

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.**

PRINCIPAL BENCH - COURT NO. 3

Customs Appeal No. 52760 of 2019

(Arising out of Order-in-appeal No. CC(A)/CUSTOMS/D-I ACC. Exp-NCH/315/2019 dated 30.08.2019 passed by the Commissioner of Customs (Appeals), New Custom House, New Delhi).

Kabir Oldtex

18-B, Rajpura Road, Civil Lines
New Delhi-110054.

Appellant

VERSUS

Commissioner of Customs, Export

New Custom House, Near IGI Airport
New Delhi-110037.

Respondent

APPEARANCE:

Shri P. Pathak, Consultant and Shri Mukeshwar Nath Dubey, Advocate for the appellant

Shri Rakesh Kumar, Authorised Representative for the respondent

CORAM:

HON'BLE MS. BINU TAMTA, MEMBER (JUDICIAL)

HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

FINAL ORDER NO. 51609/2023

DATE OF HEARING: 14.09.2023

DATE OF DECISION: 07.12.2023

BINU TAMTA:

The appellant has challenged the Order-in-appeal No. 315/2019 dated 30.08.2019 whereby the Commissioner of Customs (Appeals) dismissed the appeal and confirmed the findings of the Adjudicating Authority.

2. The short question involved in the present appeal is whether the appellant is required to fulfil the export obligation within the time prescribed under the notification or the same is subject to

the EODC Certificate issued by the DGFT. The issue is no longer res-integra and has been decided in series of decisions that the liability of the importer is only to fulfil the export obligations and submit the requisite documents to the concerned authority. However, if there is any delay on the part of the authority in issuing the requisite certificate to be submitted to the Customs Authorities, the importer cannot be held liable for the same and therefore no duty liability can be imposed on him.

3. For considering the present appeal, we need to appreciate the brief facts. The appellant was issued EPCG License No. 0530137818 dated 11.01.2005 for import of Needle Detector Machine by the Additional Director General of Foreign Trade (DGFT). The said machine was imported vide Bill of Entry No. 869747 dated 02.02.2005 on payment of concessional rate of duty @ 5% in terms of Notification No. 97/2004 dated 17.09.2004. That one of the conditions of the EPCG License dated 11.01.2005 was that the importer was required to fulfil obligation by exporting all types of cotton made ups worth US\$ 25,379 i.e. eight times the duty saved on capital goods on FOB basis within the period of eight years. As per the said notification, the export obligation was required to be fulfilled in block periods 1 to 6 years to the extent of the 50% and the remaining obligation was required to be fulfilled in second block period, i.e. 7 and 8 years. The relevant para of the notification, which is under consideration so as to ascertain the liability of the appellant is quoted herein below:-

“(4) that the importer produces within 30 days from the expiry of each block from the date of issue of licence or within such extended period as the

Deputy Commissioner of Customs or Assistant Commissioner of Customs may allow, evidence to the satisfaction of the Deputy Commissioner of Customs or Assistant Commissioner of Customs showing the extent of export obligation fulfilled, and where the export obligation of any particular block is not fulfilled in terms of the preceding conditions, the importer shall within three months from the expiry of the said block pay duties of customs of an equal amount equal to that portion of duties leviable on the goods, but for the exemption contained herein which bears the same proportion as the unfulfilled portion of the export obligation bears to the total export obligation together with interest at the rate of 15% per annum from the date of clearance of the goods;”.

4. The appellant had exported the goods from JNPT, Nava Sheva and submitted the details of the export to DGFT on 01.10.2011, i.e. within the period of eight years for issuance of Export Obligation Discharge Certificate (EODC). The said document has been placed on record by the appellant alongwith written submissions filed on 08.06.2023 at page No. 29 - 30. It appears that after the expiry of the period of eight years on 10.01.2013, the Customs Department issued the show cause notice dated 04.06.2014, which according to the appellant was not received by him and consequently when the show cause notice was being adjudicated by the Deputy Commissioner of Customs and notice of personal hearing was sent for 15.10.2014, 21.10.2014 and 28.10.2014 as recorded in the adjudication order dated 24.11.2014, the appellant neither appeared in person nor replied to the show cause notice. The Adjudicating Authority in a very cursory manner confirmed the show cause notice holding that the noticee failed to submit requisite documents regarding export obligation as well as installation certificate. That pursuant to the Order-in-original, the Department called upon the appellant vide letter dated 25.05.2015 to deposit the dues. Subsequently, again on 16.02.2016, another communication was made to the appellant for recovery of Government dues, which was personally handed over to one of the employee of the appellant

and accordingly vide letter dated 05.10.2016, a request for supply of certified copy of the Order-in-original was made so that further action can be taken by them. The appellant again repeated his request for supply of certified copy of the order-in-original vide letter dated 07.11.2016 which was forwarded by the Office of Commissioner of Customs to the Deputy Commissioner vide communication dated 08.11.2016. All these communications are placed on record alongwith written submissions by the appellant. Thereafter the appellant challenged the Order-in-original in an appeal filed on 01.05.2017 before the Commissioner of Customs (Appeals) and pleaded the non-receipt of the show cause notice and also the Order-in-original. The appellant specifically stated that pursuant to the fulfilment of the export obligation EODC has been obtained from the DGFT on 26.05.2015.

5. The Commissioner (Appeals) recorded that the onus of submission of the EODC was on the appellant which he has chose to fulfil during the personal hearing which was after the prescribed time limit had lapsed and therefore the impugned order-in-original was upheld. Being aggrieved, the appellant has filed the present appeal.

6. Learned Counsel for the appellant has submitted before us that for fulfilment of the export obligation, the time period available was upto 10.01.2013 and from the Form ANF5B (statement of export for redemption of EPCG authorisation) was submitted to the DGFT on 01.10.2011 and therefore the condition of the license was duly complied by the appellant and no delay can be attributed in that regard on them. In addition, he relied on the principle of natural

justice which seems to have been violated in the present case as the show cause notice was not served on the appellant and though such contention was raised before the Appellate Authority, however, the Commissioner (Appeals) failed to consider the same nor did they called upon the Department to satisfy as to whether the show cause notice was actually served on the appellant. Learned Counsel referred to various orders passed by this Tribunal as well as by the High Court on the issue under consideration. On the contrary, learned Authorised Representative for the Revenue has submitted that it is an open and shut case where the appellant had not submitted the EODC on time and the EODC issued by the DGFT is much beyond the stipulated period and therefore the conditions have not been fulfilled to claim the benefit of the notification and consequently the appellant is liable to pay the custom duty. The learned Authorised Representative has also referred to series of decisions which are basically on the point that the conditions of the notification have to be strictly construed and in the event of any ambiguity the benefit has to go to the State.

7. We have heard both sides and perused the record of the case.

8. Considering the conditions of the notification for grant of license we are of the opinion that the responsibility and liability of the importer is to fulfil the export obligations and submit the requisite documents to the concerned authorities and the issuance of the EODC was on the concerned authority. From the records, we also find that the export obligations were fulfilled by the appellant and

communication in that regard was made by him on 01.10.2011, which was much prior to the block period, i.e., 10.01.2013. Both the Adjudicating Authority and the Appellate Authority are aware that the authority issuing the EODC is DGFT and therefore while adjudicating the show cause notice which was issued by the customs authority, it was incumbent to have verified the status of the issuance of the EODC by the competent authority. Moreover, when the appeal was filed by the appellant, he has submitted the EODC which was issued on 26.05.2015, instead of taking note of the same which evidently proved that the appellant had fulfilled the export obligations within the prescribed time, the Appellate Authority ignored the same on the ground that it was belated. We do not agree with the same and are therefore of the opinion that the impugned order deserves to be set aside.

9. We would like to refer to certain orders which have been passed by the Tribunal and also by the High Court in this regard. Learned Counsel for the appellant has relied on the decision of the **Telangana High Court in Hetero Labs Ltd., vs. Assistant Commr. Of Customs (Group 7), Chennai -2019 (370) ELT 234 (Telangana)**, where the Division Bench was dealing with the condition No.(ix) of Notification No. 96/2009, which required submission of redemption certificates within sixty days from the expiry of the period allowed for fulfilment of the export obligations and as the petitioner could not submit the same within the said period owing to the delay on the part of the issuing authority, the first respondent therein had chosen to penalise the petitioner by raising

duty demands with interest thereon for failure to comply with Condition (ix). The Court therefore observed-

"17. Significantly, it is not the contention of the customs authorities that the delay in issuance of the redemption certificates was attributable to the petitioner. It was therefore for the authorities themselves to put in place necessary machinery to see that such certificates were issued promptly, so that they could be produced within the time stipulated in Condition (ix) of Notification No. 96 of 2009, dated 11.09.2009. An importer who duly complied with such export obligations in terms of the exemption granted under the Foreign Trade Policy cannot be penalised for delay on the part of the authorities in processing the necessary documentation.

18. Given the aforesaid admitted facts, we find that the first respondent adopted a tediously hidebound approach in dealing with the matter. According to the petitioner, the fact that it had discharged its export obligations would have been well within the knowledge of the customs authorities themselves and all that the first respondent had to do was to cross verify the factum of such compliance even if the petitioner failed to appear before him. We find merits in this submission."

10. In another decision by this Tribunal in the case of **Arjuna Natural Extracts Ltd., vs. Commissioner of Customs, Cochin - 2021 (378) ELT 187 (Tri. Bang.)**, the learned Single Member noted that the appellant therein had fulfilled the export obligation and has submitted all the relevant documents to JDGFT office within time but the redemption letter was issued after inordinate delay and in the meantime the show cause notice was issued and following the order of the High Court in appellant's own case on the same ground, observed that since the redemption certificate has already been issued showing the fulfilment of the export obligation by the impugned order, the impugned order is set aside. The learned Counsel for the appellant has relied on the decision in the case of **Bestech Hospitalities Pvt. Ltd., vs. CC (Import), New Delhi** in Customs Appeal No. 50232/2020 (SM), Final Order No. 51771-51773/2021 dated 25.08.2021 where the Tribunal dealt with the issue whether the appellant has failed to fulfil the export obligation in the requisite time and failed to submit EODC before the concerned

authority so as to entitle the Department to demand the duty foregone by the appellant at the time of import. Referring to series of decisions, the learned Member observed that the law has been well settled that once EODC is issued, the Department cannot recover the amount of duty waiver. The learned Member also relied on the Circular No. 16/2007-Cus., dated 02.05.2017 (which has also been placed on record by the appellant herein), which clarifies that where the license/ authorisation holder submits proof of their application having been submitted to DGFT, the matter may be kept in abeyance till the same is decided by the DGFT. In this case also though the EODC was produced before the Commissioner (Appeals) during the hearing, however the same was ignored and therefore the said order was set aside. We are not adding too many orders which have been relied on by the learned Counsel for the appellant, however, the order passed by the High Court of Madras in **Ramsays Corporation Pvt. Ltd., vs. Commissioner of Cus., Chennai-IV - 2022 (381) ELT 372 (Mad.)** where the learned Division Bench dealt with the issue of delay in producing the EODC and observed as under:-

6. There can be no dispute about the fact that, the appellant had discharged their Export Obligation, as would be evident from the Redemption Certificate issued on 27-10-2021. The production of Export Obligation Discharge Certificate (EODC) in terms of EPCG scheme is necessary for the importers to claim benefit under the said Scheme and delay in producing the Export Obligation Discharge Certificate (EODC) cannot result in denial of the benefit, more so, when the assessee/importer has admittedly discharged the Export Obligation and has also furnished the requisite documents before the appropriate authority for issuance of Export Obligation Discharge Certificate (EODC). A condition which is dependent on action by public authorities over which an assessee/importer has no control and, delay on the part of a public authority cannot result in denial of the benefit extended in larger public interest. Thus, the delay in obtaining Export Obligation Discharge Certificate (EODC) cannot result in denial of benefit under the EPCG Scheme, which itself has been formulated to promote export and earn foreign exchange. In this regard, it may be relevant to refer to the judgment of the Hon'ble Supreme Court in the case of *Commissioner of Customs (Imports) v. Tullow India Operations Ltd.*, reported in (2005) 13 SCC 789 = 2005 (189) E.L.T. 401 (S.C.), relevant portion of which, is extracted hereunder :

Both the importers are licensees. "21. Indisputably, they were entitled to the benefit of the exemption notification subject, of course, to the condition that they would produce the essentiality certificate granted by the Directorate General of Hydrocarbons at the time of importation of goods. Grant of essentiality certificate was not in the hands of the assesseees. It was the function of a department of the Central Government. The essentiality certificate admittedly was not granted by the Directorate General of Hydrocarbons within a reasonable time. The importers could not be blamed therefor. It is possible that delay in granting the said essentiality certificate was by way of default on the part of the authorities concerned.

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26. The Directorate General of Hydrocarbons is under the Ministry of Petroleum and Natural Gas of the Government of India. The functions performed by it are public functions. The notification never contemplated that a public functionary, having regard to the importance of the subject-matter and in particular when such importations are being made in public interest, would not dispose of the application for grant of essentiality certificate within a reasonable time so as to enable the importer to avail the benefit thereof. Applicants for grant of such certificates, having regard to their importance, should have been processed by the Directorate General of Hydrocarbons as expeditiously as possible but they did not choose to do so probably having regard to the fact that no time schedule therefor was prescribed. It is trite that when a public functionary is required to discharge its public functions within a time specified therefor, the same would be construed to be directory in nature. (See *P.T. Rajan v. T.P.M. Sahir* [(2003) 8 SCC 498] and *Punjab SEB Ltd. v. Zora Singh* [(2005) 6 SCC 776].)"

11. The decisions referred to by the learned Authorised Representative for the Revenue referred to the order of CESTAT, Mumbai in **Bombay Hospital Trust vs. Commissioner of Customs, Sahar, Mumbai -2005 (10) TMI 112**, affirmed by the Bombay High Court in **Bombay Hospital Trust vs. Commissioner of Customs (ACC) Mumbai -2006 (6) TMI 117, Mediwell Hospital and Health Care Pvt. Ltd., vs. Union of India -1996 (12) TMI 51 – SC 1996 (11) TMI 67 –SC, Rajyalakshmi Labs Ltd., vs. CC&CE, Hyderabad –II, 2006 (7) TMI 64 (Tri. Bang.,) Sheshank Sea Foods Pvt. Ltd., vs. Union of India** and also in **Commr. of Cus. (Imp.) ACC, Sahar vs. Wockhardt Hospital & Heart Inst. -2006 (4) TMI 137**, would not really help the Revenue on the issue which we have considered above and so far as the submission is concerned

that the exemption notification has to be construed strictly, we have no doubt on that.

12. From the aforesaid decisions, we find that in the present case the appellant had fulfilled the export obligations and submitted the requisite papers to DGFT for issuance of EODC well in time. However, the non co-operation of the two Departments, i.e. the Customs and the DGFT, the instant show cause notice and the impugned orders have resulted in denying the benefit to the appellant and imposing the liability to pay the custom duty, which prima-facie is unsustainable. The delay, if any, in issuance of the EODC was on the part of the DGFT and for which the appellant cannot be penalised. In any event when the same was produced before the Commissioner (Appeals), he should have taken that into account and had decided the issue in view of the law laid down by the higher forums in that regard. We, therefore, set aside the impugned order and allow the present appeal with consequential relief.

(Pronounced on 7th Dec., 2023).

(Binu Tamta)
Member (Judicial)

(Hemambika R. Priya)
Member (Technical)