

1

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 8th DAY OF JUNE, 2023

PRESENT

THE HON'BLE MR. JUSTICE P.S. DINESH KUMAR

AND

THE HON'BLE MR. JUSTICE T.G. SHIVASHANKARE GOWDA

C.S.T.A No. 4 OF 2019

C/W

C.S.T.A No. 10 OF 2019

IN C.S.T.A. No. 4 OF 2019

BETWEEN:

M/S. KALINGA COMMERCIAL CORPORATION LTD
C-112, HIG HOUSING BOARD COLONY
BARAMUNDA, BHUBANESWAR
ODISHA-751 003
REPRESENTED BY ITS
MANAGING DIRECTOR
SRI. SOUMYA RAJAN SAMAL

...APPELLANT

(BY SHRI. G. SHIVADASS, SENIOR ADVOCATE FOR
SHRI. PRASHANTH S. SHIVADASS, ADVOCATE)

AND:

COMMISSIONER OF CUSTOMS
CENTRAL REVENUE BUILDING
QUEENS ROAD
BENGALURU-560 001
KARNATAKA

...RESPONDENT

(BY SHRI. M.B. NARAGUND, ASG FOR
SHRI. AMIT ANAND DESHPANDE, ADVOCATE)

THIS CSTA IS FILED UNDER SEC.130 OF THE CUSTOMS ACT, 1962 ARISING OUT OF ORDER DATED 06.12.2018 PASSED IN FINAL ORDER NO.21851/2018 PRAYING TO ADMIT THE PRESENT APPEAL, ADJUDICATE UPON THE SAME IN TERMS OF SECTION 130 OF THE CUSTOMS ACT, 1962 AND FURTHER BE PLEASED TO SET ASIDE THE ORDER DATED 06.12.2018 IN FINAL ORDER NO.21851/2018 PASSED BY THE HON'BLE TRIBUNAL AND ETC.

IN C.S.T.A No. 10 OF 2019

BETWEEN:

COMMISSIONER OF CUSTOMS
OFFICE OF THE COMMISSIONER
OF CUSTOMS, BANGALORE CITY
COMMISSIONARATE, P.B.NO.5400
CENTRAL REVENUE BUILDING
QUEENS ROAD
BENGALURU-560 001

...APPELLANT

(BY SHRI. M.B. NARAGUND, ASG FOR
SHRI. AMIT ANAND DESHPANDE, ADVOCATE)

AND:

1. M/S. KALINGA COMMERCIAL
CORPORATION, (PRESENTLY
KALINGA COMMERCIAL CORP. LTD)
C-112, H.I.C. HOUSING COLONY
BARAMUNDA
BHUBANESHWAR-715 003
ORISSA
2. P.K. BHATTACHARYA
ADDL. GENERAL MANAGER (MINING)
M/S. ORISSA MINING CORPORATION LTD.,
BHUBANESHWAR-715 003
ORISSA
3. S.K. MALL
M/S. BARELION INTERNATIONAL
PLOT NO.447/2167, SHREE VIHAR
BHUBANESHWAR-751 031

...RESPONDENTS

(BY SHRI. G. SHIVADASS, SENIOR ADVOCATE FOR
SHRI. PRASHANTH S. SHIVADASS, ADVOCATE)

THIS CSTA IS FILED UNDER SEC.130 OF THE CUSTOMS ACT, 1962 ARISING OUT OF ORDER DATED 06.12.2018 PASSED IN FINAL ORDER NO.21851-21853/2018 PRAYING TO SET ASIDE FINAL ORDER NO.21851-21853/2018 DATED 06.12.2018 PASSED BY THE CESTAT, SOUTH ZONAL BENCH, BANGALORE INsofar AS SETTING ASIDE THE PENALTY IMPOSED, VIDE ANNEXURE-A AND TO DIRECT THE RESPONDENT KALINGA COMMERCIAL CORPORATION TO PAY THE PENALTY AS DIRECTED IN ORDER-IN-ORIGINAL DATED 15.04.2011 AND ETC.

THESE CSTAs, HAVING BEEN HEARD AND RESERVED FOR JUDGMENT ON 31.03.2023 COMING ON FOR PRONOUNCEMENT OF JUDGMENT, THIS DAY, **P.S. DINESH KUMAR J.**, PRONOUNCED THE FOLLOWING:-

JUDGMENT

These two appeals by the assessee-appellant¹ and the Revenue (Customs Department)² are directed against the common order dated December 6, 2018 in Final Order No. 21851-21853/2018 passed by the CESTAT³, Bengaluru. Both these appeals have been admitted to consider following common questions of law and are being disposed of by this common order:

(i) Whether in the facts and circumstances of the case the Tribunal was right in law to hold that, by having put to use the mobile capital equipments, imported under Export Promotion Capital Goods (EPCG) Scheme, for the declared purpose, without parting with ownership, possession or control of such equipments, the Appellant violated the

¹ CSTA No.04/2019

² CSTA No. 10/2019

³ Customs, Excise and Service Tax Appellate Tribunal

actual user condition as contemplated in paragraph 9.5 & 9.6 of the Foreign Trade Policy 2004- 2009, for having used those at a place other than declared to the Licensing Authority?

(ii) Whether in the facts and circumstances of the case the Tribunal was right in law to hold that the 'mines', wherein the Appellant had deployed the imported capital goods for rendering mining services upon being granted exclusive permissive possession thereon, must necessarily own the 'mines' so as to be covered under the expression 'own manufacturing unit' or 'manufacturing for his own use' as used in paragraph 9.5 of the Foreign Trade Policy?

(iii) Whether in view of the provisions of the Foreign Trade Policy, the Tribunal, constituted under Section 129 of the Act, has erred in assuming jurisdiction to examine the eligibility criteria for grant of EPCG Authorization under the provisions of Foreign Trade Policy, particularly when import under the EPCG Authorizations were already completed and the authorizations were still valid inasmuch as the DGFT Authorities never cancelled the authorizations despite having been seized of the proceedings initiated by the DRI against the Appellants under the provisions of Act?

(iv) Whether in the facts and circumstances of the case and in view of the stare decisis of the Hon'ble Supreme Court in the case of Titan Medical Systems Pvt. Ltd. Vs. Collector of Customs, New Delhi [2003 (151) ELT 254 (S.C.)] that once a license was issued and not questioned

by the licensing authority, the Customs authorities cannot refuse exemption on an allegation that there was misrepresentation before the Licensing Authority; the Tribunal was right in taking a contrary view?

2. For the sake of the convenience, parties shall be referred as per their status in CSTA 04/2019.

3. Heard Shri. G. Shivdass, learned Senior Advocate for the appellant and Heard Shri. M.B. Nargund, learned Additional Solicitor General for respondent-Revenue.

4. Brief facts of the case are, Appellant, M/s. Kalinga Commercial Corporation is a proprietorship firm engaged in the mining activities for the Odisha Mining Corporation Ltd.⁴, a Government owned corporation. During the relevant period i.e., from September 2005 to May 2008, appellant entered into mining contracts with OMC for raising iron ore at three mines belonging to the OMC in the State of Orissa namely, Kurmitar Iron Ore Mines, Khandadhar;

⁴ 'the OMC' for short

Gandhamardhan Iron Ore Mines, Keonjhar; and Daitari Iron Ore Mines, Keonjhar. For the purpose of raising iron ore, OMC gave the possession of the mines to appellant. Appellant was required to install the machineries and other equipments out of its own funds for raising/excavation of iron ore and processing the same.

5. Appellant had obtained 12 authorizations out of which, 3 authorizations were issued by DGFT⁵ Cuttack and 9 were issued by the DGFT Patna under Export Promotion Capital Goods Scheme⁶ provided under the Foreign Trade Policy⁷, 2004-2009. Appellant imported 33 numbers of capital goods under the 12 authorizations by availing the exemption under Notification No. 97/2004 and installation certificates were issued by the Assistant Commissioner of Central Excise, Customs & Sales Tax. The capital goods imported by appellant were seized by the DRI⁸ Kolkata on the ground of violation of 'Actual User

⁵ Directorate General of Foreign Trade India

⁶ 'EPCG Scheme' for short

⁷ 'the FTP' for short

⁸ Directorate of Revenue Intelligence

Condition' i.e., the imported machines were used in premises other than the ones mentioned in the authorization.

6. Pursuant to the compliant received from the DRI, the Deputy DGFT Patna issued a show cause notice dated July 10, 2008 to appellant proposing to cancel nine EPCG licenses already issued and place the appellant under Denied Entity List. Similarly, show cause notice dated August 05, 2008 was issued by the Deputy DGFT Cuttack proposing to cancel three EPCG licenses. Thereafter, the DRI, Kolkata Zonal unit issued a show cause notice proposing to recover the amount of duty saved at the time of import of Capital Goods, along with interest and penalty. While adjudicating the show cause notices, the Deputy DGFT Patna issued a Blacklisting Order refusing to grant and renew further licenses to appellant or its proprietor. The Deputy DGFT Cuttack further issued a 'Refusal of License' order, refusing to issue any license to appellant and its Proprietor. Appellant

8

preferred an appeal against the Refusal of License order and the Blacklisting order before the ADGFT⁹, New Delhi. The ADGFT allowed appellant's appeal and set-aside the order. The said order was not challenged by the Revenue and has thus attained finality. Appellant filed its reply to show cause notice dated 08.05.2009 issued by the ADG & DRI¹⁰, Kolkata Zonal Unit before the CoC¹¹, Bangalore.

7. The Respondent passed an OIO¹² dated March 31, 2011 confirming the proposal made in show cause notice and whereby, *inter alia*:

- confiscated the Capital Goods valued at Rs.33,47,03,410/- imported by appellant through Mumbai Customs, Bangalore Customs and Nhava Sheva Customs under Section 111(o) of the Customs Act, 1962¹³

⁹ Additional Directorate General of Foreign Trade India

¹⁰ Addl. Director General, Directorate of Revenue Intelligence

¹¹ Commissioner of Customs

¹² Order-In-Original

¹³ 'the Act' for short

- imposed redemption fine of Rs. 15,00,000/- in lieu of confiscation under Section 125 of the Act;
- demanded and confirmed differential Customs duty amounting to Rs.9,05,96,540/- with interest under Section 28 & Section 28AB of the Act;
- imposed equal penalty of Rs.9,05,96,540/- under Section 114A & 114AA of the Act; and
- directed to encash/invoke the Bank Guarantees and Bonds executed by Appellant before the Customs Authorities at the respective ports of importation and to be adjusted/appropriated towards the differential duty demand/ interest/penalty/redemption fine as above.

8. Aggrieved by the said OIO, appellant preferred an appeal before CESTAT, Bangalore. The CESTAT partly allowed appellant's appeal and upheld the demand of duty and interest, however, the penalty imposed was set aside. Hence, these appeals.

9. Shri. G. Shivadass, for the appellant, praying to allow appellant's appeal and to dismiss the appeal preferred by the Revenue, submitted that:

- appellant being engaged in the execution of Mining contract for the OMC was in sole permissive possession of all the mines for which the Appellant had entered into agreements with the OMC;
- in the application for EPCG authorization, appellant had declared these mines as the place of installation of the capital goods imported under EPCG licenses;
- the DGFT being fully aware that mines cannot be owned by the private parties and are only leased by the State owned entities, have issued the licenses;
- once the licensing authorities have considered the permissive use of the mines as relevant for

the activity, then it is not open to the Customs Authority to take a different view;

- appellant falls within the definition of 'actual user (Industrial)' as defined in para 9.5 of the FTP which does not specifically state that the place of installation (mines, in this case) must be owned by the importer;
- the contention urged on behalf of the Revenue that the capital goods imported by appellant were not found in the places declared in the EPCG License, is incorrect as the imported goods are movable in nature. Further, these goods were found in other mines owned by OMC, wherein the appellant had undertaken the mining activities;
- the Policy circular No. 26/2009-2014 dated 17.03.2010 has been issued by the JDGFT clarifying the requirement of installation certificate with respect to movable goods,

wherein it has been clarified that the installation certificate is not required in case of movable goods;

- further, the ADGFT in its order has held that there is no misuse of imported goods and the appellant had satisfied the actual user condition;
- appellant is eligible for the benefit in terms of Chapter 5 of the FTP 2004-2009 wherein, para 9.37 of the FTP recognizes mining as 'manufacturing' and appellant was engaged in the mining activities using the goods imported under the EPCG Licenses as recorded by the ADGFT in his Order-in-Appeal dated 03.01.2011;
- as recorded by the CESTAT at para 3.11, the DDGFT, Cuttack has clarified that where some doubt had arisen in earlier cases regarding installation certificate, the same was regularized by the Appellate Authority. Further, in the present case, there is no dispute over installation

13

certificate issued by the Central Excise Officers.
Therefore, the view taken by DRI that appellant
had violated the condition is untenable;

- the customs authorities have no jurisdiction to question the wrongful availment of benefit in terms of EPCG license.

10. In support of his contentions, Shri. Shivadass has placed reliance on the following authorities:

- *Titan Medical Systems Pvt. Ltd. v. Collector of Customs, New Delhi*¹⁴;
- *Commissioner of Central Excise, Nagpur V. Universal Ferro & Allied Chemicals Ltd.*¹⁵;
- *Commissioner of Customs, Bangalore v. Aditya Birla Nuvo Ltd.*¹⁶;
- *Central Warehousing Corporation v. Adani Ports Special Economic Zone Limited and Ors*¹⁷.

¹⁴ 2003 (151) ELT 254 SC

¹⁵ 2020 (372) ELT 14(SC)

¹⁶ 2021(378) E.L.T. 42 (Kar)

¹⁷ MANU/SC/1319/2022

11. Shri. Shri. M.B. Nargund, for the Revenue,
submitted that:

- the CESTAT in para No. 6.11 has held that appellant has violated the eligibility criterion of the license and consequently violated the provision of the Notification No. 97/2004. Therefore, the CESTAT has erred in setting aside the imposition of the penalty under Sections 114A and 114AA of the Act;
- appellant is not the owner of the product even if they manufacture the same as job worker;
- installation certificates were issued by the Chartered Engineers without physically inspecting the machines in the place of its installation and the certificates were undated and consequently the installation certificates are invalid;

- appellant was engaged by OMC at the rate of Rs.265/- per Metric Tonne. Therefore, it is a work contract;
- OMC's name has never been entered in the records. It is mandatory that the importer should be a manufacturer – exporter;
- appellant's main contention that ADGFT by his order dated 20.4.2011 had allowed appeal and remitted the matter to DDGFT Patna does not support appellant's case because no further orders were passed after the remand. Therefore, the appellant cannot get the benefit of ADGFT's order;
- the EODC¹⁸ was not granted by the DGFT. Hence, the appellant's contention that they have been given a clean certificate by DGFT is untenable;
- both the DGFT and the customs authorities are duty bound to verify and decide the conditions of the license. Customs authority is also empowered

¹⁸ Export Obligation Discharge Certificate

to demand the duty for violation of the terms and conditions imposed on appellant;

- appellant has not only violated the conditions of license but also not fulfilled the export obligations as a manufacturer-exporter and as a merchant-exporter;
- once the goods are confiscated under Section 10(o) of the Act, the penalty under Section 114 A and 114 AA of the Act ought to have been imposed automatically.

12. With these submissions, Shri. Nargund prayed to allow the Revenue's appeal with regard to the penalty and to dismiss appellant's appeal.

13. We have carefully considered rival contentions and perused the records.

14. Undisputed facts of the case are, appellant is engaged in the mining activities. It uses capital goods

17

imported under the EPCG License. Appellant was granted permission by OMC to carry out its mining activities.

15. In sum and substance, Revenue's case is, the machines have been given by appellant on hire to OMC and the same have not been kept in the mines mentioned in the license. The installation certificate is issued without verification and appellant has diverted some machines imported to other mines. Thereby, appellant has violated the terms and conditions of EPCG scheme.

16. Appellant's case is, it has not used the capital goods for any other purpose other than for which they were imported. In the application for EPCG authorization, appellant had declared all the mines as the place of installation of the capital goods imported under EPCG licenses. Appellant is covered under the definition of 'Actual User (Industrial)' as defined in para 9.5 of the FTP. The goods imported by the appellant are movable equipments.

18

17. It is also not in dispute that the Deputy DGFT Patna had issued a show cause notice¹⁹ proposing to cancel the license and to put appellant in the denied entity list. This notice was issued based on the complaint made by DRI. The Deputy DGFT Cuttak had also issued a notice²⁰ proposing to cancel three licenses issued to the appellant.

18. The Deputy DGFT Patna issued a blacklisting order. The Deputy DGFT Cuttak issued a 'refusal of license' order and refused to issue any license to the appellant.

19. Appellant has challenged the orders passed by Deputy DGFT Patna and Cuttak before ADGFT Delhi and the said appeal has been allowed and attained finality.

20. It was argued by Shri. Shivadass that this Court in *CIT, Bengaluru Vs. Aditya Birla*²¹ has held that once the issue is examined by the Joint Director of

¹⁹ Dated 10.07.2008

²⁰ Dated 08.05.2010

²¹ Para 9

Foreign Trade, it not open to the Customs Authorities to take a different stand. We are in respectful agreement with the view taken by this Court in the said authority.

21. In support of Revenue's contentions, Shri. Nargund has placed reliance upon the following authorities:

- *Commr of Customs Vs. Indian Rayon & Industries Ltd.*²²;
- *Commr of Customs Vs. Pennar Industries Ltd.*²³;
- *Sheshank Sea Foods Vs. Union of India*²⁴;
- *Sushant Minerals (P) Ltd. Vs. Commissioner of Customs (Export Promotion), Mumbai*²⁵;
- *Prakash Roadlines Corporation Vs. CC (Export Promotion), Mumbai*²⁶.

22. With regard to the first authority in *Indian Rayon's Case*, it was argued by Shri. Shivadass that the

²² 2008(14) SCC 228

²³ (2015) 10 SCC 581

²⁴ (1996) 11 SCC 755

²⁵ 2013-TIOL- 1533-CESTAT-Mum decided on 27.05.2013

²⁶ CESTAT Mumbai Appeals No. C/302 303/2011

Supreme Court was examining as to whether the assessee therein could shift his stand after failing to re-export the goods. We may record that the assessee therein had initially claimed the benefit of notification No. 158/95-cus. The goods were rejected by the foreign buyer. The assessee could not re-export the goods. At that point of time assessee sought to claim benefit under Notification No.94/96-cus. In those circumstances the Apex Court has held that assessee cannot approbate and reprobate. Hence on facts, the said authority does not support Revenue's case.

23. With regard to the second authority in *Pennar Industries*, Shri. Shivadass urged that appellant does not deny the power of the customs authority to initiate action. However, once at the instance of the customs authority, the Licensing authority initiates action, examines the factual position and holds the issue in favour of appellant; such finding is binding on the Customs authorities. Further, in the case of *Pennar Industries*, the goods were

raw material and not capital goods. Hence, the ratio of the said authority is applicable to the facts of this case. We have followed the decision of this Court in *Aditya Birla Nuvo* and held that the decision of ADGFT is final. Therefore, the authority relied upon by the Revenue does not support its contention.

24. With regard to the third authority in *Sheshank Sea Foods*, it is held that the provisions of import-export policy do not take away the power of Customs Authority. In that case, the assessee had approached this Court seeking a Writ of Prohibition restraining the Customs Authorities from proceeding with search and seizure operations. The writ petition was dismissed by the Hon'ble Single Judge and the writ appeal by the Division Bench. In such circumstances, the Apex Court has held as aforesaid. In contradistinction, in the case on hand the ADGFT has adjudicated the matter and allowed the appeal. Therefore, the said authority does not support Revenue's case in any manner.

25. The last two authorities namely *Sushant Minerals (P) Ltd.* and *Prakash Roadlines* are the orders passed by the CESTAT on the facts of those cases and cannot be considered as authorities.

26. In view of the above discussion, assessee's appeal merits consideration. Revenue has challenged CESTAT's order setting aside penalty. We have held that assessee's appeal merits consideration consequently, Revenue's appeal fails.

27. Hence the following:

ORDER

- i) CSTA 4/2019 is ***allowed***.
- ii) Final Order No. 21851-21853/2018 order dated December 12, 2018 passed by the CESTAT²⁷, Bengaluru confirming the OIO, so far as imposing the duty and interest on the assessee is set-aside.

²⁷Customs, Excise and Service Tax Appellate Tribunal

23

- iii) The substantial questions of law are answered in favour of the assessee and against the Revenue.
- iv) CSTA 10/2019 is ***dismissed***.

**Sd/-
JUDGE**

**Sd/-
JUDGE**

SPS