CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL SOUTH ZONAL BENCH

CHENNAI

Appeal No.C/148/2007

[Arising out of Order-in-Appeal C.Cus.No.940/2006 dt. 26.12.2006 passed by the Commissioner of Customs (Appeals), Chennai]

Hetero Drugs Ltd. Appellant

Versus

Commissioner of Customs (Airport)

Chennai Respondent

Appearance:

Shri S.Krishnanandh, Advocate

For the Appellant

Shri K. Veerabhadra Reddy, JC (AR)

For the Respondent

CORAM :

Honble Ms. Sulekha Beevi C.S. Member (Judicial)

Honble Shri Madhu Mohan Damodhar, Member (Technical)

Date of hearing / decision : 18.09.2017

FINAL ORDER No. 42141 / 2017

Per Bench

The brief facts of the case are that appellant imported Zidovudine vide two Bills of Entry dt. 6.7.2004 and 30.7.2004 claiming the benefit of Customs Notification No.21/2002-Cus. dt. 1.3.2002 under Sl.No.80(B). However, they did not fulfil the condition prescribed under the said Sl.No.80 (B). The Revenue alleged that appellants are not eligible for such concession rate of duty as they have not fulfilled the conditions set out in Sl.No.80(B) of the notification . Show cause notice dt. 4.8.2004 was issued demanding the differential duty which after adjudication culminated in passing the impugned order which confirmed the duty demand along with interest and also imposed penalty. In appeal, the Commissioner (Appeals) upheld the same. Hence this appeal.

2. Ld. Counsel for appellant submitted that Commissioner (Appeals) has erred in holding that Zidovudine imported being a bulk drug is not eligible for concessional duty as a drugfalling under Sl.No.80(A) of the notification; that the procedure attached to Sl.No.80(B) is not a substantive one and being only a procedural condition, the non- compliance of the same would not disentitle the appellant of the substantive benefit. It was also argued by him that since there was notice for recovery for short levy issued under Section 28 the confirmation of demand would not be sustainable as there was no appeal against the assessment order. He relied upon the decision of the Tribunal in the following cases :

(a) CIPLA Ltd. Vs. CC Chennai

2007 (218) ELT 547 (Tri.-Chennai)

(b) CCE Hyderabad Vs. Hetero Drugs Ltd.

2010 (262) ELT 490 (Tri.-Bang.)

(c) DR. Reddys Laboratories Ltd. Vs. CCE Hyderabad

2010 (251) ELT 447 (Tri.-Bang)

3. Against this, Ld. A.R Shri K.V. Veerabhadra Reddy, submitted that appellant has declared the goods as bulk drugs and therefore has violated the condition attached to Sl.No.80(B) of the notification.

4. Heard both sides. It is not disputed that Zidovudine is specifically listed in List 3 against Sl.No.80(A) of the said notification. Against Sl.No.80(A), there is no condition attached. According to appellants, the condition attached to Sl.No.80(B) is only a procedural one and since the items would fall within the description of drugas seen in Sl.No.80(A), the benefit of notification ought to have been granted. The said issue was decided in the cases relied upon by the counsel for the appellant. The relevant portion of decision of this Bench in the case of Cipla Ltd. (supra) is reproduced as under :

"5.?In the instant case, admittedly, the bulk drugs imported by the appellants were specifically mentioned in List 3 appended to Sl. No. 80(A) of Customs Notification No. 21/02 and are liable to be considered as drugs mentioned at 80(A). It is beyond doubt that bulk drugs are also drugs. They are so defined under the Drugs (Prices Control) Order, 1995 also. The imported goods, which are specified in List 3, must fall within the coverage of drugs specified in List 3and consequently the benefit of Sl. No. 80(A) would be admissible to them in relation to BCD. It would follow that, insofar as CVD is concerned, the benefit of Sl. No. 47(A) of the Central Excise Notification would be available to the goods. We have taken this view upon strict interpretation of the language used in the description of goods under the relevant entries of the Notification, in terms of the Apex Courts ruling in Gujarat State Fertilisers Co. v. CCE - 1997 (91) E.L.T. 3 (S.C.) and other cases cited by learned DR. In the result, all the appeals filed against the appellate Commissioners order on merits are bound to succeed."

5. The Tribunal in the case of CCE Hyderabad Vs Hetero Drugs Ltd. (supra) on the aforesaid issue, observed as under :

"4.?In the appeal before the Tribunal, the appellant revenue has taken the following grounds. It is submitted that Lopinavir is bulk drug and cannot be treated as drug or medicines. The expression drug at Sl. No. 47(A) referred to finished pharmaceutical products or formulations whereas bulk drugs at Sl. No. 47(B) referred to bulk drugs which were used in the manufacture of drugs or medicines. The assessee had classified the item under Chapter 29 of the Central Excise Tariff which covered organic chemicals; and drugs were classifiable under Chapter 30 of the tariff. It is submitted that the impugned goods were bulk drugs as per the definition of the term in the notification and as per common parlance. Drugs falling under Sl. No. 47(A) were exempted unconditionally whereas bulk drugs at Sl. No. 47(B) were exempted subject to fulfilment of the condition No. 2 specified in the Notification. As per this condition if the bulk drugs were used elsewhere than in the factory of production, the procedure laid down in the rules had to be followed. In the instant case, the assessee had not followed the procedure prescribed in the rules. In allowing the appeal of the assessee, Commissioner (Appeals) had wrongly placed reliance on the decision of the Tribunal in M/s. Burroughs Wellcome (I) Ltd.(supra); the issue involved in that case was whether life saving drugs could also include bulk drugs.

5. Heard both sides.

6. We have carefully perused the case records and the submissions by both sides. The dispute involved in the subject case is whether Lopinavir an item figuring in List 3 appended to the Notification of the

Govt. of India, erstwhile Ministry of Finance (Department of Revenue) No. 21/2002-Customs dated 1-3-2002 is entitled to the exemption in terms of the Sl. No. 47(A) of the Notification No. 4/2006-C.E. The impugned item was cleared as bulk drug without following the procedure prescribed in the rules. We find that there is no definition of bulk drugs in the Notification involved. As per the Drugs (Prices Control) Order, 1995, drugs also include bulk drugs. The item Lopinavir figures in List 3 of Notification No. 21/2002-Cus. Therefore we find that the impugned clearances of Lopinavir are entitled to exemption extended to goods at against Sl. No. 47(A). In terms of the Notification such clearances are entitled to exemption unconditionally."

6. In a recent decision in the case of M/s.Biocon Ltd. Vs CC Chennai by Final Order No.42065/2017 dt. 13.09.2017, the Tribunal has taken a similar view. Following the above said decisions, we hold that the condition attached to Sl.No.80(B) of Notification No.21/2002-Cus. dt. 1.3.2002 being a procedural one, non-compliance cannot be a ground for denying the benefit especially because the entry drug in Sl.No.80 (A) does not have any conditions attached to it. From the above discussions, we set aside the impugned order. The appeal is allowed with consequential relief, if any, as per law.

(Operative part of the order pronounced in court)

(Madhu Mohan Damodhar) (Sulekha Beevi C.S)

Member (Technical) Member (Judicial)