CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 86413 OF 2023

[Arising out of Order-in-Original No: CC-RK/005/2022-23 Adj.(X) ACC dated 31st October 2022 passed by the Commissioner of Customs (Exports), Air Cargo Complex, Mumbai.]

Dyna Biotech
Gat No. 407-408, At: Post Bhandgaon, Tal: Daund
Pune – 412 142 … ***Appellant***

versus

Commissioner of Customs (Export)
Air Cargo Complex, Sahar, Andheri (E), Mumbai-400099 ***…Respondent***

WITH

(i) Customs Appeal No: 87731 of 2022 (Alcan Logistics LLP), (ii) Customs Appeal No: 87916 of 2022 (DHL Logistic Pvt Ltd), (iii) Customs Appeal No: 85022 of 2023 (Sun Impex Clearing & Shipping Agency Pvt Ltd), (iv) Customs Appeal No: 85023 of 2023 (Seveseas Express Logistics Pvt Ltd), (v) Customs Appeal No: 85118 of 2023 (Eastern Cargo Carriers India (P) Ltd), (vi) Customs Appeal No: 85278 of 2023 (Jet Wings Freight Forwarders), (vii) Customs Appeal No: 85279 of 2023 (Expert Cargo Movers), (viii) Customs Appeal No: 86588 of 2023 (Sadhna Vinod Kumar Patil) and (ix) Customs Appeal No: 86620 of 2023 (Vinod Kumar R Patil)

[Arising out of Order-in-Original No: CC-RK/005/2022-23 Adj.(X) ACC dated 31st October 2022 passed by the Commissioner of Customs (Exports), Air Cargo Complex, Mumbai.]

APPEARANCE:

Shri Sanjay Singhal, Advocate for the appellant

Shri Ram Kumar, Assistant Commissioner (AR) for the respondent

CORAM:

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

FINAL ORDER NO: 85814 /2024

DATE OF HEARING: 14/02/2024
DATE OF DECISION: 13/08/2024

PER: C J MATHEW

Before us are ten appeals comprising that of M/s Dyna Biotech and two Directors of the said appellant besides those of seven customs brokers who had handled exports of ‘fermenters and parts thereof’ valued at ₹ 33,62,28,692, on which the principal appellant had availed drawback of ₹ 59,68,936 and refund of ‘integrated goods and service tax (IGST)’ of ₹ 13,03,086, against 42 shipping bills filed between 21st September 2017 and 13th August 2020. The order[1] of Commissioner of Customs –IV (Export), Air Cargo Complex (ACC), while confiscating the impugned goods under section 113(d), 113(i) and 113(ii) of Customs Act, 1962, imposed fine of ₹ 3,50,00,000 in lieu thereof under section 125 of Customs Act, 1962 besides imposing penalty of ₹ 4,00,00,000 on the exporter and ₹ 2,00,000 each on the individual-Directors under section 114(i) of Customs Act, 1962 in addition to ordering recovery of drawback under rule 17 of Customs and Central Excise Duties Drawback Rules, 2017 along with interest thereon, while imposing penalty of ₹ 5,00,00,000 and ₹ 5,00,000/- each respectively

[1] [order-in-original no. CC-RK/005/2022-23 Adj.(X) ACC dated 31st October 2022]

on the exporter and the two Directors as also varying amounts on the other appellants under section 114AA of Customs Act, 1962.

2. It was alleged that the said exports had been effected in contravention of notification no. 29/2015-20 dated 21st September 2017, prescribing restrictions on cross-border transaction in goods under the Special Chemicals, Organisms, Materials, Equipment and Technologies (SCOMET) regime, which *inter alia* included

'3D00615 Fermenters

(1) Fermenters capable of cultivation of micro-organisms or of live cells for the production of viruses or toxins, without the propagation of aerosols, having a total internal volume of 20 litres or greater;

(2) Components designed for such fermenters, as follows:-

a. cultivation chambers designed to be sterilized or disinfected in situ;

b. cultivation chamber holding devices; or

c. process control units capable of simultaneously monitoring and controlling two or more fermentation system parameters (e.g. temperature, pH, nutrients, agitation, dissolved oxygen, air flow, foam control).

Technical Note:

Fermenters include bioreactors (including single-use (disposable) bioreactors), chemostats and continuous-flow systems.'

3. Based on inputs from the special wing of the Central Board of Indirect Taxes and Customs pertaining to one specific consignment, the overseas transactions of the exporter came under scrutiny and proceedings were initiated for non-furnishing of licence from the competent authority as prescribed for export of such goods. It is seen from the impugned order that the confiscation of the exported goods and imposition of penalties on exporter, directors and the logistics agencies have been founded on the alleged conformity of description in the shipping bills with that of the goods included in the notification *supra* in conjunction with non-acceptance of the several pleas made by the exporter that the restricted regime was not applicable to their goods. The specific pleas taken before the original authority that were found to be unacceptable in the impugned order are that the SCOMET regime is intended to cover 'fermenters' of particular specifications as well as certain specified components thereof which theirs were not. The adjudicating authority discarded the contentions offered in defence on the ground that the descriptions in the shipping bills matched the intended restrictions on export with the finding that

> *'5.4.1 ………. Thus, it is clear that the noticee are into export of fermenters. Further, Appendix 3D of SCOMET list published by the DGFT includes fermenters and its components. The notice has made an attempt to confuse by saying that only the components mentioned in the Appendix 3D are covered and are restricted. Their intention is to state that the exported goods i.e. components are other than those*

> *mentioned in the said Appendix 3D of SCOMET list and same are not covered under the notification. It has come on record that the fermenters and its components are used for vaccine manufacturing for humans, animals, therapeutic proteins, antibiotics, probiotics, cell culture products etc. it is further a fact that fermenters capable of cultivation of micro-organisms or of live cells for the production of viruses or toxins are covered in the SCOMET list published by DGFT. In my opinion, the components specified are only examples of includibility. The wordings of the notification clearly indicate that fermenters and its components are covered in the SCOMET list. Had the intention of the statue being otherwise, the notification would have clearly mentioned that only these components are included, which is not the case. The notification specifically covers fermenters and their components. The exported goods are undoubtedly of that category which is n accepted fact. The contention are therefore rejected.'*

4. It was further held that the strict interpretation of notifications, espoused by the Hon'ble Supreme Court in *Novapan India Ltd v. Commissioner of C [1994 (9) TMI 67 (SC)]* and *Commissioner of Central Excise v. Parle Exports (P) Ltd [1998 (11) TMI 108 (SC)]*, were rendered inapplicable thus

> *'5.4.1.1. ……. The judgments has dealt with interpretation of exemption notification and tariff schedule under taxing statute, whereas Notification No. 29/2015-20 dated 21.09.2017, which has been issued by DGFT, governs the trade policy, which deals with export of SCOMET items, which is permitted subject to authorizations, so the ratio of the said case laws are not applicable to the instant case.'*

5. Furthermore, the adjudicating authority asserted that such proceedings were governed by preponderance of probability and not by mathematical precision with the finding that

> *'5.4.2 Further, it is well settled law that the department is not required to prove its case with mathematical precision to a demonstrable degree. The law does not required the department to prove the impossible. All that it requires is the establishment of such a degree of probability that a prudent man may, on its basis, believe in the existence of the fact in issue. Therefore, even if some of the facts remain undisclosed during investigation, it does not tantamount to the absence of such malicious act as all other evidences goes against the Noticee. Following case laws clearly supports the aforesaid view.*
>
> *xxxxx*
>
> *5.4.6 ………..It is not necessary for the Customs department to unravel each and every activity and the link by adducing direct evidence. It is also well settled that many facts relating to the illicit business remain in the special or peculiar knowledge of the persons concerned in it and the department is not required to prove the facts which are especially within the knowledge of the opponent. Hence in the departmental proceedings, the department is required to establish the charge at least by preponderance of probabilities.'*

6. In addition, the adjudicating authority was guided by the fact that the exporter had, in connection with consignments despatched thereafter, approached Director General of Foreign Trade (DGFT) and obtained necessary permissions implying that the requirements of compliance

with restrictions could no longer be pleaded as inapplicable..

7. According to Learned Counsel for the appellants, restriction was limited only to 'fermenters capable of cultivating microorganisms or live cells for production of virus/toxins without the propagation of aerosols' and 'parts', *viz.*, for 'cultivation chambers of process control units' and not the entirety of all or any type of fermenter. It was further contended that the fermenters exported by them involved aerosols propagation which was attested to in the certificate of Chartered Engineer furnished during the proceedings. It was submitted that obtaining of licence for subsequent exports was not admission of coverage under the regime as the licensing authority did issue those routinely without examining the requirements for such licences. It was further contended that there was no mis-declaration on their part in any of the shipping bills, and that, with exports having been undertaken, there was no jurisdiction for recovery of the drawback availed by them. Insofar as customs brokers are concerned, it was argued that their role was limited to filing of the shipping bills and complying with the procedure of examination for assessment. It was pointed out that the imputations levelled against them were more in the nature of alleged infractions of obligations devolving under the Customs Brokers Licensing Regulations, 2018 which, if warranted, mandate separate proceedings under the said Regulations. It was also pointed out that M/s Sevenseas Global Express Logistics Pvt Ltd had been proceeded with by the

licensing authority, *viz*., Commissioner of Customs, Bengaluru, who had dropped the proceedings under the said regulations.

8. According to Learned Authorized Representative, the adjudicating authority had correctly pointed out that the SCOMET regime was intended for particular purpose and that broad view taken about the impugned goods being covered by the said regime was not disputed. The factum of having obtained export licence after the investigation commenced was, according to him, clear indication of coverage by the restricted regime and submitted that the end-use certificate furnished by the exporter did not advance their case inasmuch their validity could have been acknowledged had they been issued by the official authorities. He further referred to the said notification of the Directorate General of Foreign Trade (DGFT) as well as scientific literature to point out that the action taken in the impugned order could not be faulted.

9. It would appear that the SCOMET regime was intended to monitor goods capable of 'dual use' and to preclude deployment for purpose other than licit through documentary trial from the time of shipment of consignment from India – a multi-lateral initiative for ensuring that 'seemingly' commercial goods are not put to use for purpose which endangers the human race. We find that the adjudicating authority has taken a superficial view of the impugned goods to hold

those to be subject to restrictions under the Foreign Trade Policy (FTP). The Foreign Trade Policy (FTP) is designed by the Directorate General of Foreign Trade (FGFT) under the authority of Foreign Trade (Development and Regulation) Act, 1992 with the customs authorities playing an agency role in enforcement thereof. In matters such as SCOMET regime, which, if wrongly applied and indiscriminately, could defeat the purpose of trade promotion and, involving technologies specified in international conventions, customs authorities should necessarily have obtained authoritative opinion from the licensing authority. From the acknowledgement of the clearance of specific consignments in accordance with the procedure, it should also have struck the adjudicating authority that no action had been initiated by the licensing authority in relation to the earlier consignments which would have been a natural reaction had the impugned goods required such compliance.

10. The assumption of the adjudicating authority that the restrictions were amenable to broadbanding, and that too in a restrictive regime, is an incorrect perspective on licensing rules and regulations. The decisions of the Hon'ble Supreme Court in *re Novapan India Ltd* and *re Parle Exports (P) Ltd* appears to have been misapplied by the adjudicating authority. We are unable to fathom the scope for 'preponderance of probability', which relates to discharge of onus to establish goods as not smuggled or in application of evidence, for varying the requirements of

customs law to goods which, admittedly, had been declared and made available for examination at the time of export. From the manner in which the adjudicating authority has dealt with the proposition in the show cause notice, as well as disregard of the defence put up by the noticees, it would appear that the requirements of factual ascertainment in adjudication and pre-requisite for visiting penalties has not been followed. The primary responsibility for applying established facts to known law that devolves on the adjudicating authority and the casual approach to this obligation is not one that mandates rectification in the appellate jurisdiction. That would defeat the very purpose of the statutory mechanism for adjudication.

11. In view of the failure to discharge such responsibility, we are constrained to set aside the impugned order and remand the matter back to the original authority for reference to the licensing authority for their opinion on applicability of the SCOMET regime and to dispose off the show cause notice in accordance with such reports after considering the defence if any, put up by them. For the above reasons, the impugned order is set aside and the appeals are allowed by way of remand.

(Order pronounced in the open court on 13/08/2024)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*