

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI**

APPEAL NO.C/890/2010

(Arising out of Order-in-Appeal No. CAO No.75/2010/CAC/CC/SS dated
25.08.2010 passed by the Commissioner of Customs (EP), Mumbai)

Scottish Chemical Industries : **Appellant**
407-412. Span Centre, South Avenue
Santacruz (W), Mumbai 400 054

VS

COMMISSIONER OF CUSTOMS (EP) : **Respondent**
2nd Floor, New Customs House, Ballard Estate,
Mumbai 400 001

WITH

APPEAL NO. C/891/2010

(Arising out of Order-in-Appeal No. CAO No.75/2010/CAC/CC/SS dated
25.08.2010 passed by the Commissioner of Customs (EP), Mumbai)

Scottish Chemical Industries : **Appellant**
407-412. Span Centre, South Avenue
Santacruz (W), Mumbai 400 054

VS

COMMISSIONER OF CUSTOMS (EP) : **Respondent**
2nd Floor, New Customs House, Ballard Estate,
Mumbai 400 001

WITH

APPEAL NO. C/974/2010

(Arising out of Order-in-Appeal No.OIO No.75/2010/CAC/CC/SS dated
25.08.2010 passed by the Commissioner of Customs (EP), Mumbai)

COMMISSIONER OF CUSTOMS (EP) : **Appellant**
2nd Floor, New Customs House, Ballard Estate,
Mumbai 400 001

VS

Scottish Chemical Industries : **Respondent**
407-412. Span Centre, South Avenue
Santacruz (W), Mumbai 400 054

Appearance

Shri R. B. Pardeshi, Adv for Appellant

Shri A.P. Kothari, Addl. Comm. for Respondent

CORAM:

Hon'ble Dr. D.M. Misra, Member (Judicial)

Hon'ble Shri P Anjani Kumar, Member (Technical)

Date of hearing : 07.03.2019

Date of decision : 05.07.2019

ORDER NO. A/86208-86210/2019

Per : P Anjani Kumar, Member (Technical)

Heard both sides and perused the records of the case.

2. Briefly stated the facts of the case are that the Appellant, a manufacturing and exporting Unit; they have been utilizing Advance Licenses, for import of Per Chloro Ethylene (PCE) as input for manufacture and export of Hexa Chloro Ethane (Hexa) as per SION norms. During the year 1997-2002, the Appellant, imported 5179,374 MTS PC under 9 Licenses; used 4199.099 MT (82%) in own factory for manufacturing Hexa and used 980.275 MT (18%) in sister concern M/s. SCF, which is also in Taloja; goods were moved to M/s. SCF, in terms of Rule 57F (4) and Notification No.214/86, using 249 Job Work Challans issued under stamp and seal of jurisdictional authorities. Export Obligation was fulfilled; Remittances received; DGFT redeemed all 9 Licenses and Customs cancelled the Bonds executed. Revenue issued an SCN dated 30.9.2003 for Rs.1.22 Cr, alleging that the appellants misrepresented before DFGT in obtaining SION; imported excess 980.275 MTs PCE and diverted goods for job work to sister concern. Appellant paid Rs.54.16 Lakhs during investigation.

2.1. As the SCN was not adjudicated till 2009, Appellant approached the Hon'ble High Court with a Writ Petition No.2511/ 2009. Hon'ble High Court, vide Order dated 25.1.2010, disposed of the Petition, as Revenue gave undertaking to decide the SCN in a time bound period. Commissioner Export adjudicated SCN; though he did not uphold allegation of excess of import, held that condition of notification Custom Notification 30/97 was violated on ground that job work was without permission and as such goods are to be treated as diverted. He confirmed the demand of Rs.1, 22, 84,534 and equal penalty under Section 114A and penalty of Rs.6 Lakh on M/s. SCF. Hence, these Appeals (C/890/2010 and C/891/2010). Revenue filed an appeal (C/974/2010) for enhancing Penalty to include Interest amount in penalty.

3. Learned Counsel for the appellants submits, during the hearing and vide written submissions dated 7-3-19 and 18-3-19 that The SCN proceeds on Excess imports than required for export goods. The SION norms have been determined by the DGFT Norms Determining Committee. Commissioner Adjudication has dropped excess charge. Even now the same SION norms are there. The adjudicating Authority proceeds on extraneous material declaring Appellant as "Merchant Exporter" and presumes that Sister Concern SCF as "Supporting Manufacturer"; 18% job work by M/s. SCF is covered by Condition No (viii) of Custom Notification No.30/97; Appellant is an "Export Manufacture", condition (viii) is not applicable; entire finding and demand confirmed on the basis of Merchant and Supporting Manufacturer basis. As the ownership always remained with the appellants, the view of Learned Commissioner is contrary to Section 5 of India Transfer Property Act, 1882.

4. Learned Counsel submits that the Sister Concern SCF is a Manufacturer and also Trader/Importer of PTE Raw Material (SCN page 63): M/s SCF purchased 1266.211 MT PCE. The alleged 156.278 MT is out of this purchase. Statements of, 3 persons out of 7 Purchasers, has no relevance material imported as replenishment under 9 DEEC

licenses; Appellants confess that he sent for job work to SCF-Sister Concern; statutory records also support that of 18% of imported material was sent for job work and returned; Learned Commissioner accepts this and raised a new ground of Merchant and Supporting Manufacture treating "Appellant – Export Manufacture" as Merchant Manufacture and Job Worker as Supporting Manufacture.

5. Learned Counsel submits further that in the instant case as against export obligation of 4, 500,000 KG, 4, 531,226 Kg were Exported; actual User conditions complied with; all Licenses issued on same SION and redeemed and Job work challans contains there Office Seal and acknowledgment. He submits that a majority of input i.e. 82% was used by them and a mere 18% used in Sister Concern M/s. SCF. Shri Kamal Khandelwal has categorically stated that 980 MT PCE was sent on job work to SCF (Para 6 (xvi) of SCN). He further submits that Department itself has shown SCF purchased 1266.211 MT of PCE locally during 1997 to 2002 and have also imported 40.504 MT on 5.11.98. Therefore, M/s. SCF sold 156.278 MT PCE, out of this 1306.715 MTs and not out of 980.275 MTs PCE. Further, as far as 264.841 MTs sale to SCF is concerned, two traders stated that it was paper transaction out of fear. Department did not Charge these persons for aiding abetting. Some of them could not be traced.

6. He further submits that Exim Policy permits job work. A minor quantity of goods manufactured through job worker as per Para 3.5 of EXIM policy as Actual User. Thus it is not violation of Custom Notification Custom Notification 30/97. Taking permission for sending Replenishment Import goods for job work (though Assistant Commissioner permitted) is not a mandatory, essential and substantial condition. At the best, it is procedural, directory or technical condition. Therefore there is no breach of condition of notification. Disallowing exemption benefit by misconstruing and on technical ground is defeating and frustrating the purpose, object and spirit of beneficial notification. He relies on and submits that export obligation can be completed on the job work basis; there is no mandate that job work cannot be carried out without permission or intimation.

- (i) CC (Prev) Amritsar Vs Malwa Industries Ltd. 2009 (235) ELT 214 (SC)
- (ii) CC (Prev) Mumbai vs. M. Ambalal & Co. 2010 (260) ELT 487 (SC)
- (iii) Maheshwari Solvent Extraction Ltd Vs CCE, Nagpur 2014 (299) ELT 116 (Tri. Bom)
- (iv) Stump Schule & Somappa Ltd. Vs CC (Exports), Chennai, 2005 (190) ELT 257,
- (v) Tetra Pak (I) Ltd. V/s CC Nhava Sheva, 2006 (202) ELT 495

5. Learned Counsel submits also that the condition that merchant exporter needs to declare supporting manufacturer for job work is new being introduced by Commissioner; it was held in CC Delhi V Multivac India Pvt. Ltd 2017 (357) ELT. 1148 (Tri. – Del) that department cannot introduce extraneous condition in the notification. The ratio of CC, Hyderabad vs. Pennar Industries Ltd. 2015 (322) ELT 402 (SC) is not applicable; in the present case replenishments are imported after fulfilling the export obligation where as in Pennar case, no export was made and exempted imports were used in manufacture and sale in the local market. The Commissioner did not consider their submissions that removal for job work is not transfer or diversion and not violation of based Notification No.30 of 97. They relied on clarification given by the Office of DGFT and following cases.

- (i). CCE, Hyderabad Vs Sunder Steel 2005 (181) ELT 154 SC
- (ii). Navjyothi International Vs CC, Chennai 2004 (177) ELT 875(T)
- (iii). Ashok Enterprise V/s. CC Chennai 2005 (186) ELT 497 (T)

Learned Counsel further submits that there is no suppression of facts; they had informed Jurisdictional AC was about the Job Work as evidenced by Office Seal and acknowledgement, therefore, Section 114A is not applicable.

6. Learned Counsel submits that, inter alia, the following require consideration by this Bench.

- (i). in view of Delhi HC Judgment in Mangali Impex Ltd 2016 (335) ELT 605, Whether DRI has jurisdiction to issue SCN;

- (ii). Whether Job work is prohibited in DEEC Scheme for fulfilling export obligation?
- (iii). Does sending goods for job work amount to transfer of ownership/ title of goods amounting to breach of Custom Notification 30/97? How would the same be permissible if the exporter is a merchant Exporter who endorses the name of manufacturer?
- (iv). Whether the demand is hit by limitation period when Department had complete knowledge of job work; permitted the same and duly signed, stamped and audited the job work register?
- (v). While the SCN proceeds to demand duty on the allegation of excess import, is the Adjudicating Authority is correct in confirming the demand on technical ground, while he dropped demand on the main allegation.
- (vi). Whether the Adjudicating Authority disregarded higher judicial fora in not following the ratio of cases cited by them?

7. Learned AR per contra, reiterates the findings of the OIO as far as confirmation of duty and penalty is concerned. Further submits that penalty needs to be inclusive of duty plus interest as appealed by department. He submits, vide written submissions dated 18-3-2019 that the case was made on the basis of information received; searches were conducted at the office and factory premises of SCI and their sister concern, M/s. Scottish Chemical & Fluxes; evidence was gathered and statements of the concerned persons were recorded. Shri Kamal Khandelwal Partner of SCI, in his statement on 06.08.2003, inter alia, admitted to the illegal diversion; ratio of imported PCE to the finished goods was one kg of PCE for one kg of Hexa exported i.e. Hexa till June, 2000; there after it was 900 gm. / 1 kg; thus, excess quantity of 980.275 MT was arrived at; SCI were also sending the imported PCE to their sister concern (SCF) for manufacture of Hexa on job work basis; SCI did not maintain any records for the imported PCE sent SCF; SCF had sold imported PCE as such, and Hexa after manufacture, in the in the market.

8. Learned AR submits that invoices pertaining to the sale, of 156.278 MTs of imported PCE were recovered, from the records of SCF, indicating that the imported PCE was illegally diverted by SCI to SCF, which was in turn sold by SCF in the domestic market. Investigation carried out revealed that 980.275 MT of PCE imported duty free against Advance Authorisation was not utilized in the manufacture of Hexa exported by them. Duty was demanded on the 980.275 MTs imported PCE which was not utilized in the Hexa exported and illegally diverted by them in the local market. The Licenses are of actual user condition and thus, imported material cannot be diverted.

9. Learned AR submits a compilation of following case laws on the issue that exemption notification and submits that notifications have to be read in strict sense. & is case of.

- (i). CCE, Hyderabad V/s. Sunder Steels Ltd 2005 (181) ELT 154 (SC)
- (ii). Hotel Leela Venture Ltd. V/s. CC (Gen.) Mumbai (4) ELT 389 (SC)
- (iii). CC, Chennai v/s. Ashok Enterprises 2014 (302) ELT 191 (Mad.)
- (iv). CC (Import), Mumbai Vs Dilip Kumar & Co 2018 (361) ELT 577 (SC)

10. Brief issue to be decided in this case is to whether the Appellants have violated the conditions of Customs Notification 30/97 dated 01.04.1997 in respect of imports of Hexachloroethane under DEEC Licenses. The Department alleges that the Appellants have misrepresented the facts of input out ratio to the authorities of DGFT; thus they have imported HCE in excess of their requirements and also they have violated the condition of the notification, cited above, in as much as they have transferred / diverted part of the imported HCE to the local market by way of clearance to their sister concern M/s. SCF. The Appellants contend that clearances to M/s. SCF are for the sake of job work and the goods after due processing have been returned to the Appellants by M/s. SCF and have been exported.

11. The Appellants contended that whereas the Show Cause Notice was on the issue of excess import, the adjudication order proceeded on the premise that the condition of notification are violated. Ongoing through the Show Cause Notice it appears that though the intelligence was that the Appellants have imported excess quantity of HCE by misrepresenting to the DGFT authorities, the Show Cause Notice has also raised the issue of transferability of the license/goods at para No.30 and 31 specifically. It has been categorically stated that the 9 Advance licenses were issued in terms of para 7.4 of the Exim Policy and are nontransferable. The condition sheet attached to each of the above license also stipulates as under:

(a) The exempted goods imported against the license shall only be utilized in accordance with the provisions of the Export Import EXIM Policy 1997-2002 and the concerned Customs Notification, as amended from time to time.

(b) The license holder shall maintain a true and proper account of consumption and utilization of imported goods in the proforma given in Appendix-21 of the Hand Book of Procedures 1997-2002.

Therefore, the condition of the Appellant that the adjudication order traversed beyond the scope of the Show Cause Notice is not acceptable.

12. The Appellants further contended that they have sent a part of the imported goods to their sister concern M/s. SCF on job work basis; they had intimated the authorities in this regard. However, we find that Learned Adjudicating Authority has given a clear finding that there was no records maintained at the factory premises of M/s. SCI for receipt of imported PCE. From the RG 23A Part I maintained by the importer, it is seen that no entry of PCE as raw material has been made through 3 consignment of PCE purchased locally were entered. Therefore, the claim of the Appellants that they have merely sent the goods for Job Work to M/s. SCF do not stand scrutiny. We find that the investigation has successfully established that goods cleared to M/s. SCF by the Appellants have not returned back. The Appellants

have taken the plea that M/s. SCF have themselves imported / locally procured PCE and sold to others and therefore the allegation that the sale of PCE, imported by the Appellants, by M/s. SCF is not proved. We find that the investigation has proved to the extent that all the purchasers and sales shown to have been effected by M/s. SCF are bogus. Commissioner has given elaborate reasoning on the basis of the evidence on record, statements recorded. Commissioner has given a clear findings as follows:

32. *From the foregoing, it appears inter alia that:*

(vii). The fact of diversion of duty free PCE from SCI to SCF and its consumption at SCF or its sale in local market is evident from the following :

- a) Procurement of bogus bill of purchase of PCE by SCF from M/s. Siddharth Agro Chem, M/s. Heha Sales Corporation, M/s. Shree Raj Enterprises, M/s. New Impex Enterprises, M/s. K.J. Enterprises, M/s. Viniyar Trading co. and M/s. Jayanti Sales.*
- b) Finding of drums of PCE in factory sealed condition at SCF. Which were imported by SCI under B/E No.000327 dated 07.05.2002.*
- c) Sales of PCE in factory sealed drums of INEOS CHLOR (i.e. the goods which were imported free of duty by SCI under their advance license) as deposed by Shri Hemant H. Kothari, partner of M/s. Paresh Chemical Corporation, Shri Mahendra Shah, Partner of M/s. R. Mahendra Kumar & Co. Shri Kishore Kulchandani, Partner of M/s. Usha Chemical Company, Shri P. Subramaniam Raja, Proprietor of M/s. Spark Enterprises, Dr. Ashok Manghani, Partner in M/s. BOPP Agencies & M/s. Soofi Traders.*
- d) No record of utilization and consumption of exempt material as required under para 7.30 of the EXIM Policy, maintained by SCI.*

In view of the above, we find that the Appellants contention on the plea that the goods were not transferred but were sent on job work basis or not acceptable. We find that Appellant have not mentioned the name of the job workers while obtaining the licenses. Therefore, the plea on the basis of intimation to the authorities is not acceptable. We find that the investigation has successfully demonstrated that the

goods even if they were supposed to have been sent to M/s. SCF on job work basis have never back to the Appellants for further use and export in their factory. In the result one has to hold that such goods have been diverted in to the local market in contravention of the Exim Policy and the Customs Notification. We find that the Learned Commissioner has correctly relied upon a number of judgments in this matter.

13. We find that the Learned Commissioner has logically concluded that the reliance of the Appellants in the case of M/s. Ashok Enterprises (supra) is not correct. The Learned Commissioner has clearly elaborately distinguished different cases cited by them. We find that ratio of the cases can be applied only when the facts are identical. Further, we find that Hon'ble Supreme Court of India, in the case of *CCE, Bangalore v. Srikumar Agencies* - [2008 \(232\) ELT 577](#) (S.C.) = [2009 \(13\) S.T.R. 3](#) (S.C.) = 2008 - TIOL-220-SC-200-CX-LB, has stated in that,

(Para 5) one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper. They have also quoted the words of Lord Denning in this, which is as follows:

"Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect in deciding such cases, one should avoid the temptation to decide cases (as said by Cordozo) by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive."

14. In addition to the above, we find that Shri Kamal Khandelwal, Partner of SCI and Power of Attorney holder in M/s. SCF has accepted that the Appellants have diverted the excess quantity of PCE available with them to M/s. SCF and the products manufactured are sold in the domestic market which is in violation of the condition of advance license of duty free PCE has been used by SCF and that the Appellants were willing to pay the customs duty leviable on the quantity of PCE diverted by them. We find that this statement was not retracted and as discussed above, the diversion of the material imported duty free through M/s. SCF has been corroborated by the statements of the

other personal involved. The so called suppliers and buyers of M/s. SCF have been either found to be bogus or found to have been traded only in papers without dealing in the actual goods. The Appellants have put forth the reasoning that the persons have given statements out of fear cannot be accepted as the circumstances of such fear have not been established and have not been retracted. Therefore we find that the statements have evidentiary value as they are also supported by other evidence. In the circumstances the statements given are to be considered to be voluntary statements given under section 108 of the Customs Act, 1962. It has been held by the Apex Court in no uncertain terms that the statements given before the customs authorities have evidentiary value more so the statements have been committal. Moreover, the non-maintenance of records by the Appellants at their end or by M/s. SCF, to substantiate their claim, makes the arguments of the Appellants fall flat. Therefore, such arguments are devoid of any merit and are not acceptable. Appellants have taken the plea that no permission is required to be taken for job work. As discussed above, we find that the appellants have obtained licenses under actual user condition. They did not mention their sister concern as a supporting manufacturer. They have not maintained any records which could corroborate their claims. On the contrary, as discussed above, the investigation has established that the goods which were claimed to have sent on job work to M/s SCF have not returned back and the claim of sale by M/s SCF out of their domestic procurement/import has fallen flat as all the transactions have been proved to be bogus or with non-existing parties. We find that the appellants have tried to argue on the basis that they have fulfilled export obligation and as substantial compliance has been made, other minor infractions should not come in the way of their availing the benefit. We find that the conditions of Notification have to be read very strictly. We find that in spite of the claim of fulfilling the export obligation and discharge of bond by DGFT and Customs authorities, the liability of the appellants to pay duty in the event of violation of Customs Notification lies with him as held by the commissioner and the case law cited by him supports this contention. We find that

Condition No (vii) to the Notification No 30/97 dated 01-04-1997 stipulates that

Exempt materials shall not be disposed of or utilized in any manner except for utilization in discharge of export obligation or for replenishment of such materials and the materials so replenished shall not be sold or transferred to any other person.

In view of the above, the condition of the Notification is violated. In view of the clear wordings of the notification, no liberal reading in to the conditions on the basis of substantial compliance is required in view of the Apex Courts decision in the case of Dilip Kumar (Supra). The wordings used are 'shall *not be transferred/sold*'. Not only there is a bar on the sale but there is a bar on transfer also. Therefore, the reliance placed by the appellants on India Transfer Property Act, 1882 are misplaced. Having violated the conditions of the notification the importer has rendered himself liable to pay applicable duty in terms of the Notification.

15. The Appellants have also taken a plea that the Show Cause Notice is barred by limitation. We find that Learned Commissioner has rightly relied on the law laid down by the Apex Court that any goods imported duty free under any notification and subject to certain condition laid down in such notification, shall be liable to pay the duty so exempted in case of value to fulfill these conditions. We find that he has rightly relied upon the following cases.

- (i). CC (Import) Vs. Jagdish, Cancer & Research Centre 2001 (132) ELT 257 (S.C.)
- (ii). Mediwell Hospital and Health Care Pvt. Ltd Vs Union of India 1997 (89) ELT 425 (SC)
- (iii). M/s. Bombay Hospital Trust Vs CC, ACC (2006 (201) ELT 555 (High Court, Bombay).

It is not the case of the appellants that the fact of diversion, of goods imported duty free under Advance License, was in the knowledge of the department. Revenue was not made aware of the acts of omission and commission of the Appellants. Therefore, we find that Learned Commissioner has correctly found that the SCN is not hit by limitation and that duty has been correctly demanded and penalty under Section 114A was rightly imposed.

16. Coming to the penalty imposed on M/s SCF (C/891/2010), we find that the goods were imported by the appellants and the appellants are liable to pay duty in case of any violation. The appellants have diverted the imported goods to M/s SCF which were further sold in domestic market. We find that partner of the appellants is also the authorised signatory of M/s SCF. Equal Penalty under Section 114A has been imposed on the appellants and we have upheld the same. Under the circumstances, penalty imposed on M/s SCF appears to be higher side. Therefore, we are inclined to reduce the penalty on M/s SCF to Rs One Lakh only from Rs Six Lakhs.

17. We find that there is an appeal filed by the department for inclusion of the amount of interest in the penalty under Section 114A. We find that this issue is no longer Res Integra. We find that the interest payable on the duty demanded does not require to be taken into consideration for arriving at the amount of penalty payable under Section 114A.

18. In view of the above, Appeal C/890/2010 filed by M/s Scottish Chemical industries and C/974/2010 filed by Revenue are dismissed. Appeal No C/891/2010 filed by M/s SCF is partly allowed by reducing the penalty imposed to Rupees One Lakh only.

(Order pronounced in open court on 05.07.2019)

(D.M. Misra)
Member (Judicial)

(P Anjani Kumar)
Member (Technical)

HM