CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.

PRINCIPAL BENCH - COURT NO.II

Excise Appeal No. 60131 of 2013

(Arising out of Order-in-Appeal No.68/VC/CE/JPR-II/2013 dated 16.07.2013 passed by the Commissioner of Central Excise-II, Jaipur (Rajasthan)]

M/s Bhati and Company **Appellant**
E-524-526, MIA, Basni Phase-II,
Jodhpur (Rajasthan)

VERSUS

Commissioner of Central Excise **Respondent**
NCR Building, Statue Circle, Jaipur (Rajasthan)

Appearance:

Shri O.P. Agarwal, Advocate for the appellant.
Shri V.B. Jain, Authorised Representative for the respondent

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. BIJAY KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO.51617/2019

DATE OF HEARING: 30.09.2019
DATE OF DECISION:30.09.2019

ANIL CHOUDHARY:

The issue in this appeal is whether the appellant is liable to pay duty for the finished goods lying in their EOU, when permission for debonding was issued on 24.04.2008, under the admitted facts and prior to the date of final debonding i.e. on 29.12.2008, the goods stood admittedly exported in view of the admitted facts before the court below.

2. At the time of debonding, the appellant paid duty as per provisions applicable under CER, at the relevant time.

3. The assessee has contended that the stocks of finished goods lying as on the date of issue of NOC i.e. on 13.03.2008 was later on exported by them before final Debonding date. Since, the said stock was not cleared in DTA and was exported, therefore, there cannot be any question of demand of duty on such goods. The court below did not find any force in the above contention of the assessee. The documents viz. ARE-1, shipping bill, bill of lading, RG-1 register etc. indicate that these removals are after 25.04.2008 i.e. after issue of NOC by the department. Hence, the exports made by the assessee were in the capacity of being DTA unit and not the EOU. As discussed in the foregoing para, before issue of NOC by the department, the assessee was required to assess, intimate and deposit the duty liability of finished goods lying in their stock as on 13.03.2008, which they failed to do so. Also observed that in the facts and circumstances of this case, there is no need of removal of the goods physically to charge duty on de-bonding. The conversion of an EOU unit into a DTA unit is equal to removal of goods from the EOU to a DTA unit. In this context, the assessee has relied upon the decision in the case of **CCE Vs. Solitare Machine Tools (P) Ltd.** reported at **2003 (152) ELT 384 (Trib.)** In this case this Tribunal has held that goods lying in stock at the time of debonding are liable to duty, only at the point of removal of those goods from the place of manufacture. It was observed that the decision in this case has been pronounced on 13.11.2002, whereas in the instant case the demand of duty on finished goods has been made in the light of Para 6.18(a) of the FTP 2004-09. Further, observed that the said issue has been decided by the Larger Bench of the CESTAT in the case of M/s Himalayan International Ltd. Vs. Commissioner of Central Excise, Chandigarh reported in 2003(154) E.L.T. 580 (Tri.-LB) wherein it has been held that "Rate of duty as per the proviso to section 3(1) of the Central

Excise Act, 1944 would be applicable for assessing all the excisable goods, which were cleared by 100% EOU to DTA whether in terms of permission granted or in excess of permission granted."

4. In the light of aforesaid decision of Larger Bench of the Hon'ble CESTAT the Board has issued Circular No. 01/2004-Cus., dated 05.01.2004. The contents of Circular No.1/2004-Cus., dated 05.01.2004, are reproduced below:

> "Subject: Withdrawal of Board's Circular No.618/9/2002-CX, dated 13-2-2002-Removal of Goods by 100% EOU to DTA- Clarification Regarding Levy of duty on Removal of goods by 100% EOU to DTA.
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> I am directed to draw your attention to Board's Circular No. 618/9/2002-CX dated 13-2-2002 on the above subject wherein it was clarified that prior to 11-5-2001, the clearances from EOUs if not allowed to be sold in India, shall continue to be chargeable to duty under main section 3(1) of Central Excise Act, 1944. This was based on an interpretation on Appex Court's decision in the case of SIV Industries Ltd[2000(117) ELT 28(SC)].

However, attention is now invited to the decision of larger Bench of CESTAT in the case of M/s Himalayan International Ltd Vs Commissioner of Central Excise, Chandigarh, reported in the 2003(153) E.L.T. 580(Tri.-LB), wherein it has been held that "Rate of duty as per the proviso to section 3(1) of the Central Excise Act, 1944 would be applicable for assessing all the excisable goods, which were cleared by 100% EOU to DTA whether in terms of permission granted or in excess of permission granted." In view of the said judgment of the CESTAT, it is now clear that all the goods manufactured by EOU and cleared into DTA before final debonding of the EOU shall be chargeable to duty under proviso to Section 3(1) of the Central Excise Act, 1944 and under no condition, goods produced in 100% EOU can be charged under main Section 3(1) of Central Excise Act, 1944.

In view of the above judgement of the CESTAT, the matter has been re-considered by the Board and it has been decided to withdraw the Board's Circular No.618/9/2002-CX dated 13-2-2002. The above-mentioned judgment of CESTAT, which has been accepted by Board, may kindly be taken into consideration in deciding similar pending cases.

It may also be kept in mind that the duty on the finished goods, at the rate applicable under the proviso to section 3(1) of the Central Excise Act, 1944 as also appropriate duty on the bonded capital goods and raw material is paid before the unit is allowed to be debonded.

In the impugned order, it is observed –

> "5. I also find that on the issue, the Boards has issued Circular No. 8/2004-Cus., dated 28.01.2004, wherein in para 6, the Board has clarified that "Even where the above facility is extended and the unit allowed to debond it should be ensured that duty on the non-duty paid raw materials, non-duty paid capital goods and finished manufactured goods, is discharged before the unit is allowed to debond."
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> 6. "I find the order in the case of **CCE Vs. Solitare Machine Tools (P) Ltd. (supra)** has been issued prior to the decision of larger bench of the CESTAT and subsequent issuance of Circular No. 1/2004-Cus. and the decision in the case of **M/s Himalayan International Ltd. VS. Commissioner of Central Excise, Chandigarh reported in 2003(154) E.L.T. 580(Tri.-LB)** and contents of Board's Circular No. 1/2004-Cus. were not before the Hon'ble Tribunal for consideration in the case of **CCE Vs. Solitare Machine Tools (P) Ltd.** Hence, I am of the considered view that

decision of the Larger Bench of the Tribunal in the case of **M/s Himalayan International Ltd. Vs. Commissioner of Central Excise, Chandigarh** would have override effect. Therefore, the ratio of decision in the case of **CCE Vs. Solitare Machine Tools (P) Ltd. (supra)** is not applicable in their case. The assessee has also relied upon the decision in the case of **Dalmia Cements (Bharat) Ltd. Vs. CCE- 2008 (224) E.L.T. 484 (Trib)**. The issue for decision in the cited case was entirely different than that of this case. The Hon'ble Tribunal has rendered the decision with reference to demand of CENVAT credit availed on capital goods used in captive power plant and subsequently leasing out of the power plant to another company whereas demand in the instant case has been made in compliance of para 6.18(a) of the FTP 2004-09. The concept of applicability of duty on 'removal' in the light of decision given by Hon'ble Supreme Court in the case of **J. & K. Cotton 1997 (32) ELT 234 (SC)** is also not applicable in their case as they are not a DTA unit but a 100% EOU and being 100% EOU they have to follow the provisions of Foreign Trade Policy applicable at the relevant time. Hence the ratio of cases cited in this regard is not applicable in their case."

5. Thereafter, the Department issued a show cause notice for recovery of duty on the finished goods lying in stock as per RG-I register on the date of issue of NOC. But in this case, as per record, the goods were exported prior to issue of final debonding order and the ld. Counsel submits that no stock of finished goods was lying at the time of debonding. The appellants were required to pay appropriate duty of central excise as per the provisions of Section 3 (1) of the Central Excise Act.

6. On the other hand, ld. AR has reiterated the impugned order on the grounds contained in the impugned order.

7. After having considered the rival contentions and on perusal of the appeal records carefully, we find that in the present case, the issue is

regarding the payment of duty on the goods in question, which have been exported prior to final debonding. It is not disputed that export of the goods has already taken place prior to debonding. The ld. Counsel relies on the case of **M/s. Fateh Granities Ltd. vide Final Order No.58543/2013-SM (B),** wherein it has been held, if the goods were exported, refund of the duty paid on finished goods lying in stock at the time of debonding, as such stock was later on exported, hence the appellants cannot be denied refund of duty paid. Accordingly, the refund was granted to the appellant. In **Jubilant Life Sciences Ltd. Vs. CCE, TS-182-Tribunal-2013-FTP,** this Tribunal have held that no duty is payable on finished goods, lying in stock, if goods are exported before the final debonding order. The issue involved in this case is identical and, therefore, following the said decision, we are of the view that these impugned orders are not sustainable. Accordingly, we set aside the order and allow the appeal.

[Order dictated & pronounced open court]

(Anil Choudhary)
Member (Judicial)

(Bijay Kumar)
Member (Technical)

Ckp