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

Customs Appeal No. 76056 of 2016

(Arising out of the Order-in-Original No. CC (P)/BBSR/CUS/No.38/COMMISSIONER/2016 dated 31.03.2016 passed by Commissioner of Customs (Preventive), Bhubaneswar.

M/s Paradeep Phosphates Ltd.,
Bayan Bhawan, Pt. Jawaharlal Nehru Marg. Bhubaneswar-751001.

...Appellant (s)

VERSUS

Commissioner of Customs (Prev.), Bhubaneswar.
C. R. Building, Rajaswa Vihar, Bhubaneswar.

. ...Respondent(s)

APPERANCE :
Shri Jnanesh Mohanty & Sri Shreya Mundhra, both Advocates for the Appellant
Shri Faiz Ahmed, Authorized Representative for the Respondent

CORAM:
HON'BLE MR. ASHOK JINDAL MEMBER (JUDICIAL)
HON'BLE MR. K. ANPAZHAKAN MEMBER (TECHNICAL)

FINAL ORDER No.....76007/2023

DATE OF HEARING : 20.06.2023
DATE OF DECISION : 20.06.2023

PER K. ANPAZHAKAN :

The Appellant is engaged in the manufacturing and marketing of DAP/NPK Fertilizer, in their factory located at Paradeep, Odisha. The factory of the Appellant consists of Sulphuric Acid Plant, Phosphoric Acid Plant, Captive Power Plant and Di-Ammonia Phosphates (DAP) Plant. All the three plants are integrally connected to each other and involved in the process of manufacture of fertilizer.

2. The instant appeal was filed by the Appellant challenging the impugned order dated. 31.03.2016, imposing CVD & SAD, on the quantity of imported Sulphur, which was not used in manufacture of fertilizer, invoking extended period of limitation, under Section 28 of the Customs Act, 1962 (in short the Act) and consequent imposition of penalty under Section 114A of the said Act.

The Appellant also challenged confiscation of imported goods under Section 111(o) and imposition of redemption fine under Section 125 of the Act.

3. The dispute has arisen, consequent upon an investigation initiated by DRI, resulting in re-assessment of Bill of Entry, under which Sulphur was imported by the appellant for manufacture of fertilizer. Sulphur falling under Chapter 25030010 of the Customs Tariff Act, 1975 attracts "Nil rate of 'CVD' and 'SAD', in terms of Notification No. 4/2006-CE dated 01.03.2006 and Notification No. 20/2006-CUS dated 01.03.2006, respectively, as amended.

4. In the present case, the Appellant imported sulphur and used the same in the manufacture of sulphuric Acid, which in turn, was used in the manufacture of fertilizer. However, due to the disruption in manufacturing process and storage constraints, a small quantity of Sulphuric Acid manufactured out of the imported Sulphur, was cleared to certain customers in the domestic market, on payment of appropriate central excise duty. Such clearance was duly reflected in the statutory ER-I returns filed by the Appellant and other Central Excise records which have been audited by the department at periodical intervals.

5. A Show Cause Notice dated 08.07.2013 was issued by DRI, invoking extended period of limitation, under the provisions of Section 28(4) of the Customs Act, to recover the proportionate CVD and SAD, on Sulphur contained in the Sulphuric Acid, used for the purposes other than manufacture of fertilizer. The Notice was adjudicated by the Commissioner, vide the impugned order dated 31.03.2016, confirming CVD and SAD amounting to Rs.1,23,42,183/- along with interest under Section 28AB/28AA of the Act, besides imposition of equal amount of penalty, under Section 114A, along with redemption fine of Rs.2.00 crores, in lieu of confiscation under Section 125 of the Customs Act, 1962.The present appeal is against this impugned order.

6. In their submissions, the Appellant stated that imported Sulphur has been used in the manufacture of sulphuric acid, which is an intermediate product, for manufacture of fertilizer, the ultimate finished product. The entire imported quantities were stored in 4 nos. of Tanks from which the materials were continuously fed to the manufacturing process of fertilizer. However, at times under unforeseen situations like disruption of manufacturing process, they have cleared the said intermediate product, to indigenous customers, against payment of central excise duty / execution of Bond etc.

7. During the period from April, 2007 to march, 2013, they have sold 25165.450 MT of Sulphuric Acid in the market and the Sulphur content in the total sulphuric acid removed for the purpose other than for manufacture of fertilizer, was only 0.66% (8304.265 MT) of the total sulphur imports, which is quite negligible. Sulphuric Acid was cleared from the factory on payment of appropriate duty of central excise, which was reflected in the monthly ER-1 return, filed by them under Rule 12 of the Excise Rules, 2002.

8. According to the department the Sulphur which was used in manufacture of fertilizers only qualifies for exemption, under Sl. No. 3 of Notification No 4/2006-E dated. 01.02.2006. But, the Sulphur used for the purposes other than manufacture of fertilizer or for manufacture of sulphuric acid sold in market, is not eligible for exemption and chargeable to CVD & SAD at applicable rates.

9. The Appellant sated that they have fulfilled the requirement of the said Notification, in as much as, the goods imported, were procured for manufacture of fertilizer. The 'intended use', was only for manufacture of fertilizer and a small quantity, was sold to outside customers, which constitute only 0.66% (8304.265 MT) of the total sulphur imports. In support of the stand regarding the expression "for use" means "intended to use" as incorporated in the notification, the Appellant relied on the decision on the

case of State of Haryana Vs. Dalmia Dadri Cement Ltd. 2004 (178) ELT-13 (SC), wherein the Hon'ble Supreme Court has held that the phrase "for use" means "intended for use", and not actually used. The relevant extracts of the judgment is reproduced below:-

> "10. We are unable to accept the submission of Mr. Bana that, in order to get the exemption it must be show that the goods in question, namely, the cement supplied y the assessee in this case was actually used I the generation or distribution of electrical energy. It must be noted that the important words used in the relevant provisions are goods for use by it in the generation or distribution of such energy (emphasis supplied by us). On a plain regarding of the relevant clause it is clear that the expression "for use" must mean "intended for use". If the intention of the legislature was to limit the exemption only to such goods sold as were actually used by the undertaking in the generation and distribution of electrical energy, the phraseology used in the exemption clause would have been different as, for example, "goods actually" used or "goods used".

12. The appellant also relied on the judgement of the Hon'ble Supreme Court in case of BPL Display Devices 2004 (174) ELT-5 (SC) wherein it has been held as under:

> "2. This appeal must therefore be necessarily allowed. We are of the view that no material distinction can be drawn between the loss on account of leakage and loss on account of damage. The words "for use" used in similar exemption Notifications have also been construed by this Court earlier in the State of Haryana Vs. Dalmia Dadri Cement Ltd, 1987 (Suppl) SCC 679 to mean 'intended for use'. According to this decision the object of grant of exemption was only to debar those importer/manufacturers from the benefit of the Notifications who had diverted the products imported for other purposes and had no intention to use the same for manufacture of the specified items at any stage.

13. The Appellant stated that imported goods were always intended for manufacture of fertilizers only. Hence, in view of the principles of law decided

by the Hon'ble Supreme Court (Supra), the importer has rightly availed the exemption of CVD and SAD under the Notifications.

14. Regarding invocation of extended period, the Appellant stated that the extended period of limitation in terms of Section 28(4) can be invoked for recovery of duties not levied or short levied, on account of suppression of fact, willful mis-statement, fraud, collusion etc., on the part of the importer. Similarly, penal provision under Section 114A can be invoked, where the above ingredients are present. However, in the present case, at the time of importation of Sulphur by the Appellant in bulk, it cannot be visualized / ascertained, as to how much quantity, will be used in manufacture of Sulphuric Acid, cleared in the domestic market, so that duty on such quantity of Sulphur would be paid by the Appellant. Therefore, the entire quantity of imported Sulpur was taken clearance at 'Nil' rat of duty. Due to storage and other constraints, the Appellant was compelled to clear Sulphuric Acid, in the domestic market. The said clearance of Sulphuric Acid, were made under the cover of excise invoices, on payment of appropriate central excise duty. In such a situation, no charge of suppression or willful mis-statement and fraud etc., can be alleged against the Appellant, accordingly extended period of limitation cannot be invoked in this case.

15. The Ld. A.R. reiterated the findings of the adjudicating authority in the impugned order.

16. Heard both sides and perused the appeal records.

17. We observe that Sulphur was imported by the appellant for manufacture of fertilizer. Sulphur attracts "Nil rate of 'CVD' and 'SAD', in terms of Notification No. 4/2006-CE dated 01.03.2006 and Notification No. 20/2006-CUS dated 01.03.2006, respectively, as amended, when it is used for manufacture of fertilizer. It is a fact on record that during the period from April, 2007 to March, 2013, the Appellant have sold 25165.450 MT of Sulphuric Acid in the

domestic market. The contention of the department is that the Sulphur content in the said quantity of Sulphuric acid cleared in the domestic market are not eligible for the above said exemptions. The Sulphur content in the total quantity of sulphuric acid removed for the purposes other than for manufacture of fertilizer works out to 8304.265 MT, which accounts for 0.66% of the total import of Sulphur made by the Appellant. Hence, this quantity of Sulphur which was not used in manufacture of fertilizers does not qualify for the exemption, under Sl. No. 3 of Notification No 4/2006-E dated. 01.02.2006 and chargeable to CVD & SAD at applicable rates.

18. A perusal of Notification No. 4/2006-CE dated 01.03.2006 and Notification No. 20/2006-CUS dated 01.03.2006, clearly indicates that the exemption from CVD and SAD are available to Sulphur, only when they are used in the manufacture of fertilizer. Admittedly, the Appellant have sold 25165.450 MT of Sulphuric Acid in the market and hence the Sulphur content in the total quantity of sulphuric acid removed for the purposes other than for manufacture of fertilizer are not eligible for the exemption. The quantity of Sulphur in the Sulphuric Acid cleared to open market works out to 8304.265 MT, which accounts for 0.66% of the total import of Sulphur made by the Appellant. Hence we hold that the Appellant are not eligible for the exemption of CVD and SAD provided under the above said Notifications, for the above said quantity of Sulphur cleared to domestic market.

19. In their submissions, the Appellant relied on the decision in the case of State of Haryana Vs. Dalmia Dadri Cement Ltd. 2004 (178) ELT-13 (SC), wherein the Hon'ble Supreme Court has held that the phrase "for use" means "intended for use", and not actually used. We observe that the said decision is not applicable to the present case on hand, since the exemption in this case is applicable only when the Sulphur imported is actually used in the manufacture of fertilizer. Since, the Appellant themselves admitted that the said 25165.450

MT of Sulphuric acid has been cleared to open market, there is no dispute that 8304.265 MT of Sulphur imported was not used in the manufacture of fertilizer. Hence, we observe that the decisions cited by the Appellant are not relevant to this case.

20. Regarding invocation of extended period, the Appellant stated that the extended period of limitation in terms of Section 28(4) cannot be be invoked for recovery of duties not levied or short levied, as there was no suppression of fact, willful mis-statement, fraud, collusion etc., on the part of the assessee. Similarly, penal provision under Section 114A also cannot be invoked, as the ingredients required for invoking the section are not present in this case. We observe that the Appellant has imported sulphur in bulk. At the time of importation of Sulphur they could not visualize how much quantity will be used in the manufacture of Sulphuric Acid and what quantity will be cleared in the domestic market. Therefore, the entire quantity of imported Sulphur was taken clearance at 'Nil' rat of duty. Due to storage and other constraints, they were compelled to clear some quantity of Sulphuric Acid in the domestic market, which is beyond their control. We also find that the said clearances of Sulphuric Acid were made under the cover of excise invoices, on payment of appropriate central excise duty and duly mentioned in the ER-1 returns filed and other Central Excise records which have been audited by the department at periodical intervals. In such a situation, no charge of suppression or willful mis-statement and fraud etc., can be alleged against the Appellant. Accordingly, we hold that extended period of limitation cannot be invoked in this case. Hence, the duty demand has to be limited only to the normal period of limitation. Interest is also chargeable for the demand of duty payable under the normal period.

21. Regarding penalty imposed on the Appellant under Section 114A of Customs Act, 1962, we observe that penalty under this section can be

imposed only when duty has not been paid on account of suppression of fact, willful mis-statement, fraud, collusion etc. As discussed above no such ingredient was present in this case warranting imposition of penalty under this Section. Accordingly, we set aside the penalty imposed under the Section 114A of the Customs Act, 1962.

22. Regarding, redemption fine imposed on the Appellant, we observe that the clearances of Sulphuric Acid were made by the Appellant under the cover of excise invoices, on payment of appropriate central excise duty and the same was duly mentioned in the ER-1 returns filed by them for the relevant periods. Hence, the goods cleared to open market are not liable for confiscation under Section 111(o) of the Customs Act, 1962. Accordingly, we hold that the redemption fine imposed on the Appellant is not sustainable.

23. In view of the above discussion, we uphold the demand for the normal period of limitation and set aside the demands made in the impugned order by invoking the extended period. We also set aside the penalty imposed on the Appellant under Section 114A of the Customs Act, 1962. The redemption fine imposed on the Appellant is also set aside. The Appeal is disposed of on the above terms.

(Dictated and pronounced in the open Court)

Sd/-

(Ashok Jindal)
Member (Judicial)

Sd/-

(K. Anpazhakan)
Member (Technical)

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