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

Appeal(s) Involved:

C/781/2008-DB; E/893/2008

[Arising out of OIO No. 05/2008 dated 09/09/2008 passed by CCE&C, Belgaum]

M/S. PATIL ATLANTIC FORCE SUNUM LTD.
SY NO. 10/2B SHRI KRISHNA WEAVING MILL COMPOUND, VENGURIA ROAD, BELGAUM

Appellant(s)

Versus

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

Respondent(s)

Appearance:

Shri G. Shivadass, Advocate
Ms. Apoorva, Advocate
Shri Syed Peeran, Advocate

For the Appellant

Dr. J. Harish, Dy. Commissioner(AR)

For the Respondent

Date of Hearing: 03/08/2018
Date of Decision:___________

CORAM:

HON'BLE MR. S.S GARG, JUDICIAL MEMBER
HON'BLE MR. P. ANJANI KUMAR, TECHNICAL MEMBER

Final Order No. /2018

Per : P. ANJANI KUMAR

The appellants, M/s. Patil Atlantic Force Sunum Ltd., are 100% EOU in terms of the Letter of Permission dt. 20/07/1988. The appellants have imported capital goods under Notification No.13/81-Cus. and Notification No.123/81-CE respectively. They have commenced commercial production in 1991 and up to 1998, they have exported the goods worth Rs.2,08 crores. In March, 1998, the unit was declared defunct and was closed. The Development Commissioner of Customs passed a Order-in-Original dt. 26/11/2002 suo moto debonding the premises and a show-cause notice dt. 22/11/2007 was issued demanding customs duty of Rs.2,37,18,242/- and central excise duty of Rs.5,35,992/- and central excise duty of R.7,895/-. Commissioner of Customs Vide Order-in-Original No.5/2008 dt. 08/09/2008 has confirmed the demands raised therein and imposed a penalty of Rs.10 lakhs on the appellants.

2.1. The appellants contended that they were manufacturing numbering machines (also called 'numbering boxes') which were used by printing industry during 1987-1995 under the notifications cited above. During the period 1997-98, they have exported goods worth Rs.2.08 crores and after 1998 they were finding it difficult to export the numbering machines as there was no market due to changes in technology. They have become sick and have closed the unit. The Development Commissioner, Cochin Special Economic Zone, Bangalore vide Order-in-Original No.1/24/91:EOU:CEPZ dt. 26/11/2002 found that the appellants were guilty of contravening the provisions of the Foreign Trade (Development and Regulation) Act, 1992 and ordered suo moto debonding of the unit from the EOU w.e.f. 26/11/2002.

2.2. The appellants further contended that they were not liable to pay customs duty in terms of Notification No.13/81-Cus; non-fulfillment of export obligation was due to genuine financial constraints and as such it was beyond their control. Demand of duty on the capital goods is not sustainable as the same were warehoused and had not yet been cleared for home consumption; in any case, the appellants have relinquished the title to the said capital goods. They accepted that the demand in respect of the finished goods and raw materials lying in stock was not sustainable being premature.

2.3. The appellants contended that Tribunal in the case of Hindustan Agrigenetics Ltd. Vs. CCE [2018(360) ELT 1042 (Tri. Bang.)] has held that if the provisions of governing Notification No.126/94-Cus dt. 03/06/1994 do not provide for demand of duty on the capital goods even if a 100% EOU fails to achieve positive NFE, there cannot be any demand of duty on capital goods. This decision was affirmed by Hon'ble High Court of Andhra Pradesh to the extent of capital goods report in 2018(360) ELT A306(AP). The Tribunal, while coming to the conclusion, followed its earlier decision in the case of CCE Vs. Semco Electric P. Ltd. [2007(215) ELT 253 (Tri. Mum.)] in the case of Such Silk International Ltd. Vs. CCE, Mysore.

2.4. The appellants contended that Notification No.13/1981-Cus dt. 09/02/1981 provided for payment of duty on the raw materials and consumables imported by the EOU in case of failure to either fulfill the export obligation or to achieve NFEP as the case may be. The Notification did not provide for demand of duty on capital goods imported duty free in case the unit failed to fulfill its obligation. The above Notification was in force till 1997. Notification No.53/97 has come into force which was amended in 2003 whereby the provision to demand customs duty on capital goods was contemplated where the export obligation was not fulfilled. The imports in the instant case, having been made prior to these amendments, the amendments would not be applicable. During the period, neither the provisions of EXIM Policy nor Customs Act, 1962 or Notifications contemplated the question of payment of entire duty foregone at the time of import of the capital goods imported duty free in case failure to achieve NFE.

2.5. They also contended that in the instant case, the import of capital goods was made in the year 1987. The appellants started commercial production on 26/07/1991. The appellants would be entitled to pay duty on depreciated value which is required to be calculated at the rate specified in the Policy / Notification. CBECC vide Circular No.29/2003-Cus dt. 03/04/2003 has clarified that there will be no upper cap for claiming depreciation with respect to capital goods imported by EPU/STP/EHTP and depreciation can be claimed up to 100% from the ate of commencement of commercial production till the date of payment of duty. Tribunal has been consistently holding that depreciation would be available to a 100% EOU if the commercial production has been started. They relied upon the following case laws:-

i. CC Vs. Maharashtra Hybrid Seeds Co. Ltd. [2008(226) ELT 575 (Tri. Bang.)]
ii. Sandur Micro Circuit Ltd. Vs. CCE [2008(227) ELT 128 (Tri. Bang.]
iii. Salora Floritech P. Ltd. Vs. CC [2008(88) RLT 867 (CESTAT-

Delhi)]

iv. Profitex Pvt. Ltd. Vs. CC&E [2008(226) ELT 711 (Tri. Mum.)]
v. Suvarna Aqua Farm & Exports Ltd. Vs. CC [2005(190) ELT 284]
vi. Natural Stone Exports Ltd. Vs. CC [2006(188) ELT 440]
vii. Premier Granites Ltd. Vs. CC&E [2007(210) ELT 200]
viii. P. Suresh Vs. CC [2011(266) ELT 226 (Tri. Bang.)]

2.6. The appellants contented that demands are not sustainable as the goods imported and procured from local sources duty free have been used in goods exported and no duty is payable on the raw materials as they have exported goods worth Rs.2.01 crores. Similarly duty cannot be demanded on the finished goods lying in the factory. The Commissioner has erred in not allowing the benefit of Notification No.2/95-CE to the appellants. As the goods were not cleared, no duty can be demanded. Hon'ble Supreme Court in the case of SIV Industries Vs. CCE [2000 (117) ELT 281 (SC)] held that the goods cleared into DTA by a EOU without permission of the Development Commissioner has to be considered as goods 'not allowed to be sold in India' within the meaning of Section 3 of the Central Excise Act, 1944 and the decision has been followed by the Tribunal in Maruti Cotex Vs. CCE [2005(183) ELT 393] and in Om Shanti Satins Vs. CCE [2010(255) ELT 131 (Tri. Bang.)].

2.7. The appellants further contended that proviso to Section 68 of Customs Act, 1962 provides that the duty shall not be demanded if the importer relinquishes his title to the goods before they are cleared for home consumption. They have relinquished the title of the goods and therefore they are not liable to pay any duty. They relied upon the following case laws:-

a. I2 Technologies Software Pvt. Ltd. [2006(193) ELT 341] – Affirmed by Hon'ble High court of Karnataka [2007(217) ELT 176 (Kar.)]
b. J.K. Cement Works Vs. CCE&C, Jaipur [2008(223) ELT 138 (Raj.)

2.8. Lastly, they have also contended that confiscation of goods and imposition of penalty is not sustainable in view of the following case laws:-

a. Jaswal neco Ltd. Vs. CC, Visahakapatnam [2015(322) ELT 561 (SC)]
b. Suvarna Aqua Farm & Exports Ltd. Vs. CC [2005(190) ELT 284]
c. Natural Stone Exports Ltd. Vs. CC [2006(198) ELT 440]

3. The Department representative has reiterated the findings of the Order-in-Original and submitted that Tribunal in the case of German Garden Ltd. Vs. CCE, Delhi-III [2015(328) ELT 505 (Tri. Del.)] has held that Notifications No.126/94-Cus and No.136/94-CE neither provided to achieve positive NFEE nor any condition requiring payment of proportionate duty in case of non-fulfillment of export obligation. Therefore entire duty foregone which should be recoverable. As the conditions of the exemption notification have not been fulfilled, demand is sustainable. The Tribunal has observed as follows:-

> ***7.*** *The appellants referred to the judgment of Khabros Steel India Ltd. v. CCE, Jaipur - 2006 (194) E.L.T. 117 (Tri.-Del.) to argue that in the case of debonding the duty is to be paid on the depreciated value at the rate in force at the time of payment of such Excise duty. They also referred to the CESTAT judgment in the case of CCE, Vadodara v. Solitaire Machine - 2003 (152) E.L.T. 384 (Tri.) wherein it was, inter alia, held that "A perusal of Notification No. 13/81-Cus. and the EOU provisions make it clear that duty liability upon debonding is no way connected to discharge of export obligation. It is clear from the notification that under the EOU scheme, imported goods were given exemption from duty as long as they were used for production of export goods. Thereafter, upon debonding the goods are treated as imported goods and subjected to duty as applicable to other import goods. That the original import was under an export obligation scheme makes no difference to duty liability." In this regard, it is to state that we agree with the contention of the appellants that during the relevant time when the goods*

were procured duty free there was no condition to achieve positive NFEE in Notifications Nos. 136/94-C.E. and 126/94-Cus. nor was there any condition requiring only proportionate payment of duty in case of non-fulfilment of export obligation. Indeed the adjudicating authority's reference to Notification No. 52/2003-Cus. and Notification No. 22/2003-C.E. in the present case is totally out of context because these notifications were issued on 31-3-2003 while procurement of impugned goods duty free took place prior thereto and hence these notifications do not have any nexus with the impugned goods. However, it needs to be emphasised that the adjudicating authority has categorically recorded a clear finding that the appellants did not fulfil the conditions of the exemption Notification No. 136/94-C.E. regarding exporting the goods produced wholly or partly from the impugned goods (procured duty free) during the stipulated period. Consequently the Central Excise duty demand sustains even without reference to Notification No. 22/2003-C.E.

8. *Similarly the goods were procured by them from abroad duty free in terms of Notification No. 126/94-Cus., dated 3-6-1994 which inter alia contained the following conditions :*

"(3) The importer at the time of import or procurement of said goods executes a bond in such form and for such sum as may be prescribed by the Assistant Commissioner of Customs or Deputy Commissioner of Customs binding himself :-

(a) to produce a certificate from the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise having jurisdiction over his unit, certifying receipt of the said goods in the unit as having been entered in the records prescribed for this purpose.

(b) to fulfil the Export obligation and comply with the conditions stipulated in this notification and Export and Import Policy, and to pay on demand an amount equal to the duty leviable on the goods and interest at the rate of 20% per annum on the said duty from the date of duty free importation or procurement of the said goods till the date of payment of such duty."

As per the LOP, the appellants had inter alia the following export obligation :

(i) The entire (100% production shall be exported to General Currency Area Countries/Hard Currency Area Countries.

(ii) To export the entire production (100%) excluding rejects not exceeding 5 (five) per cent. for a period of 10 (ten) years.

(iii) The value addition shall be a minimum of 90% as per new formula in force w.e.f. 1-4-1993.

As has been discussed earlier, the appellants did not fulfil their export obligation and thereby violated the condition of the exemption Notification No. 126/94-Cus. which makes them ineligible for the said exemption notification. As a consequence the Customs duty foregone was correctly confirmed by the adjudicating authority in terms of Section 28 of the Customs

Act, 1962 read with the bond executed by the appellants.

4. The learned counsel for the appellants has intervened at this juncture and submitted that the decision of the Tribunal and the Hon'ble High Court in the case of Hindustan Agrigenetics Ltd. appeared to have not placed before at the time of the judgment in the case of Hindustan Agrigenetics. However in case, the duty is held liable to be paid, due allowance for depreciation in terms of the Board's Circular needs to be granted.

5. Heard both sides.

6. The brief issue to be decided in this case is as to whether a EOU which has not fulfilled the positive NFE is liable to pay the customs duty foregone on the capital goods procured duty free under Notification No.13/81-Cust and No.123/81-CE. We find that there are two contradictory judgments by the Tribunal whereas the Delhi Bench of the Tribunal in the case of German Garden Ltd. (supra) has held that as the Notification did not provide for any condition of NFE or payment of proportionate duty in case non-fulfillment of export obligation. The duty requires to be paid by the EOU on de bonding. On the other hand as contended by the appellants, this Bench of the Tribunal in the case of Hindustan Agregenetics Ltd. (supra), has categorically held that in terms of clause 3(iv) of the Notification, the importer has to discharge the duty liability only in the case of raw materials, components, spares and consumables. The

duty foregone on the capital goods has been excluded from the demand of duty as the condition of exemption on the capital goods was only limited for installation of the capital goods and used within the unit in the manufacture of goods for export. It is undisputed that the capital goods which were procured by claiming benefit under exemption notification were installed and used for production of goods for export. Therefore, we find that as per Notification, the demand of duty on the capital goods cannot be sustained. The Tribunal has referred to the ratio of the decision in the case of CCE, Pune Vs. Semco Electric Pvt. Ltd. [2007(215) ELT 253 (Tri. Mum.)]. To have a better appreciation of the position, one has to see the notifications together. On going through the notifications, it is very clear that the condition in respect of capital goods was only with respect to the installation as has been held by this Bench in the case of Hindustan Agrigenetics ltd. (supra). Moreover, the decision of this Bench has been affirmed by the High Court of Andhra Pradesh. A doubt has been raised whether the decision of High Court, which has no jurisdiction on this Bench, needs to be followed or otherwise. It is seen that the judgment of Delhi Bench of the Tribunal in the case of German Garden Ltd. came in 2015 and it has not been shown to have been affirmed by any High Court. The decision of this Bench on the other hand has been affirmed by High Court . as there are no contra judgments by any of the High Courts in this matter, we find that the affirmation given by the Hon’ble High Court of Andhra Pradesh requires to be followed. There, we follow the ratio of the decision of this Bench in the case of Hindustan Agrigenetics Ltd. (supra).

7. It was further submitted by the learned counsel for the appellant that even if the duty is held liable to be paid on the capital goods, depreciation needs to be allowed in terms of the Board's circular (supra) and on that account count also, since it has been a long period that depreciation would reach 100% and on that count also, no duty is liable to be paid. Learned AR has fairly conceded that depreciation needs to be allowed. The learned counsel for the appellants has also conceded that the duty on the raw material imported or procured from DTA duty free requires to be paid. We accept the contention. We find that for calculating the duty payable by the appellants on the raw materials imported or procured duty free lying as such or contained in the finished goods, the matter required to go back to the original authority.

8. In view of the above, we allow the appeals by way of remand for the limited purpose as above.

(Order pronounced
in Open Court on **.........................**)

P. ANJANI KUMAR
TECHNICAL MEMBER

S.S GARG
JUDICIAL MEMBER

Raja….