IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
SOUTH ZONAL BENCH AT CHENNAI

E/40437/2016

(Arising out of Order-in-Appeal. No. 89/2016 (CXA-II) dated 29.02.2016 passed by the Commissioner of Central Excise (Appeals-II), Chennai).

M/s. Jeevan Diesels and Electricals Ltd. : Appellant

Vs.

CCE & ST, Pondicherry : Respondent

Appearance

Shri K.S. Jain, M.D.
for the Appellant

Shri R. Subramaniyam, AC (AR)
for the Respondent.

CORAM :

Hon'ble Ms. Sulekha Beevi, Member (Judicial)
Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of Hearing/Decision: **04.04.2018**

FINAL ORDER No. **41289/2018**

Per Bench

The facts of the case are that M/s. Jeevan Diesels and Electricals Ltd., (100% EOU), the appellant herein are the manufacturers of 'Diesel Generator sets' and parts thereof. The appellant procured the goods by import as well as indigenously without payment of duty under Notification No. 52/2003-Cus.

dated 31.03.200 and No. 22/2003-CE dated 31.03.2003. The appellants had cleared one Diesel Generator set to M/s. Oil and Natural Gas Corporation (ONGC), claiming exemption against Project Authority Certificate under Notification No. 12/2012-Cus. dated 17.03.2012. The said clearance was effected in DTA under Notification No. 23/2003-CE read with Notification No. 12/2012-Cus. The department took the view that since the appellants had cleared the goods at 'nil' rate of duty by availing exemption under Notification No. 12/2012-Cus., they are not eligible to avail benefit of Notification No. 22/2003-CE on the inputs procured by them for manufacture of the impugned Diesel Generator sets. Hence SCN dated 04.09.2013 was issued to the appellants proposing to demand duty of Rs. 3,76,980/- with interest and imposition of penalty under various provisions of Central Excise law. The adjudicating authority confirmed the proposals in the SCN in his adjudication order dated 05.08.2014. In appeal, the Commissioner (Appeals) vide order No. 89/2016 dated 29.02.2016 (impugned order) upheld the order of the original authority and rejected the appeal. Hence, the appellant filed appeal before this forum.

2. Today when the matter came up for hearing, the appellants were represented by Shri K.S. Jain, M.D of the appellant, who made following oral submissions which can be broadly summarized as under:-

i) As per para 6.11 (c) (ii) of Project Authority Certificate (PAC), EOU units are entitled to exemption from payment of Central Excise duty on goods procured from DTA, on goods manufactured in India.

ii) As per para 8.2 (f) of PAC, supply of goods to any project or purpose in respect of which the Ministry of Finance, by a Notification, permits import of such goods at 'zero' customs duty shall be regarded as "deemed exports under Foreign Trade Policy, provided goods are manufactured in India.

iii) As per para 8.3 (c) of PAC, deemed exports shall be eligible for exemption from terminal excise duty where supplies are made against International Competitive Bidding.

iv) The clearance taken for the impugned goods under notification No. 12/2012-Cus., as also the inputs brought in for the above manufacture against CT-3 Certificate is in order.

v) The supply of diesel generator sets against International supply of bidding does not require reversal of Cenvat credit earned on the inputs since it is deemed exports.

vi) Shri K.S. Jain drew our attention to PAC issued by ONGC find in page-40 of the appeal book to point out that the supplies under the contract are being made to a project where the benefit of deemed export has been subscribed in accordance with para 8.2 (f) and 8.4.4 (iii) of the FTP 2004-2009.

3. On the other hand, Ld. AR supports the impugned order. He drew our attention to para-10 of the impugned order where the Commissioner (Appeals) has highlighted the amendments made in the FTP vide Circular No. 54/2004-Cus. dated 13.10.2004, wherein to counter balance the comparative disadvantage faced by DTA unit manufacturing similar goods vis-à-vis EOU/EHTP/STP units, which availed the facility of duty free inputs, it has been provided that when such goods are cleared into by DTA by later where the basic duty and CVD both are nil, duty foregone on inputs utilized for production of such goods will have to be paid, as in the case of non-excisable goods vide para-6 of the Notification No. 22/2003-CE dated 31.03.2003 and para-3 of the Notification No.. 52/2003-Cus. dated 31.03.2003.

4. Heard both sides and have gone through the facts.

5.1 Notification 22/2003-CE very clearly denies exemption to inputs imported/procured indigenously if the finished goods manufacture, if imported is leviable to 'nil' rate of duty. In the instant case, finished goods manufactured by the appellant out of the inputs procured under Notification No. 22/2003-CE, if imported are leviable to 'nil' rate of duty of customs and hence appellant is not entitled for exemption on the inputs imported indigenously procured under the said Notifications. No doubt, the intended purpose of the proviso in Notification No. 22/2003-CE as amended seeking to deny the exemption from Central Excise duty on inputs in cases where goods cleared into DTA are non-excisable etc., and similar proviso in Notification No. 52/2003-Cus is basically to counter balance otherwise comparative disadvantage that DTA units manufacturing similar goods have to suffer duty on inputs phase. At the same time, it is to be kept in mind that the intended purpose of treating supply of goods to certain persons or organizations to be regarded as deemed exports is not only to provide a fillip for the goods manufactured in India but also enable saving of foreign exchange. For example para-8.2 of FTP lists categories (a) to (j) where supply of goods shall be regarded as deemed export, provided goods are manufactured in India. Sl. No. (a) extends deemed export relates to "supply of goods against advance authorization/advance licence holder in DTA. We further find that CBEC vide a Circular No. 268/01/2016-CX dated 16/09/2016 has clarified as under:-

> "3. The issue has been examined. It is seen that s.no. 22 of notification no. 23/2003-CE dated 31.03.2003 as amended, issued in respect of goods manufactured by EOUs and cleared in DTA, specifically exempts Central Excise duty when such manufactured goods are supplied to an Advance Licence/Authorisation Holder. In fact, clearance from EOU or DTA unit to Advance Licence/Authorisation holder has been allowed without payment of Central Excise duty, as both the cases are of "Import substitution." In case of supply of goods to Advance Licence/Authorisation holder, the export obligation is cast upon person holding Advance Licence/Authorisation and in case of default in export obligation recovery from the person holding Advance Licence/Authorisation is provided for in law.

> 4. Further, if the EOUs are made liable to pay back the amount availed as exemption on the inputs in case of supplies to Advance Licence/ Authorisation Holder, with reference to the said proviso under notification no. 22/2003-CE dated 31.03.2003, then the EOUs would be placed in a disadvantageous position when compared to a DTA unit which supply manufactured goods to Advance Licence Holder without payment of Central Excise duty in terms of notification no 44/2001-CE(N.T.) dated 26.06.2001 and without reversal of the CENVAT credit availed on inputs. This position has been clarified by Board vide circular no. 785/18/2004-CX dated 17.05.2004.
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> 5. Accordingly, it is clarified that the second proviso to para 6 of the notification no. 22/2003-CE dated 31.03.2003 and the proviso to para 3 of notification no. 52/2003-Cus dated 31.03.2003 (refer para 1 of the circular) would not be applicable, in case of supply of manufactured goods by EOU to Advance Licence/Authorisation holder in DTA, without payment of Central Excise duty.

We are of the considered opinion that this CBEC Circular will apply *mutatis mutandis* to supply of deemed exports covered by the category (f) of para-8.2 of FTP which covers supply of goods to a project of purpose for which the MoF, by a notification, permits import of such goods at zero customs duty. It is also clarified in para-8.2 that benefit of deemed export shall be available under para 8.2 (f) only if the supply is made under the procedure of International Competitive Bidding.

5.2 In the circumstances, we hold that benefit of deemed export will be available to the supply of one Diesel Generator set made by the appellant to ONGC under Project Authority Certificate issued by the competent authority, interalia certifying that such benefit is permitted for the said supply in accordance with para 8.2 (f) and 8.4.4 (iii) of the FTP-2004-09, and the clearance of the impugned item will bet benefit of duty exemption as claimed by the appellants.

6. In the event, impugned order is set aside and appeal allowed with consequential benefits, as per law.

(Operative part of the Order pronounced in the open Court)

(MADHU MOHAN DAMODHAR)
MEMBER (TECHNICAL)

(SULEKHA BEEVI C.S.)
MEMBER (JUDICIAL)

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