

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

Date of Hearing:14.08.2018

Date of Decision:14.02.2019

Excise Appeal No.56083, 56084/2014-EX(DB)
Customs Appeal No.54528-54529/2015 &
Excise Appeal Nos.50792-50793/2018 with Misc. No.50327-50328/2018

case No	Impugned Order Detail's	Date of Impugned Order	Passed By	Appellant	Respondent
E/56083/2014-DB	OIO No.186/Commr/WLH/LTU-M/CX/2014	03/09/2014	Commissioner of Central Excise and Service Tax, LTU, Mumbai_I	C.C.E.- Mumbai-i	Lupin Ltd
E/56084/2014-DB	OIO No.188/Commr/WLH/LTU-M/CX/2014	03/09/2014	COMMISSIONER OF CGST & CENTRAL EXCISE-, LTU, MUMBAI-I	C.C.E. & S.T.- Ltu Mumbai	Lupin Ltd
C/54528/2015-DB	OIO No.188/Commr/WLH/LTU-M/CX/2014	03/09/2014	COMMISSIONER OF CGST & CENTRAL EXCISE, LTU, MUMBAI-I.	C.C.- Mumbai(port-import)	Lupin Ltd
C/54529/2015-DB	OIO No.186/Commr/WLH/LTU-M/CX/2014	03/09/2018	COMMISSIONER OF CGST & CENTRAL EXCISE,LTU,MUMBAI-I.	C.C.- Mumbai(port-import)	Lupin Ltd
E / 50792 / 2018-DB With E/Misc/50327/2018	OIA-BHO-EXCUS-001-APP-505-17-18	30/11/2017	COMMISSIONER OF CGST & CENTRAL EXCISE (Appeals) BHOPAL.	LUPIN LTD	CGST C.E & C.C-BHOPAL
E / 50793 / 2018-DB with misc. 50328/2018	OIA-BHO-EXCUS-001-APP-510-17-18	30/11/2017	COMMISSIONER OF CGST & CENTRAL EXCISE (Appeals), BHOPAL	LUPIN LTD	CGST C.E & C.C-BHOPAL

Appearance: Rep by Shri S.K. Bansal, DR for Department/Appellant.
Rep. by Shri Bharat Raichandani, Advocate for the assessees.

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

PER ANIL CHOUDHARY:

The brief facts involved in the present case for both units i.e. 'Prill' & 'Oral' is tabulated respectively as under -

2. The facts (Prill Unit), in brief, are thus:

Date	Summary	Event
19.08.2010	Filing of de-bonding application	The applicant made an application to Development Commissioner ('DC'), Indore, SEZ, Mumbai for de-bonding of its Prill Unit EOU.
31.08.2010	Directions of DC	The DC directed appellant to follow procedure laid down under Appendix 14-I-L of FPT Handbook of Procedure (Vol-1)

		('HBP V1').
21.09.2010	Intimation of effective date of de-bonding	The appellant applied to the Deputy Commissioner of Central Excise, LTU ('DC-LTU') for de-bonding the Prill Unit EOU w.e.f. 01.10.2010.
28.09.2010	Advance License issued	DGFT issued Advance License to the appellant for discharging custom duty on imported raw material at the time of de-bonding.
01.10.2010	Intimation of stock to the department	The appellant submitted self-certified stock statement of raw material, capital goods, consumables, work-in-progress ('WIP') and finished goods lying in stock as on cut-off date
11.11.2010 ; 23.11.2010 ; 29.11.2010	Advance License issued	DGFT issued Advance License to the appellant for discharging custom duty on imported raw material at the time of de-bonding.
23.12.2010	Completion of stock verification	The DC-LTU intimated that the stock verification has been completed by central excise officers and the appellant was directed to discharge central excise and custom duty at applicable rates.
11.02.2011	Computation of Liability	The appellant submitted the computation of liability to the DC-LTU and requested to confirm the proposed mode of payment of duties.
22.02.2011	Confirmation of mode of payment	DC-LTU confirmed the mode of payment proposed vide letter dated 11.02.2011.
04.03.2011	Payment of duty & request for NDC	The appellant submitted complete details of payment of duty on de-bonding along with other relevant documents to the DC-LTU and requested DC-LTU to issue No Dues Certificate ('NDC').
31.05.2011	NDC received	The DC-LTU issued NDC to exit from the EOU scheme.
23.06.2011	Final de-bonding order	The Development Commissioner issued final de-bonding order.
—————	DC-LTU objected mode of payment of duty	The DC-LTU, after a long gap of more than one year from the date of issuance of NDC, disputed the mode of payment of excise and customs duty by the appellant and directed the appellant to discharge its duty liability in cash. Further, the DC-LTU also directed to reverse cenvat credit availed on CVD and SAD paid on raw material and capital goods (indigenous as well as imported).
February, 2013 to August, 2013	Payment of duty in cash and reversal of credit under protest	The appellant once again discharged the above liability in cash along with interest and reversed cenvat credit taken on the original duty payment. The said payment and reversal were made 'under protest'.
01.11.2013	SCN issued on the basis of above investigation	The department issued show cause notice to the appellant, alleging that the payment method adopted by the appellant for payment of duties at the time of de-bonding is incorrect and the cenvat credit availed on CVD and SAD is inadmissible.
20.12.2013	RUD received	The appellant received the relied upon documents of the above show cause notice.
15.01.2014	Reply filed	The appellant filed a detailed reply to the above show cause notice and refuted all the allegations contained therein.
07.04.2014	Additional submissions	The appellant filed additional submissions in response to the above show cause notice.
03.09.2014	O-I-O dropped	The order-in-original issued by the Commissioner, CX & ST, LTU, Mumbai dropped the entire demand of central excise

	SCN	duty, custom duty and cenvat credit.
		This resulted in the present Departmental appeal to CESTAT.
06.04.2015	Application for re-credit	Pursuant to above order dated 03.09.2014, the appellant filed an application of re-credit of cenvat credit reversed during the course of investigation.
09.07.2015	Refund application	The appellant also filed a refund claim of the duty & interest paid under protest during the course of investigation.
06.08.2015	Deficiency notice by department	The department issued deficiency letter to the appellant with respect to the above refund claim.
20.10.2015	Reply to deficiency notice	The appellant replied to the above queries of the department and submitted various documents to prove its claim.
28.10.2015	Re-credit sanctioned	In the meantime, the Assistant Commissioner, LTU, Mumbai sanctioned the above re-credit claim of cenvat credit reversed of the appellant filed on 06.04.2015.
06.01.2016	SCN issued for refund application	The department issued the show cause notice calling upon the appellant to show as to why their refund claim should not be rejected. The said show cause notice once again alleged that the mode of payment of duties by the appellant at the time of de-bonding was incorrect.
05.05.2016	Reply filed	The appellant filed a detailed reply to the above show cause notice.
11.05.2017	O-I-O partly rejected the claim of refund	The order-in-original issued by the Deputy Commissioner, LTU, Mumbai partly rejected the refund claim of the appellant.
-----	Appeal to CCE(A)	The appellant filed an appeal against the above order, in as much as it was against the appellant, before the Commissioner (Appeals)
30.11.2017	O-I-A upheld the O-I-O	The impugned order-in-appeal passed by the Commissioner (Appeals) upheld the order-in-original dated 11.05.2017.
	Present appeal	Hence, the present appeal, by assessee.

3. The facts (Oral Unit), in brief, are thus:

Date	Summary	Event
10.03.2011	Filing of de-bonding application	The Respondent made an application to Development Commissioner ('DC'), Indore, SEZ, Mumbai for de-bonding of its Oral Unit EOU and requested for extension of validity period of letter of permission and green card.
28.03.2011	Approval for exit from EOU scheme	The Development Commissioner extended validity period of letter of permission and green card. The Development Commissioner granted 'in-principle approval' for exit from EOU scheme.
01.04.2011	Intimation of effective date of de-bonding	The appellant applied to the Deputy Commissioner of Central Excise, LTU ('DC-LTU') for de-bonding the Oral Unit EOU w.e.f. 01.04.2011
21.07.2011	Completion of stock verification	The Deputy Commissioner-LTU intimated that the stock verification has been completed by central excise officers and the appellant was directed to discharge central excise and custom duty at applicable rates.
03.08.2011	Issuance of NOC	The Development Commissioner issued a NOC for exit from EOU scheme as well as conversion into the EPCG scheme.
08.09.2011	EPCG scheme	DGFT granted authorization to the Respondent under EPCG scheme.
02.03.2012	Details of	The respondent submitted complete details of payment of

	payment of duty	duty on de-bonding along with other relevant documents to the Deputy Commissioner-LTU.
16.03.2012	Request to issue NDC	The appellant requested Deputy Commissioner-LTU to issue No Dues Certificate ('NDC').
04.04.2012	Extension of 'in-principle de-bonding'	The Development Commissioner extended validity period of letter of permission upto 30.04.2012, and the permission for 'in-principle de-bonding' was also extended by one month upto 27.04.2012.
17.04.2012	Request for NDC	The Respondent once again requested the DC-LTU to issue the NDC.
26.04.2012	NDC received	The Deputy Commissioner-LTU issued NDC to exit from the EOU scheme.
15.06.2012	Final de-bonding order	The Development Commissioner issued final de-bonding order.
—	DC-LTU objected mode of payment of duty	The Deputy Commissioner-LTU, long after the entire process was over, disputed the mode of payment of excise and customs duty by the appellant and directed the appellant to discharge its duty liability in cash. Further, the Deputy Commissioner-LTU also directed to reverse cenvat credit availed on CVD and SAD paid on raw material and capital goods (indigenous as well as importer).
February, 2013 to March, 2013	Payment of duty in cash and reversal of credit under protest	The appellant again discharged the above liability in cash along with interest and reversed cenvat credit CVD & SAD that was taken on the original duty payment. The said payment and reversal were made 'under protest'.
01.11.2013	SCN issued on the basis of above investigation	The department issued show cause notice to the appellant, alleging that the payment method adopted by the appellant for payment of duty at the time of de-bonding is incorrect and the cenvat credit availed on CVD and SAD is inadmissible.
20.12.2013	RUD received	The appellant received the relied upon documents of the above show cause notice.
22.01.2014	Reply filed	The appellant filed a detailed reply to the above show cause notice and refuted all the allegations contained therein
09.04.2014	Additional submissions	The appellant filed additional submissions in response to the above show cause notice.
03.09.2014	O-I-O dropped SCN	The order-in-original issued by the Commissioner, CX & ST, LTU, Mumbai dropped the entire demand of central excise duty, custom duty and cenvat credit.
		Hence, the present appeals by the Department
06.04.2015	Application for re-credit	Pursuant to above order dated 03.09.2014, the Respondent herein filed an application of re-credit of cenvat credit reversed during the course of investigation.
09.07.2015	Refund application	The Respondent also filed a refund claim of the duty & interest paid under protest during the course of investigation.
06.08.2015	Deficiency notice by department	The department issued deficiency letter with respect to the above refund claim.
20.10.2015	Reply to deficiency notice	The Respondent replied to the above queries of the department and submitted various documents in support of the claim.
28.10.2015	Re-credit sanctioned	In the meantime, the Assistant Commissioner, LTU, Mumbai sanctioned the above re-credit claim of the respondent filed on 06.04.2015.
07.01.2016	SCN issued for refund application	The department issued the show cause notice calling upon the respondent to show as to why their refund claim should not be rejected. The said show cause notice once again alleged that the mode of payment of duties by the appellant at the time of de-bonding was incorrect.
05.05.2016	Reply filed	The Respondent filed a detailed reply to the above show

		cause notice
11.05.2017	O-I-O partly rejected the claim of refund	The order-in-original issued by the Deputy Commissioner, LTU, Mumbai partly rejected the refund claim of the Respondent.
-----	Appeal to CCE(A)	The Respondent filed an appeal against the above order, in as much as it was against the appellant, before the Commissioner (Appeals)
30.11.2017	O-I-A upheld the O-I-O	The impugned order-in-appeal came to be passed by the Commissioner (Appeals) rejecting the appeal filed by the Respondent
-	Present appeal	Hence, the present appeal filed by the assessee against rejection of refund claim.

4. The details of the appeals filed in the present case are tabulated as under –

S.No.	Appeal filed by whom	Appeal filed against Order Number along with date		Unit
1.	Revenue	Order-in-Original	186/Commr/WLH/LTU-M/CX/2014 dated 03.09.2014	Prill
			188/Commr/WLH/LTU-M/CX/2014 dated 03.09.2014	Oral
2.	Assessee	Order-in-Appeal	BHO-EXCUS-001-APP-510-17-18 dated 30.11.2017	Prill
			BHO-EXCUS-001-APP-505-17-18 dated 30.11.2017	Oral

5. Personal hearing was held on 14.08.2018, Mr. Bharat Raichandani, Ld. Advocate, appeared on behalf of the appellant/respondent (M/s Lupin) and reiterated the submission made in their appeal memorandum.

6. We have carefully gone through the facts of the case on record, grounds of appeal in the Appeal Memorandum and submissions made by the respective parties.

APPEAL FILED BY THE REVENUE

7. We find that the Commissioner has passed a detailed and cogent order. The Commissioner has given finding on each and every point and decided the show cause notice judiciously.

8. The grounds of appeal do not dispute the factual position. The grounds of appeal are beyond the scope of the show cause notice. The grounds of appeal are without any merit. Hence, the appeals filed by the Revenue are liable to be rejected and consequential refund should be allowed to the Respondent.

Finding on limitation

9. We find that it has been held by the Commissioner (Appeals) that the appeal is time barred. The said finding is a finding of fact. The said finding has not been challenged by the department. In other words, the demand has been set aside by the Commissioner on merits as well as limitation. However, in the instant appeals, the challenge is only on the merits of the case. The department seems to have accepted the order on limitation. Once the entire demand is time barred and it has been accepted by the Department, the question on merits would become purely academic. On this count alone, the present appeals filed by the department are liable to be dismissed. The above view has been taken in the following cases:

- (i) **CCE V/s Balakrishna Industries 2006 (206) ELT325 (SC)**
- (ii) **CCE V/s Echjay Forging Private Limited 2015 (319) ELT 127**

10. We find that during the course of hearing, however, the Ld. Authorized Representative for the Revenue relied upon one ground of appeal to submit that the finding on limitation has been challenged by the Revenue. The same reads thus:

“3.5) Para 6.18(e) provides that between “No dues certificate” issued by the Customs and Central Excise Authorities and final debonding order by the Development commissioner, unit shall not be entitled to claim any exemption for procurement of capital goods or inputs. It is seen that Lupin Oral has obtained advance authorization & EPCG License for duty free procurement of inputs and capital goods through advance license. M/s Lupin, after the cut off date procured the Advance authorizations and utilized the same for payment of import duty amounting to Rs.75,34,044/- on raw material covered under Bill of Entry No.1 to 4 all dated 03.03.2011. Similarly, they also procured EPCG license after the cut off dated and utilized the same for payment of import duty amounting to Rs.19,70,432/-. The noticee fraudulently & deliberately with intention to defraud the exchequer got the licenses mentioned above endorsed from the DGFT office, much later, that too after initiation of enquiry, to the effect that valid de-bonding of EOU. Since the advance authorizations were procured subsequent to cut off date, the duty through these licenses could not be debited. They paid these duties in cash vide challan No.06 and 07 both dated 15.02.2013.

11. We find that the above submission is without any merit for the reasons as follows:

12. **First**, the said ground is not a ground on limitation. The said ground does not challenge the finding of the Commissioner, reproduced above, on limitation. It is not even prayed that the demand is not time barred. The said ground of appeal does not urge that the dropping of the demand by not invoking the extended period of limitation under proviso to section 11A of the Central Excise Act or section 28 of the Customs Act is not correct. Hence, the reliance placed on the said ground is incorrect.

13. **Second**, in any event, the said ground of appeal is beyond the entire proceedings. The same is being raised for the first time during hearing before this

Tribunal. This is clearly impermissible. The Revenue cannot make out a new case at this stage

14. **Third**, in any event, if the allegation that the advance license was obtained fraudulently is correct, then the Licensing authority (DGFT) would have taken action against the Respondent. No such action has been taken by the DGFT. There is no such proposal. The Revenue cannot go beyond the license and propose to deny benefit of exemption and demand duty. The Hon'ble Supreme Court in the case of **Titan Medial Systems Private Limited V/s CC 2003 (15) ELT 254 (SC)** held thus:

As regards the contention that the appellants were not entitled to the benefit of the exemption notification as they had misrepresented to the licensing authority, it was fairly admitted that there was no requirement, for issuance of a licence, that an applicant set out the quantity or value of the indigenous components which would be used in the manufacture. Undoubtedly, while applying for a licence, the appellants set out the components they would use and their value. However, the value was only an estimate. It is not the respondents' case that the components were not used. The only case is that the value which had been indicated in the application was very large whereas what was actually spent was a paltry amount. To be noted that the licensing authority having taken no steps to cancel the licence. The licensing authority have not claimed that there was any misrepresentation. Once an advance licence was issued and not questioned by the licensing authority, the Customs authorities cannot refuse exemption on an allegation that there was misrepresentation. If there was any misrepresentation, it was for the licensing authority to take steps in that behalf.

15. The above view has been re-iterated by the Hon'ble Bombay High Court in **Autolite (India) Limited V/s Union of India 2003 (157) ELT 13 (Bom)**.

16. **Fourth**, in any case, there is no error in grant of the said license by the DGFT. There was no misrepresentation on facts. The basic grievance of the Revenue is utilization of the advance license for payment of duties. There is no bar against the same under the Policy. Para 6.8(e) is in a different context and cannot be relied upon.

17. **Last**, in any event, in the facts of the instant case, no suppression of facts can be alleged against the Respondent. The Respondent has paid the duties in respect of the stock as on cut-off date. The show cause notice merely disputes the mode of discharge of duty i.e. whether Excise duty on Customs duty ought to be paid. Hence, it cannot be said that the Respondent indulged in any collusion, willful misstatement or suppression of facts with intent to evade duty. If the intention of the Noticee was to evade duty, then, even Excise duty would have not been paid on the exit stock (on indigenous procurements). Hence, the mode of payment of duty as alleged in the show cause notice, at best, be said to be a case of incorrect interpretation of law. However, no mala fide intent or collusion can be attributable on the assessee so as to invoke larger period of limitation under Section 28 (4) of the Customs Act. Further, the Respondent has followed the above method/mode of payment for de-bonding of another unit (Prill Unit), where no objection was raised by the department. Hence, the Respondent proceeded on the same basis. Moreover, all the relevant facts have been appropriately disclosed to

the Department vide various letters and periodical returns. The Respondent communicated their intention for de-bonding from EOU vide letter dated March 9, 2011. Before commencing the de-bonding of the Oral EOU, the Respondent had obtained final de-bonding orders of Pril EOU. At the time of de-bonding of the Pril EOU, the Respondent discharged the applicable duties. As the unit had submitted their letter dated 11.02.2011 showing the mode of payments, department was already aware of the duty positions adopted by the Respondent. Further, pursuant to discharge of the applicable duties, the Respondent intimated the Customs and Excise authorities regarding the mode and methodology of computation and payment of applicable duties on goods lying in exit stock in these units, vide letter dated March 2, 2012 and the appellant/assessee also submitted various documents. The same have been accepted by the department. There is no dispute about this factual position. There is no material to suggest that the Respondent had made any deliberate mis-statement or suppression to defraud the Government of its due revenue. No evidence has been produced by the Revenue on record. There is no such whisper in the present appeal as well. Hence, there exists no circumstances to invoke the larger period of limitation under proviso to Section 28(1) / Section 28 (4) of the Customs Act and Section 11 A of the Excise Act.

18. In identical factual situation, the above view has been taken in the following cases:

(i) **Marwar Art Exports V/s CCE 2018-TIOL-1471-CESTAT-DEL**

(ii) **CCE vs. Emcure Pharmaceuticals Limited 2014 (307) ELT 180** affirmed by Hon'ble Bombay High Court in **2016 (342) ELT 172 (Bom)**

Nature of duty payable at the time of de-bonding

19. We find that even on merits, there is no case made out by the department in the instant appeal. The only case made out by the department in the show cause notice dated 01.11.2013 was that the nature of duty payable on the goods, which were procured indigenously, cleared by EOU to DTA is customs duty and not central excise duty. The show cause notice alleged that the goods cleared by EOU to DTA are to be treated as imported goods as EOU cannot be considered as located in India. We find that the above case is devoid of any merit for the reasons stated herein below-

20. **First**, the Respondent is an EOU. It availed benefit of Notification No. 52/2003-Cus and Notification No. 22/2003-CX. Accordingly, imported goods and indigenously procured goods without payment of custom duty and excise duty respectively. Therefore, when a unit gives up its EOU status, the said benefit availed by the unit (ie, whatever duty foregone) should be given back. Hence, the EOU exiting from the EOU scheme shall be liable to pay customs duty and excise duty on imported goods and indigenously procured goods respectively lying in the stock as on cut-off date. This view is in line with the said notifications as well.

21. **Second**, the duty payable for clearance of goods from EOU to DTA unit is duty of Central Excise. Similarly, when the EOU converts to DTA the duty payable on finished goods and goods procured indigenously is central excise duty. This view has been taken by Larger Bench of this Tribunal in **Vikramlspat vs. CCE 2000 (120) ELT 800 (Tri. – LB)** wherein the issue was primarily the availability of credit of tax paid on input received from an EOU and determination of the nature of duty on clearance of finished goods produced or manufactured within an EOU. The Larger Bench has, inter alia, held that clearance of goods by an EOU to any place in India is not 'import' as defined under section 2(23) of the Customs Act, 1962.

22. **Third**, the taxable event contemplated under the Customs Act for the purpose of levy of customs duty is bringing goods into the territorial borders of India from place outside India. However, in the present case EOU is situated in the territory of India. The goods in dispute are procured by the respondent from a DTA unit located in the territory of India. Therefore, at all points in time, the goods remain in India itself. Hence, on de-bonding, there is no question of goods being said to have been imported into India and demand of custom duty on such goods is without any authority of law.

23. **Fourth**, Para 6.18 of Foreign Trade Policy ('FTP') 2009-14 provides for exit of EOU from EOU scheme on condition of payment of excise and customs duties. Further, Appendix 14-I-L of FTP 2009-14 prescribes guidelines for de-bonding of an EOU. Clause (a) of the said appendix provides that applicable customs and excise duties would be paid on imported and indigenous goods in stock. Therefore, if the contention of the department is accepted, the provisions of FTP would become redundant. The provisions shows that the legislature never intended to impose only customs duty on the goods lying in stock at the time of de-bonding of EOU.

24. **Fifth**, the department itself, in grounds of appeal at Para 2.6(Prill) & Para 2.3 (Oral), has contended that on de-bonding the respondent (appellant therein) is liable to pay customs duty on imported goods and excise duty on the indigenously procured goods and finished goods. Therefore, on this count alone, we find that the entire proceedings go.

Discharge of excise duty liability by utilization of cenvat credit is correct and legal

25. Further, the Revenue is of the view that the payment of central excise duty by the respondent at the time of de-bonding by debiting cenvat credit is incorrect. There is no legal basis for this view.

26. We find that as per Rule 17 of the Central Excise Rules, 2002 provides that in case where goods are removed from EOU to DTA, such removal shall be made under invoice and the duty leviable on such goods may be paid by utilizing the available

cenvat credit or in cash. Thus, an EOU is permitted to utilize cenvat credit for discharging excise duty on removal of goods from EOU to DTA. This view has been consistently taken by this Tribunal in the following cases:

- (i) **CCE V/s Gangeshwar Shipping Mills 2016 (336) ELT 696**
- (i) **Tecumseh Products India P. Ltd. vs. CCE - 2015-TIOL-3066-CESTAT-BANG**
- (ii) **CCE vs. Sequent Scientific Ltd. - 2018-TIOL-1475-CESTAT-MUM**

Availment of cenvat credit of the excise duty paid on indigenous procured goods, SAD paid on capital goods imported and CVD and SAD paid on imported raw material

27. The Revenue contends that the respondent is not eligible to avail cenvat credit on the inputs and consumables as the cenvat credit of the same is available at the time when the inputs and consumables are procured in the factory of manufacture of final product. This contention is without any legal basis.

28. We find that as per Rule 3 of the Cenvat Credit Rules, 2004 allows cenvat credit of the duty paid on goods procured by the Respondent is available provided the following conditions are satisfied:

- (i) the goods imported or indigenously procured qualify as 'inputs' or capital goods' in terms of definition under Cenvat Credit Rules, 2004;
- (ii) capital goods and inputs are received in the factory of the manufacturer; and
- (iii) the capital goods and inputs are used in the factory of the manufacturer for manufacture of excisable goods or used for providing any output service.

29. We find that in the instant case, inputs and capital goods fall within the definition of 'input' and 'capital goods' as defined under Cenvat Credit Rules, 2004. This fact is not under dispute. The said inputs and capital goods were received in the factory of manufacturer and the same have been used in the manufacture of final products (excisable goods). This fact is also not under dispute. Furthermore, the Respondent has issued invoice under Rule 11 of the Central Excise Rules, 2002 while making payment of duty on such indigenous procurements. Hence, it is evident that the Respondent has fulfilled all the conditions of Rule 3 of the Cenvat Credit Rules, 2004 for availing credit of duty paid on such inputs and capital goods.

30. In fact, the department also accepts this legal position. In respect of imported procurements, department allows cenvat credit only to the extent of CVD portion paid on imported capital goods and does not extend credit of SAD portion of customs duty on such goods. Further, such cenvat credit of CVD has been allowed only for capital

goods and not for raw materials, raw material content in work in progress, packing materials and consumables. This shows the dual stand taken by the Revenue itself. It is well settled that the department cannot blow hot and cold at the same time. The law does not permit blowing the bugle at both ends. Such arbitrary allowance of credit is grossly unjustified as, in terms of the Credit Rules, 2004, cenvat credit of SAD is available to a manufacturer of goods for not only the capital goods but also for other imports such as raw materials, packing materials and consumables. Hence, credit of SAD should also be extended to the respondent on all imported procurement and not only on capital goods.

Customs duty paid by debiting EPCG license and advance license is legal and proper

31. We find that the case of the department is that the customs duty paid, at the time of de-bonding, by the respondent through debiting EPCG license and advance authorization is not correct in terms of FTP 2009-14, as the advance license and EPCG license were obtained long after the cut-off date and hence, the same cannot be allowed to discharge Customs duties. This contention is without any legal basis for the reasons stated herein below -

32. **First**, Para 6.18(e) of FTP 2009-14 provides that between “No Dues Certificate” issued by customs and central excise authorities and final de-bonding order by Development Commissioner, EOU shall not be entitled to claim any exemption for procurement of capital goods or inputs. However, in the present case, EPCG and advance licenses were procured prior to issuance of ‘No Dues Certificate’. The Respondent achieved positive NFEE and submitted certified statement of duty liability on the exit stock on March 31, 2011 which was duly accepted by DC-LTU. In the meanwhile, the Respondent obtained ‘No Objection’ for utilizing EPCG License towards payment of Customs duty on imported capital goods from Development Commissioner on August 03, 2011, and thereafter, the DFGT granted EPCG license to the Respondent. As admitted in the show cause notice, the Respondent presented such EPCG licenses towards discharge of duty on imported capital goods; however, the same was rejected on the sole ground that these licenses were obtained pursuant to the cut-off date. These facts have been ignored by the department in their show cause notice as well as appeals filed by them. Hence, the entire case of the department is frivolous and based on incorrect facts. Thus, the payment of customs duty through EPCG and advance license is correct and is in accordance with procedure provided in the FTP 2009-14.

33. **Second**, Para 6.18 of the FTP 2009-14 prescribes that the Development Commissioner may submit an EOU to exit from the EOU scheme by availing the benefit under EPCG Scheme subject to fulfilment of the positive NFEE criteria. Similarly,

Notification No.52/2003-Cus also provides for utilization of EPCG License for discharging Customs duty on de-bonding of capital goods, subject to fulfilment of positive NFEE criteria by such EOU (Refer Para 4 thereof). Similarly, provisions for utilization of EPCG License for discharge of Excise duty on de-bonding of capital goods is also provided under Notification No.22/2003-CE (Refer Para 8 thereof). A perusal the same, clearly shows that an EOU which has fulfilled the positive NFEE criteria shall be allowed to de-bond capital goods against utilization of EPCG License. However, no particular time line has been prescribed by the policy or the aforementioned notifications, wherein such EPCG licenses should be procured. Apart this, neither the provisions in FTP nor Notification No.52/2003-Cus or Notification No.22/2003-CE prohibit utilization of EPCG license obtained pursuant to receipt of in-principal approval for de-bonding from Development Commissioner. When the provisions granting the exemption and also the FTP have liberalized the entire process, validly obtained EPCG license, cannot be denied on the ground that the same were obtained after the cut-off date. Denial of the benefit of payment of duty by debiting EPCG license is not justified.

34. **Third**, the EPCG and advance licenses are issued by Director General of Foreign Trade ('DGFT') subject to the terms of conditions mentioned in FTP and schemes made thereunder. The customs or excise department has no jurisdiction to question the legality of issuance of EPCG and advance license. Once the said licenses are procured legally, the same can be utilized to discharge custom duty liability.

35. In identical set of facts, this Tribunal in **Welspun Zucchi Textiles V/s CCE 2006 (204) ELT 401**, wherein the issue was utilization of EPCG license for payment of duties on second hand machinery, at the time of de-bonding of EOU, which was duly allowed by the Development Commissioner. In the said judgment, 'In principle' approval for de-bonding was obtained on June 29, 1999, and the EPCG license was obtained on August 5, 1999, and benefit under the EPCG scheme was granted even though the EPCG license was obtained after acquiring the in-principle approval for de-bonding by Development Commissioner.

36. Any ways, department has already sanctioned the refund in this matter and as such, this is not a subject matter in the present appeal.

Duty foregone on finished goods and raw materials exported pursuant to cut-off date is allowed

37. The Revenue contends that the Respondent is liable to pay customs duty on the finished goods exported and raw material re-exported after the cut-off date as the

respondent shall not be eligible for the benefits available to an EOU. There is no basis for this argument.

38. We find that the respondent did not discharge duty on finished goods amounting to Rs. 58,27,344/- (Prill) & Rs. 10,90,669/- (Oral), lying in exit stock, which were exported out of India under Bond B-17, before the issuance of No Due Certificate by the Deputy Commissioner. Further, the respondent discharged duty of Rs.62,91,409/- (Prill) & Rs.18,67,092/- (Oral) on the balance finished goods lying in stock at the time of payment of duty by debiting in their cenvat credit. In terms of note to Appendix 14-I-L of the HBP V1 which provides that a 100% EOU continues to be treated as EOU till the date of final exit order and such view is also expressed in various judicial precedents. The respondent cannot be placed in an indeterminate state in the intervening period till the NDC or final de-bonding order is obtained. Therefore, the respondent unit continues to remain an EOU till the date of final de-bonding order and is eligible to export finished goods without payment of duty under Bond B-17. This view has been taken by this Tribunal in **Jubilant Life Sciences Limited Vs. CCE TS-182-Tribunal-2013-FTP**, wherein the Tribunal held that no duty is payable on finished goods, lying in stock as on the date of de-bonding, provided there was no removal of goods into DTA from EOU and the goods were exported out of India under advance authorization claim after receipt of 'in principle' approval for de-bonding, but before the date of issuance of final de-bonding order.

39. Even otherwise, assuming whilst denying, that the respondent is liable to discharge excise duty and customs duty in respect of the finished goods and raw materials, lying in exit stock, it would be a case of revenue neutrality as the respondent would be entitled to refund of the duty so paid. Hence, the entire exercise is purely academic and having no revenue implications.

No duty is payable on WIP/semi-finished goods

40. It is well settled that central excise duty is payable on 'excisable goods' as defined under section 2(e) of the Central Excise Act. No central excise duty is payable at intermediate stage. No goods are manufactured or produced at that stage. Appendix 14-I-L of the FTP Handbook of Procedures Vol. 1 outlines the exit from the EOU Scheme. The said appendix lays down the applicable customs and excise duties payable by the unit on imported and indigenous capital goods, raw materials, components, consumables, spares and finished goods. It does not provide for payment of duties on WIP. Obviously and logically so. Therefore, no duties of customs are payable on WIP at the time of debonding. This view has been taken by this Tribunal in **Tirumala Seung Han Textiles Limited V/s CCE 2009 (237) ELT 145**.

41. In light of the above findings, the department appeals are dismissed.

APPEAL BY THE ASSESSEE

42. We find that once the appeal filed by the Department is rejected, the action proposed by the Revenue on the refund application is negated. Hence, the payment of duties, in cash, subsequently, after the objection taken by the department, becomes refundable to the Respondent. The order-in-appeal passed by the Commissioner (Appeals), on consequential refund, becomes a nullity. In any case, there are several infirmities in the order passed by the Commissioner (Appeals) which have been pointed out in the grounds of appeal.

43. Accordingly, the appeals filed by the department are rejected and the appeals filed by the assessee are allowed, with consequential refund, along with interest thereon. Misc. application also stand disposed of.

(Order pronounced on 14.02.2019)

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

(BIJAY KUMAR)
MEMBER (TECHNICAL)

Ckp.