IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI
COURT NO. II

Appeal No. C/536/09

(Arising out of Order-in-Appeal No. 20(AC/EPCG)2009 (JNCH) dated 16.1.2009 passed by the Commissioner of Customs (Appeals), JNCH, Nhava Sheva).

Commissioner of Customs (Export), Nhava Sheva	Appellant

Vs.

M/s Chiripal Industries Ltd.	Respondent

Appearance:

Shri S.R. Nair, E.O (AR)	for Appellant
Shri P.P. Jadeja, Consultant (AR)	for Respondent

CORAM:

HON'BLE SHRI RAMESH NAIR, MEMBER (JUDICIAL)
HON'BLE SHRI RAJU, MEMBER (TECHNICAL)

Date of Hearing: 20.03.2018

Date of Decision: 16.05.2018

ORDER NO. **A/86379 / 2018**

Per: Raju

This appeal has been filed by the Commissioner of Customs against order of Commissioner (Appeals) permitting re-assessment of Bills of Entry.

2. Learned AR pointed out that the respondents had filed Bills of Entry for clearance of goods under EPCG authorization scheme at concessional rate of duty. The said Bills of Entry filed on 7.5.2008 was assessed as per Notification No. 97/04 and

duty @ 5% was collected and the consignment was cleared. The respondents had challenged the said assessment before Commissioner (Appeals) claiming that under Notification No. 1(RE-2008)/2004-09 dated 11.4.2008, the Foreign Trade Policy amendment w.e.f. 1.4.2008 has reduced the prevailing customs duty rate in respect of EPCG scheme from 5% to 3%. Commissioner (Appeals) had allowed re-assessment of the said Bills of Entry on the strength of the said Notification dated 11.4.2008. Learned AR pointed out that the said Bills of Entry was filed on 7.5.2008 and the prevailing customs notification on the said date was 97/04-Cus dated 17.9.2004 which prescribes 5% rate of duty. The said rate was revised to 3% by Notification No. 64/08, which came into force on 9.5.2008. Since the Bills of Entry was assessed on 7.5.2008, the benefit of Notification No. 64/08 has wrongly been allowed by the Commissioner.

3. Learned Counsel for the respondent relied on the decision of Hon'ble Apex Court in the case of MRF Ltd. – 2006 (206) ELT 6 (SC), State of Punjab Vs. Nestle India Ltd. – 2004 (6) SCC 465 and Kamani Oil – 1986 (SVPP) SCC 728. It was argued that one branch of the Government i.e. Ministry of Commerce, O/o the DGFT has changed and issued the necessary notification reducing the duty rate in respect of EPCG scheme from 5% to 3% on 11.4.2008 and it was made effective from 1.4.2008. He argued that in these circumstances, the delay in issuing the corresponding customs notification revised the duty from 5% to 3% should not be a reason for imposing the duty liability on the respondents. It was argued that the Customs authority cannot review or question or reject the benefit granted by the Government of India in the Import Policy through DGFT.

4. We have considered the rival submissions. We find that while on the one hand DGFT vide Notification No. 1(RE-2008)/2004-09 dated 11.4.2008 had reduced the rate of duty under EPCG scheme to 3% and accordingly the license was issued to the respondent under EPCG scheme. The EPCG authorization was issued in respect of the said import on 30.4.2008 prescribing 3% as customs rate of duty. Ideally there should not be any disregard between the EPCG and the Customs authorities and the notification in respect of said scheme should be issued simultaneously by both the authorities. In the instant case, while policy was amended w.e.f. 1.4.2008, the notification of customs implementing the said change was issued on 9.5.2008 also 39 days after the issue of DGFT notification. The respondents have relied on the decision of Hon'ble Apex Court in the case of State of Punjab Vs. Nestle India Ltd. (supra). The facts in the said case were that the Finance Minister in his Budget Speech for the year 1996-97 made representation of the effect that State Government has imposed Purchase Tax on Milk. Acting on the said representation manufactures of Milk products stopped paying purchase tax on milk for the Assessment Year 1996-97 mentioning the said fact in their returns. However, after expiry of the assessment order, the decision was taken not to impose the said purchase tax on milk and consequent demands were raised. In the said case, after examining the fact in para 47-48, Hon'ble Apex Court has observed as follows: -

> *"47. The appellants have been unable to establish any overriding public interest which would make it inequitable to enforce the estoppel against the State Government. The representation was made by the highest authorities including the Finance Minister in his Budget Speech after considering the financial implications of the grant of the exemption to milk. It was found that the overall benefit to the state's economy and the public would be greater if the exemption were allowed. The respondents have passed on the benefit of*

that exemption by providing various facilities and concessions for the upliftment of the milk producers. This has not been denied. It would, in the circumstances, be inequitable to allow the State Government now to resile from its decision to exempt milk and demand the purchase tax with retrospective effect from 1st April 1996 so that the respondents cannot in any event re-adjust the expenditure already made. The High Court was also right when it held that the operation of the estoppel would come to an end with the 1997 decision of the Cabinet.

48. In the case before us, the power in the State Government to grant exemption under the Act is coupled with the word "may" signifying the discretionary nature of the power. We are of the view that the State Government's refusal to exercise its discretion to issue the necessary notification "abolishing" or exempting the tax on milk was not reasonably exercised for the same reasons that we have upheld the plea of promissory estoppel raised by the respondents. We, therefore, have no hesitation in affirming the decision of the High Court and dismissing the appeals without costs."

4.1 In the instant case, it is apparent that when the EXIM Policy was amended and notified the Government has taken the decision of revised customs duty under the EPCG from 5% to 3%. To enforce this decision, the Ministry of Finance, Department of Revenue was required to act in tandum with the DGFT and Ministry of Commerce. In the instant case, the appellants were also issued a license as well as authorization prescribing 3% rate of duty. In these circumstances, failure of customs authorities to issue notification on time cannot be held against the respondent.

5. In these circumstances, we do not find any merit in the appeal filed by the Revenue. The same is dismissed.

(Pronounced in Court on 16.05.2018)

(Ramesh Nair)
Member (Judicial)

(Raju)
Member (Technical)

Sinha