IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHENNAI

REGIONAL BENCH – COURT NO. III

Excise Appeal No. 42186 of 2013

(Arising out of Order-in-Original No. 03/2013 (Commr.) dated 31.07.2013 passed by Commissioner of Customs & Central Excise and Service Tax, 6/7 ATD Street, Race Course, Coimbatore - 641 018.

M/s. Annur Cotton Mills., **: Appellant**
(A Unit of Sharadha Terry Products Ltd),
S.F.No.396/1,2, & 3, 397/A2, B1,
Odderpalayam Village, Annur - 641 653

VERSUS

The Commissioner of Central Excise, **: Respondent**
6/7 ATD Street, Race Course Road,
Coimbatore – 641 018

AND

Excise Miscellaneous Application No. 40132 of 2013

Excise Appeal No. 42187 of 2013

(Arising out of Order-in-Original No. 01/2013 (Commr.) dated 29.07.2013 passed by Commissioner of Customs & Central Excise and Service Tax, 6/7 ATD Street, Race Course, Coimbatore – 641 018.

M/s. Annur Cotton Mills., **: Appellant**
(A Unit of Sharadha Terry Products Ltd),
S.F.No.396/1,2, & 3, 397/A2, B1,
Odderpalayam Village, Annur - 641 653

VERSUS

The Commissioner of Central Excise, **: Respondent**
6/7 ATD Street, Race Course Road,
Coimbatore – 641 018

WITH

Excise Appeal No. 42325 of 2013

(Arising out of Order-in- Original No. 01/2013 (Commr.) dated 29.07.2013 passed by Commissioner of Customs & Central Excise and Service Tax, 6/7 ATD Street, Race Course, Coimbatore-641018.

The Commissioner of Central Excise, **: Appellant**
6/7 ATD Street, Race Course Road,
Coimbatore – 641 018

VERSUS

M/s. Annur Cotton Mills., **: Respondent**
(A Unit of Sharadha Terry Products Ltd),
S.F.No.396/1,2, & 3, 397/A2, B1,
Odderpalayam Village, Annur - 641 653

APPEARANCE:

Shri S. Durairaj, Advocate
For the Appellant

Mrs. Sridevi, Additional Commissioner (Authorized Representative)
For the Respondent

CORAM:

HON'BLE MS. SULEKHA BEEVI C.S., MEMBER (JUDICIAL)
HON'BLE MR. M. AJIT KUMAR, MEMBER (TECHNICAL)

FINAL ORDER Nos. 40485 to 40487/2023

DATE OF HEARING: 12.06.2023

DATE OF DECISION: 26.06.2023

Order : Per Ms. Sulekha Beevi C.S.

The issue in all these appeals being analogous were heard together and are disposed of by this common order. The parties are hereafter referred to as Assesse and Department for the sake of convenience.

2. Brief facts are that, the assessee namely, M/s. Sharada Terry Products Ltd., is a registered public limited company, established as 100% EOU under the name and style "Annur Cotton Mills" for the manufacture of 100% Cotton Terry Towels. They obtained License for private bonded warehouse on 25.09.2007.

2.1 As per the provisions of Notification Nos. 22/2003-CE dated 31.03.2003 and 52/2003 dated 31.03.2003, the assessee by import as well as indigenously procured inputs, capital goods without payment of duty for manufacture of final products.

2.2 On fulfilment of Export obligation, they applied for permission to exit from the EOU scheme, *vide* letters dated 10.02.2011, 24.02.2011 and 17.03.2011. The Development Coimmisioner by his letter dated 24.03.2011 granted permission to exit in principle upon payment of requisite duties on all imported and indigenously procured capital goods, inputs, consumables, including finished stock. The appellant then paid all duties including duties on semi-finished goods and finished goods. On the basis of no objection and final exit order issued by the Development Commissioner the appellant exited the EOU scheme and got converted into a DTA unit, in the same premises and transferred all capital goods, raw materials, semi-finished goods and finished goods to the DTA unit. From the DTA unit, the finished goods were exported and the semi-finished goods were fully processed and also exported on payment of duty under claim of rebate of duty in terms of Rule 18 of CER, 2002.

2.3 While examining the rebate claims, it appeared to the Department that the assesse has not correctly paid the duty on semi-finished goods and finished goods at the time of de-bonding into a DTA unit. The assesse had discharged duty on semi-finished goods and finished goods by availing the concession rate of duty under Notification No. 23/2003-CE dated 31.03.2003. Further for arriving at the assessable value, the appellant had not adopted Rule 14 of Customs Act, 1962 in so far as the

freight charges, insurance and landing charges were not included in the assessable value.

2.4 According to Department, a 100% EOU is governed by para 6.8 of Foreign Trade Policy for clearances into DTA whereas para 6.18 covers the procedure to be followed for exiting as EOU and conversion into DTA. The Foreign Trade Policy thus does not provide for payment of concessional rate of duty by availing the notification benefit while de-bonding as a 100% EOU. The transfer of goods from 100% EOU into DTA by way of de-bonding is distinct and different from the clearances made by 100% EOU to DTA. Thus the duties paid by the appellant at the time of de-bonding availing the concessional rates of duty in terms of notification no. 23/2003 applicable to 100% EOU is incorrect. Show Cause Notice was issued proposing to demand the short paid duty on semi-finished goods and finished goods which were transferred to DTA at the time of de-bonding. It was also proposed to enhance the assessable value by including the freight charges insurance and landing charges. After due process of law, the original authority confirmed the demands, interest and penalty. Aggrieved by the duty demand, interest and penalties the assesse has filed appeal no. E/42187/2013. The proposal to enhance the value by including various charges was dropped by the adjudicating authority. The department has filed appeal No. E/42325/2013 aggrieved by the order of dropping the inclusion of such charges.

3. A further Show Cause Notice dated 06.06.2012 was issued to the appellant alleging wrongful availment of credit and for recovery of the same with interest and for imposing penalties. The appellant had availed credit of the duty paid on semi-finished goods, finished goods, inputs, capital goods. The department is of the view that such credit is inadmissible. After due process of law, the original authority allowed credit on all items except credit of the duty paid on semi-finished goods and finished goods. Aggrieved by such order the appellant has filed appeal no. E/42186/2013.

4. The learned Counsel Shri S. Durairaj appeared and argued for the appellant. At the time of de-bonding, appellants paid duties on the stock of finished goods/ semi-finished goods as on 23.05.2011 as per proviso to Section 3(1) of Central Excise Act, 1944 by availing the benefits of Sl.No: 1, 2 and 3 of notification 23/2003-CE dated 31.03.2003. Sl.No:1 is the exemption from 4% SAD, when VAT is not exempted for DTA clearances. Sl.No:2 is the exemption for 50% customs duty [BCD], when the goods are manufactured out of indigenous materials and cleared in DTA [5/15%]. After assessment by the jurisdictional authorities, the no due certificate was issued. Subsequently, the present Show Cause Notice has been issued alleging that the exemption under notification 23/2003-CE is applicable only for DTA clearances as per

para 6.8 of FTP and not for payment of duties while de-bonding as per para 6.18 of FTP.

4.1 Apart from this while in the SCN, profit margin of 20%, freight amount of 20%, insurance amount of 1.175% and landing charges of 1% were also proposed to be added to the assessable value. The Appellants then replied to the Show Cause Notice contending that they are entitled to avail concessional rate of duty as per notification No. 23/2003-CE because the phrase 'brought to any other place in India' is mentioned both in proviso to Section 3(1) and also in notification No. 23/2003-CE. If 23/2003-CE is denied, the levy is only under Section 3(1) and not under proviso to Section 3(1) in terms of the decision in SIV Industries Ltd Vs CCE – 2007 (117) 281 (SC). However, the adjudicating authority confirmed the demand of duty on semi- finished goods and finished goods as per Show Cause Notice, but however dropped the proposal for inclusion of freight, insurance and landing charges.

4.2 The learned Counsel submitted that it is an admitted and undisputed fact as seen from Annexure A of show cause notice and para 12 of show cause notice, that duty [Rs.1,54,62,551/-] was paid on semi-finished goods [12,53,263 kgs] and duty of Rs.42,52,812/- was paid on the finished goods at the time of de-bonding. The appellant had then paid duty as per proviso to Section 3(1) availing the benefit of concessional rate of duty for a

100% EOU. However, The department is of the view that at the time of de-bonding appellant has to pay duty as per proviso to Section 3(1) without availing the benefit of the notification. Hence the additional demand over and above the payments made is confirmed *vide* the impugned order. It is also an admitted fact that de-bonded goods were exported subsequently.

4.3 On the demand of duty raised on semi-finished goods it is argued by the learned Counsel that such semi-finished goods are not marketable and are out of the purview of Section 2(d) of Central Excise Act, 1944. Therefore the goods are not liveable to duty under Section 3 of Central Excise Act, 1944. Appendix 14-I-L of FTP Hand book of procedures Vol.1 also excludes semi-finished goods from the liability. In the case of *M/s. Jubilant Life Sciences Limited Vs CCE – 2018 (5) TMI 466 – CESTAT Allahabad* dated 05.03.2018 and also in the case of *CCE Vs M/s. EID Parry India Limited – 2018 (8) TMI 1494 – CESTAT* dated 05.06.2018 Chennai, it was held that demand on the semi-finished goods and work in progress goods is not sustainable because the finished goods have not yet come into existence. Similar view was taken in the case of *CCE, LTU Vs Lupin Ltd -2019 (2) TMI 937 IPCA Laboratories Ltd Vs. CCE – 2022(11) TMI 336-CESTAT* dated 04.11.2022, 42/2001-CE (NT) dated 26.06.2001, *43/2001-CE(NT) 26.06.2001 and 19/2004-CE(NT)* dated 06.09.2004.

4.4 In regard to the duty demand on finished goods it is submitted by the learned Counsel that the adjudicating authority has taken the view that, the phrase 'brought to any other place in India" in proviso to Section 3(1) covers both 'de-bonding' and 'DTA clearances'. The same phrase in notification 23/2003-CE covers only DTA clearances and not de-bonding. That, therefore, assessee has to pay duty as per proviso to Section 3(1) [Aggregate of all customs duties] without availing benefit of Notification No. 23/2003- CE. The adjudicating authority has relied on the decision of *Century Yarn Vs CCE – 2011 (270) ELT 554 and also the Circular 1/2004-Cus* dated 05.01.2004.

4.5 The learned Counsel pointed out that the decision of SIV Industries (supra) was rendered, when the phrase in clause (b)(ii) of proviso to Section 3(1) earlier read as "allowed to be sold in India". In the case of SIV Industries the *Hon'ble Apex Court* held that the assessment of the finished goods lying in stock on the date of de-bonding must be made as per Section 3(1) and not as per proviso to Section 3(1) because 'de-bonding' cannot be equated with goods 'allowed to be sold in India'.

4.5.1 The phrase 'allowed to be sold in India' was later substituted as 'brought to any other place in India" with effect from 11.05.2001. In the case of Universal Ferro and *Allied Chemicals Ltd Vs CCE – 2020 (372) ELT 14 (SC),* the Full Bench of Hon'ble Supreme Court, while

considering the consequential effect of substitution of the phrase `allowed to be sold in India" by the phrase "brought to any other place in India", held as below:

> *"55. We do not find that there would be any conflict in the amended provisions of clause (ii) of the proviso to sub section (1) of Section 5A of the Act and the said Exemption Notification. In any case, by the 2001 Amendment, the legislature has not laid down any exhaustive code in respect of the subject matter in replacing the earlier law. It appears, that the said Amendment has been incorporated to bring the said clause (ii) of sun-section (1) of Section 5A in sync with the words used in clause (i) of the proviso to sub-section (1) of Section 5A of the Act and the words used in the proviso to sub-section (1) of Section 3 of the Act. In that view of the matter, we find that the said contention is without substance.*
> *56. In so far as the reliance placed by the Learned Senior Counsel on the judgment of this Court in the case of SIV Industries Ltd. (supra) so as to distinguish the terms "allowed to be sold in India" and "brought to any other place in India" is concerned, we find, that the said judgment would rather support the case of the respondent-assessee. It would be relevant to refer to the following observation in paragraph 18 of the said judgment, which reads thus:*
> *"Thus it is apparent that de bonding and permission to sell in India are two different things having no connection with each other. It also becomes apparent that in view of the EOU Scheme as modified from time to time and corresponding amendments to Section 3 of the Act the expression "allowed to be sold in India" in the proviso to Section 3(1) of the Act is applicable only to sales made up to 25% of production by 100% EOU in DTA and with the permission of the Development Commissioner. No permission is required to sell goods manufactured by 100% EOU lying with it at the time approval is granted to de-bond."*

4.5.2 It is argued by the learned Counsel that in view of the above reasons, the decision of Century Yarn and the Circular dated 05.01.2004 cannot be relied since these are contrary to the decision of the Hon'ble Supreme Court in the case of SIV Industries (supra) and Universal Ferro and Allied Chemicals Ltd (supra). It is submitted by the learned Counsel that the levy at the time of de-bonding has to be under Section 3(1) and not under

proviso to Section 3(1) because, 'brought to any other place in India' does not cover de-bonding, especially, when it is established that the goods were exported.

4.5.3 Countering the grounds in the appeal filed by the Department which is an appeal to include the freight charges, insurance, etc., in assessable value of finished goods, and semi-finished goods while de-bonding to DTA, the learned Counsel submitted that since proviso to Section 3(1) is not applicable, the valuation has to be done only under Sec 4 of Central Excise Act, 1944 and not under Section 14 of the Customs Act, 1962. That therefore the appeal filed by the department may be dismissed.

4.5.4 In regard to the allegation that credit has been wrongly availed on semi-finished goods and finished goods, the learned Counsel submitted that as duty has been paid on such goods which were later cleared for export, the credit is eligible.

4.5.5 The learned Counsel prayed that the assesse appeal may be allowed, by setting aside the duty, intrest and penalties imposed in regard to semi-finished goods and finished goods. It is also prayed that the credit availed of duty paid on semi-finished goods and finished goods may be allowed.

5. The learned Authorised Representative M/s. Sridevi Taritla supported the findings in the impugned order.

6. Heard both sides.

7. The moot point that arises for consideration is whether the assesse is liable to pay the demand of differential duty on the semi-finished goods and finished goods at the time of de-bonding.

8. The issue with regard to the liability to pay duty on semi-finished goods was considered by the Tribunal in the case of Jubilant Life Sciences Ltd. (supra). The Tribunal observed that the duty demand is on the goods that had not come into existence (that have not completed the manufacturing stages) and therefore not sustainable. Moreover, these goods have been further processed into finished goods and the assesse has exported these goods. In the case of Tirumala Seung Han Textiles Ltd. Vs. CCE (A) Hyderabad, the Tribunal set aside the demand observing that there is no mention of semi-finished goods in Para 6.18 of the Foreign Trade Policy and the demand for duty on such goods is not sustainable. The relevant Para reads as under:

> "5.1 In respect of in- process goods, the appellants have argued that there is no authority for demanding duty. As per Para 6.18 of the Foreign Trade Policy 2004-09, an EOU may opt out of the scheme with the approval of the Development Commissioner subject to the payment of Excise Duty. In the policy, only imported and indigenous capital goods, raw materials, components, consumables, spares and finished goods in stock are mentioned. There is no mention about the in-process goods. In the absence of the mention of the in-process goods in the policy, there is no authority for demanding duty on the in-process goods. Hence, we set aside the demand of duty on the in-process goods."

9. The Co-ordinate Bench of the Tribunal at Chennai had followed the above decision in the case of *CGST & CCE, Trichy Vs. M/s. EID Parry India Ltd. 2018 (8) TMI*

1944 CESTAT Chennai. By judicial discipline following the above decision, we hold that the demand of duty on semi-finished goods is not justified and requires to be set aside, which we hereby do.

10. The duty demand on finished goods was defended by the learned Counsel by submitting that the goods having been exported the demand cannot sustain. It is an admitted fact, in the Show Cause Notice as well as the OIO that these goods have been exported. At the time of such export assessee has paid duty as per provisions of Section 3(1) of the Central Excise Act, 1944 on the export clearances. The Tribunal in the case of *M/s. Bhati & Company Vs CCE, 2019 (9) TMI 1500 CESTAT New Delhi* had set aside the demand of duty raised invoking proviso to Section 3(1) of the Central Excise Act without availment of Notification No. 23/2003. It was observed therein that the finished goods having been exported the duty demand cannot sustain. We do not find any grounds to take a different view. The goods having been exported, the differential duty demand cannot sustain. Ordered accordingly. It needs to be mentioned that though initially, the appellant had contended that the duty on semi-finished goods and finished goods is payable as per proviso to Section 3(1) availing the benefit of notification no. 23/2003, this claim was given up at the time of hearing. It is argued by the learned Counsel that the Apex Court in the case of universal Ferro and Allied Chemicals

Ltd. (supra) held that the substitution of the words 'brought into any place in India' does not bring any change. That therefore at the time of de-bonding, the assesse has to pay duty as per Section 3(1) of Central Excise Act. The appellant has paid duty on the goods for the second time at the time of export as per Section 3(1) of Central Excise Act, 1944. The goods having been exported we hold that the demand cannot sustain.

11. The department has filed Appeal No. E/42325/2013 aggrieved by the Order-in-Original passed by adjudicating authority who dropped the proposal to include freight charges, insurance and landing charges in the assessable value. As we have already set aside the duty demand on semi-finished goods and finished goods, the issue raised in the department appeal does not survive.

12. The assesse has filed appeal No. E/42186/2013 against the order passed by the original authority disallowing credit on certain items. The Show Cause Notice dated 06.06.2012 was issued to the appellant proposing to deny credit on inputs, capital goods semi-finished goods and finished goods and to recover the duty along with interest and for imposing penalty. After due process of law, the original authority allowed the credit availed on imported raw materials, indigenous raw materials, credit availed of additional duty paid on imported raw materials and also allowed the service tax credit transferred. However, the credit availed of the duty

paid on semi-finished goods and finished goods by availing the benefit of Notification No. 23/2003 on at the time of de-bonding was disallowed.

13. The learned Counsel submitted that the assesse has paid duty twice on these goods. Duty was paid at the time of de-bonding (as per proviso to section 3(1) by availing concessional rate of duty as per Notification No. 23/2003) and also at the time of export (as per section 3(1) of Central Excise Act, 1944) after de-bonding. The assessee has therefore rightly availed the credit of the duty paid on finished goods and semi-finished goods transferred to DTA unit.

14. The learned Authorised Representative pointed out that in Para 22.1 of the Order-in-Original, the adjudicating authority has discussed the reasons for disallowing the credit on semi-finished goods and finished goods. It is stated that the assessee has paid duty at the time of de-bonding by wrongly availing the concessional rate of duty at Sl. No. 2 and Sl. No. 3 of Notification No. 23/2003-CE. Assessee ought to have paid duty under proviso to Section 3(1) of Central Excise Act, 1944. Without availing the notification benefit. The credit has been denied for this reason. The relevant discussion is as under:

> *"23.5 In the case of the duty paid by an EOU on the goods manufactured by them, duty has to be paid as per the proviso to section 3(1) of CEA (De-bonding) or the proviso read with Notification No. 23/2003 (DTA Sales) and hence the levy is under the CEA and the duty so paid is duty of excise. However, the rate of duty is not as specified in the first schedule to Central Excise Tariff Act but equal to the aggregate of customs duties leviable under the Customs Act 1962. In*

view of the absence of one of the ingredients, the credit of duty paid by an EOU at the time of de-bonding cannot be allowed under rule 3(1)(i) of CCR as it allows the credit of duty as specified in the First Schedule to the Central Excise Tariff Act 1985 only. Rule 3(1) of CCR 2004 do not specify under it the duty of excise paid which is equal to the duties of customs leviable under the Customs Act. Therefore I am of the considered view that the credit, of duty paid by an EOU on the goods manufactured by them, either in terms of the proviso to section 3(1) of CEA or in terms of Sl.Nos.2 and 3 of Notification No. 23/2003. Is not allowable under rule 3(1)(i) or under any other sub rule rule 3(1) of CCR 2004 and I hold so."

15. We have already concluded that the duty demand raised on the semi-finished goods and finished goods cannot be sustained for the reason that the goods have already been exported and that too on payment of duty under Section 3(1) of Central Excise Act, 1944. As the differential duty demand by applying proviso to Section 3(1) without availing the benefit of notification has been set aside by us, we find no reason to uphold the disallowance of credit. We hold that appellant is eligible to avail credit of duty paid on finished goods and semi-finished goods.

16. From the foregoing we order as under:-

(i) The duty demand, interest and penalty on semi-finished goods and finished goods is set aside. The impugned order is modified according Appeal E/42187/2013 is allowed accordingly.

(ii) The appeal No. E/42325/2013 filed by department is dismissed.

(iii) In appeal No. E/42186/2013, the credit availed and utilized of duty paid on semi-finished

goods and finished goods at the time of de-bonding is allowed. Appeal E/42186/2013 is allowed in above terms.

17. In the result, the impugned order is modified in above terms.

(Order pronounced in the open court on 26.06.2023)

(M. AJIT KUMAR)
Member (Technical)

(SULEKHA BEEVI C.S.)
Member (Judicial)

RKP