

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No.2, R. K. Puram, New Delhi.

Date of hearing: 30.05.2017
Date of pronouncement: 06/06/2017

Excise Appeal No. 1381 of 2011

(Arising out of order in original No. 19/2011/C. Ex./JPR-II dated 31.03.2011 passed by the Commissioner of Central Excise, Jaipur).

M/s Nitin Spinners Limited Appellant
Sh. B. L. Narasimhan, Advocate for the appellant
Vs.

CCE, Jaipur-II Respondent
Ms. Suchitra Sharma, AR for the Respondent

AND

Excise Appeal No. 1767 of 2011

(Arising out of order in original No. 19/2011/C. Ex./JPR-II dated 31.03.2011 passed by the Commissioner of Central Excise, Jaipur).

CCE, Jaipur-II Appellant-Revenue
Ms. Suchitra Sharma, AR for the Revenue

Vs.

M/s Nitin Spinners Limited Respondent
Sh. B. L. Narasimhan, Advocate for the respondent-assessee

Coram:

Hon'ble Shri Anil Choudhary, Member (Judicial)
Hon'ble Mr. B. Ravichandran, Member (Technical)

Final Order Nos. 53682 – 53683/ 2017

Per: **B. Ravichandran:**

Both Revenue and the assessee are in appeal against the order dated 31.03.2011 of Commissioner of Central Excise, Jaipur-II. The appellant-assessee are engaged in the manufacture of cotton yarn and knitted fabrics. They were

earlier operating under 100% EOU scheme. Later they have applied for opting out of the scheme. The Jurisdictional Development Commissioner, Noida allowed the appellant-assessee to opt out of EOU scheme and to operate under EPCG scheme in terms of para 6.18 of Foreign Trade Policy. In the EPCG licence, list of textile and power plant machinery alongwith spare parts and their accessories were given. During the course of verification of records of the appellant-assessee, it was noticed that they have paid duty @ 3.09% on the capital goods and spares / accessories in terms of Notification No. 64/2008-Cus. dated 09.05.2008. It appeared that the appellant have not discharged correct duty on the capital goods/ spares parts procured indigenously. The case of the Revenue is that there is no specific Central Excise notification which provides exemption from payment of duty when cleared to unit availing EPCG scheme. The capital goods / spares parts which were originally procured duty free in terms of Notification No. 22/2003-CE dated 31.03.2003 while setting up of EOU, would have to be debonded in terms of para 8(1) of the said Notification.

2. Accordingly, the Revenue proceeded against the appellant-assessee, alleging short payment of Central Excise duty on indigenous capital goods/ spares parts/ accessories, during the course of debonding of EOU unit. Show cause notice dated 13.05.2009 was issued to the appellant-assessee to demand Central Excise duty of Rs.7,31,57,629/-. A demand of Rs. 22,26,129/- towards customs duty was also made in respect of imported spare parts alleging the same were not includible in the EPCG benefit. The appellant-assessee contested the demand. The original authority adjudicated the case resulting in the impugned order.

3. The original authority decided on the following issues:

Sl. No.	Issue	Duty demand	Effect of the O-I-O
1	Whether indigenously procured capital goods could be de-bonded under the EPCG scheme on payment of 3% duty instead of 14% excise duty.	Rs.6,63,54,420/-	Issue decided against the appellant and demand confirmed with interest.
2	(i) Whether depreciation is to be calculated based on rates prevailing on the date of debonding or on the date of receipt of the capital goods? (ii) Whether certain items (like fire control systems, water storage tank, etc.) fall under the definition of capital goods and eligible for depreciation?	Rs. 68,03,209/-	Issue decided in favour of the appellant and demand dropped.
3	Whether imported spare parts were included in the EPCG licence?	Rs.22,26,129/-	Issue decided in favour of the appellant and demand dropped.

The present appeal by the appellant-appellant is challenging the said OIO dated 29.03.2011 to the extent it is against them. The appeal filed by the department is challenging the findings given on issues 2 and 3.

4. Ld. Counsel for the appellant –assessee submitted that Notification No. 22/2003 as amended, provides that capital goods may be debonded under the prevailing EPCG scheme provided the unit has achieved positive NFE. There is no dispute about fulfilment of positive NFE by the appellant-assessee. Ld. Counsel submitted that the EPCG scheme permits import of capital goods @ 3%. Notification No. 22/2003-CE clearly stipulates that EOU may debond any capital goods in accordance with provision of Foreign Trade Policy. It necessarily follows, that the said debonding shall be made on payment of 3% duty only.

5. Even if the excise duty is to be paid @ 14.42% at the time of debonding, the appellant-assessee would have been eligible for taking credit of the same. Effectively, no revenue will accrue to the department. In case of such revenue neutrality the demand shall not survive. It is further contended that Notification No. 22/2003-CE is a self contained code for EOUs. Para 8 therein gives the procedure for debonding. Since the appellant-assessee fall clearly under the provisions of the said Notification, the extra duty liability as demanded by the lower authority is not sustainable.

6. Ld. Counsel also submitted that the Deputy Commissioner has issued a final debonding order and without reviewing the said order no further demand can be issued by the Commissioner. Further, it is also contended that EOU being a custom bonded warehouse is considered as a place outside India. As such, there is no reason for not charging customs duty for goods cleared in DTA.

7. Regarding the appeal filed by the Revenue, the appellant –assessee submitted that the original order was passed in terms of provisions of para 8 of Notification No. 22/2003-CE. The various items like fire control system, water storage tank etc. are to be considered as capital goods. The appellant-assessee relied on certain case laws in which this issue has been decided in their favour.

8. Ld. AR for the Revenue while opposing the submissions of the appellant-assessee submitted that the Commissioner erred in allowing the depreciation based on the rates, prevailing at the time of debonding. He should have followed the rates as prevailing on the date of receipt of capital goods. Further, it is also contended that certain items like fire fighting etc. cannot fall under the category of

capital goods, for depreciation. The imported spare parts were not to be included in the EPCG licence for concession.

9. We have heard both the sides and perused appeal records.

10. We take up appeal by the appellant –assessee first. The original authority held that there is no Notification granting concessional rate of duty to EPCG unit for procuring capital goods from DTA. He held that in case where EOU is debonded the same is required to pay, in respect of capital goods at the time of debonding, applicable customs duty @ 3.09% in cases where capital goods that have been imported and Central Excise duty @ 14.42% adv. in cases where capital goods were procured from indigenous units. The appellant-assessee contested the findings of the original authority on the ground that the debonding is done after following the stipulated procedure of the Foreign Trade Policy. Permission has been granted in terms of para 6.18 of the Foreign Trade Policy 2004-09. The relevant provisions of para 6.18 of Foreign Trade Policy is as below:

“(d) An EOU/EHTP/STP/BTP unit may also be permitted by Development Commissioner, to exit from the scheme at any time on payment of duty on capital goods under the prevailing EPCG Scheme for DTA Units. This will be subject to fulfilment of positive NFE criteria under EOU scheme, eligibility criteria under EPCG Scheme and standard conditions indicated in HBP v1”.

11. The contention of the appellant is that the Policy did not make a distinction between capital goods imported or procured from domestic sources. It was further contended that Notification No. 22/2003-CE dated 31.03.2003 is a self contained code for debonding of EOU and para 8 of the said Notification read with the above mentioned provisions of the Policy will make them entitled to pay concessional rate of customs duty on such capital goods and the Central Excise duty of 14.42% is not applicable to them. On careful examination of the legal provisions, we find

that the claim of the appellant-assessee is not supported by any exemption Notification issued by the Ministry of Finance. Para 8 of the said Notification stipulates that no such clearance or debonding of capital goods under EPCG Scheme of Chapter 5 of Foreign Trade Policy shall be allowed if the user industry has not fulfilled the positive NFE criteria at the time of clearance or debonding in terms of para 6.18 (d) of the Foreign Trade Policy. Thereafter, the procedure for such clearance and method of calculation of depreciation are mentioned in the said Notification. Admittedly, in the present case, the appellant-assessee are entitled for debonding as they have achieved positive NFE. Accordingly, debonding was permissible in terms of the said Notification. It is to be noted that Notification No.22/2003-CE is for providing exemption to goods brought into EOU. This Notification does not provide any exemption to the capital goods, spare parts etc. for supply under EPCG Scheme. We are in agreement with the original authority regarding absence of any exemption Notification covering the situation as explained above, to support the claim of the appellant-assessee for an exemption from Central Excise duty.

12. It should be noted that the Foreign Trade Policy is for enunciating the Policy of the Government with reference to export/import and trade promotion. Various schemes and procedures were stipulated under the Policy. The rates of duty applicable to any goods either manufactured in India, imported into or exported out of India are to be governed by specific tariff entries and notifications issued by Ministry of Finance who are incharge of tax collection on such goods. The rates applicable to any goods should have a clear legislative provision by way of rate in the tariff or by a supporting exemption notification. We note that no specific exemption Notification could be cited by the appellant-assessee to claim

exemption for the capital goods which are being debonded to avail EPCG Scheme. In such situation, we are not able to accept the claim of the appellant-assessee. We find no infirmity in the findings recorded by the original authority.

13. The appellant –assessee emphasised that the demand is not tenable as there is Revenue neutral situation resulting no addition to the Government revenue. We find that the concept of Revenue neutrality cannot be considered as a bar for non confirmation of tax dues, otherwise payable by the appellant –assessee. If that be so, then in many of the cases the appellant themselves can choose whether to pay duty on goods or services, when the credit is available; or to pay duty only on final product. Such discretion is not vested with tax payer. This is very much against the concept of value added taxation. The argument that the appellant-assessee need not pay duty as the same is available for credit is against the appellant-assessee's own case. If that is the position, there is no need to fight against the present demand. Apparently, the point of Revenue neutrality is being raised only to avoid interest payment as the duty has not been discharged in time. The concept of Revenue neutrality may have relevance in order to determine the malafide or bonafide intent of the assessee. The same cannot be pleaded for non payment of tax itself. Even the availability of credit itself is subject to various conditions in terms of Cenvat Credit Rules, 2004. The availability of such credit cannot be presumed in order to contest the duty liability of the appellant-assessee, which is in terms of applicable provisions of the Act and the Notification thereunder. We have perused case laws relied upon by the appellant-assessee. No general law has been laid down in these decisions to support the case of the appellant-assessee. The decisions are on the facts applicable to the said case.

14. The appellant-assessee also raised the point regarding final order being issued by the Deputy Commissioner and the present demand being not tenable in the absence of review of such final order. We are not in agreement with such assertion. We note that the debonding has been issued based on the submissions made by the appellant and relying on the permission granted by the licensing authorities for conversion into EPCG Scheme. Letter dated 16.05.2008 is for exit of the appellant-assessee from EOU Scheme. After detailed scrutiny of the documents of the appellant-assessee and various nature of items claimed to have been converted to EPCG Scheme, the present proceedings were initiated. We find no infirmity in such proceedings. Similarly, we find no relevance in the assertion of the appellant-assessee regarding EOU bonded area to be considered as being outside India. As already noted, we are dealing with debonding on EOU unit and the rate of duty applicable on the capital goods, spare parts etc. upon such debonding and conversion to EPCG Scheme. As such, we find no merit in the appeal filed by the appellant- assessee against demand for differential duty on capital goods as confirmed by the impugned order.

15. We have considered the appeal filed by the Revenue also. The Revenue is aggrieved on the rate of depreciation allowed for calculating the value of capital goods at the time of debonding. We note that the assessment has been made in terms of Notification No. 22/2003-CE which allowed conversion of EOU and procedure for treatment of capital goods. We find the Revenue in the appeal, seeks to apply the depreciation rate as applicable at the time of procurement of capital goods in terms of Notification No. 1/95-CE. We note that similar issue came for consideration before the Tribunal in ***Pudumjee Plant Laboratories Ltd. vs. CCE, Pune-III -2013 (295) ELT 593 (Tri. Mum)***. The Tribunal held that the rate of

duty on the depreciated value should be on the date of debonding under EPCG Scheme. We note that when the debonding is done in terms of Notification No.22/2003-CE, then the rates of depreciation as prescribed in the Notification has been correctly applied.

16. The Revenue also contested the inclusion of items like fire control system, water storage tank etc. in capital goods for the purpose of assessment. In this connection, we note that the original authority had examined the issue in detail. It was observed that in terms of para 9.12 of Foreign Trade Policy ‘capital goods’ covered various items. Para 9.2 of the Policy gave the scope of accessories. On careful consideration of these provisions as well as para 6.6.1 (b) of Handbook of Procedure of Foreign Trade Policy, the original authority concluded that the items like cord can, fire control system, water storage tank etc. will fall within the scope of “capital goods” as understood in the trade parlance. Accordingly, the original authority allowed depreciation applicable to capital goods and dropped the demand for differential duty on this account. We are in agreement with the reasons recorded by the impugned order.

17. Regarding, the spare parts and accessories procured from domestic sources and also imported, we find the original authority has recorded categorical reasons for extending the benefit to these items. The application dated 14.04.2008 filed by the appellant-assessee for EPCG authorisation gave details of various spares imported as well as procured locally. On analysis of the authorisation as well as nature of items as recorded in the impugned order, we are in agreement with the findings of the original authority regarding the eligibility of these items under EPCG Scheme. In the present appeal, the Revenue could not bring out any

substantial issue either in fact or in law to interfere with the finding of the original authority.

18. The Revenue also raised the point regarding non imposition of penalty under Rule 25 by the original authority. We have perused the impugned order on this aspect also. It is clearly recorded that the appellant-assessee have not breached any of the provisions of Rule 25 of Central Excise Rules, 2004 as they have not removed the excisable goods in contravention of any of the Rules. We find no reason to interfere with the categorical finding of the original authority. As such, we find no merit in the appeal filed by the Revenue.

19. In view of the above discussions and analysis, we find that the impugned order is as per law and same is to be upheld. The appeals filed by the appellant-assessee as well as Revenue are rejected.

(Pronounced on 06.06.2017).

(Anil Choudhary)
Member (Judicial)

(B. Ravichandran)
Member (Technical)

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