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

REGIONAL BENCH - COURT NO. 3

EXCISE APPEAL NO. 10451 Of 2017-SM

[Arising out of Order-in-Original/Appeal No VAD-EXCUS-003-APP-288-2016-17 dated 05.08.2016 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-VADODARA-I]

TRANSATLANTIC PACKAGING PVT LIMITED .... **Appellant**
S. V. No. 263, Golana Road, Village- Lunej,
Khambhat, Gujarat -388620

VERSUS

CGST & CENTRAL EXCISE VADODARA I .... **Respondent**
Office of the Commissioner, Central Excise, Customs
& Service Tax, Central Excise Building,
Nr. Juna Dadar, Behind Old Bus Depot Anand,
Gujarat-388001

APPEARANCE :

Shri Saurabh Dixit, Advocate for the Appellant
Shri Mihir G Rayka, Addl. Commissioner (AR) for the Revenue.

CORAM:
HON'BLE DR. AJAYA KRISHNA VISHVESHA, MEMBER (JUDICIAL)

FINAL ORDER NO. 10386/2025

DATE OF HEARING : 27.02.2025
DATE OF DECISION : 16.05.2025

DR. AJAYA KRISHNA VISHVESHA :

This appeal is directed against the impugned order dated 05.08.2016 passed by learned Commissioner (Appeals), Central Excise & ST, Vadodara through which the learned Commissioner (Appeals) upheld the order-in-original passed by Jt. Commissioner, Central Excise & ST, Anand dated 31.03.2016 and rejected the appeal.

2. The facts of the case, in brief, are that the appellant, a 100% EOU was issued Letter of Permission (LOP) by Development Commissioner, KASEZ on 17.03.2005, valid for 5 years, which was subsequently extended for next 5 years block period subject to condition that they meet the LoP condition of Net Foreign Exchange (NFE) earning within the extended period of 5 years. On review of the export performance for block of five years ending 31.03.2015, on the basis of Annual Performance Reports (API), it was revealed that the NFE for the period 2010-2015 was negative. Accordingly, show cause notice dated 15.05.2015 was issued by DC, KASEZ, Gandhidham to the Appellant to show cause as to why action be not taken for cancellation of LOP under Section 9 of Foreign Trade (Development and Registration) Act, 1992 read with Rule 10 of the Foreign Trade (Regulation Rules) 1993 and imposition of penalty under section 11 of the Foreign Trade (Development and Registration) Act, 1992. The DC KASEZ, Gandhidham, vide Order dated 07.09.2015 upheld the averments raised in the show cause notice and imposed penalty of Rs. One Crore on the Appellant. The Appellant has been availing the benefits of Notification No. 22/2003-CE dated 31.03.2003 and Notification No. 52/2003-Cus dated 31.03.2003 for procuring the goods/ importing the goods without payment of Central Excise/ Customs Duty, in accordance with the conditions mentioned in the said notifications. Since, it was noticed on the basis of the order-in-original dated 07.09.2015 that the Appellant has achieved negative NFE and had not fulfilled the obligations and conditions as provided in Para 4(b) of Notification No. 22/2003-CE and Para 3(d) of Notification No. 52/2003-Cus dated 31.03.2003, thus contravening the provisions of Section 5A of Central Excise Act, 1944, and violating Rule 20 of the Central Excise Rules, 2002 as well as contravened Section 25(1) of the Customs Act, 1962. A show cause notice dated 30.09.2015 was issued to the appellant seeking to recover, Central

Excise Duty, along with interest and penalty as well as Customs duty along with interest and penalty.

2.1 Later on a corrigendum dated 25.02.2016 was issued to the show cause notice dated 30.09.2015, wherein certain charging portions of the show cause notice were amended. The said show cause notice was adjudicated by the adjudicating authority vide order-in-original dated 31.03.2016 and confirmed the demand and ordered recovery under Section 11A(2)/11A(10) as applicable of the Central Excise Act, 1944 the Central Excise duty amounting to Rs 6,93,932/- from appellant alongwith interest and also imposed penalty of Rs 6,93,932/- under Rule 25 of Central Excise Rules, 2002 read with Section 11AC of the Central Excise Act, 1944. The order-in-original also confirmed demand of Rs. 42,576/- and ordered to recover Rs. 42,576/- under Section 28A (8) of the Customs Act, 1962. Appellant, aggrieved by the order passed by learned Jt. Commissioner filed appeal before Commissioner (Appeals). Learned Commissioner (Appeals) after hearing came to the conclusion that appellant had failed to achieve positive NFE in the block years 2010-2015 thus violated the condition/provisions of Notifications stated above. Since they have been exempted from payment of duty leviable on the goods/ capital goods procured under the said Notification No. 22/2003-CE dated 31.03.2003 and 52/2003-Cus dated 31.03.2003, the duty involved in such goods needs to be recovered from them for having failed to achieve positive NFE. The learned Commissioner (Appeals) declined to interfere in the order-in-original and dismissed the appeal. Aggrieved from the order-in-appeal dated 05.08.2016 the present appeal has been filed before the Tribunal.

3 Learned Counsel for the appellant argued that Para 4(b) and Para 3(d) of the exemption Notifications 22/2003-CX dated 31.03.2003 & 52/2003-

Customs dated 31.03.2003 respectively only provides for the furnishing of the bond. It is an undisputed fact that we had furnished the bond and the LOP was also extended from time to time and even for the period after the issuance of the impugned order. Nowhere para 4(b) & para 3(d) provides that in case the assessee does not achieve Net Foreign Exchange earnings, as provided under FTP, the exemption would be withdrawn and would not be available for the procurement of goods / duty-free inputs for the purposes specified in the notification. Therefore, appellant has duly complied with the condition stipulated under para 4(b) and para 3(d) of the exemption Notifications 22/2003-CX dated 31/03/2003 and 52/2003-Customs dated 31.03.2003 respectively by furnishing the bond and hence the impugned order recovering the duties in the absence of any breach in the conditions cannot be sustained.

3.1 Learned Counsel for the appellant further argued that the impugned order is without any basis since the encashment of bond as stipulated in para 4(b) and para 3(d) of the exemption notifications 22/2003-CX dated 31.03.2003 and 52/2003-Customs dated. 31.03.2003 respectively, is permissible only when there is a permanent failure to achieve net foreign exchange earnings and LOP is cancelled leading to the debonding of the EOU. In present facts, admittedly the LOP has been extended upto 12.05.2020, whereas the impugned order dated 31.03.2016 demands the excise duty and customs duty for the period 2010-15. Though there were no net foreign exchange earnings, LOP granted to appellants by DC, KASEZ was valid and in force and was not cancelled and an extension of the validity period of LOP for another block of five years up to 12.05.2020 was granted by DC vide letter dated 14.05.2015 in terms of FTP. When the LOP is in force and not cancelled, Appellants are entitled to all the privileges and benefits attached to the LOP including the benefit of the exemption notification. When appellants continue to enjoy the status of EOU, Revenue has no authority to recover the impugned duty disregarding the valid and in-force LOP held by the Appellants. It is only DC-KASEZ who alone can cancel the LOP withdrawing all the benefits and privileges attached to it. The impugned order therefore is illegal and arbitrary. Hence even on this ground, the impugned order cannot be sustained. Learned Counsel also argued that Revenue has very heavily relied on show cause notice dated 15.05.2015 and order-in-original dated 07.09.2015, of DC, KASEZ, to make the case of recovery of impugned demand and interest and imposition of penalty. Revenue has utterly failed to appreciate that, vide said order-in-original dated 07.09.2015, DC has not cancelled the LOP granted to Appellants and has simply imposed the penalty for not achieving positive net foreign exchange earnings. Therefore, the impugned order passed in the absence of cancellation of the LOP is bad in law and cannot be sustained. Even in the period prior and subsequent to the period in question, there is negative NFE and revenue has accepted the legal position as canvassed herein and has not issued SCN proposing to recover the duty etc. The Department has issued CT-3 certificates, even though there are negative net foreign exchange earnings. If appellants were not entitled to the benefit of exemption Notification No. No.22/2003-CE, dated 31.03.2003, as amended, because of negative NFE as contended by the department, CT-3 certificates would not have been issued authorizing appellants to procure materials duty-free. He submits that even on this ground, the impugned order cannot survive.

3.2 Learned Counsel for the appellant also argued that the impugned order fails to provide any basis for arriving at the liability under para 4(b) and para 3(d) of the exemption notifications 22/2003-CX dated 31.03.2003 & 52/2003-Customs dated 31.03.2003 as the said provisions permit only recovery on a pro-rata basis. The Annexure A to the show cause notice was demanded at the time of adjudication but the same was not provided. Hence even on this ground the impugned order fails to meet the principle of natural justice and deserves to be quashed.

3.3 Learned Counsel for the appellant argues that the show cause notice invokes an extended period of limitation. The non-achievement of net foreign exchange earnings was on account of external business exigencies. Appellants have regularly filed all the returns etc. disclosing the net foreign exchange earnings achieved and Revenue was fully aware of the fact of negative net foreign exchange earnings. In such facts there cannot be any suppression of facts or intention to evade. Further, the demands of excise duty are revenue neutral inasmuch as the same is duly entitled to CENVAT Credit and refund owing to 100% exports. Hence even on this ground, the impugned order deserves to be set-aside.

3.4 Learned Counsel for the appellant also argued that the LOP as well as the warehousing license granted to appellant to operate as EOU was valid. Subsequent to the impugned order-in-original, appellant has achieved the stipulated positive NFE as required by DC-KASEZ while granting an extension of the LOP period. Annual progress reports for FY 2016-17, 17-18 & 18-19 submitted to DC-KASEZ established the fact that positive NFE have been achieved and there was no breach of any of the conditions of the law and even on this ground the impugned order deserves to be quashed. Learned Counsel prays that the appeal be allowed and the impugned order be set aside.

4. Learned AR for the department argued that in this case, the appellant has failed to fulfill the conditions of Notification No. 22/2003-CE dated 31.03.2003 and Notification No. 52/2003-Cus dated 31.03.2003 and have

failed to achieve positive NFE earning during the period 2010-11 to 2014-15 thereby contravening Section 5A of Central Excise Act, 1944 and violating Rule 20 of Central Excise Rules, 2002 and also contravening the provisions of sub-Section (1) of Section 25 of Customs Act, 1962. Hence Central Excise duty amounting to Rs. 6,93,932/- is recoverable as per the provision of para 4(b) of Notification No. 22/2003-CX dated 31.03.2003 with interest and penalty and Customs duty to the tune of Rs. 42,576/- is recoverable as per para 3(d) of Notification No. 52/2003-Cus with applicable interest and penalty. The total amount of duty recoverable amounts to Rs.7,36,508/- during the period of September 2010 to September 2015. Learned AR also emphasizes that the B-17 Bond to be enforced against the duty and interest liability. She prays that impugned order be upheld and appeal be dismissed.

5. I have heard the learned Counsel for the appellant and learned AR for the department and perused the record.

6. The main issue to be decided by this Tribunal is whether the demand of Central Excise duty and Customs duty alongwith interest and penalty was rightly imposed upon the appellant and enforcement of B-17 bond for recovery of duty demand and interest was proper on account of failure of the appellant in achieving positive NFE earnings.

7. Before deciding the question as mentioned above, it appears proper to reproduce the provisions of para 4(b) of the Notification No. 22/2003-CE dated 31.03.2003 and the provisions of para 3(d) of Notification No.52/2004-Cus dated 31.03.2003 which are as under :-

Para-4 (b) of Notification No. 22/2003-CE dated 31.03.2003 reads as under:-

"**(4)** the user industry executies a bond with the Deputy Commissioner of Central Excise or Assistant Commissioner of Central Excise or Deputy or Deputy Commissioner of Custody or Assistant Commissioner of Customs, as the case may be, (hereinafter referred to as the said officer) in the prescribed form and for such sum as may be specified by the said officer for the proper account of the receipt, storage and utilization of such goods, to achieve positive Net. Foreign exchange Earning and comply with conditions stipulated in this notification and the Export and Import Policy and binding itself to pay on demand:-

(a) an amount equal to duty leviable on the goods and interest at the rate specified in the notification of the Government of India, Ministry of Finance, Department of Revenue issued under section 11 AB of Central Excise Act, 1944 (1 of 1944) from the date of duty free procurement of the said goods till the date of payment of such duty, if-

(i) in the case of capital goods, such goods are not proved to the satisfaction of the said officer to have been installed or otherwise used within the user industry within a period of one year from the date of procurement thereof or within such extended period not exceeding five years as the said officer may, on being satisfied that there is sufficient cause for not using them as above within the said period, allow;

(ii) in the case of goods other than capital goods, such goods as are not proved to the satisfaction of the said officer to have been used in connection with the production or packaging or goods for export out of India or cleared for home consumption within a period of three years from the date of procurement thereof or within such extended period as the said officer may, on being satisfied that there is sufficient cause for not using them as above within the said period allow:-

(iii) in the case of –

(a) goods produced or packaged, such goods have not been exported out of India and

(b) unused goods (including empty cones, bobbins or containers, if any, suitable for repeated use) as have not been exported or cleared for home consumption, within a period of one year from the date of procurement of such goods or within such extended period as the said officer may, on being satisfied that there is sufficient cause for not using them as above within the said period, allow.

(b) in case of failure to achieve the positive Net Foreign exchange Earning, the duty equal in amount to the portion of the duty leviable on the said goods but for the exemption contained in this notification and the duty so payable shall bear the same proportion as the unachieved portion of Net Foreign exchange Earning bears to the positive Net Foreign exchange Earning to be achieved along with interest at the rate of as specified in the notification of the Government of India, Ministry of Finance, Department of Revenue issued under section 11AB of the Central Excise Act, 1944, from the date of procurement of the said goods till the payment of such duty."

Para-3 (d) of Notification No. 52/2003-CE dated 31.03.2003

"(3) The unit executes a bond in such form and for such sum and with such authority, as may be specified by the said officer, binding himself,–

(a) .....
(b) .....
(c) .....
(d) to pay on demand-
(I) ......

> (II) in case of failure to achieve the said positive Net Foreign Exchange Earning, the duty equal in amount to the portion of the duty leviable on the said goods but for the exemption contained in this notification and the duty so payable shall bear the same proportion as the unachieved portion of Net Foreign Exchange Earning bears to the positive Net Foreign Exchange Earning to be achieved along with interest at the rate as specified in the notification of the Government of India in the Ministry of Finance (Department of Revenue) issued under section 28AB of the said Customs Act, on the said duty to be paid on demand from the date of importation or procurement of the said goods till the payment of such duty. "

8. There is no controversy regarding the fact that appellants failed to achieve positive NFE and could not export the goods to achieve positive NFE earning for the period 2010-15 having procured goods without payment of duty.

8.1 The main argument of the appellant is that they have duly complied with the condition stipulated in para 4(b) and 3(d) of exemption Notifications No. 22/2003-CE and 52/3003-Cus dated 31.03.2003 respectively by furnishing bond and hence the impugned order to recover the duty in the absence of any breach of conditions, cannot be sustained. I do not agree with the argument of the learned Counsel for the appellant. From the plain reading of the provisions as contained in 4(b) and 3(d) of the exemption notifications as mentioned above, it is clear that conditions stipulate the payment of duty alongwith interest in case of failure of achieving positive NFE earning and the adjudicating authority can demand duty alongwith interest in case of failure to achieve positive NFE.

8.2 Learned Counsel for the appellant has also argued that encashment of bond as stipulated in para No. 4(b) and para No. 3(d) of the exemption notifications 22/2003-CE and 52/2003-Cus dated 31.03.2003 respectively is permissible only when there is permanent failure to achieve net foreign exchange earning and LOP is cancelled leading to the debonding of the EOU. In the present facts, the LOP has been extended upto 12.05.2020 whereas the impugned order dated 31.03.2016 demands the excise duty and Customs duty for the period 2010-15. He contends that when the LOP is in force and not cancelled, appellant are entitled to all the privileges and benefits attached to the LOP including the benefit of the exemption notification and the Revenue has no authority to recover the duty. I do not agree with the arguments of the learned Counsel for the appellant and the contention of the appellant cannot be accepted. The conditions of the bond B-17, executed by the appellant with the Assistant Commissioner Central Excise and Customs, contained the following conditions:-

> "1. We, the obligators shall, observe all the provisions of the Customs Act, 1962, Central Excise Act, 1944 and the rules and regulations made thereunder in respect of the said goods.
>
> 2. We, the obligators shall, pay on or before a date, specified in a notice of demand, all duties and rent and charges claimable on account of the said goods under the Customs Act, 1962, Central Excise Act 1944 and rules/regulations made thereunder together with interest on the same from the date so specified at the rate applicable."

From the language of B-17 bond, as mentioned above, the appellant has undertaken to observe all the provisions of Customs Act, 1962 and Central Excise Act, 1944 and to pay, on demand, all the dues and rent and charges claimable on account of the said goods alongwith interest at the appropriate rate. The bond executed can be enforced to demand duty and interest without any limitation.

8.3 The learned Counsel for the appellant has forcefully argued that DC-KASEZ has not cancelled the LOP granted to the appellant and has simply imposed the penalty for not achieving positive net foreign exchange earnings. The Revenue has not issued show cause notice proposing to recover the duty etc. The department issued CT-3 certificates even though there was negative NFE earnings and the appellant was entitled to the benefits of notifications. It is contended that if the appellant breached the conditions of the above mentioned notification CT-3 certificates would not have been issued authorizing appellant to procure material duty free. I am of the view that the argument of the appellant as mentioned above cannot be accepted because there is not doubt that the appellant has violated the conditions of Notification No. 22/2003-CE and 52/3003-Cus dated 31.03.2003 inasmuch as they have failed to achieve positive NFE earnings during the period 2010-11 to 2014-15. Therefore, the Revenue was justified to confirm the demand and order recovery of Central Excise duty and Customs duty from the appellants. Even though the department has issued CT-3 certificates, the issue remains that the appellant could not achieve positive NFE earnings during the relevant period 2010-15.

8.4 Learned Counsel for the appellant has vehemently argued that the impugned show cause notice invokes extended period of limitation. The non achievement of NFE earnings was on account of external business exigencies. The appellants have regularly filed all the returns etc. disclosing the net foreign exchange earnings achieved and Revenue was fully aware of the fact of negative NFE earnings and there cannot be any suppression of facts or intention to evade payment of duty. I am of the view that, as the learned Commissioner (Appeals) has also mentioned in the Order-in-Appeal, "the appellant is functioning as a 100% EOU, wherein the prime aim of the unit should be to achieve a positive NFE." The appellant did not come out clean before the department and chose to keep the department in dark, holding back information from the department in as much as they have never brought to the notice of the department of having not achieved positive NFE. I also agree with the findings of the learned Commissioner that the demand could be raised only after the receipt of Order-in-Original of the

DC, KASEZ, since the failure to achieve positive NFE was known to the department only on receipt of the same. Accordingly, the arguments of the learned counsel for the appellant cannot be accepted that they have regularly submitted the returns etc. disclosing the net foreign exchange earning achieved and extended period of limitation cannot be invoked. I am of the view that the department has rightly invoked extended period of limitation and the ingredients mentioned in provision of Section 11A of Central Excise Act, 1944 and Section 28 of the Customs Act, 1962 are present in the instant case.

8.5 Learned Counsel for the appellant also argued that subsequent to the impugned order-in-original, appellant have achieved the stipulated positive NFE earnings as required by DC KASEZ while granting an extension of the LOP period. Annual progress reports for FY 2016-17, 17-18 and 18-19 submitted to SC-KASEZ establish the fact of positive NFE achieved which is enclosed by the appellant. I am of the view that argument of the learned Counsel cannot be accepted because the show cause notice was issued to the appellant for violation of exemption notifications for the Financial Year 2010 to 2015 and not for the Financial Year 2016 to 2019.

8.6 The learned Counsel cited the decision in the case of **M/s. Paras Fab International –** 2010 (256) ELT 556 (Tri.LB) in which it has been held by the Principal Bench, New Delhi that the entire premises of EOU has to be treated as a warehouse if the license granted under Section 58 to the unit is in respect of the entire premises and imported goods warehoused in the premises of a 100% EOU, which is licensed as a Customs bonded warehouse and used for the purpose of manufacturing in bond as authorised under Section 65 of the Customs Act, 1962, cannot be treated to have been removed for home consumption.

8.7 The learned Counsel for the appellant has also cited the decision **Reliance Industries Limited** vs. **Commissioner of Customs, Rajkot** – 2013 (287) ELT 433 (Tri. Ahmd.) in which it has been held that inputs duty foregone by department, consumed in EOU after filing in-bond bill of entry or documents like re-warehousing certificate which indicated that goods were warehoused in EOU's licensed warehouse and no allegation made for removal of inputs as such, it was held that no duty was required to be paid as inputs were consumed in EOU which is treated as warehouse and penalties under Section 114A of Customs Act, 1962 and Section 11AC of Central Excise Act, 1944 were un-sustainable.

9. After going through the principles laid down in above decisions, I am of the view that the law laid down in the above mentioned judgment is not applicable here in the material difference in facts of this case. Here the appellant has violated the provisions of exemption Notification No. 22/2003-CE dated 31.03.2003 and 52/3003-Cus dated 31.03.2003 by not achieving the net foreign exchange earnings.

10. In view of the above discussion, I have come to the conclusion that the appellant has violated the conditions of Notification No. 22/2003-CE dated 31.03.2003 and 52/3003-Cus dated 31.03.2003, having failed to achieve positive Net Foreign Exchange earnings during the period 2010-11 to 2014-15 and the appellant have contravened Section 5A of the Central Excise Act, 1944 and violated Rule 20 of Central Excise Rules, 2002. They have also contravened the provisions of Section 25 of the Customs Act, 1962. Therefore, demand of Central Excise duty of Rs. 6,93,932/- as per provisions of Section 4(b) of the Notification No. 22/2003-CE dated 31.03.2003 with interest and penalty and Customs duty of Rs. 42,576/- demanded as per para 3(d) of the Notification No. 52/2003-Cus with

applicable interest and penalty is liable to be upheld. Therefore, the impugned order passed by Commissioner (Appeals) is liable to be confirmed whereas the appeal filed by appellant is liable to be dismissed.

11. Consequently, the appeal is dismissed.

(Order pronounced in the open court on 16.05.2025)

(Dr. Ajaya Krishna Vishvesha)
Member (Technical)

KL