

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD**

Division Bench
Court – I

Appeals Nos. C/22429 & 22430/2015

(Arising out of Order-in-Original No. GUN-EXCUS-000-COM-084-14-15-CUS dated 31.12.2014 passed by Commissioner of Central Excise & Service Tax, Guntur)

M/s Avanti Feeds Ltd.,

.....Appellant(s)

Vs.

**Commissioner of Customs, Central Excise
& Service Tax, Guntur**

.....Respondent(s)

Appearance

Shri Vikram Nankani, Senior Counsel, Shri Jitender Motwani, Shri Nand Lal, Shri B.V. Kumar, Advocates for the Appellant.

Shri V.R. Pavan Kumar, Superintendent (AR) for the Respondent.

Coram:

Hon'ble Mr. M.V. RAVINDRAN, MEMBER (JUDICIAL)

Hon'ble Mr. P. VENKATA SUBBA RAO, MEMBER (TECHNICAL)

Date of Hearing: 31/01/2019

Date of Decision: 13/03/2019

FINAL ORDER No. A/30329-30330/2019

[Order per: M.V. Ravindran]

These two appeals are directed against Order-in-Original No. GUN-EXCUS-000-COM-084-14-15 CUS/CE dt. 31.12.2014. One appeal filed by the appellant is against the demand of Central Excise duty, raised along with interest and penalties while another appeal is against demand of customs duty with interest and penalties. Since

both these appeals are against the very same Order-in-Original and arising out of common issue they are being disposed of by a common order.

2. Heard both sides and perused the records. The relevant facts that arise for consideration, after filtering out unnecessary details are, appellant was granted an approval as a 100% Export Oriented Unit under Letter of Permission department letter dated 28.06.1993 (herein after referred to as LOP) and was originally permitted to manufacture shrimp feed, falling under Chapter sub-heading No. 2302.00 of the Central Excise Tariff Act, 1985. Under the LOP, appellant was required to export the entire production of shrimp feed maintaining value addition of minimum of 61% as per formula w.e.f 01.04.1993. Due to various circumstances beyond his control, including poor market conditions etc., appellant sought an approval of the board for broad branding for licence to include processing and export of shrimp and prawns as new articles, the said proposal by the appellant was accepted by the board and by letter dated 25.11.1997, office of the DGFT amended original LOP broad banding to include processing of shrimp & prawns. Due to this appellant was required to maintain NFEP as 57% as against 61% as stipulated in the original LOP, and he was also required to achieve export turnover of USD 63.20 million in five years beginning after commencement of commercial production or from the date of executing fresh agreement as per the following schedule.

- a) 1st year USD 32,00,000
- b) 2nd year USD 120,00,000
- c) 3rd year USD 160,00,000
- d) 4th year USD 160,00,000
- e) 5th year USD 160,00,000

There was another amendment to the LOP was made on 24.02.1998 to include additional unit of the appellant at Gopalapuram, Ravulapalem Mandal as Export Oriented Unit. As per direction of the authorities appellant entered into new legal agreement dated 26.03.1998 with the President of India represented by Development Commissioner, Ministry of Commerce which indicated that the 5 year period for completing the export obligation was to commence from the date of execution of new legal agreement.

2.1 In the interregnum Revenue Authorities issued six show cause notices between 01.08.1999 to 31.03.2002 for the period 01.04.1994 to 31.07.1999 calling on them to show cause as to why various Customs and Central Excise duties foregone by the department be not demanded by alleging non fulfillment of export obligation and for non achievement of value addition as stipulated in original LOP. The said show cause notices were adjudicated by the Commissioner of Customs and Central Excise, found that appellant had applied and obtained extension of period up to 2003 for completing the export obligation, from the appropriate ministry and that there was no suppression of any information from the knowledge of department with evade duties. The Adjudicating Authority's orders were contested by the Revenue before the Tribunal and the bench at Bangalore by Final Order No. 135214/2004 dated 19.01.2004 dismissed the Departmental appeals and the proceedings have attained finality.

3. Parallely, Development Commissioner conducted its own proceedings for the period 01.11.1994 to 31.03.2001 and came to a conclusion that appellant had achieved negative NFEP; imposed

penalty of Rs. 5,00,000/- for failure to fulfill the stipulated/minimum export obligation and value addition for the aforesaid LOP. This order dated 03.05.2002 of the Development Commissioner has also attained finality as appellant has not preferred any appeal nor the departmental authorities have not done so.

4. Thereafter, appellant filed application dated 15.04.2003 seeking to exit from the EOU scheme stating that they have achieved NFEP as well as minimum export performance as stipulated under EXIM policy as on date and with the NFEP standing at 15.36% positive as on 31.03.2003 based upon provisional figures.

5. While the appellant's application for exit from EOU scheme was pending, the Revenue Authorities issued a show cause dated 18.07.2003 covering the period 01.08.1999 to 31.03.2002, demanding the central excise duty and the customs duty foregone alleging violation of conditions under Notification No. 53/97-Cus dated 03.06.1997 and the conditions of the legal undertakings/ agreements dated 15.12.1993 and 26.03.1998; insofar as domestic procurement is concerned, it was alleged that appellant had procured various raw materials as well as spares indigenously for the machinery installed for the duty free items, in terms of Notification No. 01/1995-CE for the period 01.04.1998 to 31.03.2002. The show cause notice demanded the customs duty foregone and the excise duty foregone as also interest, besides seeking to impose penalties.

6. During the pendency of the adjudication of show cause notice by the Departmental proceedings, the Development Commissioner issued the Final Exit Order from EOU scheme to

appellant, on 21.08.2003 holding that export performance of the appellant for the period 01.04.2000 to 31.03.2003 has been reviewed and found that appellant had achieved positive NFEP and fulfilled the export performance as was undertaken by them. The Respondent Department acting upon such Exit Order cancelled the customs bonded private warehouse license dated 09.02.1995, and In-bond manufacture sanctioned order dated 23.03.1995 and central excise registration bonding into the same. The Assistant Commissioner has also returned the B-17 Bond for Rs. 9 crores executed by the appellants and returned the Bank Guarantee for Rs. 45 lakhs given as security. It is an undisputed that the said order granting appellant an exit from EOU scheme holds that appellant had achieved positive NFEP and fulfilled the export performance as per the prescribed norms and such exit order has been accepted by both sides and has attained finality.

7. For the sake of completion of facts, it is required to be mentioned that customs and excise demands during period 01.08.1999 to 31.03.2002 was confirmed by the Adjudicating Authority in Order-in-Original No. 04/2008- CUS/CE (Commr.) dated 22.05.2008, which was appealed before the Tribunal and the Tribunal by Final Order dated 25.02.2014 remanded the matter back for denovo adjudication. In this appeal by the impugned order dated 31.12.2014 once again confirmed the customs and excise duties against the appellant.

8. Learned Senior Counsel Shri Vikram Nankani appearing along with Shri B.V. Kumar, Shri Jithendra Motwani advocates, argued that the short issue to be decided is whether there was any violation of conditions mandated in the Notification No. 53/1997-Cus and Notification No. 01/95-CE. He stated that jurisdiction of Respondent to demand duty only arose if there was any violation of conditions specified in the notifications. Learned Senior Counsel then took us through the various conditions mentioned in the notifications and submitted that in the present case none of the conditions as mandated in the above notification were violated by the appellant; it was also submitted that jurisdiction to demand duty only vested with the authorities under condition No. 6 of notification No. 53/1997-Cus to the extent that it is not proved to the satisfaction of the Assistant Commissioner that the goods imported have been used in the manufacture of articles or in connection with the production or packaging or job work for export of such articles or services out of India and admittedly it is not even the case of the Department that the goods imported/procured domestically were not used in the manufacture of articles exported or cleared for home consumption on payment of full duty. It is his submission that it is also undisputed that imported goods and domestically procured goods were used in the manufacture of articles exported or cleared for home consumption on payment of appropriate full duty. Learned Senior Counsel further submits that the Revenue Authorities do not have jurisdiction to simultaneously examine whether the export obligations was achieved or not. It was alternatively submitted that appellant had complete export obligation, as per the norms prescribed under EXIM policy,

which have been accepted and confirmed under Final Exit Order dated 21.08.2003 issued by the Development Commissioner. Thus, once jurisdictional Development Commissioner held that the appellant had achieved the export obligation and the minimum positive NFEP as required under EXIM policy, there cannot be that any violation of the conditions mandatory under the above said notifications. Learned Senior Counsel submitted that in the present case, para 9.5 of the EXIM policy 1997-02 requires that the unit shall be a net foreign exchange earner and minimum net foreign exchange earning as a percentage of exports is provided at para 9.29 and the minimum export performance provided at Appendix- I of the policy. He would further submit that sub-para (iii) of the Appendix-I of the policy mandates minimum NFEP to be achieved as positive NFEP and minimum export performance for 5 years needs to be USD 1 million or 5 times the CIF value of imported capital goods whichever is higher. It is his submission that NFEP to be achieved by the appellant was minimum NFEP which is as per the Exim policy at para 9.5 read with Appendix-I. It is his further submission that as a matter of fact that jurisdictional Development Commissioner was always considered the minimum NFEP and not the NFEP stated in the amended LOP, its order dated 21.03.2002 or its Final Exit Order. It is his further submission that when the jurisdictional Development Commissioner in accordance with the policy, as amended, has considered the minimum NFEP to be achieved as positive, Respondent does not have jurisdiction to consider NFEP under amended LUT by refereeing to para 9.29 of the handbook of procedures. The Respondent's findings in this regard are also against settled law that procedure cannot override provisions of

the policy; reliance is placed on the decisions of Hon'ble High Court of Madras in the case of *Hospira Vs. Development Commissioner [2016 (340) ELT 668 (Mad)]* which has held that object of the policy cannot be diluted or prevented by procedure, and that procedures are not run contrary to the substantive right in the policy that the same should be meant only for reaching the objective. He would cite other decisions on the similar provisions which as under:

1) *Development Commissioner Vs. Hospira [2017 (356) ELT 167 (Mad-DB)]* upholding the said decision

2) *Narendra Udeshi Vs. Union of India [2003 (156) ELT 819 (Bom.)]*

3) *Green Globe Trading Vs. Union of India [2016 (338) ELT 696 (Mad.)]*

He would mention that in view of this, the impugned order needs to be set aside.

9. The Learned Senior Counsel further argued that the Adjudicating Authority has erred by going into a detailed re-examination of the exports and imports of the appellant when the jurisdictional Development Commissioner had already decided the issue. It is his submission that even otherwise, the Adjudicating Authority has erred in computation of NFE and inasmuch as the Development Commissioner has expressly held same to be positive; emphasis was placed on appellants application for LOP dated 15.04.2003 which stated that NFE up to 31.03.2003 was positive up to 15.36%, submitting so, he handed over a chart showing the calculation of NFE for the period of dispute which shows the net NFE of

12%. Lastly Counsel argues that once Respondent Department has acted upon the Exit Order and de-bonded the unit, they cannot now revisit the entire issue and hold that there was suppression and misstatement of the facts. He relies upon the decision of the Apex Court in the case of *CC Vs. A.S. Moolubhoy* [2015 (318) ELT 576] and *CCE, Vs. Kothari Products* [2008 (229) ELT 12] in support of the proposition that in cases once units were de-bonded, the question of applying extended period of limitation does not arise. He would submit, similarly, in respect to excise duty demanded, final products have been cleared by paying full duty which was equivalent to the customs duty foregone and as such the question of confirmation of any duty on raw materials which were procured indigenously, does not arise. It was also his submission that appellant was entitled to the benefit of Notification No. 02/1995-CE however, since the duty was paid at full rate without claiming the exemption, they are not pressing this point. He finally submitted that on merits, like Notification No. 53/1997 –Cus, the Revenue Authorities have not indicated how appellant has contravened conditions of the Notification No. 01/1995 as amended, hence demand cannot be confirmed against the appellant.

10. On the other hand, Learned Departmental Representative reiterating the findings of the Adjudicating Authority in the impugned order, submits appellant has failed to meet minimum export obligation which is the violation of the terms of LOP, the LUT, the Exim Policy, the hand book of procedures, the conditions of the notifications. The Learned Departmental Representative submits that by not fulfilling the export obligations as per the terms of LOP, appellant had violated the

conditions of 4 of Notification No. 53/1997- Cus and condition (c) of Notification 01/1995- CE. The said condition 4 as submitted by the Learned Departmental Representative would read as under:

“(4) Importer exports out of India 100% or such other percentage, as may be fixed by the said board, of articles manufactured wholly or partly from the goods during the periods stipulated by the said Board or such extended period as may be specified by the said Board.”

Condition (c) under Notification 01/1997-CE reads as under:

“(c) Such user industry exports out of India, 100% or such other percentage as may be fixed by the said Board or the said committee, as the case may be, or such extended period as may be specified by the said Board or the said committee, as the case may be.”

11. Learned Departmental Representative submits that in view of the above provisions prescribed, the exemption to customs duties on goods imported by 100% EOU is subject to the conditions of EXIM policy including fulfillment of minimum export obligation prescribed and agreed upon; since failure to achieve the 57% NFE as required in the LOP fixed by the Board of Approvals, appellant is liable to pay the Customs & Excise duties. Learned Departmental Representative also placed reliance on the terms of the LUT which provide that in the event of failure to fulfillment export performance, appellant would be liable to penalty in terms of legal agreement or any other law for the time being in force; according to him LUT is related with the Department of the Revenue and has huge Revenue implications for the same and therefore violation of any of the conditions therein would give jurisdiction to the Revenue to demand Customs and Excise duties. Learned Departmental Representative relies heavily on the Development Commissioner's order dated 03.05.2002, which held

that appellant herein have failed to fulfill the stipulated/minimum Export Performance and achieved negative NFEP of (-) 129.38% for the first 5 year period of 01.11.1994 to 31.03.2000 and achieved negative NFEP of (-) 1.67% during the period 01.04.2000 to 08.03.2002. According to Learned Departmental Representative, Development Commissioner's order dated 03.05.2002 has attained finality and is in itself sufficient to establish that appellant had failed to fulfill the stipulated/minimum export performance; argues that Final Exit Order dated 21.08.2008 did not condone the non-fulfillment of export obligation / export performance for the earlier 5 year period and in fact reiterates the earlier Development Commissioner order dated 03.05.2002. He also argued that in any event Final Exit Order did not tone down the export obligation of USD 632,00,000 nor does it over-ride the legal agreement dated 26.03.1998 and the Final Exit Order considers only the performance of unit for the period 01.04.2000 to 31.03.2003. He would submit that insofar as re-examination of the exports and calculation of NFE are concerned, submits that the findings of the Adjudicating Authority has recorded the issue in detail i.e. Ravulapalem unit of the appellant cannot be treated as an EOU for the period 01.04.98 to 19.07.2001 and hence the FOB value of exports of Rs. 5208.73 lakhs cannot be treated as EOU exports. It was also argued that appellant only had permission for DTA sales of Rs. 57.89 crores they have made DTA sales of Rs. 263.51 crores which are in violation of para 9.9 (b and e) of the EXIM policy 1997-2002, para 9.24 of Handbook of procedures and guidelines prescribed in Appendix-42 of the Handbook (volume 1) read with condition No. 5 of the legal agreement dated 26.03.1998 and condition

No. 4&7 of the Notification No. 53/97-Cus and condition No. 1(c) of Notification No. 1/95-CE. On limitation, it is his submission that since the show cause notice dated 18.07.2003 was issued prior to de-bonding, the contention that consequent to de-bonding of warehouse, further demand raise is not correct, show cause notice is demand of foregone duty of customs and excise and raw materials, whereas on de-bonding duties involved on the capital goods and the final products and the raw materials laying in stock are takes care of.

12. Both sides have filed detailed synopsis, submissions in which have been comprehended herein above. We considered the arguments made by both sides and as also the synopsis made by both sides and perused the records.

13. It is significant to note that Learned Departmental Representative submits in synopsis, additionally submitted that the examination of fulfillment of export obligation by the appellant can only be made after completion of 5 years review period or after premature exit from 100% EOU scheme. Accordingly to him, 5 years review period is from 01.04.2000 to 31.03.2005; alternatively the period of review is in respect of the pre-mature exit is of 01.04.2000 to 31.03.2003. Simultaneously, Learned Departmental Representative states that the relevant 5 year period for review is to be counted from such date. Therefore, by any count i.e. either by calculating 5 years from date of revised legal agreement dated 26.03.1998 or taking the 5 years review period from 01.03.2000 (i.e. after the review period 01.11.1994 to 31.03.2000) taken by Development Commissioner in his order dated 03.05.2002 the demand could have been crystallized

only subsequent to 31.03.2003 or after 31.03.2005 and not before. According to the Departmental Representative, aforesaid clearly established the show cause notice was within the period of limitation, it is further submitted that the Hon'ble CESTAT is not the appropriate forum to decide whether in the Ministry of Commerce, the Handbook of procedures prevails over EXIM policy or vice versa.

14. On careful consideration of the submissions made by both sides, we find that the entire issue is regarding whether the adjudicating authority has jurisdiction to examine as to whether appellant has fulfilled export obligation by achieving minimum positive NFE or not under Notification No. 53/97-Cus and 01/95-CE or otherwise. We find that the above issue goes to the root of the dispute, as in the impugned order the adjudicating authority has re-examined the issue whether the export obligations have been met by the appellant in terms of amended LOP & LUT dated 26.03.1998 and has separately concluded that appellant has achieved negative NFEP. According to the appellant jurisdiction to the respondent comes into question only when any of the conditions have been violated on the other hand respondent submits that non fulfillment of export obligation as stipulated by the 100% EOU by the board is itself a violation of the conditions and hence jurisdiction has been correctly exercised.

15. In order to come to a correct conclusion, it is necessary that the relevant Notification No. 53/97-Cus needs reproduced which is as under:

Notification: 53/97-Cus. dated 03-Jun-1997

“Exemption to specified goods imported for production of goods for export or for use in 100% Export-Oriented Undertakings — New scheme — Notification No. 13/81-Cus. rescinded

In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), the Central Government being satisfied that it is necessary in the public interest so to do, hereby exempts goods specified in the Table below (hereinafter referred to as the goods), when imported into India for the purpose of manufacture of articles for export out of India, or for being used in connection with the production or packaging or job work for export of goods or services out of India by hundred per cent Export Oriented Units approved by the Board of Approvals for hundred per cent Export Oriented Units appointed by the notification of the Government of India in the Ministry of Industry, Department of Industrial Policy and Promotion for this purpose, (hereinafter referred to as the said Board), from the whole of duty of customs leviable thereon under the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) and the additional duty, if any, leviable thereon under section 3 of the said Customs Tariff Act subject to the following conditions, namely :-

- (1) The imports, clearance, export, transfer and usage of the goods and goods manufactured therefrom and the net foreign exchange earning as a percentage of export shall be subject to the conditions of the Export and Import Policy - 1st April, 1997 to 31st March, 2002 notified by the Government of India under the Ministry of Commerce Notification No. 1/97, dated the 31st March, 1997 (hereafter referred to as the said Export and Import Policy).
- (2) The importer has been granted necessary licence for the import of the goods for the said purpose.
- (3) The importer carries out the manufacture, production, packaging or job work or service in Customs bond and subject to such other conditions as may be specified by the Commissioner of Customs in this behalf.
- (4) Importer exports out of India 100% or such other percentage, as may be fixed by the said Board, of articles manufactured wholly or partly from the goods during the period stipulated by the said Board or such extended period as may be specified by the said Board.
- (5) Where it is shown to the satisfaction of the Assistant Commissioner of Customs that the said unit has been allowed by the Development Commissioner or the said Board to clear any of the said goods for being taken to any other place in India in accordance with the Export and Import Policy.
 - (a) such clearance of capital goods, material handling equipment, office equipment and captive power plants may be allowed on payment of an amount equal to the customs duty leviable on such goods on depreciated value thereof and the rate in force on the date of payment of such duty;
 - (b) such clearance of goods (including container, suitable for repeated use) other than those specified in clause (a), may be allowed on payment of customs duty on the value at the time of import and at rates in force on the date of payment of such customs duty;

(c) such clearance of used packing materials such as cardboard boxes, polyethylene bags of a kind unsuitable for repeated use may be allowed without payment of any customs duty.

Provided that the importer shall not be eligible to avail of the exemption applicable to goods falling under heading No. 98.01 of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975), or the exemption available to imported goods under the Export Promotion Scheme other than the Export Promotion Capital Goods Scheme permitting import of capital goods at the rate of duty of 10% *ad valorem* in terms of notification in force at the time of debonding.

Explanation. - The depreciation in respect of goods covered by clause (a) shall be allowed for the period from the date of commencement of commercial production of the unit or where such goods have been imported after such commencement, from the date such goods have come into use for commercial production, up to the date of payment of duty.

(6) The importer executes a bond in such form and for such sum and with such security or surety as may be prescribed by the Assistant Commissioner of Customs, binding himself to fulfil the export obligations and conditions stipulated in this notification and in or under said Export and Import Policy and to pay on demand an amount equal to the duty leviable on the goods as are not proved to the satisfaction of the Assistant Commissioner of Customs to have been used in the manufacture of articles or in connection with the production or packaging or job work for export of goods or services out of India.

(7) Notwithstanding anything contained in this notification the exemption herewith shall also apply to goods which on importation into India are used for the purpose of manufacture of articles within hundred per cent Export Oriented Unit and such articles (including rejects, waste and scrap material arising in the course of manufacture of such articles) even if not exported out of India, are allowed to be sold in India, in accordance with the Export and Import Policy, on payment of duty of excise leviable thereon under section 3 of the Central Excise Act, 1944 (1 of 1944) or where such articles (including rejects, waste and scrap material) are not excisable, on payment of customs duty on imported goods used for the purpose of manufacture of such articles in an amount equal to the customs duty leviable on such articles, as if imported as such.

(8) The Commissioner of Customs may permit the goods imported into India or goods partially processed or manufactured or packaged therefrom to be taken outside the hundred per cent Export Oriented Unit concerned temporarily without payment of duty for the purposes of test, repairs, refining, processing, display, job work or any other operation necessary for manufacture of final product and return to the same unit subject to such conditions and limitations as may be specified by him in this behalf.

(9) The Assistant Commissioner of Customs may allow supply or transfer of goods imported by or received from, a hundred per cent Export Oriented Unit or articles manufactured by such unit to another hundred per cent Export Oriented Unit or to a unit in Free Trade Zone or Export Processing Zone for the purpose of further manufacture and export or for export or for use in the said unit, subject to such conditions and limitations as prescribed by him.

(10) The Development Commissioner may, subject to such condition as he may prescribe, permit a unit to re-export the goods.

(11) Where the whole of the process of manufacture by a unit is not possible to be undertaken in bond, the Commissioner of Customs may, subject to such conditions as may be imposed by him, allow such unit to undertake such of the processes, as necessary, in customs bond.

(12) The Assistant Commissioner of Customs may, subject to such conditions as he may prescribe, permit destruction of reject, waste and scrap material without the payment of duty, within the hundred per cent Export Oriented Unit or outside the said unit where it is not possible or permissible to destroy the same within the said unit.

(13) Notwithstanding anything contained in this notification, the exemption contained herein shall also apply the spares and consumables, other than those specified in the Table below, to the extent of 1.5% of the ex-factory value of articles manufactured for export out of India by the undertaking during the preceding year or such percentage in excess thereof as the Central Government may in each individual case allow having regard to the recommendation made in this behalf by the said Board of Approvals for hundred per cent Export Oriented Unit for the purpose of supply of such spares and consumables with the export articles for after-sale-service subject to the condition that such supply is specifically stipulated in the relevant export contract and the Assistant Commissioner of Customs is satisfied that the value of such spares and consumable has been included for arriving at the value addition as required under said Export and Import Policy.”

On perusal of the above reproduced notification in its entirety, we find that the Central Government grants exemption from customs duty to goods imported into India for the purpose of manufacture of articles for export out of India, or for being used in connection with the production, packing or job work for export of goods or services out of India by 100% an EOU, as notified by the Board under Ministry of Industry, Department of Industrial Policy and promotion, subject to the conditions specified therein.

Under condition No. 1 it is seen that the imports, clearance, export, transfer and usage of the goods and goods manufactured there from and the net foreign exchange earning as a percentage of export is

subject to the conditions of the EXIM policy as notified by the Government of India under the Ministry of Commerce.

Under condition No. 2 the importer has requisite licence for the import of the goods.

Under condition No. 4 importer exports out of India 100% or such other percentage, as may be specified by the said Board in the time as stipulated or as extended by the Board.

Under condition No. 7 the importer may clear such goods manufactured within EOU into DTA in accordance with the provisions of the EXIM policy and subject to payment of excise duties, in the event of excise duty being nil, then the importer is required to pay customs duty on the imported goods equivalent to the customs duty payable as if the articles manufactured are imported. On holistic reading of notification in its entirety we find that the appellant is required to import and fulfill the export obligation as required under EXIM policy. As to whether the conditions required fulfillment of export obligations as per EXIM policy, the jurisdictional authority for determining such obligation has been achieved or not, is also authority under the EXIM policy. In our view, once jurisdictional Development Commissioner has concluded that the export obligation has been fulfilled, the conditions of the notification also stands fulfilled and the adjudicating authority cannot separately embark into ascertaining the same, without challenging the findings of the Development Commissioner. This our view fortified by the decision of the Tribunal in the case of *Commissioner of Customs & Central Excise, Guntur Vs. Vijaya Shrimp Farms Ltd.*, [2014 (300) ELT 564] (refer para 6).

16. We note that the Department was in appeal before the Tribunal in the case of *Vijaya Shrimp (supra)*, the decision is maintained by the Apex Court as reported at [2015 (317) ELT A156] and similar views has been expressed by the Tribunal in the case of *CCE Vs. Positive Packaging* [2008 (224) ELT 100] (read paragraph 7). The above said view of the Tribunal in the case of *Positive Packaging* has also been upheld by the Hon'ble Hight Court of Bombay in reported at [2010 (253) ELT A112].

17. Learned Departmental Representative sought to distinguish the above precedent cases on the basis that in those cases Development Commissioner had condoned the shortfall in export obligation as sought for by the assessee therein, whereas in the case in hand no specific condonation has been given. We find that the aforesaid submissions of DR, will not carry the case of the revenue any further, as to determine whether the export obligation has been met with or not the authority is vested with the development commissioner. We find that the development commissioner has clearly that in the final exit order dated 21.08.2003 that the unit has achieved positive NFEP and fulfilled the export performance as per the prescribed norms, the said final exit order is reproduced:

GOVERNMENT OF INDIA
MINISTRY OF COMMERCE & INDUSTRY
OFFICE OF THE DEVELOPMENT COMMISSIONER
VISAKHAPATNAM SPECIAL ECONOMIC ZONE
 Administrative Building, Duvvada
 VISAKHAPATNAM – 530046

No. 8/EOU/QPR-69/VSEZ/2003
 2003.

Dated the 21st August,

FINAL EXIT ORDER FROM EOU SCHEME

Whereas M/s Avanti Feeds Limited, G-2, Concorde Apartments, 6-3-658, Somajiguda, Hyderabad-500082 have been granted approval under 100% Export Oriented Scheme vide Letter of permission NO. PER: 264 (1993)/EOB/245/93 dated 28.06.1993 to set upan EOU at Kovvur, West

Godavari District for manufacture of Shrimp Feed and the same has been amended vide letters No. E.O. 245/93 dated 25.11.1997 & dt. 24.02.1998 for undertaking processing of Shrimps and Prawns at the additional location at Gopalapuram, Ravulapalem Mandalam, East Godavari District, Andhra Pradesh.

copies to the concerned Asst. Commissioners of Customs & Central Excise, wherein it was stipulated that final exit letter will be issued by the Development Commissioner, VSEZ subject to the compliance of the following conditions by the said unit:-

a) Applicable customs and excise duties shall be paid, on the imported and indigenous capital goods, raw materials, components, consumables, spares and finished goods in stock. The unit may be allowed to dispose of raw materials, components, consumables etc., against duty free licenses. The unit also be permitted to export the CG, raw material/components etc. The unit should pay the differential duties on the advance DTA sales availed so far and remain unadjusted.

b) The penalty imposed by the appropriate authority, under the Foreign Trade (Development and Regulation) Act, 1992 for non-fulfillment of the conditions of approval, would have to be paid. In case an appeal against the order-imposing penalty is pending, de-bonding would be considered if the unit has obtained a stay order from Competent Authority and has furnished a Bank Guarantee for the penalty adjudicated by the Jt. DGFT/Addl. DGFT unless the appellate authority makes a specific order exempting the unit from this requirement.

c) In case the unit has failed to fulfil the terms and conditions of LOA and penal proceedings are to be taken up (or) are in process in the Office of the DGFT, a legal undertaking for payment of penalties, that may be imposed, would have to be executed with the concerned Development Commissioner.

d) EOU units wishing to continue operation in the DTA need to comply with the industrial, locational, environmental or other laws, rules and regulations in force in the DTA units.

Whereas the aforementioned unit Vide their letter dated 20th August, 2003 had informed that they have complied with the conditions for exit from EOU scheme as stipulated in this office 'in principle' permission letter dated 8th May 2003 and requested for issue of Final Exit Order from EOU scheme.

Whereas the Assistant Commissioner of Central Excise, Eluru Division, Narsimha Rao Pet, Eluru vide his letter No. V/5/21/2003-EOU dated 31.07.2003 has informed that no Excise Duties / Customs Duties are pending realization from M/s Avanti Feeds Limited, Kovvur (Shrimp Feed Plant) and has stated that the unit had given indemnity bond with surety as insisted by them to protect/safeguard the interest of revenue against the appeal filed by them and the show cause notices pending decision of the tribunal/ Commissioner.

Whereas the Assistant Commissioner of Central Excise, Kakinada Division, Kakinada vide his letter No. VIII/48/13/2002-Tech. Dated 13.08.2003 has informed that M/s Avanti Feeds Limited, Gopalapuram (Shrimps and Prawns Processing plant) has paid the applicable customs and excise duties on 13.08.2003 and no dues are pending realization from the unit.

Whereas the export performance of the unit for the cumulative period from 01.11.94 to 31.03.2001 has been reviewed as per monitoring guidelines and after having found that the unit had achieved negative NFEP, the unit had been issued Show Cause Notice under Foreign Trade (Development & Regulation) Act, 1992 and the case has been adjudicated and imposed a fiscal penalty of Rs. 5,00,000/- by the Development Commissioner, VEPZ. The unit has already paid the said penalty amount on 08.05.2002. Govt. Of India,

Ministry of Commerce & Industry has already declared the year 2001-02 as Blank year.

The export performance of the unit for the period from 1.4.2000 to 31.03.2003 has been reviewed adding together the performance of Feed plant at Kovvur and Shrimp Processing plant at Gopalapuram being an integrated EOU covered under single Letter of Permission and also keeping in view of the year 2001-2001 being declared as Blank year as per Govt's Order and found that the unit has achieved Positive NFEP and fulfilled the Export Performance as per prescribed norms. Hence, no penal action is due to be taken against the unit under FT (D&R) Act, 1992.

Now therefore the said M/s Avanti Feeds Limited covered under Letter of Permission No. 264/1993/EOB/245/93 dated 28.06.1993 as amended vide E.O 245/93 dated 25.11.1997 and 24.2.1998 is hereby allowed Final Exit from 100% EOU scheme, with immediate effect under Para 6.20 (a) of current Exim Policy.

The Green Card No. 020 dated 22.12.1993 valid up to 31.10.2003 issued to M/s Avanti Feeds Limited under 100% EOU Scheme is hereby cancelled with immediate effect.

(P. RAMESH KUMAR)
DEVELOPMENT COMMISSIONER

18. It can be seen from the above reproduced final Exit Order, the Development Commissioner has specifically held that appellant has achieved positive NFEP and fulfilled its export obligations as per the prescribed norms. This finding has not been challenged and attained finality. Though the Customs Authorities do not have jurisdiction to decide whether an assessee has fulfilled the export obligation, the Development Commissioner considered the provisions of the policy as applicable during the relevant period as it arrived at a definitive conclusion that the appellant has achieved positive NFEP and fulfilled its export obligations. In the above circumstances, we find that it cannot be held that appellant has violated any of the conditions of the notifications.

19. We are also in agreement with the submissions made by the Learned Senior Counsel that jurisdiction to demand duty under Notification No. 53/1997-Cus arises in cases whether there is an allegation of diversion of imported goods and the same not utilized in

the manufacture of articles as provided at condition No. 6 of notification, allegations which are absent in the case in hand.

20. Another point which has been raised by the Learned Departmental Representative is that the final exit order is for the period 01.04.2000 to 31.03.2003, whereas if entire five year period is taken into account, it would demonstrate that appellant had achieved negative NFEP as found by the Adjudicating Authority. We are not in agreement with the aforesaid contention. We find that para 9.29 of the condition 97/2002 (para 6.22 of the exim policy) NFEP shall be calculated annually and cumulatively for the period of 5 years from the commencement of commercial production according to the formula given in the handbook. In the 5 year period is admittedly from the period the fresh LUT was executed by the appellant which were on 26.03.1998, the 5 year period therefore was until 26.03.2003. The show cause notice however, was for the period 01.08.1999 to 31.03.2002 i.e. only for a portion of a total period. Non-fulfillment of export obligation/negative NFEP of the total period was never alleged in the show cause notice, thus in the absence of allegation of non fulfillment of export obligations/achievement of requisite NFEP for the entire period, adjudicating authority could not have given any such finding or reasoning to that effect. We may note that the appellant had provided calculation of NFEP achieved for the period 01.04.1999 to 31.03.2002 which cumulatively which shows that positive NFEP 12.36% achieved this has not been disputed by the Revenue.

21. In any case, we find that the re-computation of the NFEP by the Adjudication Authority is without any jurisdiction, especially

when the Development Commissioner has found that minimum NFEP and minimum export obligations met. Even otherwise, minimum NFEP calculated by the Adjudicating Authority after the exports at Gopalapuram Mandal have excused. We find that the Development Commissioner in final order has considered the proceeds from both the units, the adjudicating authority could not have re-computed the same after excluding the proceeds from one of the unit, this is especially so when development commissioner expressly considered its earlier order dated 03.05.2002 while holding that appellant has achieved net positive NFEP.

22. We have to note that above finding of the Development Commissioner is within the parameters laid down in the exim policy. Under para 9.5 of the exim policy 97/02, it is mandated that the unit shall be net foreign exchange earner and minimum NFEP calculated in para 9.29 and shall be as specified in Appendix-1 of the policy. Appendix-1 of the policy provides that minimum NFEP as positive and minimum exports performance is USD 1 million or 5 times the CIF value of imported capital goods whichever is higher. Thus finding in the exit order that appellant had fulfilled the export obligation and achieved requisite in NFEP, can be stated as in accordance with the exim policy. Learned Departmental Representative has strenuously argued that in para 9.2 of the procedures, Appendix -1 of the policy only indicate minimum level to be achieved, but does not preclude the Board of the Approval or the Development Commissioner from prescribing a higher percentage when warranted, it was also argued that final exit order does not condone the shortfall in the net NFEP achieved. We do not find much force in these submissions, as at the

first instance that we are of the view that condition to prescribe higher percentage of the NFEP in handbooks of the procedure, it is settled law that in the event of discrepancy between the policy and procedure the policy shall prevail. The above view of single judge was upheld by the Division Bench of Hon'ble High Court of Madras in the case of *Hospira V. Devp Commr.* (supra) (para. 33). The view of the Madras High Court was upheld by the Madras High Court by Development Commissioner preferred an appeal to the Division Bench as reported at [2017 (356) ELT 167 (Mad. DB)] we are therefore of the view, the minimum NFEP as prescribed in policy will take precedence NFE prescribed in Handbook of Procedures. We may note in the present case, even the development commissioner has not considered the percentage of prescribed in the LUT, in its 03.05.2002 order which has been strongly relied upon by the Learned Departmental Representative.

23. All the other decisions relied upon by the Learned Senior Counsel are equally applicable in the present case. In any event that the Board of Approvals, the Development Commissioner has the power to fix higher percentage, under para 9.37 (viii) the Development Commissioner power to proposal for revision of NFEP/EP upward or downward up to the minimum NFEP/EP as prescribed in Appendix –1. Relevant portion of para 9.37 (viii) is reproduced below:

“viii) Change in NFEP/EP: To approve proposals for revision of NFEP/EP upward or downward upto to the minimum NFEP/EP as prescribed in Appendix 1 of the Exim Policy and also subject to the provisions of para 9.21 of this Handbook. If such revision is sought before completion of the approved five year period, the revised norms shall be applicable for the remaining bond period only.”

24. In the present case, we find that the appellant vide a specific application dated 15.04.2003 has sought exit from EOU scheme stating that it had achieved positive NFEP and minimum export performance as stipulated under the EXIM policy as on date. In our view, Development Commissioner has examined the same and found that the appellant had achieved net positive NFEP and fulfilled the export obligations under the EXIM policy read with the handbook of procedures. Thus the findings of the Development Commissioner that appellant has achieved minimum NFEP and minimum export obligation, is in exercise of his powers under the EXIM Policy and as to be accepted by the authorities.

25. Insofar as the excise duties are concerned, we note that condition (1) (c) alleged to have been breached by appellant under notification No. 1/95-CE is similar to condition (4) of notification 53/97-Cus. We already found in the present case that jurisdictional Development Commissioner has definitively held that appellant had achieved the requisite NFEP and export obligations as per the prescribed norms under the EXIM policy and hence findings in respect of adhering to the conditions Notification No. 53/1997 are equally applicable in the case of demand of excise duty for same reasons, the demand cannot be sustained.

26. Moreover, it is note worthy to mention here that in the present case, appellant has paid applicable central excise duty under the proviso to Section 3(1) of the Central Excise Act, 1944, equivalent, customs duty which would have been payable on imports of like articles. In view thereof, once the full duty has been paid by the assessee, the question of demanding duty on raw materials

indigenously procured does not arise as same has been made good while discharging the duty on the final products. Our this view is fortified by the settled precedent cases, that in the event of there being DTA clearances a 100% EOU which are in excess of DTA quota and without permission of the Development Commissioner, such clearances will attract full rate of duty in terms of proviso to Section 3(1) of the Central Excise Act, 1994 as held by the Hon'ble Delhi Tribunal in the case of *EON Polymers Ltd.*, [2010 (258) ELT 225].

27. We also note and accept that there is no loss to the Revenue in the entire case in as much, it is a matter of record that shrimp feed and prawns feed is exempt from excise duty, whereas appellant has paid equivalent to customs duty making appellant's products more expensive than the similar product produced by a DTA unit. It is also pertinent to mention that as against the customs duty foregone on import of raw materials and spares, excise duty allegedly foregone on domestic procurements, is more or less equivalent to the excise duty equivalent to customs duty paid by the appellant, this apart, appellant has fulfilled the export obligation as held by the Development Commissioner. Thus in our view, there could not have been any revenue loss.

28. Both sides argued on limitation as to whether the show cause notice as time barred or not. We find that there could not have been any suppression or mis-statement of facts when it is held that there was no evidence of suppression or mis-statement in the orders dated 12.10.1999. The Adjudicating Authority in paragraph No. 8.4 has held so which is reproduced:

"8.4 I now turn to examine the issue relating to imposition of penalty under Section 28AB of the Customs Act, 1962. M/s. AFL executed a legal agreement with the Development Commissioner, VEPZ, Visakhapatnam on 15.12.93 which was in force till 14.12.98. Again they executed a revised Legal Undertaking on 26.03.98 with the said Development Commissioner, VEPZ, Visakhapatnam. They obtained extension of time up to 2003 AD from the Ministry of Industry E.O.245/93 dated 25.11.97 to work as 100% EOU. They are now covered by broad-banding facility to redeem the export obligation and to achieve the value addition. They also commenced export of processed shrimps in order to fulfill the export obligation. They never suppressed any information from the knowledge of the Department with a view to evade payment of Customs duty. In view of the above factual position, there is no case for imposition of penalty under Section 28AB of the Customs Act, 1962."

29. The Department was in appeal challenging the above order, before the Tribunal. The Tribunal finally upheld the order dated 12.10.1999 dismissed the appeal on 19.01.2004, in such conditions neither the show cause notice nor the Order-in-Original in question shown any different circumstances that demonstrate that the appellant had suppressed any information with a view to evade taxes. We are of the view that in any event allegation of suppressions with intention to evade duty cannot be upheld in the given facts and circumstances of this case.

30. In view of the foregoing, we uphold the demands for the customs duty and excise duty in the impugned order are unsustainable and liable to be set aside and we do so. The impugned orders set aside and the appeals stands allowed.

(Order pronounced in open court on 13/03/2019)

P. VENKATA SUBBA RAO
MEMBER (TECHNICAL)

M.V. RAVINDRAN
MEMBER (JUDICIAL)

Lakshmi....