**BY E-MAIL / COURIER**

**File No.90/2023-Opinion**

11.10.2023

M/s. Redington Limited,

Block 3, Plathin, Redington Tower,

Inner Ring Road, Saraswathy Nagar West,

4thStreet, Puzhuthivakkam,

Chennai – 600 091.

Attn.: Mr. N.V. Raghuraman, Senior Manager - Imports

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Sir,

**Sub.: Using RoDTEP scrips for payment of import duty – Clarifications – Reg.**

1. With regard to your trailing mail, please find attached consolidated opinion in the case of RoDTEP scrips. Annexures referred to in the opinion were already sent to you.

2. Also, the revised bill for this opinion for Rs.40,000/- is attached. The earlier bill bearing No.105/2023-24 dated 20.06.2023 may be treated as cancelled. Payment for the revised bill may kindly be arranged.

3. Consolidated opinion and revised bill in respect of Solar Modules will be sent separately.

Yours faithfully,

**S. MURUGAPPAN**

Attached: as above.

sm/ss

**OPINION**

**1. QUERIST:**

M/s. Redington Limited,

Block 3, Plathin, Redington Tower,

Inner Ring Road, Saraswathy Nagar West,

4th Street, Puzhuthivakkam

Chennai – 600 091.

**2. FACTS:**

 The querist intends to procure scrips issued under RoDTEP Scheme by way of transfer for payment of customs duty. In this connection, they have referred to the notifications issued by the Ministry of Finance.

**3. QUERY:**

 In the above context, querist would like to know the risks involved in buying these scrips and the safeguards to be taken by them to protect their interest.

**4. OPINION:**

4.1 In the Foreign Trade Policy, a scheme for remission of duties and taxes on export products (RoDTEP) is provided for. Though this scheme is formulated by the Ministry of Commerce and the rates also have been notified by that Ministry for various products for giving credit on their export, the scheme, as such, is administered by the Ministry of Finance. In this connection, to operationalize the scheme , the government of India has issued Notification No.76/2021-Customs (N.T.) dated 23.09.2021 and Notification No.75/2021-Customs (N.T.) dated 23.09.2021. Copies of these notifications are attached as **Annexures - A & B** to this opinion. Notification 76/2021 mentioned above was amended by Notification No.75/2022-Customs (N.T.) dated 14.09.2022 and further amendments were made in the Electronic Duty Credit Ledger Regulations 2021 originally notified through Notification No.75/2021-Customs mentioned above by issue of Notification 79/2022-Customs (N.T.) dated 15.09.2022. These amendments are attached as **Annexures - C & D** to this opinion.

4.2 Apart from the above, the Ministry of Finance also has issued circulars providing guidelines for implementation of the above scheme. In this connection, Circular No.23/2021-Customs dated 30.09.2021 and another Circular No.21/2022-Customs dated 26.09.2022 will be relevant. Copies of these circulars are attached as **Annexures - E & F** to this opinion.

4.3 A perusal of the original Notification 76/2021 issued will show that based on the exports made and based on the rates fixed by the Ministry of Commerce, duty credit will be allowed by the Central Board of Excise & Customs after undertaking proper scrutiny of the documents filed and exports made. Based on the export documents, once the claim is accepted for grant of RoDTEP, a scroll for duty credit will be generated in the automated system by Customs. The exporter has an option to combine the duty credits under a particular scheme covering one or more shipping bills or bills of export and carry forward the duty credits to create an e-scrip. If the exporter does not exercise the option of creating the e-scrip then, under the scheme, it is provided that at the end of one year an e-scrip will be automatically created in the customs automated system as a single e-scrip. Registration of the e-scrip from the customs station where the exports were made also will be automatically done. The validity period of the e-scrip was initially one year and subsequently in terms of an amendment made on 15.09.2022 it was increased to two years.

4.4 As per Notification 76/2021 referred to above, the credit available can be used for payment of basic customs duty. There are certain export items which are excluded from the benefits under the scheme and these are mentioned in Table-I to Notification 76/2021.

4.5 It may be seen that the notification provides for transfer of the credit available by way of sale and the transferee holding an IEC number will be able to utilize the scrip for payment of basic customs duty. It may be noted that in respect of any fraudulent claim or violation of the provisions relating to the scheme, the duty credit can be cancelled by the Principal Commissioner or Commissioner of Customs. It is also provided that though the scroll for duty credit is generated after export, in case, the sale proceeds for such exports have not been received within the time limit stipulated in the Foreign Exchange Management Act then, the credit allowed can be recovered.

4.6 The initial scheme provided for recovery of such credit from the original scrip holder or transferor as well as transferee. In case, recovery could not be made from the transferor, originally Notification 76/2021 in paras 4(2) and 5(5) provided for recovery of the credit wrongly utilised or wrongly claimed by the exporter from the transferee also. This meant that for any omission or violation committed by the exporter, at a later date, if the scrip is cancelled or the credits are denied, then, wherever the scrips have been utilised by third-party importers, such credit can be recovered from them also in case, recovery could not be possible from the exporter. Subsequently, in terms of Notification 75/2022 issued on 14.09.2022 these clauses have been removed. This means that as per the amended notification, recovery can be made only from the transferor / original scrip holder and not from the transferee.

4.7 However, it is to be noted that still in terms of powers given to the government under Section 28AAA of Customs Act, without prejudice to recovery of import duties in respect of wrong / fraudulent claims by exporters for various duty credit scrips, recovery action can be initiated against the importer also who has utilised such scrips. Therefore, it has to be kept in mind that though the notification has deleted the provisions relating to recovery from transferee still, Customs Act under Section 28AAA gives powers to government to recover the credit amount involved by proceeding against the importers. This Section reads as follows:

***Provided****that the action relating to recovery of duty under this section against the person to whom the instrument was issued shall be* ***without prejudice to an action against the importer under section 28.***

4.8 In the light of the above provision, it may be noted that while recovery can be made from the original scrip holder in terms of Section 28AAA, such an action will not preclude the customs authorities from taking action, including recovery action, on the importers in terms of Section 28. As such, the above proviso grants powers to the authorities to raise demands in terms of Section 28 of Customs Act on the importers also. Such situations may arise when recovery from the original scrip holder is rendered impossible.

4.9 It is true that Notification 75/2022 amended Notification 76/2021 with regard to recovery of dues from the transferee. It is to be seen that Notification 76/2021 is a self-contained notification issued in terms of Section 51B of Customs Act 1962 imposing certain conditions with regard to grant and use of scrips under RoDTEP scheme. The scheme incorporated in the above notification contains comprehensive procedures to be followed under the scheme, including the process to be followed for recovery of dues.

4.10 Originally, once a demand is made, the notification provided for its recovery in terms of Section 142 of Customs Act from the importer / transferee not withstanding a demand made on the original scrip holder. In terms of the subsequent amendment made as per Notification 75/2022, only these clauses in Notification 76/2021 were deleted. The powers granted to the customs authorities for recovery of short paid duties in terms of Section 28AAA as well as Section 28 is vast in scope and therefore, deletion of clauses relating to recovery from the importer in terms of Section 142 of the Customs Act in the above notification will not have any impact on the authorities if they decide to proceed in terms of Section 28 of Customs Act against the importer.

4.11 There are two key decisions, for and against recovery of duties from the transferee, in case of fraudulent scrips under the earlier schemes contained in the Foreign Trade Policy. In the case of *Friends Trading Company Vs. Union of India* reported in *2010 (254) E.L.T. 652 (P&H)* the Punjab and Haryana High Court has taken a view that concession availed based on forged documents is not retainable. In the case of *Commissioner of Customs Vs. Leader Valves Ltd.* reported in *2007 (218) E.LT. 349 (P&H***)** the very same the Punjab and Haryana High Court has held that extended period cannot be invoked against an importer for recovery of duty even in cases of use of fraudulent scrips, since the transferee/importers are not parties to the fraudulent claim by the exporter before the DGFT authorities. When this was challenged before the Supreme Court by way of Special Leave Petition, the Special Leave Petition was dismissed both on the grounds of delay as well as merit by the Supreme Court as reported in *2008 (227) E.L.T. A29 (S.C.)*.

4.12 Thus, it can be seen that application of legal provisions can slightly vary depending upon the facts and circumstances of each case. However, the general principle is that if the importer is unaware of the fraud committed by the exporter in obtaining the scrip, then he cannot be saddled with a demand by invocation of extended period against him. This means that still duty can be recovered from the importer within the normal period of two years since the transferee cannot have a better title on the scrip than the original scrip holder as what is obtained by fraud becomes a nullity. The judgments and decisions rendered under the earlier schemes also will have relevance for recovery of duties under RoDTEP scheme to the extent they are not contrary to the specific conditions stipulated in terms of Notification 76/2021 referred to above. For example, the above notification prescribes recovery of duty credit where export proceeds are not realized. This aspect was not one of the disputed areas under the earlier schemes. In the case of East India Commercial Co. Ltd., Calcutta Vs. Collector of Customs, Calcutta, which was decided in 1962 by the Supreme Court, the issue involved is different. It is also to be noted that there the decision relates to Sea Customs Act 1878 and the Imports and Exports (Control) Act 1947, which are no more in force today. In addition, the case there related to only licence violation as per the import and export policy under the above Imports and Exports (Control) Act. In that case, the Supreme Court held that there is no legal basis for the contention that licence obtained by misrepresentation makes the licence non est. It also has held, as can be seen from the observations made in para 28 of the judgment, that the relevant sections in the Sea Customs Act and Imports and Exports (Control) Act do not expressly or by implication empowers the authorities to confiscate the goods imported under a valid licence on the ground that a condition of the licence not imposed by the order is infringed or violated. In the present set of cases the issue relates to validity of duty credit scrips under an export incentive scheme. This involves use of the scrip for payment of / debit of duty read with relevant customs notifications. Thus, factually and legally the issues will stand apart from the decision of the Supreme Court in the case of East India Commercial Co. Ltd. The two judgments which I have referred to above, will be more relevant for disputes under RoDTEP scheme.

4.13 It also to be noted that with regard to transfer of the e-scrips, the notifications provide only for complete transfer and not partial transfer. Clause 7(2) of Notification 75/2021-Customs (N.T.) dated 23.09.2021 states that duty credit available in an e-scrip shall be transferred at a time for the entire amount available in the e-scrip to another person and that transfer of duty credit in part is not permitted. The customs notification as well as circular in this regard clearly provide that the e-scrips under reference can be used only for debit of basic customs duty and not for other duties.

4.14 Keeping the above in mind though apparently there is no possibility for disputes with regard to eligibility or otherwise, still the querist needs to take sufficient precautions. As already mentioned, though a notification was issued under the scheme for removing the clauses with regard to recovery of duties from the transferee, still, the provisions in the Act in Section 28AAA provides for recovery from the transferee.

4.15 There are two situations where the scrips already issued can be found ineligible. One can be misrepresentation on the part of the importer or contravention of any provisions of Customs Act leading to suspension/ cancellation of the duty credits allowed. The second situation will be where even though the exports may be genuine, sale proceeds have not been realized within the time limit stipulated under the Foreign Exchange Management Act. Therefore, in both these situations, the querist may find themselves in a situation where the credits are being denied at a later date.

4.16 The querist, therefore, can examine the scope to get any guarantee / surety from the transferor, indemnifying the querist from any claim from the customs department in this regard and also guaranteeing that the transferor will make good any loss/ damages suffered by the transferee in respect of such e-scrips.

4.17 It is also to be noted that getting indemnity from the seller of the scrip, either the original scrip holder or the authorized agent, will help the querist for recovery of damages and duty loss from the seller/scrip holder. It will not protect the querist from initiation of action by the department for recovery of dues, in case, provisions of Section 28 are relied upon for proceeding against an importer.

4.18 In the past, under various export incentive schemes, one of the areas leading to disputes is mis-classification of the products exported for availing a higher rate of incentive. Such disputes can arise under the present RoDTEP scheme also and hence, at a subsequent date if the department proceeds against the scrip holder, recovery of full duty or excess duty/ benefit claimed cannot be contested. Obtaining indemnity will protect the querist to recover the loss, if any, by way of claims by the department. Therefore, in this background, the risk element cannot be completely ruled out.

4.19 It is to be noted that even in respect of genuine exports, if foreign exchange is not realized within the stipulated time under FEMA, then, there is a possibility of the credit being recovered. Unlike some scrips where credits are permitted only after realization of sale proceeds, in this scheme, the scrips are issued subject to realization of foreign exchange/ sale proceeds for the goods exported. Accordingly, in this context the transferee has to be careful and take necessary precaution.

4.20 With regard to any penal liability in the absence of active involvement of the purchaser of the scrip in duty evasion on wrong availment of benefit, there is no scope to levy penalty. However, there are instances where the customs have issued notices to third-party importers also and in such cases, it needs to be established through further proceedings / appeal proceedings that the importer / querist has not committed any violation of the provisions under this scheme, knowingly or in collusion with the exporter. Only when that is done, there will be relief from penal liability.

**S. MURUGAPPAN**

sm/ss

**Disclaimer:-** The above opinion is provided based on the information and documents made available to us by the querist and further based on the laws and rules prevalent as on date and the understanding of such provisions by the author and is meant for the private use of the person to whom it is provided without assuming any liability for any consequential action taken based on the views expressed here.

**TO:**

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