CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

WEST ZONAL BENCH, MUMBAI

Custom Appeal No. 170 of 2010

(Arising out of Order-in-Appeal No. GOA/CUS/CM/121/2009 dated 30.11.2009 passed by the Commissioner of Customs & Central Excise (Appeals), Goa.)

M/s Semco Electric Pvt. Ltd. ....Appellant
Gat No. 155, 1541/1,
Mahalunge Village, Chakan Talegaon Road,
Chakan Pune - 410501

VERSUS

Commissioner of Customs & ....Respondent
Central Excise, Goa
ICE House, EDC Complex, Plot No. 6,
Patto, Panaji, Goa -403001

APPERANCE:

Shri Narendra Dave, C.A. with
Ms. Lakshmi Menon, Advocate for the Appellant

Shri C. Singh, AC Authorised Representative with
Shri Manoj Kumar, AC Authorised Representative for the Respondent

CORAM:

HON'BLE MR. C J MATHEW, MEMBER (TECHNICAL)
HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

FINAL ORDER NO. A/86099/2019

Date of Hearing: 23.01.2019
Date of Decision: 12.06.2019

PER: DR. SUVENDU KUMAR PATI

Clearance of capital goods imported earlier without payment of Customs duty availing benefits of Notification No. 53/97-Cus. dated 03.06.1997 to DTA unit without appropriate authority's explicit permission and without payment of appropriate customs duty that was being held inadmissible by the Commissioner of Customs & Central Excise (Appeals), Goa is assailed in this appeal.

2. Facts in nutshell is that appellant M/s Semco Electric Private Limited is an 100% Export Oriented Unit (EOU) who imported Die casting machine vide Bill of Entry No. 00137 dated 05.06.1999 availing benefit of Customs duty exemption under Notification No. 53/97-Cus. dated 03.06.1997 that was installed in the factory of the appellant and utilised for manufacturing of resultant product namely electric wiring accessories. The said machine become obsolete for the appellant who decided to sell off the said machine to a DTA buyer. Accordingly, para 6.16 (b) of the EXIM Policy 2002-07 was followed, permission in writing was sought from the Deputy Commissioner of the Central Excise & Customs, Division-V, Akurdi, Pune and a copy of letter of appellant seeking permission from the Deputy Commissioner was also forwarded to the Development Commissioner, SEEPZ for information who allowed the sale of capital goods under reference, in the DTA after payment of applicable duty, subject to compliance of Custom procedure. Die casting machine was cleared to one M/s Zenith Metaplast Pvt. Ltd. against an EPCG

licence issued to Zenith on payment of excise duty @ 5% ad velum on the transaction value of ₹10,25,000/-. During audit, objection was raised in the audit report that appellant was refused permission by the Development Commissioner for such DTA clearance and was required to pay duty on the depreciated value and not on the basis of transaction value and that merit rate of duty and not EPCG rate was applicable for such clearance. Show-cause notice dated 20.02.2008 was issued to the appellant demanding differential duty of Rs. 6,24,710/- for violating the condition of Notification No. 53/1997-Cus. along with proposal for confiscation of Die casting machine valued at Rs. 12,79,745/- under Section 111(d) and (o) of the Customs Act along with applicable interest under Section 28B as well as penalty under Section 112(b) and 114A of the Act. Appellant replied to the notice, matter was adjudicated upon, duty demand along with interest, penalty and redemption fine in lieu of confiscation of goods/machine were confirmed by adjudicating authority and appellant's appeal before the Commissioner (Appeals) also had yielded no fruitful result. Appellant is before us challenging the legality of such order.

3. In the memo of appeal and during the course of hearing of appeal, learned Counsel for the appellant Shri Narendra Dave and Ms. Lakshmi Menon submitted that there was no requirement under the EXIM Policy to obtain permission from the Development Commissioner for clearance of imported machine and in any case such permission was also granted by Development Commissioner.

He further submitted that goods was clearly assessed by the proper officer and who permitted clearance from the bonded warehouse of the appellant which assessment cannot be reopened without reviewing the order of assessment passed by the proper officer under Section 129D of the Act. In placing reliance on the Policy Circular No. 5 (RE-2005)/2004-2009 dated 13.05.2005 whereby clarification was given by DGFT that under EPCG Scheme concessional rate of duty was to be paid and not full duty of Excise and placing reliance on the decision reported in *Sahajanand Technologies (P) Ltd. Vs CCE - 2007 (210) ELT 108 (Tri.-Ahmd), Orbit Fabrics Ltd. Vs CCE - 2009 (248) ELT 359 (Tri.-Ahmd.), CCE Vs Orbit Fabrics Ltd. - 2011 (264) ELT 53 (Guj.), Welspun Zucchi Textiles Vs CCE - 2006 (204) ELT 401 (Tri.-Mum.), CCE Vs. Emcure Pharmaceuticals Ltd. - 2014 (307) ELT 180 (Tri.-Mum.), CCE Vs. Emcure Pharmaceuticals Ltd. - 2016 (342) ELT 172 (Bom.),* he also submitted that extended period is not invokable in the instant case for which order passed by the Commissioner (Appeals) is required to be set aside.

4. In response to such submissions, learned AR Shri C. Singh, Assistant Commissioner with Shri Manoj Kumar, Assistant Commissioner for the respondent-department argued in support of the reasoning and rationality of the order passed by the Commissioner (Appeals) in holding in-applicability of Notification No. 53/1997-Cus. and non-filing of ex-bond Bill of Entry by the appellant, for which they sought for no interference by the Tribunal in the order passed by the Commissioner (Appeals). He placed reliance in the

case laws reported in *Unimark Remedies Ltd. Vs. Commissioner of Customs (Export Promotion), Mumbai – 2017 (355) ELT 193 (Bom.)* in support of his contention.

5. We have heard from both the sides at length and perused the case record. The primary objection in the audit report was that appellant was refused permission/NOC to clear the said Die casting machine to DTA and had not paid duty on the depreciated value of the goods which was valued at Rs. 12,29,745/- and paid excise duty on transaction value of Rs. 10,25,000/-. Contention of the appellant is that no such permission was a requirement under the EXIM Policy and alternatively it was submitted that express permission was also granted by the Development Commissioner. Therefore, it is imperative to have a look at the content of the letter issued by the Assistant Development Commissioner SEEPZ to the appellant, the text of which reads (Annexure-4) as under:-

> *"I am directed to refer to your letter No. SEMCO/03-04 dated 7th April, 2003, on the subject cited above and to say that in terms of Para 6.20 (d) an EOU can apply for permission for conversion of EOU under EPOG Scheme as one time option. However, you propose to sell one machine and hence your request cannot be considered. However, you may sell the CG under reference in the DTA after payment of applicable duties subject to compliance of Customs Procedures."*

5.1 A bare reading of the said communication would reveal that the Development Commissioner was authorised to grant permission for conversion of EOU under EPCG scheme as one time option for which the request to sell one machine could not be considered at their end but appellant may sell the same in the DTA after payment of applicable duties subject to compliance of Customs Procedures. Therefore, the finding in Order-in-Original and Order-in-Appeal passed stating Development Commissioner had refused permission for clearance of goods to DTA is erroneous.

6. The second objection of audit is the duty had been paid on depreciated value and not on transaction value and the rate of duty should be as applicable at the time without any concession by invocation of benefit extended under EPCG scheme. Clarificatory Circular issued by DGFT policy no. 5 (RE-2005)/2004-2009 dated 13.05.2005 as referred above in the preceding para clearly indicates that concessional rate of duty is applicable to the appellant. However, the same should have been on the depreciated value of the goods/machinery which is admittedly not done in the instant case but when the Superintendent of Central Excise accepted the same and debited the transaction value as declared by the appellant before allowing clearance of the said machine and accordingly commercial invoice was raised thereafter with counter signature of Range Superintendent, Appellant's assertion that re-assessment cannot done without review of the order of assessment has its force in view of Section 129D of the Act, which also finds its approval in the case laws reported in *Madurai Power Corporation (P) Ltd. Vs Deputy Commissioner of Central Excise, Madurai-I reported in 2008 (229) ELT 521 (Mad.) and Vittesse Export Import Vs. Commissioner of Customs (EP) Mumbai reported in 2007 (224) ELT 241 (Tri.-Mumbai).* Therefore no mis-declaration or suppression of the fact

can be attributed to the conduct of appellant to invoke extended period also. Hence the order.

ORDER

7. The appeal is allowed and the order passed by the Commissioner of Customs & Central Excise (Appeals), Goa *vide* Order-in-Appeal No. GOA/CUS/CM/121/2009 dated 30.11.2009 is hereby set aside.

(Order pronounced in the court on 12.06.2019)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

(C J Mathew)
Member (Technical)

Prasad