IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 29.06.2017

CORAM :

THE HONOURABLE MR.JUSTICE RAJIV SHAKDHER
AND
THE HONOURABLE MR.JUSTICE R.SURESH KUMAR

CMA No. 3074 of 2011
and MP No. 1 of 2011

The Commissioner of Customs (Export)
Custom House,
No.6, Rajaji Salai,
Chennai -600 001. ... Appellant/Respondent

Vs.

M/s.Dynamatic Technologies Limited,
JKM Park J67, SIPCOT Industrial Estate,
Irugattukottai, Sriperumpudur. ...Respondent/Appellant

PRAYER: Petition filed under Section 130 of the Customs Act, 1962, to consider the substantial questions of law raised by the Revenue and allow this appeal by setting aside the impugned Final Order No.325/2011 dated 17.02.2011 passed by the Hon'ble CESTAT,South zonal Bench, Chennai.

For Petitioner : Mr.A.P.Srinivas

For Respondent : Mr.T.R.Ramesh

O R D E R

(Order of the Court was made by RAJIV SHAKDHER,J.)

This is an appeal preferred by the Revenue against the Judgment and Order dated 17.02.2011 passed by the Customs, Excise and Service Tax Appellate Tribunal.

2. By virtue of the impugned Judgment, the Tribunal has allowed the appeal of the Assessee. The Tribunal set aside the order-in-original dated 02.09.2009 passed by the Commissioner of Customs (Seaport-Export) and remanded the matter to allow amendment and conversion of Shipping Bills as prayed for by the Assessee.

3. The principal reason for allowing the appeal of the Assessee was that the Tribunal on examination of the invoices along with Shipping Bills filed before it discovered that they carried both the EPCG License Number as well as the Advance License Number.

4.The Revenue, inter alia, contests before us that the invoices filed by the Assessee before the Tribunal only carried the EPCG License Number and not the Advance License Number. In support of this submission the Revenue has placed before us an invoice bearing No.014/05-06 dated 28.02.2006. This invoice, as correctly pointed out on behalf of the Revenue carries only the EPCG Number which reads as follows: " EPCG 0730001528/2/11/00."

5. The record shows that the appeal was admitted on 20.10.2011, when, the following questions of law were framed for consideration of this Court.

> "1. Whether the Hon'ble CESTAT ignore the evidence already submitted by the respondent at the time of shipment and which are available with the Revenue and were properly appreciated by the Original Adjudicating Authority?
>
> 2. Whether the Hon'ble CESTAT first decide the case absolutely and then remand the case back to the Original Adjudicating Authority and thereby leaving no scope for adjudicating by the Original Adjudicating Authority?
>
> 3. Whether the Appellate Tribunal was right in not considering the compliance of Board's Circular No.4/2044-Customs dt.16.01.2004, which is an express law on the subject issue before deciding the case in hand?"

6. In order to adjudicate upon the appeal, the following broad facts are required to be noticed:

6.1. The Assessee had imported Aluminium Alloys (A-356 grade) against Advance Licenses issued to it. The Advance Licenses obligated the appellant to make exports against imports made.

6.2. The record shows that exports were made by the Assessee between September 2004 and March 2006. The goods which were exported, are described as Aluminum Castings : H-BRACKET. It appears that the Assessee had, inadvertently, in the Shipping

Bills filed at the time of exports only adverted to the EPCG Scheme. It is the Assessee's case that the invoices filed along with the Shipping Bills carried both the EPCG License Number as well as the Advance License Number.

6.3. It is in this back ground that the Assessee apparently, made a request for amendment of the Shipping Bills vide communication dated 01.09.2008. Evidently, this request of the Assessee was rejected by the Revenue vide communication dated 11.09.2008. The Assessee reiterated its request vide communication dated 05.01.2009 which was also rejected by the Revenue vide response dated 17.06.2009.

6.4. The record seems to indicate that the Assessee, once again, wrote to the Revenue vide letter dated 15.07.2009, whereupon, it sought adjudication in the matter after being granted personal hearing, in support of his stand.

6.5. It is in these circumstances, that the Commissioner of Customs (SEAPORT-EXPORT) passed the aforementioned order-in-original which is dated 02.09.2009.

6.6. Being aggrieved, the Assessee carried the matter in appeal to the Tribunal. As indicated above, the Tribunal allowed the appeal of the Assessee and remitted the matter to the Adjudicating Authority with a direction that it should allow amendment and conversion of the Shipping Bills shipping bill as was sought for by the Assessee.

7. Having perused the record and heard the counsels, we find that there is an inconsistency with regard to the facts as found by the Adjudicating Authority and those found by the Tribunal with regard to whether or not Advance license numbers were referred to in the invoices filed by the Assessee along with the shipping bills. The Adjudicating Authority in this behalf made the following observations:

> "For further verification, the scanned copies of the Shipping Bills were called from the Records Section and on verification it was seen that all the Shipping Bills in respect of which conversion was sought for, has been filed under the EPCG Scheme (Code No.11) and all the relative invoices also carried the EPCG License Number and no mention of the Advance License Number was made."

7.1. The above observation is followed by the following finding of fact:

> "Further, a careful reading of the Board's Circular No.04/2004-Cus dated 16.11.2004 indicates that the request of the exporter is for conversion of EPCG Shipping Bills into EPCG-cum-DFIA scheme category and

> not from one scheme vis. Advance License/DEPB/DFRC to another scheme. Though the exporter was in possession of the Advance Licenses, the same was not made available to the department at the time of export and it has also been admitted by the exporter in their letter dated 05.01.2009 that they had omitted to mention the Advance License No. in the Shipping Bill. "

8. As against this, the Tribunal recorded the following finding of fact:

> "However, we find that the invoices submitted by the appellants along with the shipping bills had both the numbers, EPCG license numbers and Advance License numbers recorded on the same and therefore, the same were available at the time of export. Taking the same into account and also the subsequent certification done by the Central Excise Authorities, we are of the view that in the interest of export promotion, this is a case where a lenient view requires to be taken."

9. Ordinarily the Tribunal being the final fact finding authority, we would have accepted the finding returned by it but for the fact that the Revenue has placed an invoice before us to which we have made a reference above which clearly does not advert to the Advance License Number. This apart, the Revenue has taken a ground in the appeal filed before us which seems to suggest that the invoices taken into account by the Tribunal did not relate to the subject shipping bills. As a matter of fact, the Revenue asserts that the relevant invoices did not contain the Advance License Numbers. This assertion had been made by the Revenue in ground 'C'.

10. We must also note that the Assessee has filed before us the extracts of the statutory Consumption Register which facially appear to demonstrate that the Alluminum Alloy A-356 grade was consumed by the Assessee in production of Aluminum Castings : H-BRACKET.

11. Furthermore, the Assessee has also placed on record its certificate, dated 13.01.2009 issued by the Superintendent of Central Excise to demonstrate that the aforementioned goods, imported under the Advance License were used in the manufacture of excisable goods which in turn were exported by the Assessee.

12. Therefore, having regard to the aforesaid facts and circumstances, we are of the view that the impugned order of the Tribunal will have to be modified to the extent that, while the direction issued to remit the matter to the Adjudicating

Authority will remain, the Adjudicating Authority will, however, reexamine the matter afresh and only after it is satisfied that the Assessee's case falls within the purview of Section 149 of the Customs Act, 1962, will it allow the amendment and conversion of shipping bills, as prayed for by it. In other words, the Adjudicating Authority will on facts reexamine all the relevant invoices and return a finding of fact as to whether or not the Advance License Numbers were adverted to on the said invoices. If the Adjudicating Authority comes to conclusion that the Advance License Numbers were adverted to on the invoices, it would then form an opinion as to whether or not, amendment as prayed for under the provisions of Section 149 of the Customs Act, 1962 should be allowed to the Assessee. In coming to the said conclusion, the Adjudicating Authority will be free to advert to the circular dated 16.01.2004, and any other relevant circular, including circular No.36 of 2010, as also, the Consumption Register that may be placed before it by the parties for consideration.

13. The appeal is disposed of accordingly. Consequently, pending M.P.No.1 of 2011 is closed. There shall be no order as to costs.

Sd/--
Asst.Registrar (CS IV)

/true copy/

Sub Asst. Registrar

To

The Customs, Excise & Service Tax Appellate Tribunal,
South Zonal Bench,No.26, Haddows Road,
Shastri Bhavan, Chennai 600 006.

+1cc to Mr.V.Balasubramaniam,Advocate sr.45499

+1cc to Mr.B.Babu Manohar,Advocate sr.45093

CMA No. 3074 of 2011

msm(co)
ss(2/8/2017)