dhruva
advisors llp

Indirect Tax Alert

Date: May 15, 2021

Dimensions – 113th Edition

Judgment under the GST era

YSI Automotive India Pvt. Ltd. v. Commissioner of Customs and Others[1]

Issue for Consideration

Whether mentioning the Export Promotion Capital Goods ("EPCG") license number on a shipping bill is mandatory, or whether an export obligation could be substantiated through other alternative evidence?

Discussion

- The Petitioner is engaged in the business of supply components of cars / automobiles.
- The Petitioner had obtained licenses under the EPCG Scheme in terms of Foreign Trade Policy 2009-14 ("FTP"). Under the scheme, the Petitioner is entitled to import capital goods at a concessional rate of duty, on the condition that the Petitioner exports eight times the amount of duty saved under each license. The Petitioner did not comply with the export obligation within the stipulated time period, so sought an extension in terms of FTP, and consequently an extension was granted for a further period of two years.
- The Petitioner complied with the export obligation, by undertaking the exports through a third-party exporter, in accordance with the terms of para 5.7.1 of FTP.[2] However, the third-party exporter did not mention the name of the Petitioner (being the supporting manufacturer) or the EPCG license number of the Petitioner on the shipping bills.
- The Petitioner thereafter filed applications before the Respondent in order to seek amendments to the shipping bills, on the following grounds:
  - The licenses were obtained on the basis of anticipated orders to supply components of cars / automobiles, and consequently supplies were effected through a third-party exporter, which assembled the components as Completely Knocked Down (CKD) kits for export.
  - The non-mentioning of the EPCG license number on the shipping bills by the third-party exporter was due to the supplies being received from several vendors and supporting manufacturers, resulting in an administrative inconvenience for the third-party exporter to

[1] 2021 (5) TMI 222.

[2] EPCG authorisation holder shall export either directly or through third party(s). If a merchant exporter is EPCG authorisation holder, name of supporting manufacturer shall also be indicated on shipping bills. At the time of export, EPCG authorisation no. and date shall be endorsed on shipping bills which are proposed to be presented towards discharge of export obligation.

© Copyright Dhruva Advisors LLP.

mention EPCG license number on the shipping bills for all of the parties concerned.

- The assessing authority thereafter passed an order rejecting:
  - the applications that were filed by the Petitioner, seeking amendments of shipping bills; and
  - the request for concessional duty and invoked bank guarantee due to the non-fulfilment of the export criteria.
- Aggrieved by the order, the Petitioner filed two Writ Petitions before the Hon'ble High Court. The first Writ Petition challenged the invocation of the bank guarantee against the EPCG license, and the second Writ Petition sought permission to amend the shipping bills. The Hon'ble High Court, after taking into account the facts of the case, observed as follows:
  - The Petitioner could use a number of methods to establish to the Respondents that its exports had taken place, such as obtaining confirmations from the third-party exporter, correspondences, and other documents at its disposal.
  - Para 5.7.1 of the FTP requires both the name of the supporting manufacturer as well as the EPCG authorisation number to be mentioned on the shipping bills. However, the non-mentioning of the same is not fatal to the claim for the concessional rate of duty. Furthermore, section 149 of the Customs Act, 1962[3] provides a forum to the Petitioner for establishing the factum of the export by way of contemporaneous records.
  - In view of the above, an opportunity must be provided to the Petitioner to prove the factum of the export through the third-party exporter by means of supporting material, such as confirmations from the third-party, correspondences, and other relevant documents. Such an opportunity should be read as per para 5.7.1, so as to ensure that the benefit of the concessional duty is not denied to the supporting manufacturers in genuine and bona fide cases.

Judgment

The Hon'ble High Court allowed the Writ Petition, with the following directions:

- The impugned order is a non-speaking order that has not adverted to the justification that was put forth by the Petitioner and, thus, was set aside.
- The Petitioner was directed to appear before the Respondent without any further notice. The Respondent, after considering any material that is furnished by the Petitioner, shall pass a speaking order within four weeks of the date of the appearance.
- The bank guarantee should not be invoked until the time when the speaking order is passed, with respect to the amendment of the shipping bills.

Dhruva Comments:

It is a well-settled law that any benefits accruing should not be denied merely on the ground of a technical or procedural lapse.

This is a welcome judgment, and it would certainly provide relief on similar matters. Furthermore, while giving the verdict, the Court also remarked that the conditions, though mandatory, could be satisfied constructively, according to the intent of the policy.

Judgment under Pre-GST era

Ruchi Soya Industries Ltd. v. *Union of India, The Commissioner of Customs*[4]

Issues for Consideration

- Effective date of applicability of notifications issued under the Customs Act, 1962.

[3] Section 149 of the Customs Act: provided that no amendment of a bill of entry or a shipping bill or bill of export shall be so authorised to be amended after the imported goods have been cleared for home consumption or deposited in a warehouse, or the export goods have been exported, except on the basis of documentary evidence which that was in existence at the time when the goods were cleared, deposited, or exported, as the case may be.

[4] 2021 (5) TMI 45

© Copyright Dhruva Advisors LLP.

- Whether customs duty payable on reassessment of a bill of entry can be classified as an operational debt under the Insolvency and Bankruptcy Code, 2016 ("IBC, 2016")?

Discussion

- The Petitioner filed a bill of entry in advance on September 15, 2015 to clear the consignment of crude palm oil and proposed to pay basic customs duty at 7.5%.
- The rate of duty on such goods was increased from 7.5% to 12.5% vide notification no. 46/2015-Customs dated September 17, 2015.
- Section 25(4) of the Customs Act, 1962 provides that notifications issued come into force on the following date:
  (a) the date of its issue by the Central Government for publication in official gazette;
  (b) when it is published and offered for sale on date of its issue by the Directorate of Publicity and Public Relations of the Board, New Delhi ("DPRB").
- As per the RTI application, it is observed that the notification was issued for publication in the official Gazette and offered for sale on September 21, 2015.
- After the import, the bill of entry was assessed at the higher rate of duty of 12.5%. The Petitioner contended that the higher rate of duty was not applicable in the present case since the second condition under section 25(4) of the Customs Act, 1962 had not been satisfied on the date of assessment.
- In this regard, the Petitioner placed reliance on the decision of the Hon'ble Supreme Court in *Union of India* v. *Param Industries Ltd.* 2015[5] wherein the Court recognised that if the second condition was not satisfied, the notification cannot be said to have come into force.
- Also, section 25(4) of the Customs Act, 1962 has been amended vide Finance Act, 2016 wherein the second condition under section 25(4) was specifically deleted.
- Alternatively, the Petitioner was under the provisions of the IBC during the pendency of the writ petition. The Petitioner further contended that since the Respondent has failed to submit their claims during the insolvency resolution proceedings, all its rights stand extinguished. In this context, reliance was placed on the judgment of Hon'ble Supreme Court in the case of *Committee of Creditors of ESSAR Steel India Ltd.* v. *Sathish Kumar Gupta and others*[6].
- The Respondent submitted that the writ is not maintainable as the Petitioner has an alternate remedy by way of an appeal before the Appellate Commissioner against the assessment order. It is further submitted that, in an identical issue, the Calcutta High Court has ruled the judgment against the Petitioner.
- After considering the facts of the case and the contention of the parties, the observations of the Hon'ble High Court in relation to the first issue were as follows:
  - When the judgment in the case of *Param Industries Ltd.*, was pronounced, the hosting of the notifications through the website of the Central Board of Excise and Customs ("CBEC") had not evolved as it was in 2015. Hence, there was a marked difference in the practice of dissemination of statutory information prevailing at the time for which the judgment was pronounced than in 2015.
  - The use of information technology had changed by leaps and bounds since 2001. By 2015, all information was available at the click of the button on the website of CBEC.
  - The amendment notification was posted on the website of the CBEC on September 17, 2015 and was also published in the official Gazette

[5] 2015 (321) ELT 192 (SC)
[6] (2020) 8 SCC 531

© Copyright Dhruva Advisors LLP.

on the same day. Therefore, the Petitioner cannot complain that it was unaware of the change in the rate of duty merely because the sale of official Gazette was made only on September 21, 2015.

  - Reference has also been made to the Information Technology Act, 2002 ("IT Act") which clearly states that any information required to be made under any law in printed form shall be deemed to be satisfied if such information is made available in electronic form.
  - The decision in the case of *Param Industries Ltd.* has not examined the issue from the perspective of section 4 of the IT Act.
  - The Court held that the amended notification came into effect on the date of its publication in the official Gazette on September 17, 2015 and its publication on the website of the CBEC on the same date.

- The second argument of the Petitioner is regarding the extinguishing of the rights of the Respondent in view of the IBC proceedings initiated against the Petitioner. The moot point is whether the 'customs duty' payable is an 'operational debt' of the Petitioner as envisaged under section 5(21) of the IBC, 2016 and whether the customs department is an 'operational creditor' as per section 5(20) of IBC, 2016.

- The Court observed as follows:

  - As per section 5(21) of the IBC, 2016, 'Operational debt' means *a **claim** in respect of the provision of goods or services including employment or a **debt** in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government, or any local authority.*
  - The expression "claim" means a right to payment and should be in respect of provision of goods or services to qualify as an operational debt. Section 3(11) of the IBC, 2016 defines "debt" as a liability or obligation in respect of the claim which is due from any person.
  - A tax once determined to be paid in accordance with law is a sovereign debt and cannot be altered whether increased or decreased by any authority, whether by the Court or under a scheme of Insolvency resolution under the Companies Act, 2013 or the IBC, 2016. Corporate re-structuring under the IBC, 2016 does not mean waiver or extinguishing of sovereign debts.
  - Tax, though a crown debt, is not an operational debt as it does not arise out of a "claim" in respect of the provision of goods or services including employment.
  - However, the Hon'ble Supreme Court in *Ghanashyam Mishra and Sons* v. *Edelweiss Asset Construction*[7] has recently held that the finding of the High Court, that the dues owed to the State Government and Central Government would not come within the definition of "operational debt", is incorrect in law.
  - The legislative intent was to extinguish all such debts owed to the Governments including the tax authorities once the resolution plan was approved by the National Company Law Tribunal ("NCLT"). Since there was ambiguity, the tax authorities continued with the proceedings in respect of the tax dues owed to them.
  - To address this mischief, section 31 of the IBC, 2016 was amended in August 2019 to clarify that once a resolution plan was approved by the NCLT, all such claims / dues owed to the Governments including tax authorities, which were not part of the resolution plan shall stand extinguished. The said amendment, being clarificatory in nature, is effective retrospectively.
  - In light of the above discussion, it is clear that tax authorities are bound by the insolvency resolution plan approved by the NCLT and

[7] 2021 (4) TMI 613

© Copyright Dhruva Advisors LLP.

consequently all the dues which are not a part of the resolution plan shall stand extinguished.

Judgment

- The Court rejected the Petitioner's contention that the amended rate notification came into force only on date of issue of publication and not on the date of issue in the official Gazette.
- The Petitioner's contention of extinguishment of the rights of the Respondent to claim the differential customs duty is accepted in the light of the Hon'ble Supreme Court judgment in the case of *Ghanashyam Mishra and Sons (supra).*
- The Petitioner is directed to file an application before the NCLT within 30 days to confirm whether the differential custom duties were included in the approved resolution plan.

Dhruva Comments:

The judgment is in line with the intention of IBC law to provide a clean slate to new owners including granting relief on past tax dues. The Supreme Court judgment in the case of *Ghanashyam Mishra and Sons (supra)* puts to rest the debate that claims not forming part of resolution plan stand extinguished.

Circular

Acceptance of an undertaking in lieu of a bond

- The CBIC had earlier issued Circular no. 17/2020-Customs dated April 3, 2020 whereby it had relaxed the condition for submission of bond required under section 18, 59, 143[8] and under notifications issued under section 25 of the Customs Act, 1962. An undertaking was to be submitted by the importer / exporter in lieu of the bond. This relaxation was subject to certain terms and conditions.
- Now the CBIC has issued circular no. 09/2021-Customs dated May 8, 2021 whereby the said benefit has again been provided for the period from May 8, 2021 to June 30, 2021 subject to the importers / exporters availing such benefit should furnish the proper bond by July 15, 2021. The terms and conditions as specified in the earlier circular remain the same.

[8] Section 18 deals with the cases where the customs duty can be provisionally assessed on furnishing security (bond); Section 59 deals with the situation where a importer is required to furnish a bond in respect of the goods for which bill of entry for warehousing has been presented; Section 143 grants power to the Asst. Comm. or Dp. Comm. of Customs to allow the import or export in certain cases on execution of bond.

© Copyright Dhruva Advisors LLP.

www.dhruvaadvisors.com

Follow us on:

ADDRESSES

Mumbai
11th Floor, One World Centre,
Tower 2B, 841, Senapati Bapat Marg,
Elphinstone Road (West),
Mumbai 400 013
Tel: +91 22 6108 1000 / 1900

Ahmedabad
B3, 3rd Floor, Safal Profitaire,
Near Auda Garden,
Prahladnagar, Corporate Road,
Ahmedabad 380 015
Tel: +91-79-6134 3434

Bengaluru
Prestige Terraces, 2nd Floor
Union Street, Infantry Road,
Bengaluru 560 001
Tel: +91-80-4660 2500

Delhi / NCR
101 & 102, 1st Floor, Tower 4B
DLF Corporate Park
M G Road, Gurgaon
Haryana 122 002
Tel: +91-124-668 7000

Pune
305, Pride Gateway, Near D-Mart, Baner,
Pune 411 045
Tel: +91-20-6730 1000

Kolkata
4th Floor, Unit No 403, Camac Square,
24 Camac Street, Kolkata
West Bengal 700016
Tel: +91-33-66371000

Singapore
Dhruva Advisors (Singapore) Pte. Ltd.
20 Collyer Quay, #11-05
Singapore 049319
Tel: +65 9105 3645

Dubai
WTS Dhruva Consultants
U-Bora Tower 2, 11th Floor, Office 1101
Business Bay P.O. Box 127165
Dubai, UAE
Tel: + 971 56 900 5849

KEY CONTACTS

Dinesh Kanabar
Chief Executive Officer
dinesh.kanabar@dhruvaadvisors.com

Ritesh Kanodia
ritesh.kanodia@dhruvaadvisors.com

Niraj Bagri
niraj.bagri@dhruvaadvisors.com

Ranjeet Mahtani
ranjeet.mahtani@dhruvaadvisors.com

Dhruva Advisors has been consistently recognised as the **"India Tax Firm of the Year"** at the ITR Asia Tax Awards in 2017, 2018, 2019 and 2020.

Dhruva Advisors has also been recognised as the **"India Disputes and Litigation Firm of the Year"** at the ITR Asia Tax Awards 2018 and 2020.

WTS Dhruva Consultants has been recognised as the **"Best Newcomer Firm of the Year"** at the ITR European Tax Awards 2020.

Dhruva Advisors has been recognised as the **"Best Newcomer Firm of the Year"** at the ITR Asia Tax Awards 2016.

Dhruva Advisors has been consistently recognised as a Tier 1 firm in **India's 'General Corporate Tax'** and **'Indirect Tax'** ranking tables as a part of ITR's World Tax guide. The firm is also listed as a **Tier 1 firm** for India's **'Transfer Pricing'** ranking table in ITR's World Transfer Pricing guide.

Disclaimer:
The information contained herein is in summary form and is therefore intended for general guidance only. This publication is not intended to address the circumstances of any particular individual or entity. No one should act on such information without appropriate professional advice after a thorough examination of the particular situation. This publication is not a substitute for detailed research and professional opinions. Before acting on any matters contained herein, reference should be made to subject matter experts, and professional judgment needs to be exercised. Dhruva Advisors LLP cannot accept any responsibility for loss occasioned to any person acting or refraining from acting as a result of any material contained in this publication

© Copyright Dhruva Advisors LLP.