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Government of India
Ministry of Commerce & Industry
Directorate General of Foreign Trade
Udyog Bhawan, New Delhi- 110011

F. No. 01/92/171/58/AM-16/PC-VI/9,10

Date of Order: 16.04.2018
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Name of the Appellant:

M/s. Crystal Granite Marble Ltd. Plot No. K-5, Addl. MIDC Area, Kodoli Village, District- Satara- 415004, Maharashtra.

Order appealed against:

Order-in-Original No. SEEPZ SEZ/EOU/28/50/91/VOL. VII dated 21.01.2014, passed by DC, SEEPZ SEZ, Mumbai.

Order-in-appeal passed by:

Shri Alok Chaturvedi, DGFT
Shri J.V. Patil, Addl. DGFT

ORDER-IN-APPEAL

M/s. Crystal Granite Marble Ltd. has filed this appeal under Section 15 of the Foreign Trade (Development & Regulation) Act 1992, as amended from time to time, against Order-in-Original No. SEEPZ SEZ/EOU/28/50/91/VOL. VII/692 dated 21.01.2014, passed by DC, SEEPZ, Mumbai, imposing a penalty of Rs. 2.00 lakhs on the Appellant Company.

2. Vide Notification No.101/(RE 2013)/2009-2014 dated 5th December 2014, the Central Government has authorised the Director General of Foreign Trade aided by one Addl. Director General of Foreign Trade to function as Appellate Authority against orders passed by the Development Commissioners as Adjudicating Authority. Hence, the appeal is before us.

3. M/s. Crystal Granite Marble Ltd. Plot No. K-5, Addl. MIDC Area, Kodoli Village, District- Satara- 415004, Maharashtra was issued letter of permission bearing No. PER/64(91)/EO522 (89) Dated 05.09.1991 as amended for establishment of new undertaking for manufacturing and exporting the tiles made from Granite/other natural stones (like slate, marble etc.) and slabs made from granite/other natural stones (like slate, marble etc.) under 100% EOU scheme of Export & Import policy. After accepting the terms and conditions of Letter of permission, the noticee executed the Legal Agreement with the DC, SEEPZ SEZ on 21.05.1997.

4. . The Asst. Commissioner, Central Excise, vide Letter dated 13.12.2004, intimated to DC, SEEPZ that as per the information, M/s. Crystal Granite Marble Ltd. adopted modus-aprendi for import of marbles slabs and clearing the same in the DTA with the low price than the price by determent Customs authorities on bill of entry. The misuse of DTA sale facility has already been investigated by the Central Excise department and action has been initiated for clearance in DTA with low price and SCN-cum-Demand Notice amounting to Rs. 79, 49, 652/- has been issued to the unit.

5. The DC, SEEPZ issued Show Cause Notice on 19.01.2005 for misusing the DTA sale facility for action under section 11(2) of the FT (D&R) Act, 1992 for the violations of the guidelines for sale of goods in DTA by EOU under Appendix 14-F of HBP 2002-03.

6. In the reply the firm denied the allegation/contention in respect of the misusing DTA sale and further stated that the SCN is premature since the SCN-cum-Demand notice issued by Central Excise is yet to be adjudicated. He has requested to drop the present SCN dated 19.01.2005.

7. Commissioner of central excise issued the SCN-cum-demand notice dated 05.11.2004 and passed on order vide order bearing No. 15/CEX/2005 dated 30.08.2005 issued on 05.09.2005, and observed as follows:

> *"I hold that the value considered by the assessee for paying duty on the marble slabs cleared into DTA is not in order and has to be re-determined in accordance to the Rule 8 of the Customs Valuation Rules, 1998. The value re-determined in the SCN is as such proper and justifiable and accordingly duty needs to be recovered on the same and therefore the duty demand of Rs. 79, 49, 652/- is liable to be confirmed. The undervaluation is a result of mis-declaration of vital facts with the sole intent to evade duty. I hold the assessee liable for penalty under section 11AC of the central excise Act, 1944. The interest is also recoverable on the amount of Rs. 79, 49, 652/- in terms of section 11AB of the Central Excise Act 1944."*

8. The firm filed an appeal before Central Excise and Service Tax Apellate Tribunal (CESTAT). The CESTAT was pleased to dispose off the stay Application by passing an order dated 14.02.2006 as under:

> *"Total waiver of the pre-deposit requirements under section 35 F of the Central Excise Act, 1944 and order the stay of recovery thereof pending the regular hearing of this appeal."*

9. In the said order it was observed that:

> *"The applicants are an EOU who made clearances to the DTA. These clearances have been questioned on the grounds that the valuations, arrived at to discharge the duty thereof are not appropriate and as per the valuation Rules applicable. The transaction value is not being accepted and valuation admittedly is resorted to by applying to the cost construction method under the provisions of Rule 8 of the valuation rule applicable.*
>
> *While revenue may have reason to reject the transaction value in particular case, yet resort to cost construction method by applying rule 8 is not permissible as held by the bench of this tribunal in the case of Haryana Sheet Glass Ltd. A/264 to 266/WZB/05/C-II dated 04.04.2005. Following the same we do not find the reason to uphold the valuation and therefore consequent duty determination and equivalent penalty imposition as arrived in this case by the lower authority".*

10. The DC after hearing the firm, passed an Order-in-Original dated 21.01.2014 imposing penalty of Rs. 2 lakhs stating that "the firm violated the provisions of Export and Import Policy and the procedure by not following the provisions of the Policy Circular No. Policy Circular No. 29 (RE-01)/1997-2002 dated 14.03.2002 and imposed a penalty of Rs. 2 lakhs." In the order, DC further observed in Para 16 of the Order that "I have noted that *the EOUs are governed by the provisions of Export and Import Policy and procedure and specifically provisions set out in Chapter 6 of Export and import policy and procedure. In this context, it has been contended that the Policy Circular no. 29 (RE-01)/1997-2002 dated 14.03.2002, is not applicable to the EOU as the same is applicable only to the goods imported in India. If this argument was accepted that the policy circular no. 29 (RE-01)/1997-2002 dated 14.3.2002 cannot be applicable to EOU, then it implies that the goods which cannot enter in India at specific floor price will be allowed to enter the goods in DTA through EOU route. Apparently, the contention of the noticee is not tenable".*

11. Against the order of DC the firm has filed an Appeal. Mr. Dhruva Matta, Advocate on behalf of the appellant appeared for the Personal Hearing on 30.08.2016. They made arguments on behalf of the points which they had also submitted in their appeal. In addition in the hearing they submitted a copy of CESTAT order dated 27.02.2017. The main submissions of the appeal are as below: -

a) The impugned order has been passed by the DC in view of the intimation received from the Asst. Commissioner of Central Excise. The demand raised by the Central Excise department was sub-judice and was pending before CESTAT, Mumbai. In view of the fact that the matter was sub-judice, the DC ought not to have passed the impugned order.

b) Without pre-judice to above it is submitted that the tiles/slabs manufactured and cleared by the appellants were not covered by the Policy Circular No. 29 (RE-01)/1997-2202 dated 14.03.2002. The tiles/slabs in the DTA were polished tiles/slabs and were not covered within any of the above categories.

c) The Policy Circular is applicable only to physical imports from a place outside India and not to the DTA clearance effected by an EOU.

d) The Policy Circular is applicable to the importers/purchasers of the tiles/slabs. Since the appellants were neither importer nor purchaser of the slabs/tiles, the policy circular is not applicable to the Appellants.

e) Penalty under Section 11 (2) of the FTDR Act is not sustainable. Section 11(2) is invokable if a person imported or exported any goods in contravention of the provisions of the FTDR Actor the rules or orders made under the FTDR Act or the FTP. The Appellants in the present case as explained above has not imported or exported any goods in contravention of the Policy, Rules, Order or the Act. Thus there is no question of contravention or abetment of any provisions of the FTDR Act. As stated above the appellants had cleared the slabs/tiles after the due permission from the DC. The goods were cleared on payment of applicable duties. In view of the above it is submitted that the penalty under section 11(2) is not imposable in the present case.

f) The appellants had cleared the slabs/tiles at correct transactions value.

g) The DTA sale is not permitted in respect of cases which are not prohibited. In the present case slabs/tiles are not prohibited to be imported.

12. **The Policy Provisions:**

Under Export and Import Policy (2002-07) the relevant paras as related to DTA sale by EOUs were as below:

(i) Para 6.8 (b) stated: Units, other than gems and jewellery units, may sell goods/ services upto 50 % of FOB value of exports, subject to fulfillment of minimum NFEP as prescribed in Appendix-I of the Policy on payment of applicable duties. Sales made to a private bonded warehouse set up under paragraph 2.39 of the policy shall also be taken into account for the purpose of arriving at FOB value of exports by EOU/EPZ units provided payment for such sales are made from EEFC account. No DTA sale shall be permissible in respect of motor cars, alcoholic liquors, tea (except instant tea) and books or by a packaging/labeling /segregation/ refrigeration unit and such other items as may be notified from time to time.

(ii) Para 6.8 (f) stated: EOU/EPZ/EHTP/STP units may be permitted to sell finished products which are freely importable under the Policy in the DTA over and above the levels permissible under sub paragraph (b) above against payment of full duties, provided they have achieved the NFEP as per Appendix-I

of the Policy. Such sales may also be permitted in exceptional cases without achievement of NFEP/EP.

(iii) Para 6.9 (c) stated: DTA sale shall not affect the application to any goods of any other prohibition or regulation affecting import thereof in force at the time when such goods are imported. This also does not confer any immunity, exemption or relation at any time from ant commitment or compliance with any requirements to which the importer may be subject to under other law or regulations.

(iv) Import of Marble blocks/slabs: Under Export and Import policy, import of Marble blocks/slabs were not permitted and were restricted for import and required import license/authorizations for import from abroad. In this regard, policy circular 29 dated 14.03.2002 specified that these licenses shall be subject to the minimum floor price. The circular also specified other conditions that were to be considered by the EXIM facilitation committee while considering while considering application for import authorization. The Policy Circular specified the floor price of the Rough marble Blocks/slabs as follows:

i) For crude or roughly trimmed marble – US$300 per Metric Tonne (MT);
ii) For rough marble blocks – US$300 per Metric Tonne (MT); and
iii) For Slabs – US$ 450 per Metric Tonne (MT)

(v) The Appendix 14-F of HBP 2002-03 provided guidelines for sale of goods in the DTA by EOU units. The Paras a, b and e under the said appendix were as below:

(a) The sale of goods in DTA will be subject to the payment of applicable duties as notified from time to time by the DoR, Ministry of Finance, Government of India. DTA sale includes clearance to any other unit within India under Para 6.9.

(b) DTA sale entitlement will be applicable only to those goods and services, which are permissible as per the EXIM Policy. No DTA sale will be permissible if such sale is specifically prohibited in the EXIM Policy or the LoP/LoI.

(e) An application for sale of goods in DTA as per the EXIM Policy by the EOUs shall be submitted to the DC concerned in the form given at Annexure A. The application shall be certified by an independent cost/chartered/cost and works accountant and endorsed by the Bond Officer of Customs/Central Excise having jurisdiction over the unit. The DC concerned will determine the extent of the DTA sale admissible and issue authorization in the terms of value. An PZ unit may effect sale in DTA on the basis of the records maintained by it subject to the payment of applicable duties to customs authorities.

13. The appellant during the appearance before the appellant authority submitted a copy of the CESTAT order 27.02.2017. The CESTAT referring to the violation for demand of the duty by the Central excise while setting aside the order of Commissioner of Excise has observed at Para 5 of the order that, *"We had carefully gone through the facts of the case and records. We find that the demand had been raised mainly on the basis of DGFT circular fixing the minimum import price of the imported Marble Blocks. However, we find that*

there is no evidence of any manipulation in transaction value charged by the Appellant to their buyers. The sale had been made to the independent buyers and the price is the sole consideration of sale. In case of M/s. Eicher Tractors Ltd. vs. Commissioner 2000 (122) ELT 321 (SC) the Hon'ble Apex Court held that unless the "special circumstances" exists, the Transactional value cannot be rejected. The minimum imported price of the Marble blocks cannot be used as basis to assess the fix sale price of marble slabs cleared by the appellant automatically. We do not find any legal reason to do so. The minimum import price fixed for imports cannot be automatically considered as cost of raw material imported by the importer. The reasoning given by the adjudicating authority is thus fallacious. There is no investigation/findings that the importer has paid the amount equal to minimum import price to the seller of the Marble blocks. The application of Rule 8 of the Valuation rules by reckoning the minimum import price as the base price was not an approved method under the customs law and the valuation arrived at by this method is not correct. Even otherwise there is no comparison of Appellant's sale price with the market price during the relevant period so as to term the transaction value as incorrect. The price in the domestic market is driven by lot of factors and when the transaction was between the appellant and unrelated buyer there were no reasons to doubt the said value. The demand of duty is solely based upon the ground and reasoning that the minimum import price fixed by the DGFT of the marble blocks is much higher and therefore the transaction value is not correct. We were unable to appreciate the same. We therefore hold that the impugned order does not sustain. In view of our above findings and discussion we set aside the impugned order and allow the appeal with consequential reliefs".

14. **Summary and Conclusion:**

i) The submissions of the firm in the appeal against the adjudication order passed by the DC were considered in the light of policy provision applicable for EOU scheme and in particular about the DTA sale of the products involved and export/import policy provisions and the FTD&R act, 1992. The copy of the CESTAT order submitted by the appellant during the personal hearing was also considered.

ii) (a) The Show Cause Notice passed by the DC emanated after receipt of communication from the central excise about the violation being done by the appellant firm in DTA sale. The DC issued SCN and subsequently passed the order holding that the firm had violated the Policy Circular No. 29 dated. 14.03.2002.

(b) In this context, the export/import policy applicable is relevant. The marble blocks/slabs as was specified were under the EXIM Policy were restricted for import and required import authorization if anybody in DTA intends to import the same. The said circular also specified that these authorizations shall be endorsed with floor price below which import was not permitted. Whatever restrictions are applicable for imports will also be applicable to sale from EOU to DTA.

(c) Thus, the contention that Policy Circular is not applicable to EOU is not correct. This also been has been recorded by the DC in the Para 16 of the order. If the value at which the firm has done the DTA sale is considered, it clearly breaches the provisions of the Policy Circular. The CESTAT order only reinforces that the sale price at which DTA sale has happened was not as per the floor price specified in the Policy Circular. Thus the DTA sale itself was not in order and violated the EXIM Policy provisions including Policy Circular No. 29 dated 14.03.2002. Thus, it attracts the penalty as per the provisions of the FTDR Act, 1992. Thus, the DC has rightfully held the firm of violating the Policy Circular. This is without prejudice to any action that may be taken against the firm under any other laws/Act as applicable.

ORDER

We do not intend to interfere with the order of the DC, SEEPZ SEZ, Mumbai passed vide Order-in-Original No. SEEPZ SEZ/EOU/28/50/91/VOL. VII dated 21.01.2014. The Appeal stands dismissed.

(Alok Chaturvedi)
DGFT

(J V Patil)
Addl. DGFT

To,

M/s. Crystal Granite Marble Ltd.
Plot No. K-5, Addl. MIDC Area,
Kodoli Village, District- Satara- 415004,
Maharashtra.

Copy to: - Development Commissioner, SEEPZ-SEZ, Mumbai.

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