2014 (4) ECS (242) (Tri.- Del.)

In the Customs Excise & Service Tax Appellate Tribunal
West Block No.2, R. K. Puram, New Delhi-110066

M/s. DHAMPUR SUGAR MILLS LTD.

V/s.

C.C., GHAZIABAD

Date of Pronouncement: 04.07.2014

Customs Appeal Nos. 60023 &. 60024 of 2013-CUS(DB)

Appearance:

Shri Vinod Mehta, Advocate — For the Appellant

Shri V.P. Batra, AR — For the Respondent

CORAM:
Hon'ble Shri D.N. Panda, Judicial Member
Hon'ble Shri Rakesh Kumar, Technical Member

(Final Order No. 52708-52709/04/07/2014)

"There was no indication therein that the authorisation was subject to the condition of "grain-to-grain" basis. But the Appellant misconceived such proposition while it was allowed to operate under actual user scheme and under "ton-to-ton" basis only. The JDGFT in terms of a policy circular No.1 (RE-2010)/2009-14 dated 07.09.2010 addressed to all regional authorities informed that export of sugar on ton-to-ton basis should not be allowed without release order from Directorate of Sugar against authorisation issued from 17.02.2009 to 30th September, 2009 for import of sugar. The appellant misconceived the intent of this circular to submit that it has operated under "grain-to-grain" basis and not under "ton to ton" basis. Further the appellant misconceived that its advance authorisation being issued in 2005, there is no embargo on the appellant to export sugar without release order." (para 9)

"Appellant relied on the Notification No.22/09-Cus dated 02.03.2009 to support its view that it is not required to obtain the release order. This has no significance to the appellant because no licence was given to it to operate under grain-to-grain basis as is clear from the aforesaid letter of DGFT. There was further misconception by it that the bond executed by the appellant required recovery of the duty element in terms of Notification No. 93/04-Cus dated 10.09.2004 in case of non-fulfillment of

export obligation. It was also pleaded that the appellant operated under actual user scheme All such pietas are irrelevant and appellant was not an innocent but deliberately violated condition of advance authorisation. (para 10)

Per: D.N. Panda:
ALLEGATION AGAINST APPELLANT
AND ISSUE INVOLVED

Appellant was issued Advance Authorisation on 14.03.2005 to import raw sugar under actual user condition.

Accordingly raw sugar was imported by the appellant during the year 2005-2006. Revenue alleged that 2496 MT of sugar exported by appellant to united Arab Emirates through ICD Ghaziabad by 12 shipping bills with aggregate value of Rs.7,46,86,924/- during July-Aug 2010 was without release order from appropriate authority. According to Revenue such failure resulted in violation of law. But appellant pleaded that export having been regularized by the Directorate of Sugar adjusting above quantity against future release order for export, in terms of their letter dated 23.06.2011, there was no violation of law made by the appellant. Also plea of appellant was that it was an actual user of imported goods and the export being done on "grain-to-grain" basis, there was no violation of law.

1.2. Department also alleged that the above 2496 MT of sugar exported were neither manufactured out of the imported raw sugar nor the export made on "Ton-to-Ton" basis. Therefore those were liable to confiscation and penalty. However the goods not being physically available for confiscation, having left India, no redemption fine was imposed under section 125 of Customs Act, 1962. Penalty of Rs. 1,00,00,0001- (Rupees one crone only) each were imposed on the appellant under section 114 (i), 114 AA of Customs Act, 1962. Added to that, penalty of Rs. 10,00,000/- (Rupees Ten Lakhs only) was imposed on Shri Mukul Sharma General Manager of appellant under section 114 (l), 114 A of Customs Act, 1962.

2. On the aforesaid dispute, id. Adjudicating Authority framed following issues and decided the same against the appellant: -

"1) Whether export of 2496 MTs. of sugar effected by M/s.DSM (Dhampur Sugar Miffs Ltd.) during the period July & August, 2010 was contrary to any legal prohibition, and

"(2) Whether adjustment of export (effected without proper release order) by the Directorate of sugar at a late date

can be accepted as release of prohibition on the date of export."

SUBMISSIONS OF APPELLANT

3.1. Arguing the appeal, it was submitted on behalf of the appellant that advance authorisation was issued on 14.3.2005, to import raw sugar under actual user condition. Import was accordingly made during the year 2005-06. Appellant exported aforesaid quantity of sugar in July/August, 2010.The authorization being issued under actual user scheme, appellant was not required to export sugar manufactured out of imported raw sugar only. Actual user condition is fulfilled if imported raw sugar is used in the factory without diverting the same else where. Further Advance Authorisation was issued for export of sugar under "grain-to-grain" basis and no release order from Sugar Directorate was required for export.

3.2. It was also submitted by the appellant that definition of the terms "actual user" is given under para 9.5 of Foreign Trade Policy (2004-2009) suggesting that the appellant importing the raw sugar should use the same in its factory without diverting that to elsewhere. Therefore making use of the imported raw sugar in the factory of the appellant, import condition was fulfilled by the appellant and no violation of Exim Policy was made.

3.3. It was further submitted on behalf of the appellant that the expression "grain-to-grain" means use of the imported raw sugar grains in the factory of the appellant for manufacture without diversification thereof. The "grain-to-grain" scheme does not require release order from the Sugar Directorate for export. Accordingly, appellant was not required to obtain such order to make export of sugar during July-Aug. 2010. But Adjudicating Authority misconceived requirement of release order.

3.4. Inviting attention to the Customs Notification No. 93/2004-Cus dated 19.09.2004,, it was further submitted on behalf of the appellant that the said Notification requires./ execution of a bond in respect of the imported raw materials. That was done. Further, relying on para -3 of the Notification, it was submitted that actual user conditions specified in that notification relates to "grain-to-grain" basis scheme of import. The Circular No.92(RE-49)2004-2009 dated 4.6.2009 of DG I speaks that when export obligation is discharged under "grain to grain" basis policy, that does not require export release order from the Chief Director (Sugar). of Sugar Directorate.

3.5. Further, attention was invited by appellant to Ministry of Finance - Circular No.32/2010-Cus. dated 31.08.2010. to submit that the drawback sanctioning authority wrote to, all Chief Commissioners stating that the Directorate of Sugar has requested that no export of sugar should be permitted against raw sugar imported under advance authorization scheme from 17.02.2009 to 30.9.2009 without release order of the Directorate of Sugar. But import of raw sugar being done by the appellant prior to that period, there was no necessity of release order from Sugar Directorate.

3.6. It was further submission on behalf of the appellant that the Directorate of Sugar considering the difficulties of the sugar manufacturers allowed the past exports to be regularized while issuing subsequent release order. Such regularization does not make the appellant liable to penalty under Customs Act, 1962. To submit so, attention to the last para of the letter dated 23.06.2011 of the Directorate of Sugar addressed to the Draw Back Authority, Department of Revenue, Ministry of Finance was invited. The appellant says that the Authority considered the export of 2496 MT. sugar to be adjusted against the release order dated 29.09.2010 and 8.10.2010 as well as 25.11.2010 and no adverse view was taken by that Authority against the appellant.

3.7. Further stand of the Appellant is that Revenue misconceived that release order in respect of 2496 MT. of sugar was required in absence such mandate in law and further misconceived that imported sugar should necessarily be used in manufacture of exportable sugar. This is appreciable from the time extended upto 2011 to discharge export obligation under the advance authorization issued. When the authority allowed export to be made in July to Aug 2010 against import of raw sugar made in 2005, extending the period upto 2011, it cannot be said that the appellant has not discharged its export obligation out of the imported sugar.

3.8. With above submissions, appellant's plea was that it operated under advance authorization issued on 14.03.2005 and was not subject to 2009 Notification as well as circular since its case was "grain-to-grain" basis export, not governed under "Ton-to-Ton" basis scheme and export obligation under the "grain-to-grain" basis scheme is fulfilled if imported raw sugar is used in the factory of the importer and sugar manufactured out of indigenous raw material is exported. Under "Ton-to-Ton" basis scheme, the exporter is bound to export sugar manufactured out of the imported raw sugar while "grain-to-

grain" scheme has no "one-to-one" relationship between the imported raw materials and exported sugar.

SUBMISSIONS OF REVENUE

4.1. On behalf of the Revenue, it was submitted that it was necessity of the Advance Authorisation that the appellant was to discharge export obligation obtaining release order from the Sugar Directorate when it was operating under "Ton-to-Ton" basis scheme; but not under "grain-to-grain" basis scheme. This has been brought out clearly in paras 2.1, 2.3., 2.4, 2.5, 2.6 & 2.7 of the Show Cause Notice. The Department has also brought out that the sugar exported in July, 2010 were out of sugar manufactured in the crushing season of 2009-10, without using the grain of raw sugar imported. Shri Mukesh Sharma, General Manager of the appellant in his statement confirmed that the sugar imported under advance authorisation was exhausted by 2006-07 for which the sugar exported in July, 2010, was out of the sugar manufactured from indigenous raw material in the crushing season 2009-10. That proved that the exported sugar of 2496 MT was not out of raw sugar imported in 2005-06. Records of appellant also established that sugar exported in July, 2010 was not out of use of imported raw sugar.

4.2. Shri Batra, Id. DR submitted that the appellant has made confusion misconceiving that the appellant fulfilled the actual user condition for which no release order from the Directorate of Sugar was required. Inviting attention to para 2.7 of the show cause notice, he submits that the Chief Director (Sugar) vide his letter no.25/03/2009/ES/276 dated 30.11.2010 (RUD) in the case of Simbhuli Sugar Mills, Hapur informed that the advance authorisation issued during the period from 21.09.2004 to 15.04.2008 were to be treated on "Ton to Ton" basis and not covered under "grain to grain" basis policy. Appellant's import period is within this range. Therefore in the case of import of raw sugar made during 21.09.2004 to 15.04.2008, release order for export was sine qua non.

4.3. Relying on of the adjudication order, Shri Batra submits that the allegation in the show cause notice was established from the post-export regularization order issued to the appellant by the Sugar Directorate, proving that all along the export of sugar during July, 2010 was governed by "Ton to Ton" basis policy for which the Adjudicating Authority in Para 4.16 of the order came to the conclusion that the appellant was required to obtain release order to export 2496 MY of sugar. In absence of such order, there was violation of the conditions of the export policy.

4.4 As per the lincensing Note-1 of the chapter 17 of schedule-2 to export policy under Foreign trade Policy 2004-09 export of the sugar except the preferential quota sugar to EU &USA was allowed subject to the condition that exporter was required to obtain an export release order from the Chief Director (Sugar), Directorate of Sugar or any other officer authorized by the Chief Director (Sugar) for export of sugar whether under Open General License or Advance Authorization Scheme on ton-to-ton or any other scheme permitting export of sugar. The condition of the licence issued to the appellant reads as under

"this licence is issued with AU condition and material imported there against even after the fulfillment of the stipulated export obligation shall not be transferred and the same shall be utilized only for further export production".

4.5 Sh Rupesh Goal Deputy Manger (commercial) DSM sugar Mansurpur and Sh Mukul Sharma General Manger of DSM stated in their statement recorded under section 108 of Customs Act 1962 on 30.10.2010 and 21.10.2010, that 2496 NIT of sugar exported by them were not manufactured out of the raw sugar imported under the advance authorisation scheme; but entire quantity of sugar exported was produced by their factory during the crushing season 2009-10.

4.6 It was submitted by Revenue that plea of the appellant that it is governed by "grain-to-grain" scheme 17 is baseless since it was governed by "Ton-to-Ton" basis scheme. Reliance was placed by Revenue on paras 4.7, 4.8, 4.9, 4.10, 4.12,4.13 of the adjudication order as well as on the judgment cited therein to submit that when the appellant exported sugar not manufactured out of imported raw sugar it should face penalty since law was violated by appellant deliberately as is established from the letter of Sugar Directorate referred to above.

5. Heard both sides and perused the record.

6. It is an admitted fact on record that the raw-sugar imported by the appellant against advance authorisation during the year 2005-06 were utilised prior to July /Aug 2010 for which export of 2496 MT of sugar under 12 shipping bills bearing No.3451 dated 22/7/2010, 3544 to 3554 all dated 22.07.2010 were made out of indigenously manufactured sugar. It is also an admitted fact that the export of 2496 MT of sugar was without any release order obtained by the appellant from Sugar Directorate.

7. While issuing letter dated 23r" June, 2011 (ref. page 53 of Appeal folder) by that Directorate it was stated therein that the appellant imported 48750 and 63,000 Ton of raw sugar under advance authorisation No.510 151 260 dated 17.02.2005 and No.510153112 dated 14.03.2005. Total export obligation to be discharged by the Appellant was 1,06,429/- Tons against the advance authorisation. The appellant fulfilled export obligation to the tune of 86,697 M.T. Accordingly 19,732 tons was pending to be exported.

8. Directorate of Sugar also stated that 2496 MT of sugar was exported by the appellant without obtaining release order from that Authority. This established that release order was sire qua non for the export of above quantity of the sugar. The plea that the export is covered under "grain-to-grain" policy was discarded by the Directorate. Request of appellant to adjust the quantity of 2496 MT against the future release order was allowed to discharge export obligation for 19,732 MTs. The authority categorically stated in the aforesaid letter that the directorate was not aware of the above lapse and export of 2,496 MT of sugar without release order. The release order dated 29.09.2010, 08.10.2010 and 25.11.2010 issued by the Directorate was with another condition that whether 2496 MT was still lying un-exported was to be verified.

9. When the advance authorisation was issued that was subject to the condition as has been quoted herein before. There was no indication therein that the authorisation was subject to the condition of "grain-to-grain" basis. But the Appellant misconceived such proposition while it was allowed to operate under actual user scheme and under "ton-to-ton'" basis only. The JDGFT in terms of a policy circular No.1 (RE-2010)/2009-14 dated 07.09.2010 addressed to all regional authorities informed that export of sugar on ton-to-ton basis should not be allowed without release order from Directorate of Sugar against authorisation issued from 17.02.2009 to 30th September, 2009 for import of sugar. The appellant misconceived the intent of this circular to submit that it has operated under "grain-to-grain" basis and not under "ton to ton" basis. Further the appellant misconceived that its advance authorisation being issued in 2005, there is no embargo on the appellant to export sugar without release order.

10. Appellant relied on the Notification No.22/09-Cus dated 02.03.2009 to support its view that it is not required to obtain the release order. This has no significance to the appellant because no licence was given to it to operate under grain-to-grain basis as is clear from the aforesaid letter of DGFT. Appellant also misconceived that signing of the bond etc. exonerated it from operating under "ton-to-ton" basis. There was further misconception

by it that the bond executed by the appellant required recovery of the duty element in terms of Notification No. 93/04-Cus dated 10.09.2004 in case of non-fulfillment of export obligation. It was also pleaded that the appellant operated under actual user scheme All such pietas are irrelevant and appellant was not an innocent but deliberately violated condition of advance authorisation. It may be stated that when the appellant was categorically foun to have violated the export norm as has been stated by tti Directorate of Sugar in its letter dated 23rd June, 2011, the inescapable conclusion that may be drawn is that 2,496 MT of sugar exported by the appellant were without release order and in contravention of the law.

11. In View of the default of the appellant to make export of sugar without release order, Id. Adjudicating authority hals correctly reached to the conclusion that the appellant is liable to penalty. He has imposed penalty of Rs.100 Crore each under section 114 (i) and 114 AA of Customs Act, 1962 respectively. Considering that profit was made by appellant utilising the import of raw-sugar postponing its liability If exporting sugar manufactured out of such imported raw-sugar, levy of penalty of Rs.10.00 Lakhs (Rupees Ten Lakhs) each under above two section respectively would be justified. It is ordered accordingly and aggregate penalty of Rs, 20,00,004 shall be realisable from appellant company.

12. So far as penalty of Rs. 10,00,000/-(Ten lakhs) each under section 114 (i) and 114AA on Shri Mukesh Sharma, General Manager is concerned, finding that he came forward to admit the offence committed, it would not be preferable to burden him with such huge penalty. Accordingly, that is reduced to Rs.50,000/- (Rupees Fifty Thousand) each under section 114 (1) and 114AA respectively and aggregate penalty of Rs. 1,00,000/- shall be payable by this appellant.

13. In the result, both the appeals are allowed party to the extent indicated above.

[Dictated & Pronounced in the open Court on 04.07.2014]