CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
BANGALORE

Appeal(s) Involved:

E/109/2009-DB

[Arising out of Order-in-Original No. 12/2008 dated 20/11/2008 passed by Commissioner of Central Excise and Customs, Belgaum]

M/s. TUNGABHADRA SPECIAL PRODUCTS
TARANAGAR VILLAGE, SANDUR RALUK
322/3,. 2ND FLOOR, SREE, SAPTHAGIRI
ENCALVE, COLLEGE ROAD, HOSPET -
5832010

Appellant(s)

Versus

C.C.,C.E.& S.T-BELGAUM
NO. 71...CLUB ROAD,
CENTRAL EXCISE BUILDING,
BELGAUM,
KARNATAKA
590001

Respondent(s)

Appearance:

Mr. R.K.Tomar, Advocate
OFFICE AT 403, 4TH FLOOR, VIKAS
PREMISES, 11, N.G.N. VAIDYA MARG
(BANK STREET) FORT, MUMBAI-400023

For the Appellant

SALGAOCAR BHAVAN, ALTINHO,
PANAJI-403001
GOA

Mr. Pakshirajan, AR For the Respondent

Date of Hearing: 13/08/2018

Date of Decision:16/08/2018

CORAM:
HON'BLE SHRI S.S GARG, JUDICIAL MEMBER
HON'BLE SHRI P.ANJANI KUMAR, TECHNICAL MEMBER

Final Order No.21143/2018

Per : P.ANJANI KUMAR

M/s. Tungabhadra Special Products (Division of M/s.

Tungabhadra Minerals Pvt. Ltd.), the appellants, are 100% EOU and they are engaged in the activity of mining of Iron ore and processing of various products from Iron ore. They have obtained LOP from Cochin Special Economic Zone (CSEZ) for effecting DTA clearance of the Iron ore products. The Department was issued a SCN dated 25.03.2008 alleging that the appellants being EOU have not paid duties of excise under proviso to Section 3(1) of Central Excise Act, 1944 on the DTA clearances made by them during the period from April 2003 to June 2006. The Commissioner of Central Excise has confirmed the duty of Rs.3,64,34,215/- along with interest and penalty.

2. The learned counsel for the appellants contended that duty of Central Excise proviso to Section 3(1) of Central Excise Act, 1944 would become payable only if the goods cleared to DTA by an EOU are manufactured goods and in the instant case, there is no manufacture involved; the process undertaken by the appellants does not amount to manufacture. Therefore, there shall be no liability to pay duty. The learned counsel relied upon host of cases inter alia the following wherein it was held that process like crushing, grinding, screening, separation etc. with a view to remove foreign materials and to concentrate ores do not resulting manufacture of different commercial commodity:

(i) Kerala Minerals & Metals Ltd. Vs. Commr. of

C.Ex., Kochi- 2007 (214) ELT 556 (Tri. Bang.)
(ii) Commr. of Cus. & C.Ex., JSR & BBSR-II Vs. Steel Authority of India Ltd.- 2003(154) ELT 65 (Tri. Kolkata)
(iii) Chowgule & Co. Pvt. Ltd. Vs. UOI- 1993 (67) ELT 34 (SC)
(iv) Super Engineering Co. Vs. Collector of C.Ex., Rajkot- 1996 (82) ELT 539 (Tri.)
(v) UOI Vs. J.G. Glass Industries Ltd.- 1998 (97) ELT 5 (SC)
(vi) Divisional Deputy Commr. of Sales Tax Vs. Bherhaghat Mineral Indus.- 2000(119) ELT 271 (SC)
(vii) Commissioner of C.Ex. Mumbai Vs. Laljee Godhoo & Co.- 2007 (216) ELT 514 (SC)
(viii) UOI Vs. Ahmedabad Electricity Co. Ltd.- 2003 (158) ELT 3 (SC)
(ix) Crane Betel Nut Powder Works Vs. Commr. of Cus. & C.Ex., Tirupathi- 2007 (210) ELT 171 (SC)
(x) Hyderabad Industries Ltd. Vs. UOI- 1995 (78) ELT 641 (SC)
(xi) Commr. of C.Ex., Chandigarh-II Vs. Steel Strips Ltd.- 2003 (154) ELT 336 (SC)
(xii) Commr. of Income Tax, Chennai Vs. Yak Granite Industries P. Ltd.- 2007 (214) ELT 508 (Mad.)
(xiii) Grasim Industries Ltd. Vs. UOI- 2011 (273) ELT 10 (SC)

3. The learned counsel for the appellants submitted that assuming but not submitting that the process amounts to appellants would be eligible for claiming the benefit of concessions available under Notification No. 23/2003-C.Ex. dated 31.03.2003.

4. The learned DR has contended that the learned counsel relied upon so many cases; however, the issue under discussion in all the cases cited was about excisability or to see whether

sudden process undertaken amount to manufacture or otherwise in respect of DTA unit whereas in the present case, the issue before the Tribunal is applicability of duties on DTA clearances for any EOU therefore, the ratio of all the cases cited is not applicable. The learned DR has submitted that the assessee is registered under Central Excise Act therefore are supposed to follow Central Excise procedure as enumerated in Rule 17 of Central Excise Rules, 2002; submission of quarterly/annual reports to CSEZ has no bearing on the issue.

4.1. The learned DR has further submitted that Section 3 of the Central Excise Act, 1944 empowers levy and collection of duties proviso to Section 3(1) provides that in respect of DTA clearances of the EOU, it is the aggregated duties of customs which would be levied and collected as if such goods are manufactured outside India and imported into India and not the Central Excise duties as referred to in Section 3(1) ibid. Therefore, the nature of duties required to be paid by the EOUs in respect of DTA clearances remained to be customs duties only and the valuation of the goods is to be done in accordance with the Customs Act only. The contention of the appellants that no Central Excise duty is to be paid is not correct. The learned AR further submitted that the appellants have obtained license from DGFT claiming themselves to be a manufacturers; they have also obtained an In-bond Manufacturing License No. 1/99 dated 16.04.1999 from the Department. They have been availing CENVAT Credit and they have been obtaining refund on unutilized CENVAT Credit as applicable to EOUs in terms of the Order No. E/20834-20840/2014-SM dated 09.10.2017 passed by this very Bench. Therefore, the appellants again hold their process as not amounting to manufacture only with an intention to avoid payments of applicable duties on DTA clearances. Clearances to DTA by any EOU assume the status of imported goods. At the time of import, it is not considered as to whether the goods imported are manufactured or otherwise. If the items are placed fine in the Customs Tariff Act, customs duty as applicable is levied. In the instant case also, the goods are to be treated as imported into India from any place outside India; therefore, applicable goods under Customs Act are squarely applicable. For the purpose, FTP manufacture could include agriculture, aquaculture, animal husbandry, sericulture, horticulture, pisciculture and mining etc. Definition in FTP, all inclusive terms and the meaning thereof should not be taken in respect of goods cleared in DTA which will be governed by the Customs Act. As per the assessee's contention that in case, the goods are hold to be manufactured benefit of Notification No. 23/2003-C.Ex. dated 31.03.2003 may be given. It is to submit that the goods cleared into DTA are governed by Sub-Para (a), (d) and (g) of Para 6.8 of FTP so the entitlement is subject to fulfilling the conditions listed therein and on being permitted by the Development Commissioner. The appellants have not produced any such certificate from the Development Commissioner therefore the eligibility of the appellants to the above Notification cannot be decided at this end.

4.2 The learned AR further submitted that they have not intimated the Department about DTA clearances and have not followed the procedure under Rule 17 of the Central Excise Rules, 2002. The General Manager of the company in his statement dated 18.10.2007 has squarely admitted their lapse therefore proviso to Section 11(A) is squarely applicable.

5. Heard both sides and perused the records of the case.

6. The brief issue that requires consideration in the case is to see whether the appellants are liable to pay duty on the DTA clearances; as brought out by the learned AR, all the case law presented by the learned counsel for the appellants is on the issue of whether the process undertaken by the appellants amount to manufacture or otherwise. All the decisions quoted therein are in respect of DTA units. It is not the contention of the appellants that their unit is a DTA unit; therefore, we are afraid

that case law presented by the learned counsel for the appellants is not applicable to them. It is not denied by the appellants that they have obtained a license for EOU claiming that they are manufacturers of Iron ore; it is not also denied that they have obtained license from manufacturing bond in terms of Customs Act, 1962. As submitted by the learned AR, they have been availing CENVAT Credit and have been availing the refund of unutilized CENVAT Credit. The facts being so we find that the appellants cannot take the plea that their goods are not manufactured, non-excisable and therefore, they are not liable to pay the duty. We find that the appellants failed to distinguish between a DTA unit and an EOU unit. Understandably, the appellants have availed all the benefits of EOU under various Acts; they should be aware of the fact that any clearance by EOU into DTA shall be treated as imports in India as they are governed by the Customs Act, 1962.

6.1 Section 3 of Central Excise Act, 1944 is reproduced as under is of reference.

Duties specified in the First Schedule and the Second Schedule to the Central Excise Tariff Act, 1985 to be levied.

´1) There shall be levied and collected in such manner as may be prescribed-

´a) [a duty of excise, to be called the Central Value Added Tax

(CENVAT)] on all excisable goods [(excluding goods produced or manufactured in special economic zones)] which are produced or manufactured in India as, and at the rates, set forth in Schedule I to the Central Excise Tariff Act, 1985;

´b) a special duty of excise, in addition to the duty of excise specified in clause (a) above, on excisable goods [(excluding goods produced or manufactured in special economic zone)] specified in Schedule II to the Central Excise Tariff Act, 1985 (5 of 1986) which are produced or manufacture in India, as, and at the rates, set forth in the said Schedule II:]

PROVIDED that the duties of excise which shall be levied and collected on any excisable goods which are produced or manufactured,-

[(i) xxx]

(ii) by a 100% export-oriented undertaking and [(brought to any other place in India]; shall be an amount equal to the aggregate of the duties of customs which would be leviable [Under the Customs Act, 1962 or any other law for the time being in force], on like goods produced or manufactured outside India if imported into India, and where the said duties of customs are chargeable by reference to their value; the value of such excisable goods shall, notwithstanding anything contained in any other provision of this Act, be determined in accordance with the provisions of the Customs Act, 1962 and the Customs Tariff Act, 1975 (51 of 1975).

6.2 It is clear from the above that in respect of 100% EOUs, duties of excise levied and collected shall be an amount equal to the aggregate the duties of customs which would be leviable (under the Customs Act, 1962 or any other law for the time being in force) on like goods produced or manufactured outside India and if imported into India. It is also clear that if such goods are chargeable to duties with reference to the value, the value of such excisable goods shall be determined in accordance with the provisions of Customs Act, 1962 and Customs Tariff Act, 1975. Therefore, we find that it is not correct for the appellants to take recourse under only on the fact that such goods if cleared by a DTA unit are not liable to pay any duty. The goods cleared by the appellants into DTA ought to be treated as imported goods and duty shall be levied accordingly. We find the Tribunal in the case of ***Sarla Performance Fibers Ltd. Vs. Commr. of C.Ex., VAPI- 2010 (253) ELT 203 (Tri. Ahmd.)*** while deciding the leviability of Education Cess on the clearances by EOU have categorically held that "goods cleared in DTA cannot be treated as goods actually manufactured in India" measures of excise duty leviable on goods manufactured in EOU worked out in the same manner as applicable to the imported goods.

6.3 In view of this, we hold that the appellants' contention are misplaced irrespective of the fact that whether the process undertaken by the appellants amounted to manufacture or otherwise, they are liable to pay duty in terms of clause (ii) proviso to Section 3(i)(b) of the Central Excise Act, 1944. The goods cleared by the appellants i.e. Iron ore fall under CTH 26011110.

6.4 From the records of the case, we also find that the appellants have contravened the provisions of Rules 8, 17 of Central Excise Rules, 2002 by way of non-maintenance of account relating to production, description and removal of goods into DTA and have also not filed ER-2 Returns for the months from April 2003 to June 2006 and therefore, we hold that extended period is correctly invoked; however, we hold that the exemption available under Notification No. 23/2003-C.Ex. dated 31.03.2003 cannot be denied to the appellant if they are otherwise eligible for the same. For the determination of the applicability of the Notification No. 23/2003-C.Ex. dated 31.03.2003, the matter request to go to the original authority for determining the exact duty liability of the appellants on the goods cleared by them into DTA. We hold that penalty in terms of Section 11(AC) was however be equivalent to such duty are re-determined. The appellants are required to show to the satisfaction of the original authority that they have fulfilled all the conditions required for granting of benefit under Notification No. 23/2003-C.Ex. dated 31.03.2003.

7. In view of the above, we reject the appeal and remand the matter to the original authority to quantify the duty liability on the clearances made by the appellants into DTA after extending the benefit of Notification No. 23/2003-C.Ex. dated 31.03.2003. The appellants shall pay the duty as calculated by the original authority along with interest and equal penalty under Section 11(AC) of Central Excise Act, 1944.

(Order was pronounced
in Open Court on **16/08/2018**)

P. ANJANI KUMAR
TECHNICAL MEMBER

S.S GARG
JUDICIAL MEMBER

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