IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA

REGIONAL BENCH – COURT NO.1

Excise Appeal No.76730 of 2019
(On behalf of Appellant)

(Arising out of Order-in-Appeal No.239/SLG-CGST/2019 dated 27.03.2019 passed by Commissioner (Appeals) of CGST & Excise, Siliguri)

M/s Smitabh Intercon Limited
(Vardan Suite No.406, 25A, Camac Street, Kolkata-700016)

Appellant

VERSUS

Commissioner of CGST & Excise, Kolkata North
180,Shantipally, Rajdanga Main Road, Kolkata-700107

Respondent

APPERANCE :

Shri Indranil Banerjee, Advocate for the Appellant
Shri D.Sue, Authorized Representative for the Respondent

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

FINAL ORDER NO.75896/2024

DATE OF HEARING : 06 .05.2024

DATE OF PRONOUNCEMENT : **10.05.2024**

Per Ashok Jindal :

The appellant is in appeal against the impugned order wherein the demand of excise duty has been confirmed against the appellant for non-fulfillment of their export obligation.

2. The facts of the case are that the appellant is a 100% Export Oriented Unit (EOU) within the meaning assigned to those terms under the Foreign Trade Policy framed by the Director General Foreign Trade, Ministry of Commerce established in the year 1996 vide Letter of Permission (LOP) dated 19.02.1996 of the Development Commissioner, Falta, SEZ.

2.1 On the Revenue side, the Unit has been under the administrative control of the Central Excise, Kolkata III Commissionerate.

2.2 The LOP got extended thrice at the end of five year block validity period, last time w.e.f. 01.09.2011 vide letter dated 12.07.2011 of the Development Commissioner,Falta, SEZ, Kolkata. The manufactured item of the Unit was HDPE bags.

2.3 Since the year 2010, the appellant felt a downward trend in the export market owing largely to world-wide campaign against use of plastic/polythene items over environmental issues as the appellant failed to achieve positive Net Foreign Exchange Earning (NFE) during the year 2011-12 and 2012-13. However, in the year, 2013-14 and 2014-15, the appellant made good the deficiencies for the last two years and achieved a net positive NFE cumulatively for the period September, 2011 to March, 2015.

2.4 Thereafter, the appellant decided to exit from EOU Scheme and applied to the Development Commissioner for the said purpose. After being satisfied that the appellant has achieved positive NFE in the running block years. The Development Commissioner granted "In-principle De-bonding Order" subject to production of "No Dues Certificate" from the Central Excise authorities, which was granted in November, 2015. Accordingly, the Unit was finally de-bonded in December, 2015.

2.5 Thereafter, audit was conducted at the office of Development Commissioner, Falta, SEZ in December, 2015 and on verification of records and compilation of statistical data raised two audit queries. In those queries, the audit observed that backed with data that the appellant has failed to achieve positive NFE during the block period from September, 2011 to March, 2015, but in spite of that, they were allowed DTA sale of manufactured items at concessional rate of duty under Serial No.2 of Notification No.23/2003-CE dated 31.03.2003 in contravention of Para 6.8 (a) of the said Policy. Short levy of duty on account of AQ No.13 was ascertained at Rs.140.23 lakhs, which was later amended to Rs.1,08,02,378/-. No revenue implication was there. Apparently, the Development Commissioner sent a copy of those queries to Central Excise for offering comments. The Central Excise authorities, in turn, engaged the appellant in a series of correspondence on issues raised by the CRA. The appellant contradicted the audit's observation by submitting their own statistics to prove that they actually achieved positive NFE during the period September, 2011 to March, 2015 pointing out error in audit's method of calculating NFE. It was on account of achieving positive NFE that the Development Commissioner allowed exit from the EOU Scheme and therefore, audit's observation was wrong. Audit accepted appellant's plea of achieving positive NFE during the block period September, 2011 to March, 2015, but observed that since the appellant has failed to achieve positive NFE during the period September, 2011 to March, 2013 and also cumulatively during the first three years, i.e. up to March, 2014 of the running block period of five years, the exemption availed on DTA sale during that period was inadmissible in terms of Para 1 (h) of Appendix 14-I-H (HBP-V-1), which states that "The DTA sale entitlement would accrue only if the unit has achieved positive NFE on cumulative basis". Accordingly, it was alleged that the appellants have alleged short levy of Rs.77.42 lakhs.

2.6 Therefore, a show-cause notice was issued to the appellant on 27.09.2016. The appellant contested the show-cause notice, but the objection raised by the audit was confirmed.

2.7 Aggrieved from the said order, the appellant is before us.

3. The ld.Counsel for the appellant submits that the respondents have no jurisdiction to question fulfilment of NFE as the said job entrusted to the jurisdictional Development Commissioner, who found no discrepancy in this regard and it has been specifically observed in the final de-bonding order dated 07.12.2015 that the appellant has achieved positive NFE cumulatively. Therefore, the respondent has acted without the authority of law by raising the ground of contravention of Para 6.8(a) of FTP read with Para I (h) of Appendix-14-I-H. It is submitted that it is settled law that the action for FTP violations/NFE issue is to be initiated first by the Development Commissioner as held by this Tribunal in the following cases :

(i) Commissioner of Customs (Port), Kolkata Vs. Transworld Business Corporation : 2019 (370) ELT 612 (T) ;

(ii) Universal Biofuels Private Limited Vs. Commissioner of Customs, Vijayawada : 2019 (369) ELT 1111 (T) ;

(iii) Shree Bankey Behari Lal Board Mills Vs. Commissioner of Customs, Ghaziabad : 2018-TIOL-981-CESTAT-All. ;

(iv) Mantra Broadband Private Limited Vs. Commissioner of Customs, Bangalore : 2011 (272) ELT 243 (T) .

3.1 He further submits that the ld.Commissioner (Appeals) travelled beyond the scope of show-cause notice and furthermore, his findings are vitiated by perversity and non-application of mind.

3.2 It is submitted that the ld.Commissioner (Appeals) acknowledged that the appellant has been achieved positive NFE calculated cumulatively for the five years period commencing from 01.09.2011, but held that the appellant is silent on the quantity of DTA sale and their entitlement. No such objection has been raised in the show-cause notice, therefore, he has travelled beyond the scope of show-cause notice.

3.3 He, further submits that cumulative NFE ought to be computed only with reference to the block period and therefore, there is no merit for issuance of the show-cause notice.

3.4 Alternatively, he submits that the demand is barred by limitation as the audit took place in December, 2015 whereas the show-cause notice has been issued on 27.09.2016 for the period September, 2011 to March, 2013.

3.5 He therefore, prayed that the impugned order be set aside and the appeal be allowed.

4. On the other hand, the ld.A.R. for the Revenue, supported the impugned order.

5. Heard both the parties and considered the submissions.

6. We find that the facts in this case are not in dispute that the appellant has achieved positive NFE within block period and also obtained de-bonding from the Development Commissioner. For ready reference, the same is extracted below :

***Excise* Appeal No.76730 of 2019**

Annexure-'A'

(86)

FALTA SPECIAL ECONOMIC ZONE
Ministry of Commerce & Industry,Government of India
4th Floor, 2nd MSO Building, Nizam Palace,
234/4 AJC Bose Road, Kolkata - 700 020
Phone:2287-2263,2287-7923,2281-3117
Fax : (033)2287-3362
Email: fsez@nic.in Website: http://fsez..nic.in

No. 2 (1)/S-9/2009/ 2 692

Date: 07.12.2015

ORDER

Subject : Final De-bonding of M/s. Smitabh Intercon Limited, under 100% EOU Scheme located at 21/5 Old Nimta Road, Belgharia, Kolkata -700056 for manufacture and export of HDPE Plastic Bags, Butcher Bags, T-Shirt Bags, Bags on Roll

M/s. Smitabh Intercon Limited was permitted to set up a 100% EOU vide Letter of Permission No. PER:99(1996)/EOB/682/95 dated 19.02.1996 at 21/5 Old Nimta Road, Belgharia, Kolkata-700056 for manufacture and export of HDPE Plastic Bags, Butcher Bags, T-Shirt Bags, Bags on Roll

2. On getting a request from the unit, it was permitted in principally to exit from the 100% EOU Scheme vide this office letter No. 2(1)/S-9/2009/858 dated 23.06.2015.

3. In compliance with the conditions governing withdrawal from the 100% EOU Scheme.

(a) A No Dues Certificate has been received from the Assistant Commissioner of Central Excise, Khardah Division, 4, Brabourn Road, Kolkata -700001 in fabour of M/s. Smitabh Intercon Limited vide letter No. V (5)2/Smitabh/Bond/KDH-II/Tech/10/7349 dated. 12.10.2015.

(b) The said unit has submitted a Legal Undertaking for exit with the undertaking that it will pay whatsoever penalties are imposed by the Development Commissioner under Foreign Trade (Development & Regulation) Act, 1992 for non fulfillment of the terms and conditions of Letter of Intent/Letter of Permission.

(c) The unit has surrendered the Green Card bearing No. 53 in original.

4. The performance of M/s. Smitabh Intercon Limited has been monitored on the basis of Annual Performance Reports submitted by it and the unit has achieved (+) VE NFE cumulatively.

5. Consequently, M/s. Smitabh Intercon Limited, the 100% EOU holding Letter of Permission No. PER:99(1996)/EOB/682/95 dated 19.02.1996 for manufacture and export of HDPE Plastic Bags, Butcher Bags, T-Shirt Bags, Bags on Roll is hereby finally de-bonded from 100% EOU Scheme with immediate effect.

Yours faithfully,

(Sanjeev Nandwani)
Development Commissioner

To.
M/s. Smitabh Intercon Limited
"Vardaan", Suite 406
25A, Camac Street
Kolkata- 700016

As the de-bonding certificate has also been issued by the Development Commissioner, the Revenue has no power to initiate proceedings against the order of the Development Commissioner as held by this Tribunal in the case of Transworld Business Corporation (supra), wherein this Tribunal has observed as under :

*"**5.** We have heard the parties and perused the case records. The issue involved in this case lies on a narrow compass. In this case, the Ld. Adjudicating Authority, has correctly held that the show cause notice is premature as the matter has not been decided by the Development Commissioner, FSEZ in case of appellant. The finding of the Ld. Adjudicating Authority finds it support from the two Circulars issued by the C.B.E. & C., which are as under :*

(i) Circular No. 21/95-Cus., dated 10-3-1995;

(ii) Circular No. 122/95-Cus., dated 28-11-1995.

In these Circulars, it has been clarified that the case of violation of the Policy by the 100% EOU/EPZ be fresh settled by the Development Commissioner and only thereafter Customs should confirm the demand. On this account, that would avoid the situation wherein the allegation in the notice might be found unsustainable in terms of Exim Policy/Customs law and may have to be dropped by the Department itself. We have not been made available any communication from the Development Commissioner raising any demand to that effect by the Appellant-Revenue. Under the circumstances, we uphold the impugned order and dismiss the appeal filed by the Revenue."

7. Further, similar view has been taken by this Tribunal in the case of Universal Biofuels Private Limited (supra), wherein this Tribunal has held as under :

*"**8.** We also find strong force in the argument of Ld. Counsel for the appellant that the final decision regarding any licence issued by the DGFT or Development Commissioner rests with such authority. Once the final exit has been given by the Development Commissioner, Customs has no authority to re-open the matter."*

8. We further take note of the fact that this Tribunal in the case of M/s Shree Bankey Behari Lal Board Mills (supra), has also examined this issue and observed as under :

"5. Having considered the rival contentions, I find that prima facie the Show Cause Notice is bad and barred by limitation. There is no allegation of any contumacious conduct, suppression or mis-statement on the part of the appellant. It is apparent that the Show Cause Notice have been issued by way of

change of opinion and accordingly, the said notice is bad and not maintainable. Secondly, the learned counsel for the appellant have pointed out that under similar facts and circumstances a Division Bench of this Tribunal in Vishal Footwear Ltd., Vs. Commissioner of Customs reported at 1999 (114 ELT 60= 2002-TIOL-418-CESTAT-DEL (Tribunal Delhi) relying on Ministry of Finance, Circular No. 29/95-Cus., dated 10 March, 1995 observed that the Circular makes it very clear that even in the event of failure to make or continue exports, the Development Commissioner's recommendation is required before duty demands can be confirmed by the Customs Authorities. In this case, it is evident from the facts that on the record that the consent authorities, namely the Development Authority have not been obtained and as such the Show Cause Notice is bad on this score also. Accordingly, this appeal is allowed and the impugned order is set aside. The appellant shall be entitled to consequential benefits in accordance with law."

9. In the case of Mantra Broadband Private Limited (supra), this Tribunal has also examined the issue and observed as under :

*"**11.** We find considerable force in the submission made by the assessee that the impugned proceedings suffer from infirmity in as much as the adjudication had not followed the procedure to obtain concurrence with the Development Commissioner. We find that Circular No. 21/95-Cus., dated 10-3-95, the CBEC issued the following guidelines for the field officers to follow :*

"A number of instances have come to the notice of the Board where 100% EOU's had imported capital goods, raw materials and other permissible items under Notification No. 13/81- Cus., dated 9-2-1981 but have failed to export any goods or have closed down after exporting a few consignments. A question has been raised as to the stage at which the customs authorities should

proceed to recover duties on imported goods and other goods lying in the factory premises of the 100% EOU.

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3. Normally the customs authorities should immediately inform the Development Commissioner in case a 100% EOU ceases production prematurely or fails to commence production or export within the stipulated period. In case the Development Commissioner initiates action against the unit for non-fulfilment of export obligation etc. simultaneously the customs authorities should issue show cause notice for failure to comply which conditions of Notification 13/81-Cus., dated 9-2-1981. The demand of duty should be confirmed only after a definite conclusion has been arrived at by the Development Commissioner."

In Vishal Footwear Ltd. case (supra), the Tribunal held that the Circular made it clear that even in the event of failure to continue to make exports, the Development Commissioner's recommendation was required before duty demand was confirmed by the Customs authorities. In that case, there was no definite conclusion arrived at by the concerned authorities namely, a Development Commissioner. On the other hand, the Deputy Commissioner had extended the period of validity for a further period up to 31-3-1991 and the importers had requested for further extension. We find that the facts of the subject case are comparable with Vishal Footwear Ltd. case (supra). Further the mandatory nature of the Circular is recognized by the Tribunal in this decision. The ratio of this decision was followed in a case of similar facts in Premier Granites Ltd. case (supra). In T. V. Raja Reddy case (supra) also the demand raised by the department was found not maintainable as the recommendation of the Development Commissioner had not been obtained and the *assessee therein had got export period extended. In Teg's Masrado Ltd. case (supra), the Tribunal held that the Development Commissioner's recommendation was essential before duty demand could be confirmed on the assessee . In that case petition of the appellants for de-bonding was pending before the competent authority and the Development Commissioner had not initiated any action for non-fulfillment of export obligation. The Tribunal followed decision in the case of Vishal Footwear Ltd. (supra) and quashed the order of confiscation and imposition of penalty. The appellants had cited the decision of the Hon'ble Apex Court in the case of Ranadey Micronutrients (supra) in support of the claim that the Board's circular No. 21/95-Cus., dated 10-3-95 and Circular No. 122/95, dated 28-11-95 are binding on the departmental officers.*

12. *We find that the issue involved in the instant case is also nonfulfillment of export obligation. Capital goods had not been removed from the warehouse clandestinely or otherwise. We find that failure on the part of MBPL was that it had not used the capital goods procured under EOU scheme for manufacture and export of software. In such a situation, it was mandatory that the Commissioner obtained clearance from the Development Commissioner before initiating action against the EOU. The proceedings contrary to the binding Circular of CBEC is not maintainable. The impugned order is liable to be set aside."*

10. In view of the above cited judicial pronouncement and the issuance of order of order of De-bonding by the Development Commissioner, the respondents have no jurisdiction to initiate proceedings against the appellant as the appellants have already achieved positive NFE in the block period.

11. Therefore, the proceedings against the appellants are not sustainable. Accordingly, the same are set aside.

12. In the result, the appeal is allowed with consequential relief, if any.

(Pronounced in the open court on **10.05.2024**)

Sd/

(Ashok Jindal)
Member (Judicial)

Sd/

(K.Anpazhakan)
Member (Technical)

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