CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, WEST ZONAL BENCH : AHMEDABAD

REGIONAL BENCH - COURT NO. 3

EXCISE Appeal No. 11611 of 2016-DB

[Arising out of Order-in-Original/Appeal No VAD-EXCUS-001-COM-006-16-17 dated 31.05.2016 passed by Commissioner of Central Excise-VADODARA-I]

Contacare Ophthalmics and Diagnostics .... **Appellant**
Block No. 310/c, Village.sim of Dabhasa,
Taluka. Padra, VADODARA, GUJARAT

VERSUS

Commissioner of Central Excise & ST, Vadodara-i .... **Respondent**
1st Floor, Central Excise Building,
Race Course Circle, Vadodara, Gujarat -390007

WITH

EXCISE Appeal No. 11612 of 2016-DB

[Arising out of Order-in-Original/Appeal No VAD-EXCUS-001-COM-006-16-17 dated 31.05.2016 passed by Commissioner of Central Excise-VADODARA-I]

Shri Hasmukh I Patel .... **Appellant**
M/s Contacare Ophthalmics And Diagnostics
Block No. 310/c, Village.sim of Dabhasa,
Taluka. Padra, VADODARA, GUJARAT

VERSUS

Commissioner of Central Excise & ST, Vadodara-i .... **Respondent**
1st Floor, Central Excise Building,
Race Course Circle, Vadodara,
Gujarat -390007

APPEARANCE :

Shri J.C. Patel & Shri Rahul Gajera, Advocates for the Appellant
Shri Ajay Kumar Samota, Superintendent (AR) for the Respondent

CORAM: HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)
HON'BLE MR. RAJU, MEMBER (TECHNICAL)

DATE OF HEARING : 27.09.2023
DATE OF DECISION: 23.02.2024

FINAL ORDER NO. 10474-10475/2024

RAMESH NAIR :

Briefly the facts of the case are that Appellant, Contacare Ophthalmics and Diagonstics, were functioning as 100% EOU since 2005 (hereinafter

referred to as "the 100% EOU"). The Appellant, Hasmukh I. Patel, was employee and authorized signatory of the100% EOU.

2. On 3-8-2011, the100% EOU applied to the Development Commissioner for permission for De-bonding and exit from EOU.

2.1 On 18-8-2011, the Development Commissioner granted in-principle approval and thereafter on 08-08-2012, the Development Commissioner granted permission to exit from EOU subject to grant of "No dues Certificate" by the Assistant Commissioner of Central Excise.

2.2 The factory premises of the 100% EOU were visited by the Central Excise officers for verification of the stock of raw materials, capital goods and finished goods available at the time of De-bonding and calculation of the duty payable thereon was also verified by the department and intimated to the Assistant Commissioner of Central Excise, by letter dated 22-5-2012 of the Superintendent of Central Excise**.**

2.3 As evident from the said letter dated 22-05-2012, the 100% EOU had on 14-5-2012, paid Central Excise duty amounting to Rs.71,78,092/-. No dues Certificate was also issued to the 100% EOU on 25-6-2012.

2.4 Subsequent to the De-bonding and exit from EOU, Show Cause Notice dated 27-5-2015 was issued to the Appellant based on audit objection, wherein it was contended that the 100% EOU had wrongly claimed the benefit of Notification no. 23/2003-CE dated 31-3-2003 while calculating the duty payable on the finished goods in stock at the time of De-bonding. It was contended that the said Notification applies only to goods cleared in DTA

pursuant to DTA sales entitlement under Para 6.8 of the Foreign Trade Policy and the same does not apply to the finished goods cleared at the time of De-bonding. The Show Cause Notice demanded differential duty of Rs.78,38,123/- on the finished goods under Section 11A (5) of the Central Excise Act 1944 read with B-17 Bond executed by the Appellant at the time of taking EOU license.

2.5 By reply dated 09-06-2015 the Appellant submitted that even if the benefit of the said exemption under Notification No.23/2003-CE is not available, nevertheless, the calculation of duty done in the Show cause notice was erroneous for the following reasons:

a) The assessable value of the goods for purpose of calculation of Basic customs duty (BCD) was erroneous. The BCD was wrongly calculated on the local MRP which is contrary to the proviso to Section 3(1),

b) The CVD was wrongly calculated on the MRP instead of MRP less abatement and the rate of CVD was also incorrect,

c) Education Cess and Secondary and Higher Secondary Education Cess were wrongly taken again on the aggregate of customs duties once again although the same were already considered while calculating the aggregate of customs duties.

2.6 After giving a hearing in the matter, the Principal Commissioner of Central Excise, Vadodara-I by Order-in-Original dated 31-5-2016 confirmed demand for duty of Rs. 70,07,901/- and imposed penalty of Rs.35,03,951/- on the Appellant Contacare Ophthalmics and Diagnostics and a penalty of Rs.50,000/- on the Appellant, Shri Hasmukh I. Patel. Hence the present appeals before this Tribunal.

3. Shri J.C. Patel, learned counsel with Shri Rahul Gajera, Advocate appearing on behalf of Appellant, submits that the calculation of the Duty done by the Principal Commissioner is at page 55 of the Appeal from which the following are evident:

(a) Basic customs duty has been wrongly calculated on the MRP which is contrary to Proviso to Section 3(1) of the Central Excise Act 1944, which requires the basic customs duty to be calculated on value as per the Customs Act 1962,

(b) CVD has been wrongly calculated on the MRP instead of MRP less abatement,

(c) Education Cess and Secondary and Higher Secondary Education Cess are wrongly taken again on the aggregate of customs duties once again although the same were already considered while calculating the aggregate of customs duties.

Instead of taking such value which is mentioned in the Column before the Column of MRP on page 55 of the Appeal, the Principal Commissioner has taken the MRP, which is plainly erroneous; that to arrive at the excise duty payable by 100% EOU under the proviso to section 3(1) of the Central Excise Act, 1944, the transaction value as per Section 14 of the Customs Act 1962 was required to be adopted. As regards CVD, the Principal Commissioner has wrongly calculated the same on MRP instead of MRP less abatement under Notification No. 49/2008-CE (NT) dated 24-12-2008 and further wrongly taken Education Cess and Secondary and Higher Education Cess once again on the aggregate of customs duties, although the same were already considered while calculating the aggregate of customs duties which is contrary to the law laid down by the Tribunal in Sarla Performance

Fibres Ltd v CCE – 2010 (253) ELT 203 and by the Larger Bench of the Tribunal in Kumar Arch Tech P. Ltd – 2013 (290) ELT 372.

3.1 On limitation it was submitted that, it is evident from the letter dated 22-5-2012 that the department was fully aware of availing of notification No. 23/2003-CE. Therefore, the larger period of limitation is inapplicable in the present case, the following decisions are relied upon in this behalf:

(a) Virgo Valves & Controls P. Ltd v CCE – 2022 (5) TMI 1302-CESTAT Mumbai

(b) Dharampal Lalchand Chug v CCE- 2015(323) ELT 753

3.2 It is further submitted that the Show Cause Notice dated 27-5-2015, which is purportedly issued under Section 11A (5) of the Central Excise Act 1944 was not maintainable in law since the said Section 11A (5) stood omitted with effect from 14-5-2015.

4. Shri Ajay Kumar Samota, learned Superintendent (AR) appearing for the Revenue relied upon the findings given in the impugned order.

5. We have carefully considered the submissions made by both the sides and perused the records.

The following issues arise for consideration in the present Appeals:

a) Whether the Commissioner is right in taking the local Maximum Retail Price (MRP) for calculating the aggregate of Customs duties (Basic, CVD, SAD, Cess) to arrive at the Excise duty payable by 100% EOU under the Proviso to Section 3(1) of the Central Excise Act 1944,

b) Whether the Commissioner is right in demanding Education Cess and Secondary and Higher Education Cess once again on the aggregate of

customs duties which already includes such Cess on the basic customs duty and CVD,

c) Whether the Show Cause Notice dated 27-5-2015 which is purportedly issued under Section 11A (5) of the Central Excise Act 1944 is without jurisdiction since the said Section 11A (5) stood omitted with effect from 14-5-2015 and;

d) Whether the Notice is barred by time and the larger period of limitation apply since the goods were cleared after verification of duty payment and issue of No dues certificate by the central excise officer.

5.1 It would be evident from the calculation appearing at page 55 of the Appeal that the Principal Commissioner has wrongly calculated the Basic customs duty on the MRP of the goods, which is contrary to the provisions of Proviso to Section 3 (1) of the Central Excise Tariff Act. As per Proviso to said Section 3 (1), Excise duty on goods manufactured by a 100% EOU and brought to any place in India shall be an amount equal to aggregate of customs duties leviable on like goods when imported into India and the value of such goods shall be as per the Customs Act 1962 and the Customs Tariff Act 1975. The said Acts do not provide for calculating the basic customs duty on the local Maximum Retail price (MRP) but require adoption of the transaction value as per Section 14 of the Customs Act 1962. Instead of taking such value which is mentioned in the Column before the Column of MRP on page 55 of the Appeal, the Principal Commissioner has taken the MRP, which is plainly erroneous. Accordingly, the assessable value taken for calculating the Basic Duty is ex-facie erroneous.

5.2 As regards the CVD, the Principal Commissioner has wrongly calculated the same on MRP instead of MRP less abatement under

Notification No. 49/2008-CE (NT) dated 24-12-2008. Accordingly, the value taken for calculation of CVD is also ex-facie erroneous.

5.3 Further, the Principal Commissioner has wrongly taken Education Cess and Secondary and Higher Secondary Education Cess once again on the aggregate of customs duties, although the same were already considered while calculating the aggregate of customs duties. This is contrary to the law laid down by the Tribunal in Sarla Performance Fibres Ltd v CCE – 2010 (253) ELT 203 and by the Larger Bench of the Tribunal in Kumar Arch Tech P. Ltd – 2013 (290) ELT 372.

5.4 If the aforesaid errors in calculation of duty are corrected, the duty payable on the finished goods works out to Rs.29,69,442/- as given in the Appellant's calculation at page 84 of the Appeal in reply to the Show Cause Notice, against which Appellant have paid higher duty of Rs.50,10,931/-.

5.5 Even otherwise, the Show Cause Notice dated 27-05-2015, which is purportedly issued under Section 11A (5) of the Central Excise Act 1944 was not maintainable in law since the said Section 11A (5) stood omitted with effect from 14-05-2015. The show cause notice having been issued under a non-existing provision is not maintainable in law. Further the said Section 11A (5) read with Section 11A (4) is applicable in cases of fraud, collusion, willful mis-statement, suppression of facts or contravention with intent to evade, none of which is present in this case. As evident from letter dated 22-5-2012 of the Superintendent, prior to de-bonding, the factory was visited by the Central Excise officers and the stock and calculation of duty were duly verified by the Central Excise officers. It is evident from the letter that the department was fully aware of availing of notification No.23/2003-

CE. Therefore, the larger period of limitation is inapplicable in the present case. Reliance is placed in this behalf on the following decisions:

a) Virgo Valves & Controls P. Ltd v CCE – 2022 (5) TMI 1302-CESTAT Mumbai - In this judgment it is held that where De-bonding was done after verification by Central Excise and issuance of No dues certificate, the larger period of limitation cannot apply.

b) Dharampal Lalchand Chug v CCE- 2015(323) ELT 753 (*supra)* - In this judgment it is held that even demand in terms of the Bond has to be within limitation period.

6. In view of foregoing, impugned order is not tenable and is liable to be set aside. Accordingly, the impugned order is set aside. Appeals are allowed.

(Pronounced in the open court on 23.02.2024*)*

(Ramesh Nair)
Member (Judicial)

(RAJU)
Member (Technical)

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