IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
New Delhi – 110 066.

PRINCIPAL BENCH – COURT NO. II

Excise Appeal No. 52311 of 2015-DB

(Arising out of Order-in-Appeal No. 146(SLM)CE/JPR/2015 dated 31.3.2015 passed by Commissioner (Appeals), Central Excise Commissionerate, Alwar)

M/s Mehta Stone Export House — Appellant
SP-1/6, RIICO Industrial Area,
Sotanala, Behror, Distt. Alwar.

Vs.

Commissioner of Central Goods & Service Tax, Customs & Central Excise, Alwar — Respondent
A Block, Surya Nagar, Alwar
(Rajasthan)

<u>Appearance :</u>

Ms. Priyanka Goel, Advocate - for the appellant

Shri H.C. Saini, DR - for the respondent

CORAM: Hon'ble Mr. Anil Choudhary, Member (Judicial)
Hon'ble Mr. Bijay Kumar, Member (Technical)

Final Order No. 50554/2019

Date of Hearing: 05/04/2019
Date of Decision: 26/04/2019

Per Bijay Kumar :

The present appeal has been filed against the Order-in-Appeal No. 146(SLM)CE/JPR/2015 dated 31.3.2015 passed by the learned Commissioner (Appeals), Customs, Central Excise & Service Tax, Jaipur by which the appellant's appeal was rejected while upholding the order passed by the lower adjudicating authority.

2. The issue involved in this appeal is that the appellant is Central Excise registrant engaged in the manufacture of Sand Stone Tiles and Slate Tiles falling under Chapter Sub-Heading 25162200 of the Schedule to the Central Excise Tariff Act, 1985. The appellant had filed a refund claim of Rs. 11,78,430/- in respect of differential duty paid by them under Notification No. 22/2003-CE dated 31.3.2012 as amended on the capital goods procured indigenously as against the duty payable @ 3.09%. The appellant is a 100% Export Oriented Unit and applied for debonding of the unit under the prevailing EPCG Scheme for Domestic Tariff Area (DTA) unit. The appellant's claim for differential duty claimed under the aforesaid notification was rejected by the competent authority while debonding the goods. Consequently, the refund application was also rejected along with the claim thereon.

3. Learned Advocate on behalf of the appellant submits that the appellant had procured the capital goods duty free in terms of Notification No. 23/2003 dated 31.3.2003 and has not paid the Central Excise duty as required to be paid by them at the time of debonding of their 100% EOU by claiming the benefit under prevailing Export Promotion Capital Goods Scheme for DTA units. The appellant, as per the direction of departmental authority paid the differential duty amounting to Rs. 11,78,433/-. Subsequently, the appellant filed refund of the aforesaid amount on the ground that the Development Commissioner, Noida, South Economic Zone, had permitted the appellant to clear the goods under the said EPCG Scheme and also accorded no objection letter dated 21.2.2012. The appellant had accordingly, submitted the EPCG

licence bearing No.0.30157692 dated 21.2.2012 and 0530157949 dated 21.3.2012 which was not agreed upon by the Central Excise officer. The Central Excise Officer although agreeing with the scheme of benefit of EPCG to the Domestic Tariff Area unit of 100% EOU, however, in absence any specific notification exempting the duty, as has been issued for the customs for the benefit of EPCG scheme, denied the benefit to the appellant.

3.1 Learned Advocate also relied upon the Notification No. 23/2003 which was amended by Notification No. 24/2008-CE dated 11.4.2008 which stated at paragraph 2 as under :

> (2) after the paragraph 8, before the clause (i), the following proviso shall be inserted namely:-
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> "Provided that no such clearance or debonding of capital goods under the Export Promotion Capital Goods Scheme of Chapter 5 of the 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 Foreign Trade Policy."

4. From the perusal of the above condition, it is evident that any unit which has obtained positive net foreign exchange earning gets entitled to benefit of EPCG scheme. Accordingly, it was prayed that the adjudicating authority as well as Commissioner (Appeals) has not followed the provisions and charged the Central Excise duty at the time of debonding is not as per the provisions of Central Excise Act. It was also prayed that the notification has to be given full effect without any addition or deletion of any portion therein.

5. Learned Advocate also submits that in any case if the appellant is required to pay the duty without the benefit of EPCG scheme, the entire duty paid at the time of debonding would be eligible for Cenvat credit under the provisions of Cenvat Credit

rules, which will make the entire exercise revenue neutral. In view of above the differential duty which has been collected from the appellant is not permissible within the Central Excise Act.

6. Learned Authorized Representative on behalf of the Revenue submits that the appellant has obtained capital goods duty free scheme meant for 100% EOU and hence at the time of debonding they are required to pay the applicable rate of duty in terms of Notification No. 25/2003 dated 31.3.2003. Further, he submitted that the Department has not issued any separate notification although insertion has been made in the Notification No. 23/2003-CE vide Notification No. 24/2008, has been issued under Central Excise Act as has been done in case of Customs Act, 1962 vide Notification No. 64/2008. Therefore, in absence of such exemption notification the benefit of EPCG Scheme as prescribed under Customs Notification No. 64/2008-Cus. dated 9.5.2008 can be extended to the indigenously manufactured goods at the time of their debonding by 100% EOU and migrating to EPCG scheme. Therefore, he submits that the impugned order does not suffer from any infirmity and required to be upheld in the appeal.

7. We have heard the learned Advocate on behalf of the appellant and learned Authorised Representative on behalf of the Revenue and also perused the appeal record.

8. The issue to be determined is as to whether the appellant is entitled for the benefit of EPCG scheme at the time of debonding of their unit while exiting from 100% EOU scheme. The appellant has applied for opting out of 100% EOU scheme with the Jurisdictional

Development Commissioner i.e. NSEZ, Noida in terms of para 6.18 of the Foreign Trade Policy on the payment of duty @ 3.09% in terms of EPCG scheme as notified under Notification No. 64/2008-Cus. dated 9.5.2008. The appellant has obtained necessary permission and No Objection Certificate from the Development Commissioner to that effect. In furtherance of their claim, the appellant has also produced two EPCG licence dated 21.2.2012 and 21.3.2012 in furthering of the Act. We find that similar issue has come up for consideration before this Tribunal in the case of **M/s Nitin Spinners Limited Versus CCE, Jaipur-II and (Vice-Versa)**, wherein it is held that the benefit of Notification No. 64/2008-Cus. is also available to the EOU at the time of their debonding in terms of para 8.1 of the said notification. Para 8 of the said order which is relevant is reproduced as under :

> "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."

9. As per the revenue neutrality is concerned, the same is also dealt in the said order at para 13 of the order which is reproduced as under :

> "13. The appellant-assessee emphasized 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 to 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."

10. In view of the above, we find that there is no infirmity in the impugned order and accordingly, we uphold the order passed by the learned Commissioner (Appeals) and dismiss the appeal.

(Pronounced in Court on 26/04/2019)

(Anil Choudhary)
Member (Judicial)

(Bijay Kumar)
Member (Technical)

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