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

Appeal(s) Involved:

**C/535/2009-DB**

[Arising out of Order-in-Original No. 13/2009 CUS ADJN.
dated 19/05/2009 passed by CC, Bangalore]

**GLOBAL E- BUSINESS OPERATIONS PVT LTD,**
H.P TOWER,1,2 &3 GLOF VIEW CAMPUS,
WIND TUNNEL ROAD
MURAGAPALYA,BANGALORE

Appellant(s)

**Versus**

**Commissioner of Customs BANGALORE-CUS**
NULL C.R. BUILDING,QUEENS ROAD,
P.B.NO. 5400,
BANGALORE - 560001
KARNATAKA

Respondent(s)

**Appearance:**

Shri G. Shivadass, Advocate
V. LAKSHMIKUMARAN & V. SRIDHARAN
WORLD TRADE CENTRE NO.404-406, 4TH FLOOR, SOUTH WING BRIGADE GATEWAY CAMPUS NO.26/1, DR. RAJKUMAR ROAD, MALLESWARAM .
BANGALORE - 560 055
KARNATAKA

For the Appellant

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

For the Respondent

Date of Hearing: 28/06/2018
Date of Decision: 28/06/2018

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

## Final Order No. 20968 / 2018

**Per : S.S GARG**

The present appeal is directed against the impugned order dt. 19/05/2009 passed by the Commissioner whereby the Commissioner confirmed the demand of Rs.1,84,14,711/- along with interest and appropriated the amount of Rs.1,39,75,762/- paid by the appellant. The Commissioner also imposed redemption fine of Rs.80 lakhs under the provisions of Section 125 of the Customs Act, 1962 and also imposed a penalty of Rs.10 lakhs under Section 112(a) of the Customs Act, 1962.

2.1. Briefly the facts of the present case are that the appellant is a 100% subsidiary of M/s. Hewlett Packard Europe BV and the unit is a 100% EOU working under the STP scheme for the development of software. Appellant has also been issued Customs Private Bonded Warehousing License and In-bond Manufacturing Sanction Order dt. 23/05/2000 for manufacturing, development and export of computer software under Section 58 and Section 65 of the Customs Act, 1962. The appellant got the extension of the Private bonded Warehouse License from time to time and same has been granted up to 13/09/2010. Appellants have been carrying out the activity of software development and has been regularly exporting software and realizing the foreign exchange thereon and has been regularly filing the Annual performance Report with the STPI, Bangalore.

2.2. M/s. Verifone India (P) Ltd. (Verifone for short) was also issued a Letter of Permission for development of computer software and was also issued Customs Private Bonded Warehousing License and In-Bond Manufacturing Sanction order under Section 58 and Section 65 of the Customs Act and were carrying out the activity of software development. Verifone imported as well as procured locally capital goods for use in the manufacturing and development of computer software and the said import was duly approved by the Director of STPI from time to time. Subsequently Verifone merged with the appellant during 2011 and the Development Commissioner granted permission to undertake inter unit transfer (IUT) of capital goods as per para 9.16 of Exim Policy 1997-2002 from Verifone to the appellant. The Deputy Commissioner of Customs issued letters permitting shifting of bonded goods from Verifone to the appellant's premises and thereafter the goods were transferred to the appellant after following the required procedure. Thereafter the officers of Customs HQ(Prev.) Unit visited the premises of the appellant at Hosura on 28/06/2005 and found that the appellant had received imported capital goods from M/s. Verifone India Pvt. Ltd. , Bangalore after its merger under IUT during 2001 which were stored in two store rooms at the basement of their premises which was also duly bonded but without being used. The two store rooms were sealed under a Mahazar dt. 28/06/2005 and thereafter the Department recorded the statements of various persons / employees of the appellant and after completion of the investigation, the appellant was issued a show-cause noticed dt. 02/05/2008 demanding the duty under the provisions of Section 72(1)(b) of the Customs Act, 1962 and also proposed penalty under various sections of the Customs Act. Appellant filed reply to the show-cause notice controverting the allegation in the show-cause notice and after following the due process, the Commissioner passed the impugned order whereby he confirmed the proposal in the show-cause notice along with interest and penalty. Hence the present appeal.

3. Heard both sides and perused the records.

4.1. Learned counsel for the appellant submitted that the impugned order is not sustainable in law as the same has been passed contrary to the binding judicial precedent. He further submitted that on identical issue, the Tribunal has decided in favour of the assessee in the following Final Orders.:-

i. Intel Technology India Pvt. Ltd. Vs. CC, Bangalore [Final Order No.20245/2018 dt. 06/02/2018]
ii. CC, Bangalore Vs. Perot Systems TSI India Pvt. Ltd. [Final Order No.20739/2018]

4.2. He further submitted that there is no violation which has been committed in the process of transfer of capital goods on IUT to the appellant. He further submitted that the only objection of the Department is that the appellant being recipient unit in the IUT transaction ought ot have put the goods to use in their premises and having not done so, the appellant has violated the governing Notification No.141/91-Cus dt. 22/10/1991 and No.52/2003-Cus. He further submitted that the Notification No.140/91-Cus dt. 22/10/1991 as it stood either at the time of import of the capital goods or at the time of the IUT transaction did not contain any condition that the recipient unit should put the goods to use after its receipt into the recipient unit. He further submitted that the said condition of use was introduced into the notification by way of amendment to Notification No.140/1991-Cus by Notification No.64/2002-Cus dt. 24/06/2002. It is his further submission that this condition of use inserted on 24/06/2002 can only be prospective and would apply to imports carried out on or after the date of importation whereas in the present case import happened during 1990 to 1998 and IUT was done in 2001 and therefore the condition is not applicable to the transaction made by Verifone prior to this date. It is his further submission that the Commissioner(Appeals) has wrongly relied upon the Notification No.52/2003-Cus dt. 31/03/2003 as the said notification is not applicable as the appellants have not operated under the said notification. The learned counsel further submitted that the Notification No.140/91-Cus and Notification No.52/2003-Cus provided for depreciation of capital goods and payment of duty on a graded percentage depending on the period between the date of commencement of commercial production and the date of debonding / date of clearance, as the case may be and the impugned order confirmed the demand of duty on the depreciated value of the goods. He further submitted that once the depreciation has been allowed on the capital goods, thereafter the Department cannot take the ground that the goods have not been put to use. In support of this submission, the appellant has relied upon the decision in the case of Component Specialty (I) Pvt. Ltd. Vs. CC, Bangalore [2009(243) ELT 431 (Tri. Bang.)].

4.3. It is his further submission that the demand of duty from the appellant is not correct because the appellants are not the importers within the meaning of the Notification No.140/91-Cus. he further submitted that as per the definition of import and importer provided in the Customs Act, 1962, it is the importer who is liable to comply with the conditions of the Notification No.140/91 and not the appellant. He further submitted that the impugned demand is not sustainable as the warehousing period of the capital goods is co-terminus with the period of warehousing licence granted to the EOU and in the present case, the appellants have been given extension of their private bonded warehosing licence up to 11/08/2010 and as per the CBEC circular No.7/2005-Cus dt. 14/02/2005, necessity of the EOUs seeking periodical extension of warehousing has been done away with. In support of this submission, the appellant has relied upon the following decisions:-

i. Natural Exports Ltd. Vs. CC [2006(18) ELT 440 (Tri. Bang.)]
ii. SCC, Bangalore Vs. Infosys Technologies Ltd. [2003(159) ELT 863 (Tri. Bang.)]
iii. Macmillan India Ltd. Vs. CC, Bangalore [2008(223) ELT 443 (Tri. Bang.)]
iv. Sun Microsystem India Pvt. Ltd. Vs. CC, Bangalore [2008(225) ELT 120 (Tri. Bang.)]

4.4. He further submitted that it is not disputed that the duty free imported capital goods covered by the show-cause notice are still lying in the bonded warehouse of the appellant and as per Section 62 of the customs Act, all warehoused goods shall be subject to the control of the Customs officer and the owner of the warehouse can deal with the goods only with the permission of the Customs officer. There can be no demand on such bonded warehoused goods unless and until these capital goods are either cleared for home consumption or removed in contravention of Section 78 of the Act. In support of this he relied upon the following decisions:-

i. CC, Bangalore Vs. Infosys Technologies Ltd. [2003(159) ELT 863]
ii. DSL Software Vs. CCE [2005(181) ELT 250]
iii. Arjun Industries ltd. Vs. CCE, Jaipur [2005(70) RLT 7]

4.5. He further submitted that the goods cannot be confiscated if the goods are bonded in the warehouse as there is no violation of the post-importation condition. It is his further submission that the entire demand is barred by limitation because the officers of the customs visited the appellant on 28/06/2005 and recorded the statements of various persons and after three years, show-cause notice dt. 02/05/2008 was issued demanding the duty on the ground that the appellant has violated the condition of the Notification No.140/91-Cus dt. 22/1/1991. The learned counsel also submitted that the penalty imposed under Section 112(a) is also not sustainable as the goods imported are not liable to confiscation under Section 111.

5. On the other hand, the learned AR defended the impugned order.

6. After considering the submissions of both sides and perusal of material on record, we find that the only violation alleged against the appellant is that the appellants have violated the condition of the notification and has not used the capital goods on IUT. Further we find that in the said notification No.140/91-Cus, there was no such condition that at the time of IUT, the recipient unit must use the goods. We also find that this condition of use by the recipient unit was introduced in the Notification No.140/1991 by customs notification No.64/2002-Cus dt. 24/06/2002 which is after the transfer of goods to the present unit and therefore this condition of use cannot be made applicable retrospectively. Further we also find that the goods which were received by the appellant on IUT basis have already been used by the Verifone because the duty in the impugned order was confirmed on depreciated value of the goods which clearly shows that the goods were put to use by the Verifone prior to IUT. We also find that under the notification No.140/91, duty can be demanded only from Verifone if there is a violation of any condition of the said notification because the importer of the said goods is Verifone and not the present appellant. We also notice that the finding of the Commissioner that the appellant has not obtained extension of warehousing period of the said goods is not correct as the appellant has obtained the renewal of the warehousing licence up to 30/09/2010 and the warehousing period of the capital goods is co-terminus with the period of warehousing licence granted to the appellant in view of the latest circular No.7/2005-Cus dt. 14/02/2005 issued by the CBEC. Further we hold that the demand of duty is wrong when the goods are still lying in the warehouse and confiscation of the same and the imposition of

redemption fine is also legally unsustainable. Further we note that the demand is also barred by limitation as the officers of the Department visited the unit of the appellant on 28/06/2005 and finally issued the show-cause notice on 02/05/2008 which is much beyond the period of limitation. Further we find that on an identical issue, this Tribunal in the case of Infosys Technologies India pvt. Ltd. and Perot Systems TSI India Pvt. Ltd. cited supra, has given relief to the assesses.

7. In view of our discussion above, we are of the considered view that the impugned order is not sustainable on merit as well as on limitation. Therefore, we set aside the impugned order by allowing the appeal of the appellant with consequential reliefs, if any.

(Operative portion of the Order was pronounced
in Open Court on **28/06/2018**)

**P. ANJANI KUMAR**
**TECHNICAL MEMBER**

**S.S GARG**
**JUDICIAL MEMBER**

Raja...