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

REGIONAL BENCH - COURT NO.2

Customs Appeal No.75124 of 2017

(Arising out of Order-in-Original No.KOL/CUS/PORT/COMMR/67/2016 dated 02.12.2016 passed by Commissioner of Customs (Port), Kolkata.)

M/s. S.D. Impex
(3, Digamber Jain Temple Road, 2nd Floor, Kolkata-700007.)

...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 S.Debnath, Authorized Representative for the Revenue

CORAM: HON'BLE SHRI R. MURALIDHAR, MEMBER(JUDICIAL)
HON'BLE SHRI RAJEEV TANDON, MEMBER(TECHNICAL)

FINAL ORDER NO. 76360/2024.

DATE OF HEARING : 09.07.2024
DATE OF DECISION : 18.07.2024

Per : RAJEEV TANDON :

The Appellants have filed the impugned appeal assailing the Order-in-Original No.KOL/CUS/PORT/COMMR/67/2016 dated 02.12.2016, whereby they have been subjected to penal liabilities besides confirmation of the duty demand.

2. The appellants is a proprietory concern and imported twelve consignments of fresh apples as per table hereinbelow :

Sl.No.	BE no.	Date
01	5227886	17.4.2014
02	5304572	25.04.2024
03	5376779	2.5.2014
04	5581643	23.5.2014
05	5443126	10.5.2014

06	5513930	16.5.2014
07	5549303	20.5.2014
08.	5539588	19.5.2014
09	5672125	2.6.2014
10	5736848	7.6.2014
11	5776271	11.6.2014
12	5820939	16.6.2014

3. Import duty on the aforesaid consignments of fresh apples was paid by way of scrips issued under the Focused Market Scheme (FMS), Focused Product Scheme (FPS) and Vishesh Krishi & Gram Udyog Yojna (VKGUY) by DGFT (Refer Chapter 3 of the Foreign Trade Policy, 2009-2014). The transferrable duty credit scrips were purchased by the appellant from the open market and were accordingly submitted to the assessing group, at the time of assessment, for debit of the assessed duty in terms of Notification No.92/2009-CUS dated 11.09.2009 for FPS, 93/2009-CUS dated 11.09.2009 for FMS and 95/2009-CUS dated 11.09.2009 for VKGUV scrips.

4. Thus, an amount of Rs.1,53,31,304.80 was debited towards Customs Duties in the scrips against the above-referred 12 shipments. Subsequently, the DRI interdicted the said consignment, as it was of the view that no duty for import of the said consignment of the apples could be affected against the said duty scrips as the said items were not covered as "Item of Import" under Appendix 37B of the Handbook of Procedures of Foreign Trade Policy, 2009-14 (HBP), but were utilized for duty debit.

4.1 It is the contention of the assessee that the duty paying scrips along with all relevant documents were submitted to the department, officers for purpose of assessment, but they had pointed out no irregularity and realized the assessed duty by way of debit against the 44 scrips at the time of permitting the clearance of the consignment for home consumption. In order to clear their *bonafides* the appellant also contend that the EDI system of the department also accepted the said mode of payment of duty debit in the scrips instead of cash. The appellant submits that subsequently, having been pointed out, at the first instance itself they voluntarily paid the said duty amount of Rs.1,53,31,304.80 in cash along with interest of Rs.19,29,784/- accrued thereon during the period 2014 to March 2015.

5. Subsequently the appellants were issued a show cause notice for confiscation of goods imported and invocation of penalty amongst others.

6. We have heard Shri S.C. Ratho, Ld.Consultant for the appellant and Shri S.Debnath, Ld.Authorized Representative for the department and have perused the case records.

7. We find that there is nothing on record to suggest any culpability on the part of the appellant for having debited the duty through scrips. It is common knowledge that such duty payment debits are required to be endorsed by the officers concerned. We therefore find no justification for issuance of the show cause notice to the appellant under section 28(4) of the Customs Act invoking suppression and the larger period of limitation. It is on record that the appellant had voluntarily paid duty in cash along with interest, even prior to issuance of the show cause notice dated 10.04.2015. When both the Revenue officials as well as their own assessing system - the EDI, had accepted the initial debit of duty through scrips, which subsequently was made good in cash along with interest, the law itself provided for no show cause notice to be issued in terms of the provisions of said section 28 itself.

8. Section 28(2) of the Customs Act, 1962 as it stood at the material time provided that :

> *"The person who has paid the duty along with interest or amount of interest under clause (b) of sub-section (1) shall inform the proper officer of such payment in writing who on receipt of such information shall not serve any notice under clause (a) of that sub-section in respect of the duty or interest so paid or any penalty leviable under the*

provisions of this act or the rules made there under in respect of such duty or interest."

9. We thus find no justification in the department's action, seeking to impose penalty, on the appellant in the aforesaid matter. It is imperative that to invoke larger period of limitation, intention to evade payment of duty need to be shown and fraud, suppression or misstatement etc. need to be expressly proven. None of these elements are noticeable in the matter. The appellant has conceded before us that initial payment of debit made via duty scrips, was done out of ignorance. The same was also accepted by the department. As vigilant customs it was for the department to have pointed out the anomaly in the first stage itself at the time of assessment. This however was not done. The department therefore cannot affix the blame for their own omissions on the importer, particularly so when it is established from records that no sooner the anomalous situation was brought to the notice of the appellant importer by the DRI, all duty payments were promptly made in cash along with interest. For reasons foregoing, we find no merits in the orders of the lower authority imposing penalty on the appellant under Section 114A, initially for an amount of Rs.23.00 Lakh and then subsequently enhancing it by way of corrigendum dated 14.12.2016 to Rs.1,72,61,089.00.

9. In the result, the order of the lower authority holding the imported goods liable to confiscation and imposition of penalty under section 114A is set aside.

The appeal succeeds to the extent above.

(Order pronounced in the open Court on 18/07/2024.

Sd/

(R. MURALIDHAR)
MEMBER (JUDICIAL)

Sd/

(RAJEEV TANDON)
MEMBER (TECHNICAL)

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