IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH: KOLKATA

Appeal No.E/82/2008

(Arising out of Order-in-Original No.23/COM/CEX/HAL/07 dated 29/10/2007 passed by the Commissioner (Appeals), Central Excise, Customs and Service Tax, Bhubaneswar)

M/s. Ellenbarrie Exim Limited

….Appellant (s)

Vs.

Commissioner of Central Excise & Service Tax, Haldia

….Respondent (s)

Appearance:
Shri V. N. Dwivedi, Adv. for the Appellant (s)
Shri S.S. Chattopadhyay, Supdt. (A.R.) for the Revenue

CORAM:
HON'BLE SHRI P.K.CHOUDHARY, MEMBER(JUDICIAL)

Date of Hearing/Decision :- 18.07.2018

ORDER NO: FO/77250/2018

PER CORAM

The facts of the case in brief are that the appellant is an Exporter and is granted a certificate of "Status Holder" by the Licensing Authority being the office of Zonal Joint Director of Foreign Trade, Kolkata. On 31st March, 2003, The Central Government, Ministry of Commerce, through 2003 Edition of Exim policy 2002-2007 introduced a Duty Free Credit Entitlement (DFCE) Scheme to accelerate growth in exports by rewarding star export houses, who had achieved a quantum growth in exports. High performing star export houses were entitled for duty free credit based on incremental exports, substantially higher than the general annual exports target fixed. The DFCE was issued to the appellant for quantum growth in Financial Year 2003-04 over the Financial Year 2002-03 at the prescribed rate. Vide Notification of Customs bearing No. 53/2003-CUS dated 01.04.2003, the Holder of DFCE Certificate was entitled to import goods which were exempted from payment of :-

i) Whole of duty of customs leviable under First Schedule of Customs Tariff Act, 1975;

ii) Whole of Additional Duty leviable under sub Section (1) of Section 3 of Customs Tariff Act, 1975;

iii) Whole of the special duty leviable under Section 3A of the Customs Tariff Act, 1975;

2. The Government of India, Ministry of Commerce, through DGFT New Delhi, issued a notification bearing No. 6(RE-2005) 2004-2009 dated 04.06.2005 inter alia providing that additional duty of Customs paid in cash or through debit under DFCE Certificate, shall be adjusted as CENVAT Credit or duty drawback as per Rules framed by the Department of Revenue. The appellant imported non-alloy steel wire rod as inputs purchased by them from M/s. Sesa International Ltd., and for this importation they have debited the additional duty of customs leviable under Section 3 of the Customs Tariff Act from the credit balance in the Certificate issued by the DGFT under the DFCE scheme and used this input for manufacturing their finished goods viz. Non Alloy Steel wire, M.S. wire etc. The Show Cause Notice dated 7.11.2006 was issued alleging taking of irregular credit of customs duty paid through DFCE Certificate from October, 2005 to December, 2005. The Show Cause Notice also alleged clandestine removal on

account of shortage. The Adjudicating Authority confirmed the Cenvat duty of Rs. 1,66,79,418/- . Cenvat Duty amounting to Rs. 1,75,978/- was ordered to be recovered and since the amount already stood debited vide Cenvat Credit Account only at Sl. No. 15 dated 28.8.2016, the same was appropriated. Penalty was imposed under Section 11AB read with Rule 15 of the Cenvat Credit Rules 2004 and Rule 25 of the Central Excise Rules 2002. Hence, the present appeal before the Tribunal.

Revenue has filed cross objection.

3. Heard both sides and perused the appeal records.

4. We find that on 01.04.2003, the Central Government, through the relevant exim policy 2002-07, introduced DFCE scheme to accelerate growth in exports by rewarding star export houses, who had achieved a quantum growth in exports and the appellant company having received the quantum growth was granted DFCE Certificate. By Notification No. 6(RE-2005)/2004-09 dated 4.6.2005 issued by the DGFT, New Delhi, Central Government, para 3.7.2.1. after notes 7 in the exim policy 2002-07 as amended which reads as follows:-

Note 8 : CENVAT/ Drawback : Additional Customs duty/excise duty paid in cash or through debit under the DFCE entitlement certificate shall be adjusted as CENVAT credit or Duty Drawback as per rules framed by the Department of Revenue.

5. On 17.11.2005, the Department of Revenue by its notification no. 97/2005-CUS dated 17.11.2005 amended Notification No. 53/2003-CUS dated 1.4.2003 in accordance with the provision of policy by inserting Condition No. 7 to allow Cenvat credit in respect of additional duty paid them DFCE Certificate. On 13.10.2006 the Department of Revenue by its Circular bearing No. 27/2006-CUS issued clarification regarding availment of CENVAT Credit of additional Customs Duty paid through DFCE Scheme/TP Scheme certificates whereby it was clarified that the additional Customs duty paid in cash or through debit in certificates issued under DFCE/TP Scheme can be availed of as CENVAT credit or duty drawback under the existing Cenvat Credit Rules, 2004.

6. We observe that there is no dispute with regard to the amount of additional duty and education cess paid on the inputs. There is also no dispute regarding the receipt of the goods in the factory of the appellant and used in or in relation to the manufacture of final products, which were subsequently cleared on payment of Excise Duty. Section 5 of the Foreign Trade (Development and Regulation) Act, 1992, provided that the Central Government may, from time to time, formulate and announce by Notification in the Official Gazette, the export and import policy and may also in the like manner, amend that policy. **(upto above corrected)**

7. In the aforesaid provisions of the aforesaid acts, the Central Government by appropriate notification formulate and announce the exim policy 2002-07 and amend the same. Para 3.7.2.1 of the policy provided for DPC scheme and it was amended by notification No. 6(RE)/05/04-09 dated 4.6.2005, whereby Note-8 was inserted, which provided that additional customs duty / excise duty paid in cash or through debit under the DFCE entitlement certificate, would be adjusted as Cenvat credit as per rules framed by the Department of

Revenue. The Department of Revenue, by its circular dated 13,10.2006 clarified that Additional Customs Duties paid through debit in certificate issued under DFCE can be availed of as Cenvat credit. The relevant exim policy has a force of law and Adjudicating Authority should have considered the same before holding that Cenvat credit has to be availed and utilized on this strength of notification issued by CBEC. We also observe that the appellant has acted on the basis of and in terms of the notification issued by the Central Government through Ministry of Commerce and the appellant should not be penalized for the delay in issuing the customs notification in line or re-confirming and/or complementing the Notification issued by the DGFT. The CBEC was expected to re-confirm and/or complement issued by the DGFT simultaneously. However, the Customs notification came to be issued on 17.11.2005. In the mean time, the appellant paid additional customs duty through debit through DGFT and availed in part the Cenvat credit. CBEC through its clarification clarified that additional customs duty paid by debit should be payable as Cenvat credit. Such clarification came before passing of the impugned order. In our considered opinion the Notification dated 17.11.2005 amending the basic Notification 53/2003 is a classificatory Notification and should be applied from the date of DGFT Notification.

8. In view of the above dissuasion, benefit of credit should not be denied.

9. Regarding the shortage of 52.250 MT of goods, it was alleged to have been found short. It is the case of the appellants i.e. the shortage was due to difference arising on account of weighment on different

weigh bridges. Such quantity works out to be only 1.15% of the total quantity 7375 MT. We observe that such percentage of shortage is not made the goods having different calibrations.

10. On perusal of records we do not find any ingredient of mis-statement, suppression of facts etc., with an intent to evade payment of duty. Accordingly, no penalty is imposable under section 11AC read with Rule 15 of the Cenvat Credit Rules, 2004 and Rule 25 of the Central Excise Rules, 2002. The Cenvat credit of additional customs duty paid under TP Scheme from the date of its operationalization is allowed.

11. In view of the above discussions, it is our considered view, that the impugned order cannot be sustained and accordingly the same is set aside.

12.. The appeal filed by the appellant is allowed with consequential relief to the appellants. Cross Examination also gets disposed off.

(Dictated and pronounced in the open court.)

(P.K.Choudhary)
Member(Judicial)

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