

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, WEST ZONAL BENCH AT MUMBAI**

REGIONAL BENCH - COURT NO. 02

Customs Appeal No. 85673 of 2013

(Arising out of Order-in-Original No. 38/2012 dated 06.11.2012 passed by
Commissioner of Customs (Export), Raigad)

Allcargo Logistics Ltd.

.....Appellant

Avashya House, 6th Floor, CST Road, Kalina,
Santacruz (E), Mumbai-400098

VERSUS

**Commissioner of Customs
(Export) Nhavasheva**

.....Respondent

Jawaharlal Nehru Custom House, Sheva,
Tal. Uran, Raigad Dist-400707

Appearance:

Shri Anil Balani, Advocate for the Appellant

Shri Ramesh Kumar, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO. A/86155 / 2019

Date of Hearing: 10.04.2019

Date of Decision: 10.04.2019

Per: S.K. MOHANTY

This appeal is directed against the impugned order
dated 06.11.2012 passed by the Commissioner of Customs
(Exports), JNCH, Raigad.

2. Brief facts of the case are that the appellant had imported
capital goods namely Kalmar Reach Stacker (4 nos.) under Export
Promotion Capital Goods Scheme (EPCG), through Nhava Sheva
Port. The subject goods were assessed at concessional rate of
duty under Notification No. 55/2003 dated 01.04.2003. The said
notification extends the concessional rate of duty, with the
condition that the importer should fulfil export obligation on FOB

basis valued to eight times the duty saved on the goods imported within a period of eight years from the date of issue of the license. As per the requirement of the said notification, the appellant had executed the requisite bond and also furnished bank guarantee at the time of clearance of the subject goods, binding itself to strictly comply with the conditions of the notification. As per the license, the appellant was under the obligation to export 'cargo handling services' worth USD 36,61,265,45/-. The appellant had submitted original EODC dated 20.11.2009 along with other documents before the customs house for cancellation of the bond and bank guarantee executed against the EPCG license, in support of fulfilment of the export obligation. On scrutiny of the documents submitted by the appellant, the department observed that the vouchers have not been raised against the services provided by the use of the capital goods i.e. 'Kalmar', but have been issued towards 'ocean freight charges'. Further, it has also been observed that out of the four Kalmars, only one was found operational in the appellant's premises and the remaining three machines were deployed on rental basis in other premises. Accordingly, show cause proceedings were initiated against the appellant, seeking for confirmation of the duty demand, imposition of redemption fine and penalty. The matter was adjudicated vide the impugned order dated 06.11.2012, wherein the three nos. of Kalmars imported under EPCG Scheme were confiscated, with the option to redeem the same on payment of redemption fine of Rs.40,00,000/-. The impugned order also confirmed customs duty demand of Rs.1,35,61,535/- along with interest and also imposed equal amount of penalty on the appellant.

3. The Learned Advocate appearing for the appellant submitted that the imported capital goods were installed in the premises of the appellant on 29.04.2004 and by utilizing the same, the export obligation was achieved by the appellant. In this context, he has referred to the redemption letter dated 20.11.2009 issued by the DGFT. The Learned Advocate

submitted that since the EPCG license was redeemed by the competent authority i.e. DGFT, the customs authorities cannot deny the benefit of the EPCG provided under the Notification No. 55/2003 dated 01.04.2003. He has relied upon the judgment of Hon'ble Supreme Court in the case of Titan Medical System Pvt. Ltd.-2003 (151) ELT 254 (S.C.) to state that once license was issued and not questioned by the licensing authority, the customs department cannot refuse exemption on allegation that there was any mis-declaration. The Learned Advocate has referred to the letter dated 16.10.2012 issued by the DGFT, clarifying that cargo handling services, storage and ware house services and freight transportation can be allowed towards fulfilment of export obligation, in terms of public notice.

4. On the other hand, The Learned AR appearing for the Revenue reiterated the findings recorded in the impugned order and further submitted that customs authorities can always proceed against the importer, when the condition of exemption provided under the notification is violated and the exempted goods were diverted elsewhere. In this context, he has relied upon the judgment of Hon'ble Supreme Court in the case of Sheshank Sea Foods Pvt. Ltd. Vs. Union of India-1996 (88) E.L.T. 626 (S.C.), Commissioner of Customs, Hyderabad Vs. M/s Pennar Industries Ltd. and Anr.-2015-TIOL-162-SC-CUS.

5. Heard both sides and perused the records.

6. In this case, the department had proceeded against the appellant for denial of the benefit provided under Notification No. 55/2003 dated 01.04.2003 on the ground that the services provided was ocean freight service to liners and such transport service did not fall under cargo handling service; that the stackers can only be used on land in CFS or Docks, whereas ocean freight service cannot be availed by use of stackers; and that three number of stackers were deployed of rental basis in the premises

not owned by the appellant and thus, actual use of condition was violated.

7. On perusal of the case records, we find that the disputed capital goods were installed/commissioned in the premises of the appellant on 29.04.2004, which is evident from the certificate issued by the Chartered Engineers M/s. Joshi & Associates, placed at page 36 in the appeal records. Such installation certificate of Chartered Engineers has not been disproved by the department. Further, we also find that the appellant had filed the statement in form Appendix-9B before the Office of the DGFT regarding the foreign exchange earned by it as per the EPCG Scheme. In the said form, the appellant had stated the category of service provided as "cargo handling service". On the basis of the documents submitted by the appellant, the Office of DGFT vide redemption letter dated 20.11.2009 had confirmed that the export obligation against the EPCG authorization dated 01.03.2004 has been discharged. The said redemption letter issued by DGFT is extracted herein below:

REDEMPTION LETTER

TO,
M/s ALL CARGO MOVERS (INDIA) PVT LTD.
PORT USERS BUILDING, 3RD FLOOR,
NHAVA SHEVA,
NAVI MUMBAI, MAHARASHTRA-400707

**SUBJECT: EODC/REDEMPTION against EPCG
Authorisation No. 0330005325 Dated 01.03.2004**

With reference to your letter Dated: 01.03.2004 on the above mentioned subject, I write to inform you that on the basis of document submitted towards discharge of export obligation by you, it is observed that the Export Obligation stipulated in the Licence has been met in full in proportion to duty amount utilized by you. Consequently, Export Obligation has been discharged against the said Authorisation in terms of Para 5.13 of H.B. of procedure.

Place: Mumbai
Date: 20.11.2009

(Premchandran Nair)
Foreign Trade Development Officer

8. From the above communication of the office of DGFT, it transpires that the export obligation in respect of EPCG

authorisation was achieved by the appellant. Further, the office of DGFT vide letter dated 16.10.2012 had also included other services namely, Cargo handling service, storage & warehouse service and freight transportation for the purpose of fulfilment of 100% export obligation in terms of Public Notice 42 dated 28.01.2004. Considering the overall facts and circumstances of the case, since the licensing authority had confirmed the fact regarding achievement of the export obligation by the appellant, the benefit of concessional duty in terms of Notification No. 55/2003-Cus., dated 01.04.2003 cannot be denied by the customs department. The law is well settled in the case of Titan Medical System Pvt. Ltd. (supra) that once an advance licence was issued and not questioned by the licensing authority, the Customs authorities cannot refuse exemption on an allegation that there was misrepresentation and that if there was any misrepresentation, it was for the licensing authority to take steps in that behalf.

9. The ratio of judgment of Hon'ble Supreme Court in the case of Sheshank Sea Foods Pvt. Ltd. (supra) and Pennar Industries Ltd. and Anr. (supra) relied upon by the Learned AR for Revenue are distinguishable from the facts of the present case inasmuch as the said judgments were delivered in context with importation of goods under the license issued by the DGFT and resultant exportation of the final product. Whereas, the case involved in the present appeal relates to export of service, which is not governed under the Customs Act, 1962. In case of import or export of goods, the same are effected under the direct supervision of the customs authorities, who can always verify from the available records, whether the goods were in fact exported or not and the conditions under any notifications have correctly been fulfilled by the importer or the exporter. For the said purpose, they may not alone refer to the certificate issued by the licensing authority and may examine the documents/records to their satisfaction. On the contrary, in case of export of service, the customs authorities have no control to monitor such

exportation and for the purpose of achievement of export obligation, they only rely upon the statement of foreign exchange earnings and the export obligation discharged certificate issued by the licensing authority. In this case, it is an admitted fact on record that on the basis of documents submitted by the appellant towards discharge of export obligation, the licensing authority has issued the redemption letter, confirming achievement of export obligation. The certificate issued by the DGFT cannot be questioned at this juncture for non-fulfillment of the export obligation and contravention of the provisions under the Notification dated 01.04.2003.

10. In view of the above discussions, we do not find any merits in the impugned order dated 06.11.2012. Accordingly, after setting aside the same, the appeal is allowed in favour of the appellant.

(Operative part of the order pronounced in the open court)

(S.K.Mohanty)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)