

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

Customs Appeal No. 75085 of 2017

(Arising out of Order-in-Original No. KOL/CUS/PORT/68/2016 dated 06.12.2016 passed by Commissioner of Customs (Port), Kolkata.

M/s Vedika Metals Pvt. Ltd.,

201, Annapurna Building, Shyam Kunj Complex, 12A,
Lord Sinha Road, Kolkata-700071.

...Appellant (s)

VERSUS

Commissioner of Customs (Port), Kolkata.

Customs House, 15/1, Strand Road, Kolkata-700001.

..Respondent(s)

With

Customs Appeal No. 75086 of 2017

(Arising out of Order-in-Original No. KOL/CUS/PORT/68/2016 dated 06.12.2016 passed by Commissioner of Customs (Port), Kolkata.)

Shri Aditya Almal, Director

M/s Vedika Metals Pvt. Ltd., 201, Annapurna Building,
Shyam Kunj Complex, 12A, Lord Sinha Road, Kolkata-700071.

...Appellant (s)

VERSUS

Commissioner of Customs (Port), Kolkata.

Customs House, 15/1, Strand Road, Kolkata-700001.

...Respondent (s)

APPEARANCE :

Shri Saurabh Bagaria & Shri Indranil Banerjee, both Advocates for the Appellant

Shri S. Chakraborty, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. P. K. CHOUDHARY, MEMBER (JUDICIAL)

HON'BLE MR. K. ANPAZHAKAN MEMBER (TECHNICAL)

FINAL ORDER No...75836-75837/2023

DATE OF HEARING : 28th April, 2023

DATE OF PRONOUNCEMENT: 26th June, 2023

PER K. ANPAZHAKAN :

The Appellant is a merchant exporter and had exported Ferro Silicon (FeSi) during the period 2008-09 to 2011-12, under DEPB claims. The said

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export goods have been procured from the domestic market. Additionally, a small quantity had also been imported from Bhutan. In respect of all the goods, prior to export, the Appellant had undertaken manual processing by way of cleaning, cutting and re-sizing. After processing, the goods have been packed in bags and exported. After completion of exports, the Appellant had obtained 20 numbers of transferable DEPB scrips and thereafter sold them to different buyers.

2. A Show Cause dated 01.04.2014 was issued to the Appellant and the DEPB Transferees (Importers) alleging that FeSi exported during the relevant period had actually been imported from Bhutan. It was alleged in the Notice that the export incentives had been wrongly claimed by the Appellant as the goods exported were of Bhutanese origin and the Appellant had mis-declared them as Indian origin goods. Accordingly, 2169 Mt of FeSi valued Rs 13,72,95,276/- exported by the Appellant was proposed to be confiscated. The Notice also proposed penalties under Sections 114 and 114AA of the Customs Act, 1962, against the Appellant's Director Shri Aditya Almal. The Notice proposed to adjust the amount of Rs 63,40,305/- and interest of Rs 11,83,617/- paid by the Appellant during the course of investigation. 24 importers who had utilized the said transferable Scrips obtained from the Appellant were also made Noticees.

3. The Notice was adjudicated by the Commissioner of Customs (Port) vide Order-in-Original dated 06.12.2016, wherein he ordered confiscation of the 2169 MT of FeSi. As the goods were already exported, no redemption fine was imposed. He ordered appropriation of Rs 63,40,305/- and interest of Rs 11,83,617/- already deposited by the Appellant against undue export incentive availed by them. He also imposed penalties of Rs 6,00,000/- each on the Appellant and its Director Aditya Almal, under Section 114 and Rs 5,00,00,000/- each under Section 114 AA, on the Appellant and its Director.

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He dropped the charges against the 24 importers. Aggrieved against the impugned order, the Appellant and its Director Aditya Almal have filed the present appeals against the impugned order.

4. In their grounds of appeal, the Appellant and its Director made the following submissions:

(i) DGFT is the proper authority to take action against any DEPB license holder. The issue was referred to DGFT and they passed an order. Parallel action by the Commissioner of Customs on the same issue is bad in law.

(ii)The goods exported have been procured from the domestic market as well as some imports from Bhutan. However, In respect of all the goods, prior to export, they have undertaken manual processing by way of cleaning, cutting and re-sizing. After processing, the goods have been packed in bags and exported. After completion of exports, the Appellant had obtained 20 numbers of transferable DEPB Scrips and thereafter sold them to different buyers. Hence there was no mis-declaration by the Appellants.

(iii)The amount equivalent to import duties foregone due to imports made by different importers on the strength of the DEPB Scrips purchased from the Appellant, have been recovered from them along with interest.The Notice proposed to recover the duties foregone from different importers who used the Scrips for import. But, the adjudicating authority has appropriated the duties from the amount deposited by them. Thus, the impugned order has gone beyond the scope of the Notice.

(iv)The exports were completed during the period from 2008 to 2012 and the Notice was issued on 04.01.2014, without any seizure of goods.They has not suppressed any information from the department and hence, extended period cannot be invoked to demand the duties.

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(v) As per the Public Notice dated 05.11.2008 issued by DGFT, 'processing' can be done even on foreign origin goods and the same was permitted to be exported and incentives can be obtained.

(vi) They have declared the country of origin of the exported goods as 'India' since processing of the goods have been done in India. Hence there was no mis-declaration involved warranting penalty under Section 114 and 114AA of the Customs Act, 1962. Accordingly, the penalties imposed on the Appellants are liable to be set aside.

4. The Ld A.R reiterated the findings of the Adjudicating Authority in the impugned order.

5. Heard both sides and perused the appeal records.

6. We observe that the issues to be decided in these appeals are:

(a) Whether 2169 MT of FeSi exported by the Appellant are liable for confiscation?

(b) Whether an amount equivalent to import duties foregone due to imports made by different importers on the strength of the DEPB Scrip's purchased from the Appellant can be recovered from the Appellant along with interest?

(c) Whether penalties under Section 114 and 114AA imposable on the Appellant and its Director separately for the same offence?

7. We observe from the impugned order that the Appellant has exported FeSi under the claim of drawback/DEPB, declaring them as Indian origin. The department alleged that the exported goods were actually Indian origin. Hence, the department contended that the DEPB Scrips obtained by them are legally not tenable. Since the DEPB Scrip's were transferable, the Appellant sold them to 24 importers and they used the Scripts and imported goods. The department demanded the duty foregone on such imports from the Appellant and appropriated the amount of Rs 63,40,305/- and interest of Rs 11,83,617/- already deposited by the Appellant. Hence, the first issue to be decided here is

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whether the goods exported by the Appellant were of Indian origin or of Bhutan origin? We observe that the department has taken statements from the suppliers of FeSi to the Appellant. Five suppliers or traders who have supplied the FeSi to the Appellant stated that the FeSi supplied by them were of Bhutanese origin. The statements from the suppliers indicate that even the FeSi procured by them from Indian market were also originally imported from Bhutan. Thus, we find that the statements recorded from the suppliers clearly establish that the exported goods were of Bhutanese origin.

8. The Appellant contended that all the goods exported have undergone processing by way of cleaning, cutting and re-sizing, before export. After processing, the goods have been packed in bags and exported. However, we find that the Director Shri Almal in his statement dated 08.01.2013 admitted that the processes of cleaning, cutting, re-sizing and packing undertaken by them were not in conformity with the requirement of value addition to the tune of at least 25% of the DEPB value as required to change the country of origin. In his statement dated 08.10.2013, Shri. Almal stated that the size of FeSi imported from Bhutan was reduced manually by labourers and that no mechanical processing was carried out in their warehouse. It indicates that the exporter had no factory to undertake any mechanical processing to make any further value addition to the FeSi in terms of the conditions stipulated under the DEPB Scheme. We observe that the exporter has accepted their liability and deposited an amount of amount of Rs 63,40,305/- and interest of Rs 11,83,617/- even before issue of the Notice. Since the exports were made by declaring the country of origin as 'India', we observe that there is a misdeclaration in the country origin at the time of export. Accordingly, we hold that the confiscation of 2169 MT of FeSi in the impugned order is legally tenable.

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9. We observe that DGFT has issued Notice under Foreign Trade (Development & Regulations) Act, 1992 and passed an order dated 05/11.09.2014 and imposed a fiscal penalty of Rs.7,00,000. The adjudication and imposition of penalty of Rs 7,00,000/- by DGFT shows that the Appellant has accepted their mis-declaration. Thus, the issue to be decided here is whether penalty under section 114 and 114AA are imposable on the the Appellant and it's Director, for the same offence even after imposition of penalty by DGFT.

10. The Appellant stated that in respect of violations against DEPB Scheme, DGFT is the proper authority to initiate action. Once DGFT initiates action and impose penalty for the violations, then Customs cannot initiate separate action to impose penalty for the same violation. In support of this contention the Appellant cited the following decisions.

11. In the case of Gayson & Company (P) Ltd Vs Commissioner of Customs(Port), Kolkata, 2019 (370) ELT 1026 (Tri-Kolkata), it has been held as under:

12. In the case of M/s Blackstone Overseas Pvt Ltd, Shri Anand Prakash Gupta, Director Vs Commissioner of Customs (Port) Kolkata, 2018-TIOL-3905-CESTAT-KOL, it has been held as under:

13. We observe that the facts of the present case are similar to the decisions cited above. Accordingly, the said decisions are squarely applicable to the present case. Following the above cited decisions, we hold that the penalties imposed on the Appellant and its Director Aditya Almal under Sections 114 and 114AA are not sustainable. Accordingly, we set aside the penalties imposed under sections 114 and 114 AA on the Appellant and it's Director.

14. In view of the above discussion, we answer the questions raised in para 6 as below:

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(a) We hold that the 2169 MT of FeSi exported by the Appellant are liable for confiscation.

(b) An amount equivalent to import duties foregone due to imports made by different importers on the strength of the DEPB Scrips purchased from the Appellant can be recovered from the Appellant along with interest.

(c) Penalties under Section 114 and 114AA cannot be imposed on the Appellant and its Director separately for the same offence, since DGFT has already initiated action and imposed penalty for the same offence.

15. In view of the above discussion, we modify the order to the extent of setting aside the penalties imposed on the Appellant and its Director under section 114 and 114AA of the Customs, Act, 1962 and uphold the remaining part of the confirmations in the impugned order. The Appeals are disposed in the above terms.

(Pronounced in the open court on...26th June, 2023.....)

Sd/-

(P. K. Choudhary)
Member (Judicial)

Sd/-

(K. Anpazhakan)
Member (Technical)

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