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

REGIONAL BENCH - COURT NO.2

Customs Appeal No.76079 of 2014

(Arising out of Order-in-Original No.KOL/CUS/CUS/PORT/10/2014 dated 06.03.2014 passed by Commissioner of Customs (Port), Kolkata.)

M/s. J.S. Enterprise
(1291, Survey Park, Sammilani Park, D-Block, Kolkata-700075.)

...Appellant

VERSUS

Commissioner of Customs (Port), Kolkata

.....Respondent

(15/1, Strand Road, Custom House, Kolkata-700001.)

APPEARANCE

Shri S.C.Ratho, Consultant for the Appellant (s)
Shri Tariq Suleman, Authorized Representative for the Revenue

CORAM: HON'BLE SHRI R. MURALIDHAR, MEMBER(JUDICIAL)
HON'BLE SHRI K. ANPAZHAKAN, MEMBER(TECHNICAL)

FINAL ORDER NO. 77364/2023

DATE OF HEARING : 9 October 2023
DATE OF DECISION : 9 October 2023

Per : R. MURALIDHAR :

The Appellants have purchased VKYU license from M/s. Prak Consultancy Pvt.Ltd. through proper banking channels. The Appellants utilized this License for clearance of import of goods in January 2010. In 2012 a Show Cause Notice was issued on the ground that the VKUY License No.021034851 dated 04.12.2009 was obtained fraudulently by M/s. Agarwal Traders and were sold to M/s. Prak Consultancy Pvt.Ltd. Since the appellant has bought the License from M/s. Prak Consultancy Pvt.Ltd. and utilized the same, duty of Rs.99,871.37 was demanded on account of the Customs Duty forgone at the time of imports. After due process, the adjudicating authority confirmed the demand of Rs.99,997/- and held that the Poultry Feed imported vide Bill of Entry No.515023 dated 02.01.2010 with a value of Rs.29,58,286/- is liable for confiscation. He gave option to redeem the same on payment of redemption fine of Rs.50,000/-. He also imposed penalty of Rs.50,000/- on the proprietor. Being aggrieved, the appellant is before the Tribunal.

2. The Appellant submits in their grounds of appeal that they have purchased VKYU license N.0210134851 dated 04.12.2009 in the normal course. They had no knowledge if it was obtained fraudulently. As on the date of clearance of the imported goods, the License was still valid and DGFT had not cancelled the same. Therefore, they have correctly utilized this license for import of their consignment. They relied on the following case laws:-

(a) Mercantile India Ltd. v. CCE, Chennai
[2007 (214) ELT 540 (Tri.-Mad.)]
(b) Hind Indus v. CCE, New Delhi
[2014 (314) ELT 342 (Tri.-Del.)]

3. Heard both sides and perused the documents.

4. In the entire show cause notice, there is no fact emerging that the present Appellant was in any way colluding with the alleged perpetrators of the fraud. It is clearly on record that the appellants have bought the license in the open market through proper banking channels. As on the date of clearance of the imported goods, the license was very much valued and was not cancelled by DGFT.

5. The Tribunal in the case of Mercantile India Ltd. cited (supra) has held as under:-

> ***"5.*** *After considering the submissions, we find that what the show-cause notice and the Commissioner's order sought to recover under Section 28(2) of the Customs Act* *<u>from the appellants was not any amount of duty but an amount of DEPB credit availed by them in connection with the exports cleared under the 56 Shipping Bills. It has been consistently held by this Tribunal that DEPB credit is not a duty and the same cannot be realized under Section 28 of the Customs Act vide Rammapati Exports (supra). By now, it is also settled law that the</u>*

power to recover DEPB credit wrongly availed by an exporter is vested in DGFT vide Kobian ECS India Pvt. Ltd. v. Commissioner of Customs, Mumbai — 2003 (157) E.L.T. 662 (Tri.-Mumbai), Dear Impex v. Commissioner of Customs, Mumbai - 2004 (175) E.L.T. 611 (Tri.-Mumbai), Suresh Enterprises v. Commissioner of Customs, Mumbai - 2005 (179) E.L.T. 466 (Tri.-Mumbai) and TTK Prestige Ltd. v. Commissioner of Customs, Bangalore - 2005 (188) E.L.T. 385 (Tri.-Bang.). It is a matter of record in the present case that the proper officer in the Directorate-General of Foreign Trade initiated proceedings against the appellants for recovery of the DEPB credit in question from the appellants and that, in adjudication of the case, the Jt. DGFT cancelled the DEPB scrips/licences and directed the party to pay an amount of Rs. 3.07 crores under Section 11(2) of the Foreign Trade (Development & Regulation) Act, and imposed on them a penalty of Rs. 15.00 lakhs. Aggrieved by the Jt. DGFT's order the party is in appeal to the appellate authority under the Foreign Trade (Development & Regulation) Act. Learned Counsel has pointed out that the above amount of Rs. 3.07 crores includes the amount of Rs. 1.76 crores demanded by the Commissioner of Customs in the impugned order. For the reasons already recorded by us, this demand of the Commissioner under Section 28 of the Customs Act cannot be sustained." *[Emphasis supplied]*

6. In view of the foregoing, we set aside the impugned order and allow the appeal with consequential relief, if any, as per law.

(Operative part of the order was pronounced in the open Court.)

Sd/
(R. MURALIDHAR)
MEMBER (JUDICIAL)

Sd/
(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

sm