CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT AHMEDABAD

REGIONAL BENCH – COURT NO. 01

CUSTOMS Appeal No. 10981 of 2014
[Arising Out Of OIA No. RJT-EXCUS-000-APP-594-13-14 Dated- 19/12/2013 Passed By Commissioner (Appeals), Central Excise, Rajkot]

M/s. Viom Impex **.....Appellant**
Plot No. 3014-B, Gidc, Phase-Iii, Dared,
JAMNAGAR, GUJARAT-364760

VERSUS

Commissioner of Central Excise-RAJKOT **.....Respondent**
Central Excise Bhavan
Rajkot, Gujarat-360001

APPEARANCE:
Shri. Manish Jain, Advocate for the Appellant
Shri. Himanshu P Shrimali, Superintendent (Authorized Representative) for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. SOMESH ARORA

FINAL ORDER NO. 10653 / 2024

DATE OF HEARING:05.03.2024
DATE OF DECISION:21.03.2024

SOMESH ARORA

The issue in this case pertains to the denial of benefit of exemption under Notification No. 52/2003-Cus to inputs/raw materials imported by Appellants (EOUs) on the ground that appellants have consumed inputs and generated wastage beyond the norms fixed by norm committee. There is no allegation of diversion of inputs from EOU. The Appellant is a 100% Export

Oriented Unit. The appellant manufactures various brass items and components by using imported mix metal brass scrap by availing benefit of Notification No. 52/2003 - CUS dated 31.03.2003. All the waste generated during manufacturing of finished goods are cleared on payment of applicable customs duty under the permission of development commissioner.

2. It is the case of the department that the Appellants have not regulated their operations based on the norms as fixed by norms committee available for the consumption of inputs and thereby violated the conditions laid down under the Notification No. 0.52/2003 - Cu , dated 31.03.2003. While alleging violation of input output norms department has taken quantum of clearance of finished goods from ER2 returns and compared with imported inputs by applying the ratio as per norms committee. After applying the said ratio, in case, excess imported scrap is used, customs duty has been demanded on said excess imported utilized scrap under Section 72 read with Section 28 of customs Act.

3. Appellants made the following submissions:

3.1 The Notification 52/2003-CUS dated 31.03.2003 was amended on 06.07.2007 to limit the generation of waste up to 2% of the input quantity where no SION is notified. It is submitted that the Appellant had imported the quantity shown as opening balance i.e. 492.26 M.T. of brass scrap prior to 06.07.2007. The said condition shall not apply on the same as the amendment is applicable from the date of issue and does not have a retrospective effect. Therefore, the stock lying in balance out of import consignment prior to 06.07.2007 do not attract the said restriction and the same requires to be reduced from the excess consumption.

3.2 It was submitted that the impugned order is unsustainable in law as it denies the benefit of exemption under Notification No. 52/2003 Cus. on inputs which are used in manufacturing of finished goods and the resultant waste/ scrap/ remnants/by-products etc. cleared into DTA, with due permission of Development Commissioner. The relevant part of the Notification is produces for the ease of reference:

> *"Notwithstanding anything contained in this notification, the exemption herewith shall also apply to goods which on importation into India or procurement, are used for the purpose of manufacture of finished goods or services and such finished goods and services, (including by-products, rejects, waste and scrap arising in the course of production, manufacture, processing or packaging of such goods) even if not exported, are allowed to be sold in Domestic Tariff Area in accordance with the Export and Import Policy and subject to such other limitations and conditions as may be specified in this behalf by Development Commissioner, or the Board of Approval or the Inter Ministerial Standing Committee, as the case may be, on payment of appropriate duty of excise leviable thereon under section 3 of the Central Excise Act, 1944 (1 of 1944) or where such finished goods (including by-products, rejects, waste and scrap) or services are cleared to the warehouse appointed or registered under notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 26/98-Central Excise (NT), dated the 15th July, 1998 or No. 46/2001- Central Excise (NT), dated the 26th June, 2001 or cleared to the warehouse authorised to carry out manufacturing process or other operation under section 65 of the Customs Act. 1962 (52 of 1962) and under the Manufacture and Other Operations in Warehouse Regulation, or cleared to t the holders of certificate from Apparel Export Promotion Council and Council for Leather Export for duty free imports as referred to in clause (e) of the paragraph 6.9 of the Export and Import Policy, without payment of duty:"*

3.3 It was submitted that para 3 of the concerned Notification is a non-obstante clause ice, it starts with the word "notwithstanding anything contained in this notification". A non-obstante clause is a legislative device which is employed to give overriding effect to certain provisions over some contrary provision that may be found in the enactment.

3.4 Thus, it was submitted that there is no dispute that waste is cleared in DTA on payment of applicable duty of customs with permission of Development Commissioner. Thus, demand of customs duty on imported inputs is not sustainable. The present-issue is covered in favour of appellants by decision in case of Meridian Impex Vs. CCE & ST, 2018 (7) TMI 865-CESTAT as confirmed by Hon'ble High court of Gujarat in case of Commissioner of Customs (Preventive) Vs. Monarch Overseas, 2019 (1) TMI 1513- Gujarat High Court,

4. The present case is entirely covered by the case of Meridian Impex Vs. CCE & ST, 2018 (7) TMI 865-CESTAT, wherein it is held that after segregation of the mixed imported scrap, the segregated scrap, if cleared, cannot be considered as clearance of the 'inputs as such. The relevant para of the judgment is produced below,

> *"13. On the issue of payment of duty on the excess use/consumption scrap material. in the activity of segregation/manufacture of finished goods, then the norms fixed by the norms committee or mentioned in the Notification, as the case may be, we find that the Ld. Commissioner (Appeals), in his subsequent Orders, has rightly referred to and relied upon clause (3) of the said Notification. For better appreciation the said clause is reproduced as below:*
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> > *"3. Notwithstanding anything contained in this notification, the exemption herewith shall also apply to goods which on importation into India or procurement, are used for the purpose of manufacture of finished goods or services and such finished goods and services, (including by-products, rejects, waste and scrap arising in the course of production, manufacture, processing or packaging of such goods) even*

if not exported, are allowed to be sold in Domestic Tariff Area in accordance with the Foreign Trade Policy and subject to such other limitations and conditions as may be specified in this behalf by Development Commissioner, or the Board of Approval or the Inter Ministerial Standing Committee, as the case may be, on payment of appropriate duty of excise leviable thereon under section 3 of the Central Excise Act, 1944 (1 of 1944) or where such finished goods (including by-products, rejects, waste and scrap) or services are cleared to the warehouse appointed or registered under notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 26/98-Central Excise (NT), dated the 15th July, 1998 or No. 46/2001-Central Excise (NT), dated the 26th June, 2001 or cleared to the warehouse authorized to carry out manufacturing process or other operation under section 65 of the Customs Act, 1962 (52 of 1962) and under the Manufacture and Other Operations ations in Warehouse Regulation, or cleared to the holders of certificate from Apparel Export Promotion Council and Council for Leather Export for duty free imports as referred to in clause (e) of the paragraph 6.9 of the Foreign Trade Policy, without payment of duty:

14. Interpreting the said provision, the Ld. Commissioner (Appeals) observed that even if the imported goods are used in the manufacture of the finished goods (including by products, rejects waste and scrap arising in the course of production, manufacturing processing or packaging of such goods) even if not exported, are allowed to be sold in DTA, in accordance with the Exim Policy on payment of appropriate excise duty leviable thereon, the exemption Notification No. 53/ 2003-Cus, dated 31/03/2003 cannot be denied. In the present case, the scrap generated during the course of segregation/manufacture of brass articles had been permitted to be cleared in the DTA by the Development Commissioner and the Appellant-assessee had cleared the scrap pursuant to the said permission and discharged appropriate excise duty on its sale. Hence, demanding customs duty foregone on the excess quantity of imported scrap worked out on the basis of the Norms fixed by the Committee, in our view, is not sustainable in law. We summarize our findings as follows:

(i) The activity of Segregation of imported mixed brass scrap into foundry and non- foundry grade, results into manufacture, hence, the Revenue's Appeals on this count fails, accordingly, rejected

(ii) The excess quantity of scrap generated during the activity of segregation/manufacture of the Brass articles cleared on payment of applicable excise duty in DTA as per the permission of Development commissioner, is covered by clause (3) of the Exemption Notification 50/2003cus. Dr. 31.3.2003, as amended. and the respective Orders of the Id. Commissioner(Appeals) which are passed on same line are upheld and the Orders contrary to above, are set aside and the Appeals filed by the respective, assesse-Appellants are allowed."

5. The same has been affirmed by the Gujarat High Court in the decision of Commissioner of Customs (Preventive) Vs. Monarch Overseas, 2019 (1) TMI 1513- Gujarat High Court. The relevant para of the judgement is extracted below:

> *"11. That brings us to the second question, as to whether clearance of such scrap upon payment of excise duty would fall within the ambit of paragraph 3 of Notification No. 52/2003-Cus., dated 31-3-2003? On behalf of the appellant it has been contended that the clearance of foundry scrap beyond the ratio/norms of scrap laid down by the Norms Committee is in contravention of the provisions of Notification No. 52/2003- Cus., dated 31-3-2003. In this regard, reference may be made to the provisions of the said notification. Clause (3) of the said notification to the extent the same is relevant for the present purpose provides that notwithstanding anything contained in that notification, the exemption therewith shall also apply to goods which on importation into India or procurement, are used for the purpose of manufacture of finished goods or services and such finished goods and services, (including by-products, rejects, waste and scrap arising in the course of production, manufacture, processing or packaging of such goods) even if not exported, are allowed to be sold in Domestic Tariff Area in accordance with the Export and Import Policy and subject to such other limitations and conditions as may be specified in this behalf by Development Commissioner, or Board of Approval or the Inter Ministerial Standing Committee, as the case may be, on payment of appropriate duty of excise leviable thereon under Section 3 of the Central Excise Act, 1944. Thus, waste and scrap arising in the course of production or manufacture of finished goods are also exempt from the duty of customs leviable thereon under the First Schedule to the Customs Tariff Act, 1975 and the additional duty, if any, leviable thereon under Section 3 of the said Customs Tariff*
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> *Act. Reverting to the facts of the present case, as noticed hereinabove, the segregated waste has arisen in the course of production/manufacture of the finished goods viz. brass articles; the Commissioner of Customs has recorded that the segregated waste had in fact been cleared on payment of duty after being duly permitted by the Development Commissioner in accordance with the provisions of the EXIM Policy. The requirements of clause (3) of Notification [No.] 52/2003-Cus., dated 31st March, 2003 are therefore, wholly satisfied. Under the circumstances,*

there does not appear to be any legal infirmity in the view adopted by the Tribunal."

6. It was submitted that Chapter 6 of the Foreign Trade Policy (hereinafter referred to as "FTP") nowhere mentions that for the excess generation of waste and scrap, duty equivalent to the duty on proportionate quantity of imported raw material is required to be paid. Chapter 6 of the FTP provides that there should be no duty demand even in case where the waste or scrap is destroyed in EOU. Further, it is also stated that the by-products included in the LOP can be sold in DTA with the permission of the Deputy Commissioner on the payment of applicable duties. The relevant part of the FTP is produced for the ease of reference:

"Para 6.8 (e), (f) and (g) of the FTP read as under:

(e) Scrap/waste/ remnants arising out of production process or in connection therewith may be sold in DTA, as per SION notified under Duty Exemption Scheme, on payment of concessional duties as applicable, within overall ceiling of 50% of FOB value of exports. Such sales of scrap / waste / remnants shall not be subject to achievement of positive NFE. In respect of items not covered by norms. DC may fix ad-hoc norms for a period of six months and within this period, norms should be fixed by Norms Committee. Ad-hoc norms will continue till such time norms are fixed by Norms Committee. Sale of waste/scrap/remnants by units not entitled to DTA sale. or sales beyond DTA sale entitlement, shall be on payment of full duties. Scrap/waste / remnants may also be exported.

(f) There shall be no duties / taxes on scrap/waste / remnants, in case same are destroved with permission of Customs authorities.

(g) By-products included in LoP may also be sold in DTA subject to achievement of positive NFE on payment of applicable duties, within the overall entitlement of sub- para 6.8(a). Sale of by-products by units not entitled to DTA sales, or bevand entitlements of sub-para 6.8 (a), shall also be permissible on payment of full duties"

7. Thus, nowhere it was mentioned that duty amount on proportionate raw materials is to be paid in case, there is excess clearance of waste and scrap and therefore the same cannot be demanded. Further, the only restriction on the excess clearance of the waste and scrap is that the same can be cleared on the payment of full duty which the appellants have already paid.

8. Moreover, as per Chapter 10 of the CBEC's Custom Manual of instruction issued on 11.09.2001 duty on bonded goods can only be demanded in certain specified circumstances.

The relevant para is extracted for the ease of reference:

> *"**Recovery of Duty on Bonded Goods:***
>
> *Customs Officers may demand from the owner of bonded goods the full amount of duty chargeable on such goods, along with all penalties, rent, interest and other charges payable in the following cases:-*
>
> > *i) where any warehoused goods are removed in contravention of the Customs Act, 1962;*
> >
> > *ii) where such goods have not been removed from a warehouse at the expiry of the period permitted under section 61;*
> >
> > *iii) where any warehoused goods have been taken under section 64 as samples without payment of duty; and*
> >
> > *iv) where any bonded goods have not been cleared for home consumption or exportation or are not duly accounted for to the satisfaction of the Customs."*

9. The learned A.R reiterated the findings of the lower authority.

10. Apart from the decision quoted by the learned advocate including Hon’ble Gujarat High Court in the matter of Monarch Overseas cited (supra), a Division Bench of this Tribunal has also initially decided similar matter in

the case of Deep Recycling Industries vs CCE & ST, Rajkot vide Final Order No. 10625-10634/2024 dated 19.03.2024. Therefore, following the decision in aforesaid matter of M/s. Deep Recycling Industries, the appeal is allowed with consequential relief.

11. Appeal allowed.

(Pronounced in the open on 21.03.2024)

(SOMESH ARORA)
MEMBER (JUDICIAL)

Prachi