an Appeal before the Commissioner (Appeals) against the OIO. The case laws cited by the Department have been perused. In the case of Big Bags India Pvt Ltd (supra), there was evidence to suggest that Assessee was diverting the duty-free materials to local bonded warehouses, which has not been alleged in the present SCN, hence the facts are distinguishable. However, we find that if there is a clear case of non-fulfillment of condition for exemption notifications and there is an unauthorized removal of goods, then merely meeting export obligation cannot lessen the gravity of offense.

12. Therefore, we find that in the interest of justice, the Order of the Commissioner (Appeals) is required to be set aside and the matter is required to be remanded back to the Commissioner (Appeals) for examining all the conditions independently in respect of both the Notifications 22/2003-CE & 52/2003-CUS in the light of grounds cited by the Department and to come to the conclusion as to whether there is any breach of provisions of the notifications or otherwise warranting recovery of duty as well as imposition of penalty.

13. Appeal is allowed by way of remand to the Commissioner (Appeals).

(Pronounced in the Open Court on 06.08.2024)

(SOMESH ARORA)
MEMBER (JUDICIAL)

(A.K. JYOTISHI)
MEMBER (TECHNICAL)

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