

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

Customs Appeal No. 87134 of 2022

(Arising out of Order-in-Original No. 29/22-23/CC/NS-II/CAC/JNCH dated 12.08.2022 passed by the Commissioner of Customs, NS-II, Nhava Sheva)

M/s. Bharat Rasayan Ltd.
1501, Vikram Tower, Rajendra Place,
New Delhi

.....Appellant

Vs.

Commissioner of Customs, Nhava Sheva II **.....Respondent**
JNCH, Nhava Sheva,
Taluka Uran, Dist. Raigad

APPEARANCE:

Shri B.L. Garg, Advocate for the appellant
Shri Ranjan Kumar, AC(AR) for the respondent

CORAM:

HON'BLE MR. C J MATHEW, MEMBER (TECHNICAL)
HON'BLE MR. AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER No: 85446/2024

DATE OF HEARING : 14.02.2024
DATE OF DECISION : 01.05.2024

Per: AJAY SHARMA

Instant Appeal has been filed assailing the impugned order dated 12.08.2022 passed by the Commissioner of Customs, NS-II, JNCH by which the classification of the goods as

declared by the appellant was rejected in respect of 54 shipping bills (*including 53 past shipping bills*) and the goods were re-classified and option to redeem the goods covered under the single *current* shipping bill i.e. Shipping Bill No. 8838574 dated 9.10.2019 was granted by imposing redemption fine of Rs.2,00,000/- (*in figures its wrongly written as Rupees Two lakhs seventy thousand only*) and for the past 53 shipping bills redemption fine of Rs.25,00,000/- (Rupees twenty five lakhs only) was imposed. MEIS benefit of Rs.5,86,95,000/- (Rupees five crores eighty six lakhs and ninety five thousands only) not only of the single current shipping bill but also of the 53 earlier shipping bills which have already been utilized, were also rejected and ordered to be recovered from the appellant u/s. 28(4) of the Customs Act, 1962 alongwith interest and penalties under various provisions of Customs Act, 1962.

2. The appellant was exporting "*Lamda Cyhalothrin Technical*" vide shipping bill No. 8838574 dated 9.12.2019 by classifying them under CTH 38089199 and availing MEIS benefit of Rs.14,14,000/- @ 2% of FOB value of the said export of Rs.7,07,00,000/-. During the course of export, the Docks Officer raised the objection about the aforesaid classification by the appellant and sought to re-classify the same under RITC/CTH 38086900 by resorting to sub-heading notes 2 of chapter 3808, for which no MEIS benefit is available to the exporter. Later on the goods under that particular shipping bill were provisionally

released after the appellant (exporter) submitted requisite bond and bank guarantee. After investigation, a show-cause notice dated 31.3.2022 was issued to the appellant u/s. 124 *ibid* for rejecting the classification as declared by the appellant and for rejecting the MEIS benefits of not only the single shipping bill dated 9.12.2019 but also for the past 53 shipping bills pertaining to earlier exports, *inter alia* for showing cause as to why:-

(i) The classification of the goods declared as Lambda Cyhalothrin Technical under CTH 31089199 in respect of shipping bill no. 8898574 dated 09.12.2019 and past 53 shipping bills mentioned at Table III, should not be rejected and subject goods should not be re-classified under CTH 38086900.

(ii) The impugned goods, covered under the impugned Shipping Bill no. 8838574 dated 09.12.2019 having declared FOB Value of Rs.7,07,00,000/- appears to be mis-classified, should not be confiscated under the provisions of Section 113(i) of the Customs Act, 1962. Though the goods were released provisionally, Redemption Fine should not be imposed in lieu of confiscation in terms of Provisional Bond and Bank Guarantee executed at the time of export.

(iii) The impugned goods, covered under the past 53 shipping bills as detailed at Table -III, having declared FOB value of Rs.2,86,40,54,000/- appears to be mis-classified, though the goods are not available for confiscation, should not be held liable to be confiscated under the provisions of Section 113(i) of the Customs Act, 1962.

(iv) The claimed MEIS of Rs.5,86,95,080/- (Rupees Five Crore Eighty Six Lakhs Ninety Five Thousand Eighty only) in respect of impugned 54 shipping bills should not be rejected and restricted to Nil, on the basis of re-classification of the subject goods under CTH 38086900.

(v) MEIS scrips of Rs.5,86,95,080/- (Rupees Five Crore Eighty Six Lakhs Ninety Five Thousand Eighty only) which were obtained fraudulently by way of mis-classification of the impugned export goods covered under total 54 shipping bills

and utilized towards the payment of Customs duty by M/s. Bharat Rasayan Ltd. should not be demanded and recovered from them under the provisions of section 28(4) of the Customs Act, 1962.

(vi) Interest on duty demanded above, should not be demanded and recovered under section 28AA of the Customs Act, 1962.

(vii) Penalty should not be imposed upon them under Section 114(iii) of the Customs Act, 1962 for misclassification of export goods.

(viii) Penalty should not be imposed upon them under Section 114AA of the Customs Act, 1962 for misclassification of export goods.

(ix) The Bond and Bank Guarantee submitted by them at the time of provisional release of the goods should not be enforced against the demand of export benefits, interest & penalty as adjudged, herein.

3. The learned Commissioner vide impugned order dated 12.08.2022 rejected the appellant's classification by upholding the classification under CTH 38086900 made by the customs department, ordered for confiscation of the goods covered not only under the shipping bill dated 9.12.2019 but also the goods already exported in the past i.e. earlier 53 shipping bills and imposed redemption fine on the goods covered under all the 54 shipping bills. The learned Commissioner also rejected the MEIS benefit on the 54 (1 current+53 earlier) shipping bills and ordered for recovery MEIS benefit of Rs.5,86,95,000/- (Rupees five crores eighty six lakhs and ninety five thousands only) u/s. 28(4) *ibid* alongwith interest and penalties under various provisions of Customs Act, 1962.

4. We have heard learned counsel for the appellant and learned Authorised Representative on behalf of respondent and perused the case records including the written submissions and the case laws placed on record. Before dealing with the merits of the appeal, we must point out that the impugned order has been passed by the Adjudicating Authority in a most casual manner. The learned Commissioner failed to notice that the amount of fine and penalty etc. imposed by him, is different in 'numerical' than that of 'in words'. which can be demonstrated from the operative portion of the order, relevant portion of which is extracted as under:-

'ORDER

(i) xxx xxx xxx

(ii) *I confiscate the impugned goods, covered under the Shipping Bill no. 8838574 dated 09.12.2019 having declared FOB Value of Rs.7,07,00,000/- under the provisions of Section 113(i) of the Customs Act, 1962. However, I give an option to redeem the goods covered under the Shipping Bill no. 8838574 dated 09.12.2019 on Redemption Fine of Rs.2,00,000/- (Rupees Two Lakhs Seventy Thousand only) under the provisions of section 125(1) of the Customs Act, 1962 in lieu of confiscation in terms of Provisional Bond and Bank Guarantee executed at the time of export.*

iii) *I confiscate the impugned goods, covered under the past 53 shipping bills as detailed at Table III, having declared FOB value of Rs.2,86,40,54,000/- under the provisions of Section 113(i) of the Customs Act, 1962. However, I give an option to redeem the goods covered under the past 53 shipping bills as*

detailed at Table-III, having declared FOB Value of Rs.2,86,40,54,000/- on Redemption Fine of Rs.25,00,00,000/- (Rupees Twenty Five Lakhs only) under the provisions of section 125(1) of the Customs Act, 1962 in lieu of confiscation.

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(ix) I impose penalty of Rs.25,00,000/- (Rupees Twenty Eight Crores) of M/s. Bharat Rasayan Limited under Section 114AA of the Customs Act, 1962.'

[Emphasis supplied]

On the shipping bill dated 09.12.2019 redemption fine in numerical is mentioned as Rs.2,00,000/- but in words its written as '*Rupees two lakhs and seventy thousand only.*' Similarly on past 53 shipping bills redemption fine under the provisions of 125(1) in numerical is mentioned as Rs.25,00,00,000/- whereas in words it is written as '*Rupees twenty five lakhs only.*'. The amount of penalty on the appellant u/s 114AA in numerical is mentioned as Rs.25,00,000/- but in words its written '*Rupees twenty eight crores.*' This is clear example of non-application of mind and hope the authorities concerned will be more careful while adjudicating or deciding any appeal. We do not propose to draw any inference, adverse or otherwise, about causes of this discrepancy.

5. Now coming to the merits of the appeal. The whole issue arises due to re-classification of already exported and to be exported goods by the customs department and also because of cancellation of MEIS scrips by the said department. The

allegation against the appellant is mis-classification on the ground that goods in issue i.e. '*Lambda Cyhalothrin Technical*' have been wrongly classified under CTH 38089199 in order to avail MEIS benefits as, according to the customs department, the same is appropriately classifiable under the heading 38086900 [*in which heading no MEIS benefit is available*] and the sub-heading 380891 covers the 'others' of main heading 3808 in which sub-heading note 2 of Chapter 38 clearly list the names of the goods which can be classified under the sub-heading 380861 to 380869 wherein name of item in issue '*lambda cyhalothrin (ISO)*' has been specifically mentioned. According to learned counsel for the appellant, the goods in issue i.e. '*Lambda Cyhalothrin Technical*' were being classified under CTH 38089199 not only by the appellant but also by many other exporters in the country during the very same period and it was the prevailing industry practice to classify the said item under CTH 38089199. He further submits that initially they classified the subject goods under CTH 38089137 but DGFT raised query regarding its classification and subsequently the DGFT approved changed classification code 38089199 for the said item and issued Advance License to the appellant mentioning HS code 38089199 for their final product '*Lambda Cyhalothrin Technical*'. He also submits that the customs department has no authority to cancel the scrips issued by DGFT i.e. the licensing Authority. And once this contention finds favour with the Tribunal, the question of redemption fine, interest or

penalty does not arise. Per contra learned Authorised Representative appearing on behalf of revenue supported the findings recorded in the impugned order and prayed for dismissal of appeal. According to learned Authorised Representative considering the description of CTH and sub-heading notes 2 of Chapter 38 there is no dispute that subject goods are appropriately classifiable under heading 3808 6900 as proposed by customs department. As a result the MEIS scrips were rightly cancelled by the department.

6. The period involved herein is from 2016 to 2019. *Merchandise Exports from India Scheme (hereinafter referred to as 'MEIS')* was introduced in the Foreign Trade Policy 2015-2020 (FTP 2015-20) as an incentive scheme for the export of goods. Objective of the MEIS is to promote the manufacture and export of notified goods/products. Trade facilitation is a priority of the Government for cutting down the transaction cost and time, thereby rendering Indian exports more competitive. The rewards are given by way of duty credit scrips to the exporters. This scheme is notified by Director General of Foreign Trade (DGFT) and implemented by the Ministry of Commerce & Industry. The said scheme aims to offset associated costs or infrastructural inefficiencies involved in export of goods or products produced or manufactured in India. The incentives under the said schemes are given in percentage, anywhere ranging between 2% to 5% of the realized free-on-board (hereinafter referred to as "FOB")

value of exports as per shipping bills. These scrips can be utilized to pay customs duties or anti-dumping duties or it can also be transferred to other persons. The entitlement to MEIS benefits is governed by the Chapter-III of the said Policy. In other words, the substantive rights and obligations are created by the MEIS Scheme under Chapter-III of the FTP. According to Para 3.04 of the said Policy once the notified goods are exported to a notified market, the exporter becomes entitled to the MEIS benefits. Thus, entitlement, restriction thereof and conditions, if any, have to be looked into within Chapter-III of the FTP 2015-20. The exporter becomes entitled to the MEIS benefits once it exported the notified goods to the notified market and this benefit cannot be deprived except by cancellation of the said scrips by the DGFT itself after following due procedure. A detailed procedure for cancellation of the scrips has been set out under Section 9(4) of the Foreign Trade (Development & Regulation) Act, 1992 (in short "FTDR") which is extracted as under:-

"9 (4) The Director General or the officer authorised under sub-section (2) may, subject to such conditions as may be prescribed, for good and sufficient reasons, to be recorded in writing, suspend or cancel any licence granted under this Act: Provided that no such suspension or cancellation shall be made except after giving the holder of the licence a reasonable opportunity of being heard."

Unless and until this provision has been invoked by DGFT, the presumption is that the scrips are valid and exporter becomes entitled to the MEIS benefits once the goods are exported.

7. Rule 10 of Foreign Trade (Regulation) Rules, 1993 also provides that DGFT is the only authority which can withdraw the MEIS benefits by cancelling the license granted by them. For ease of reference the said Rule 10 is extracted as under:-

"10. Cancellation of a licence. -

The Director General or the licensing authority may by an order in writing cancel any licence granted under these rules if –

(a) the licence has been obtained by fraud, suppression of facts or misrepresentation; or

(b) the licensee has committed a breach of any of the conditions of the licence; or

(c) the licensee has tampered with the licence in any manner; or

(d) the licensee has contravened any law relating to customs or foreign exchange or the rules and regulations relating thereto."

8. In view of the aforementioned Act of 1992 and Rules, 1993 made thereunder, for withdrawing the MEIS benefits, the license issued to the exporter by the DGFT has to be cancelled firstly by the licensing authority i.e. DGFT. The customs department is not at all empowered to venture into the authority of DGFT to withdraw the MEIS benefits. Nothing has been brought on record to establish that DGFT has initiated any proceedings for cancelling the licence of appellant for alleged mis-classification or for withdrawing the MEIS benefit. The Customs authorities can initiate action for recovery under the Customs Act, 1962 only once DGFT initiates action for cancellation of an instrument and cancelled the same by following due procedure. Until the DGFT

has taken any action for cancellation, the Customs department cannot recover the duty by discarding the scrips issued by DGFT.

9. 'Ineligible categories under MEIS' have been provided under clause 3.06 of FTP and it provides that the following exports categories/sectors shall be ineligible for Duty Credit scrip entitlement under MEIS:

(i) Supplies made from DTA units to SEZ units.

(ii) Export of imported goods covered under paragraph 2.46 of FTP;

(iii) Exports through trans-shipment, meaning thereby exports that are originating in third country but trans-shipped through India;

(iv) Deemed Exports;

(v) SEZ/EOU/EHTP/BTP/FTWZ products exported through DTA units;

(vi) Export products which are subject to Minimum export price or export duty.

(vii) Exports made by units in FTWZ.

The department failed to point out under which of the above-mentioned ineligible categories as enumerated in clause 3.06 of the Scheme the case in hand falls.

10. These proceedings have been initiated by the customs authorities u/s. 28(4) of Customs Act, 1962 for recovery of alleged fraudulently availed MEIS duty credits utilized by the appellant for the payment of customs duty at the time of import alongwith interest u/s. 28AA ibid. In these proceedings, initiated by the customs authorities, everything including confiscation of

the goods is revolving around the re-classification of the exported goods by the customs.

11. It has also been noticed by us that the details of MEIS Scrips issued against aforesaid 54 shipping bills were sought by the customs department from DGFT, New Delhi vide letter dated 20.7.2021 followed by various reminders dated 31.8.2021, 14.10.2021 and 26.10.2021 respectively, but were not responded by DGFT. The MEIS scrips issued against the respective bills had already been utilized towards the payment of Customs duty levied on the goods imported by the appellant themselves. As per para/clause 3.19 of the Foreign Trade Policy 2015-20 over-claimed or illegally claimed MEIS benefits alongwith interest is recoverable by the Regional Authorities of DGFT, if the scrip is issued to the Exporter and the same is not utilized for the payment of customs duty. Therefore, in the first place only the DGFT is empowered to cancel or recover the MEIS scrips and that too only if it's not utilized for payment of customs duty. What the customs authorities are trying to recover from the appellant u/s. 28(4) ibid is MEIS benefits already availed by the appellant during the years 2016-2019 which certainly they cannot do as under the said provision the customs department can recover only the 'duty' not levied or not paid or short levied or short paid or erroneously refunded or 'interest' not paid, part-paid or erroneously refunded by reason of collusion or willful mis-statement or suppression of facts and not the MEIS benefits

and, that, too only on the ground of ineligibility to MEIS. The learned Counsel has also submitted that there is no customs duty liability on export of the impugned product even if the classification is changed and the issue is only about the availability of MEIS benefits to the appellant which we have already made clear.

12. Hon'ble Supreme Court in the matter of *Titan Medical Systems (P) Ltd v. Collector of Customs, New Delhi; 2003(151) ELT 254 (SC)* has laid down 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 because if there was any misrepresentation, it was for the licensing authority to take steps in that behalf.* The Hon'ble Supreme Court has held that if the licensing authority i.e. DGFT has not questioned the veracity of the transactions undertaken under the license, the customs authorities cannot refuse exemption on an allegation that there was any misrepresentation. Likewise in the present situation the appropriate authority could only be the authority which issued the license i.e. DGFT and not the customs authorities. This Tribunal also in the matter of *Axiom Cordages Ltd. vs. CC, Nhava Sheva-II; (2023) 4 Centax 120 (Tri-Bom)* has held that the allegation with regard to MEIS benefits wrongly availed by the appellant does not have an independent nexus to the Customs Act, 1962 inasmuch as such scheme, designed for the Merchant

Exporter, are dealt with under the Foreign Trade Policy (2015-20) and Foreign Trade (Development & Regulation) Act, 1992 and thus the administration of MEIS squarely falls within the jurisdiction of the office of the DGFT and not the customs authority. It further held that the division of exercise of authorities between the DGFT and customs authorities is well recognized judicially and should be respected to prevent abuse of due process of law.

13. We deem it proper to address a very pertinent issue which arises in situation we are dealing with and it is about the role of customs authorities. *Merchandise Exports from India Scheme* (MEIS) is intended to offer incentives to eligible exporters on the basis of their export performance in a given year. Thus, the actual exports, as evidenced in shipping bills endorsed in accordance with Section 51 of Customs Act, 1962, are scrutinized by the licensing authority i.e. DGFT and scrips issued thereon in accordance with eligibility for inputs as designed in the Standard Input Output Norms (SION). Customs authorities have no role in this process once the exports have been completed. It lies within the exclusive domain of the agency designated under Foreign Trade (Development & Regulation) Act, 1992 and no other. To invalidate exports, it is necessary for customs authorities to invoke section 113 of Customs Act, 1962 and Section 113(i) in particular. Under this provision, only goods entered for exportation can be subject to confiscation and,

as per section 2(18) 'export' means 'taking out of India to a place outside India,' implying that once goods have left India they cease to be under exportation. Such exports, under Section 51 of Customs Act, 1962, attain finality and can be re-opened only if duty has not been collected or goods are found to be prohibited; there is no other empowerment for post-export confiscation. Eligibility for any benefit arising therefrom lies alone within the exclusive domain of the agency designed under Foreign Trade (Development and Regulation) Act, 1992 as the shipping bill cannot be nullified except in the said circumstances.

14. The role of customs authorities, if at all, may commence only upon presentation of scrips for clearance of exported goods that too in accordance with Notification No. 24/2015-dt. 8.4.2015 issued u/s. 25 of the Customs Act, 1962. Once the scrips are issued and are presented before customs authorities to be debited towards duty liability as assessed, the acceptance thereof is governed by the notification (supra) issued u/s. 25 ibid. This is segregation of jurisdiction, which is implicit in the notification applicable to utilization of scrips on imports of goods. There is, thus, no concurrent jurisdiction over the stages involved between export and import and each stage is governed to the limits of licensing and assessment jurisdiction by the respective statutes.

15. The functions of the licensing authorities and the customs authorities operate in different fields. The function of the

licensing authorities is to consider whether any particular item should be allowed to be imported or exported due to various circumstances such as the requirement of the item, the amount of foreign exchange involved, permissibility and the relevant factors. If satisfied about the feasibility and permissibility the licensing authority grants license and, at times, may impose such conditions as they find necessary. This granting of licence may be dependant upon a policy enunciated in advance by the Government or may even be made to depend on the individual judgment of the licensing authority. As against this, the function of customs authorities start only after the goods are imported and brought into the territorial water of the country. Customs authorities are concerned with the recovery of Customs duty and to check evasion of payment of duty and with the prevention of entry of goods which are prohibited goods as defined by the Customs Act. It is not for the customs authorities to interpret licensing policy or to enforce the same once a valid licence is produced or to dissect the license granted. This function is of the licensing authority. If this bifurcation of function is not adhered to, there is every likelihood of utter confusion. The licensing authority may interpret the policy one way and the customs authorities may take contrary view producing a conflict between the two authorities resulting in harassment to the importer or exporter, as the case may be. It is therefore, that the function of the two authorities which operate in two different spheres must be kept within their proper ambit. If a licence is

granted in respect of a particular item by the licensing authority, the customs authority will have no right or power to go beyond the licence and determine the classification or reclassifying the same. It is only the licensing authority who has to determine the said question at the time of granting licence.

16. Before parting with this matter, there is another aspect of the present proceedings that needs highlighting. The exercise of rejecting the entitlement to the scrip commenced with reclassification of the export goods, for assigning a different tariff item in Schedule to Customs Tariff Act, 1975. The classification of the goods is exclusive to Section 12 of Customs Act, 1962 and that too only for levy of duty. The classification declared by the exporter can be disturbed only by reference to the General Rules for Interpretation of the Export Tariff appended to Customs Tariff Act, 1975. Like undertaking of reclassification for imported goods, it is necessary that the onus of identifying the correct classification as substitute for declared classification rests with the assessing officer/proper officer. Such reclassification is to be undertaken solely for the purpose of conformity with the General Rules for Interpretation and not for any other purpose. Reclassification for any other purpose has no place in adjudication.

17. In view of the discussions made hereinabove, we are of the view that the customs authorities have overstepped its jurisdiction by resorting to re-classification of exported goods

and cancelling the MEIS scrips. The same are hereby restored to the appellants. Accordingly the impugned order is set aside and the appeal filed by the Appellant is allowed with consequential relief, if any, in accordance with law.

(Pronounced in open Court on 01.05.2024)

(C J MATHEW)
MEMBER (TECHNICAL)

(AJAY SHARMA)
MEMBER (JUDICIAL)

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