

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI**

CUSTOM APPEAL NO.610/2010

(Arising out of Appeal No. PI/VSK/82/2010 dated 20.05.2010 passed by the
Commissioner of Central Excise (Appeals), Pune – I, Commissionerate.)

M/s. Fontasey Engineering Exports Pvt. Ltd. : Appellant

I/3/4/5 J N. Industrial Estate,
Pirangut, Tal Mulshi,
Pune 412 108

VS

Commissioner of Central Excise, Pune I, : Respondent

Commissionerate,
ICE House, Sasoon Road, Opp. Wadia College,
Pune 411 001

WITH

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Appearance

Shri V S Apte, Advocate for Appellant

Shri Bhushan Kamble AC (A.R) for Respondent

CORAM:

Hon'ble Dr. D.M. Misra, Member (Judicial)
Hon'ble Shri P Anjani Kumar, Member (Technical)

ORDER NO. A/87020-87021/2019

Date of hearing : 10.05.2019
Date of decision : 07.11.2019

Per : P Anjani Kumar, Member (Technical)

The Appellants, M/s. Fontasey Engineering Exports Pvt Ltd, are 100% EOU, are engaged in the manufacture of "Arcticooler Assely" and parts thereof falling under Chapter 84 of the CETH. The appellants had imported capital goods namely CNC Lathe Machine in the year 2000 under the EOU scheme; the appellants removed capital goods to DTA and EPCG license holders, during August – September 2003, on payment of concessional rate of duty @5% under EPCG scheme. Revenue alleges that proper procedure, under Section 62 and 68 of the Customs Act, 1962, was not followed and goods were removed in contravention of Section 72(1)(a) and Section 72(1) (d) of the Customs Act, 1962 and without the permission of the Development Commissioner SEEPZ, Mumbai and without execution of the Bond; benefit of Notification No.52/2003-Customs dated 31.03.2003, is not available and duty ought to have been paid Customs Duty @ 25% CVD 16% SAD 4%; appellant did not file an Ex-bond Bill of Entry; but calculated depreciation @ 16%, 12% and 10% over the years; there was short levy to the tune of Rs.9,57,934 and Rs 3,86,642. Revenue issued SCNs which were confirmed by the original authority and upheld by Commissioner (Appeals). Hence, these appeals No C/610/10 and C/6111/10.

2. Learned Counsel for the appellants submits DC/AC can permit the clearance of capital goods can be cleared subject to such permission of the Development Commissioner, in terms of Notification No.53/97-Customs dated 3.6.1997 and 87/2004 Customs dated 6.9.2004; the appellants submitted a letter, dated 22.4.2003, on 29.5.2003; as per EXIM Policy and relevant Customs Notifications, the depreciation rates were unchanged for the block 1997 – 2002 and 2002 – 2007; depreciation rates allowed as mentioned therein in the notifications. He further submits that in terms of Para 6.16, permission is required only when duty is not required to be paid; as the appellant cleared the surplus/absolute goods with the payment of appropriate duty, no permission of Development Commissioner was required; When the appropriate duty is paid and invoice under Rule 11 of CER, 2002 is made the Ex Bond Bill of Entry before the clearance is not required to be submitted He relies upon :

- (i). Commissioner of Trade TAX, U.P V/s M/s. Kajaria Ceramics Ltd
2005(191) ELT 20 (S.C.)
- (ii). IFGL Refractories Ltd V/s Jt. DGFT 2001(132) ELT 545(Cal.) (it was held that when the Law and Policy offer various alternatives benefits it is the assessee option to chose the one which give him maximum advantage.
- (iii). STP Limited V/s Collector of Central Excise, Patna 1998(97) ELT. 16(SC) (in case of any doubt in the construction of any provision of a texturing statute, the same must be resolved in favour of the assessee).
- (iv). Reply given by Chief Commissioner , during in House Meeting

organized by Customs and Central Excise, Pune Zone dated
23.03.2010.

3. Learned AR, for the department, submits that appellants imported capital goods namely CAN Lathe Machines vide Notification No.53/97-Cus. Dated 03.06.97, during the year 2000, when the EXIM policy 1997-2002 was in force; the goods were imported at concessional rate of duty in their capacity as an EOU unit and were warehoused in terms of Section 68 of the Customs Act, 1962. The procedure in this case was prescribed by Customs Notification No.53/97 dated 03.06.97; Foreign Trade Policy 1997-2002 was in force; as per condition No.5 of the said notification, in terms of Para 9.19 of the Import Export Policy 1997-2002, permission of the Development Commissioner was required, which was not sought; request letter dated 12/12/2003 was sent to the Development after the sale of the Capital goods. Further, condition No.5(a) of the said Notification provides for discharge of Customs duty at a depreciated value which would require an order of assessment to be passed by the proper authority after the filing of a Bill of Entry. Such a requirement is mandated under Section 68 of the Customs Act, 1962; the Appellant should have discharged the appropriate Customs duty in terms of the Section 68 of the Customs Act, 1962 read with condition no.5(a) of the Customs Notification No.53/97-Cus dated 03.06.97 and Para 9.19 of the Import Export Policy 1997-2002.

3.1. Learned AR further submits that the allegation of suppression of facts has also got merit as the appellants failed to

take permission of the Development Commissioner which was required for sale both to the Domestic Tariff Area and EPCG License Holders; the appellants further produced CBEC's letter issued vide F. No.305/83/94-FTT and DGFT's circulars relating to supplies made from 100% EOU unit to EPCG license holders; however, these circulars cannot be read in isolation but in conjunction with the condition under which the goods were imported.

3.2. Learned AR further submits that as per Para 4(a) of the Notification. No.52/2003-Cus date 31.03.2003, the Appellant was entitled to uniform rate of depreciation @ 10% per year whereas the Appellant applied 16% for the first year, 12% for the second and the third year and 10% for the fourth year on the basis of the Exim Policy 2002-07 in force at that time; rates of depreciation as per Notification were not aligned with the Exim Policy 2002-07 and departmental authorities were bound by the Board instructions; adjudicating Authority has rightly opined that the EXIM policy only fixes broad terms/guidelines for different benefits of duties of Customs and Central Excise to EOU, however, the actual duty benefits are given by the concerned Notifications issued by the CBEC; CBEC has also issued a Circular No.14/2004-Cus dated 13.02.2004 on this issue. He relies upon CESTAT's Final Order in the case of M/s. Dicitex Décor (P) Ltd. Vs Commissioner of Customs (Import) Nhava Sheva in case of Appeal No.C/399/2012.

4. Heard both sides and perused the records of the case. Brief issue that requires decision in the instant case is as to whether the appellants were right in clearing the lathes imported vide Notification No.53/97-Cus. Dated 03.06.97 to the domestic tariff area without permission of the Development Commissioner on the grounds that they were surplus in terms of Para 6.16 of the Import Export Policy and as to whether the rate of depreciation was to be applied in terms of the Notification No.57/2003-Cus dated 31.03.2003 or in terms of the Exim Policy. The Appellants contest that the Learned Appellant Authority has taken different stands vis-à-vis notification No.52/2003 – Custom and 53/1997 – Customs; while insisting on the condition 5 and 5a the appellant authority depends on 53/97 and for fixing of rate of depreciation relies on 52/2003. The appellants contents that in terms of 6.16 or 6.31 of [FTP 1997-02](#) or 2002-07 clearance of surplus or obsolete capital goods does not require permission of development commissioner, if they are cleared on payment of duty. He further contains that CBEC circular 88/98 – Customs provides that sale into DTA can be made by the manufacturer himself subject to his recording each transaction in the records described by board/ Commissioner or their private records approved by Commissioner; further rule 17 of CER provides that EOU can clear the goods on payment of duty; therefore EOU's are not required to take permission from the Jurisdictional Customs/Central Excise Authorities for DTA sale of goods. The units may sell the goods on payment of duty as per the conditions and entitlement of Foreign Trade Policy.

5. The gist of the contention of the Appellants is that they are not required to take a permission from Development Commissioner as they have fulfilled the export obligation and as their capital goods have become absolute. Even if it is held that the permission is required to be taken they have sought the permission from respective authorities and the same has not been denied. Under the circumstances the permission is deemed to have been given. On the issue of depreciation the appellants contend that notification No.53/97 does not provide the depreciation rates; in that case depreciation as provided by the policy needs to be applied.

6. We find that the Appellants have cleared the goods to DTA or EPCG holders during the period August to September 2003. During this period notification No.53/97 was not in currency. Notification No.52/2003 was only operational. Therefore the same requires to be considered. This notification does not contain any condition 5 or 5a as in the case of notification 53/97 as per which the unit required to take permission from the Development Commissioner and the Assistant Commissioner as the case may be. It is not the case of the department that the Appellant has not fulfilled the export obligation in terms of the Exim Policy. This claim of the Appellant is not controverted by the department. Therefore we find that the Appellants are entitled to clear the used capital goods in terms of the policy as well as the customs notification. In terms of Notification 52/2003, there is no provision for obtaining permission. Even if such a provision exist in the policy or custom notifications, it would not be the intent of the same to deny a substantial right of the appellants citing procedural

infractions like non obtaining a permission or non filing of a Bill of Entry. We find that as contended by the Appellants, Tribunal in their own case have set aside penalty imposed for non obtaining such permission in respect of some other proceedings. We find that Tribunal in 2007 (211) E.L.T. 392 (Tri. - Mumbai) held that

“The challenge in the present appeal is to personal penalty of Rs. 2,018/- imposed under Rule 25 of Central Excise Rules, 2002 on the appellants, who is 100% EOU on the ground that they had cleared capital goods without specific permission by the Development Commissioner, SEEPZ or by the Jurisdictional Deputy Commissioner Central Excise. It is not disputed by both sides that due intimation was given by the appellants and permission of the appropriate authorities was sought following numerous reminders. The appellant's contention is that in spite of the their approaching the authorities, neither the permission was granted nor denied. In these circumstances, I agree with the appellant's representative that imposition of penalty upon them is neither justified nor warranted, the same is accordingly set aside.”

In view of the above, we hold that the Appellants submission that non obtaining of the permission does not take away the applicability of notification allowing a concessional rate of duty, is acceptable.

7. The clearances should be in terms of notification 52/2003 and therefore it is needless to reiterate that the depreciation also requires to be in terms of this notification only. When a customs notification has given a rate of depreciation, it is not free for the appellants to choose concessional rate of duty in terms of such notification and depreciation rates in terms of the policy stating that the providence of policy over-ride the provision of customs. The Appellants further contended that the capital goods have become old and obsolete as they have stopped the production after fulfilling the export obligation. We are not inclined to accept the Appellants submission that the

capital goods have become obsolete and old. The Appellants are considering the unused machinery as obsolete. This is not the correct appreciation of law. Goods do not become obsolete only since the appellants have not put them to use. However, as we held that the obtaining of permission is only a procedural matter and hence do not come in the way of availing a substantial benefit, we are not going into the issue any further. We hold that the Appellants need to apply the depreciation in terms of notification No.52/2003 which was in force at the time of clearances. For this reason we find that the matter requires to go back to the original authority for computing the applicable duty after allowing the applicable rate of depreciation in terms of notification No.52/2003.

8. In view of the above, the appeals are partly allowed by way of remand to the original authority to arrive at duty payable by the appellants after extending the benefit of concessional rate of duty under notification 52/2003 and the rates of depreciation contained therein. Penalties are however set aside.

(Order pronounced in open court on **07.11.2019**)

(D.M. Misra)
Member (Judicial)

(P Anjani Kumar)
Member (Technical)

HM

