

**CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
NEW DELHI.**

PRINCIPAL BENCH,
COURT NO. IV

EXCISE APPEAL NO. 53335 OF 2018

[Arising out of the Order-in-Original No. ALW-EXCUS-000-COM-12-18-19 dated 04/07/2018 passed by Commissioner (Appeals), Central Goods & Service Tax Commissionerate, Alwar.]

M/s KEI Industries,
A-280-284, RIICO Industrial Area,
Bhiwadi, Distt. Alwar.

...Appellant

Versus

**The Commissioner, Central Goods
& Service Tax Commissionerate,**
Alwar.

...Respondent

APPEARANCE:

Shri A.K. Prasad, Advocate for the appellant.
Shri Sanjay Kumar Singh, Authorized Representative for the
Department

CORAM:

**HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)
HON'BLE MS. RACHNA GUPTA, MEMBER (JUDICIAL)**

FINAL ORDER NO. 50295/2022

DATE OF HEARING/DECISION : 22.03.2022

P.V. SUBBA RAO

This appeal is filed by M/s KEI Industries, Bhiwadi Rajasthan¹ assailing denovo order-in-original dated 04.07.2018² passed by the Commissioner of Central Goods & Service Tax,

¹ **appellant**

² **Impugned order**

Alwar. The appellant is engaged in manufacture of electric conductors and stranded wires of copper. Earlier, it was operating as a 100% Export Oriented Unit³ under the Foreign Trade Policy⁴. Thereafter, it decided to debond and convert into a domestic unit and sent letters dated 11.10.2010 and 28.10.2010 to the jurisdictional Assistant Commissioner of Central Excise seeking permission to debond. These permissions were granted by the Assistant Commissioner of Central Excise by his letters dated 25.10.2010 and 22.11.2010. Thereafter, a letter dated 13.01.2011 was issued by the Assistant Commissioner of Central Excise, Alwar to the Development Commissioner, Noida Special Economic Zone, indicating thereon as follows :-

“As desired, it is certified that no Central Excise/Customs Duties are pending against KEI Industries, A-280-284, RIICO Industrial Area, Chopanki, Distt. Alwar, Rajasthan. Accordingly, this office has no objection in debonding of the said unit”.

2. Based on this letter, the Development Commissioner has debonded the appellant and thereafter it is working as a domestic unit. Much later, the assessee was audited by the Central Excise Revenue Audit⁵ and an audit para was issued that the appellant had obtained approval from the Customs Authorities for clearance of unutilized surplus imported and indigenous raw material having value of Rs. 6,37,65,596/- on payment of excise duty to

³ **EOU**

⁴ **FTP**

⁵ **CERA**

its own concern in Domestic Tariff Area and that audit scrutiny revealed that the appellant had irregularly cleared unutilized/surplus raw material in excess of the permissions sought from the Customs Authorities amounting to Rs. 5,98,64,547/- in violation of the Foreign Trade Policy and therefore an amount of Rs. 139.58 Lakhs on such clearance needs to be recovered from the appellant alongwith interest.

3. Based on this audit report, a show cause notice dated 04.11.2015 was issued to the appellant and the demand as proposed along with interest was confirmed and a penalty of an amount equal to the duty demanded was imposed by an order-in-original dated 17.10.2016. Against this order, appeal No. C/50145 of 2017 was filed by the appellant, which was disposed of by Final order No. 56496 of 2017 dated 12.09.2017 remitting the matter back to the Original Authority as follows :-

"7. After hearing both the sides, and on perusal of the record, it appears that the appellant has claimed that the maximum quantity or value of the raw material has not been mentioned in the permission letter. **From enquiry, it appears it is not clear as to how much raw material was utilized for the export of goods and how much remained with the appellant. Further, it is also not clear as to for how much amount permission was granted by the appropriate authority for disposal of surplus raw material and whether duty was paid at the time of clearance of such raw material as claimed by appellant. During the course of the arguments, both the parties have agreed that it is not mentioned in the enquiry how much additional raw material, upon the permission, was sold by the appellant.**

8. **When it is so, then the fresh adjudication is required by the adjudicating authority. Hence, we set aside the impugned order and remand the matter back to the adjudicating authority to decide the issue denovo and by providing reasonable opportunity to the appellant.**

9. In the result, appeal filed by the appellant is allowed by way of remand".

4. Thereupon, the learned Commissioner has passed the impugned order again confirming the demand of duty along with interest and imposing equivalent amount of penalty. Hence, this appeal.

5. After hearing both sides for sometime and examining the records, we find that the appellant had sought to debond and was permitted to debond. The debonding was allowed by the Development Commissioner after the Jurisdictional Assistant Commissioner has confirmed in writing to him that no Central Excise or Customs Duty are pending from the appellant and they have been duty paid. The audit objection raised by CERA does not indicate how it had come to conclusion that there was a short payment of Rs. 139.58 Lakhs and that the appellant had cleared goods in excess of the permission granted by the Customs Authorities. A perusal of the letters issued by the Customs officers shows that no limit – whether in terms of quantity or value was fixed or specified in either of the letters. If the allegation is that goods over and above these were cleared by the appellant without paying duty there must be evidence that :

- (a) that goods were cleared in excess ; and
- (b) no duty was paid on such clearances.

6. There is no evidence either in the audit report or in the show cause notice, which was issued on the basis of the audit report with respect to either of the above. The relevant paragraphs of the show cause notice are paragraphs 7 and 8 which read as follows :-

"7. Whereas, during the course of audit, it was observed that the assessee started their commercial production on 22.01.2008 and exited out from the EOU scheme and was finally debonded in January, 2011. Further it was noticed in audit that the assessee had obtained approval from customs authorities for clearance of unutilized surplus imported and indigenous raw material having value of Rs. 6,37,65,596/- (4,11,50,494+2,26,15,102) on payment of excise duty to its own concern in DTA. Audit scrutiny, however, revealed that the assessee had irregularly cleared unutilized/surplus raw material in excess of the permission sought from customs authorities amounting to Rs. 5,98,64,547/- (12,36,30,143-6,37,65,596) in violation of the provisions of FTP ibid, more so the unit was not levied applicable customs duties Rs. 139.58 Lakh on such clearance to its own concern in DTA. Interest amounting to Rs. 68.39 Lakh is also leviable.

8. In view of the above, it appears that the assessee has not paid applicable Customs/Central Excise duty amounting to Rs. 139.58 Lakh and Interest Rs. 68.39 Lakh during the period 22.10.2010 to 21.01.2011 in respect of clearance of unutilized/surplus imported raw material in DTA in excess of the permission sought from customs authorities amounting to Rs. 6,37,65,596/- contravening the provisions of Notification No. 52/2003-Cus & 22/2003-CX both dated 30.03.2003 read with para 6.15 (a) (ii) of the Foreign Trade Policy 2009-14. The short payment of Customs/Central Excise duty amounting to Rs. 139.58 alongwith interest Rs. 68.39 Lakh is recoverable from them under Section 28 of the Customs Act, 1962/11A of Central Excise Act, 1944. The assessee is also liable for penal action under Section 112 of Customs Act, 1962 & 11AC of Central Excise Act, 1962 for contravention of the provisions enumerated above".

The relied upon documents of the show cause notice are as follows :-

- "(i) Copy of SOF in respect of performance Audit on 100% EOU.
- (ii) Copy of letter dated 17.06.2014 issued by the Superintendent, Central Excise Range II, Division II Bhiwadi to the assessee (already available with the assessee)
- (iii) Copy of letter dated 20.06.2014 of M/s KEI Industries Ltd. Bhiwadi (already available with the assessee)."

None of documents give any indication as to how the demand was arrived at.

7. It is for this reason that the matter was remanded by this Tribunal in the first round of litigation. The impugned order passed by the Commissioner faithfully reproduces observations and directions of this Tribunal in paragraph 37 of the impugned order. However, in the entire 23 page order, the fundamental question as to how much was cleared in excess of the permission and whether duty was paid or not on the goods cleared in excess and what is the basis for coming to such a conclusion and what are the supporting documents and how the duty was calculated have not been indicated at all. Learned Commissioner has relied on a number of case laws, but when the entire case is built on some imaginary numbers not supported by the facts and figures and supporting documents the order cannot be sustained. Learned Counsel for the appellant also submits that the appellant had sought the details from the Commissionerate by filing an application for information under the Right to Information Act and received a reply dated 02.11.2018 signed by the Central Public Information Officer which states as follows :-

"2. In this regard, it is submitted that the issue involved in the matter is based on Audit Para (Relevant Page of AG Audit Para is enclosed).

3. Scrutiny of records of the assessee revealed that the assessee had irregularly cleared unutilized/surplus raw material valued at Rs. 5,98,64,547/- in excess of permission granted by Customs in violation of the provisions of FTP ibid in as much as the permission was granted for clearance of unutilized/surplus raw material valued at Rs. 6,37,65,596/-. Whereas, they cleared the

said surplus raw material valued at Rs. 12,36,30,143/-. The above facts have been discussed in details in Para 6 and 41 of the OIO dated 14.10.2016. Apparently, no detailed separate chart was enclosed with the SCN issued to the assessee. However, the value of excess cleared unutilized/surplus raw material was given in the SCN dated 04.11.2015 on which the duty was arrived at the applicable rates during the relevant period.

If you are not satisfied with this reply, you can file an appeal to Shri Ved Prakash Singh, First Appellate Authority, the Additional Commissioner, Central Goods & Service Tax Commissionerate, Alwar, A-Block, Surya Nagar, Alwar – 301 001.”

8. The above clarification makes it abundantly clear that the Department has no idea as to on what basis the demand has been raised and has no documents to support the demand at all. The show cause notice raising a demand only on the ground that “audit said that you have short paid duty” with not even a vague attempt to explain how the demand was calculated cannot be sustained.

9. During hearing, we have also gone through the records presented before us aided by learned Counsel of the appellant and the learned Departmental Representative, but nobody was able to understand as to how demand was raised in the first place and confirmed in the impugned order. The inescapable conclusion is that the demand has been confirmed on some figment of imagination not supported by any facts or documents. Such a demand cannot be sustained and needs to be set aside. Consequently, the demand of interest and imposition of penalty also cannot sustain.

10. The impugned order is set aside and the appeal is allowed with consequential relief to the appellant.

(Operative part of the order pronounced in open court.)

(P.V. SUBBA RAO)
MEMBER (TECHNICAL)

(RACHNA GUPTA)
MEMBER (JUDICIAL)

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