

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, MUMBAI
REGIONAL BENCH**

Excise Appeal No. 87205 of 2016

(Arising out of Order-in-Original No. PUN-EXCUS-001-PR.COM-007-16-17 dated 23.06.2016 passed by the Principal Commissioner of Central Excise, Pune-I)

M/s. Virgo Valves & Controls Pvt. Ltd.

Appellant

Survey No.277, Village Mann-Hinjewadi,
Taluka-Mulshi, Dist. Pune 411 057.

Vs.

Commissioner of Central Excise, Pune-I

Respondent

ICE House, 41-A, Sassoon Road,
Opp. Wadia College, Pune 411 001.

Appearance:

Shri S. Narayanan, Advocate, for the Appellant

Shri Sydney D'Silva, Additional Commissioner, Authorised
Representative for the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)
HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

Date of Hearing: 30.03.2022

Date of Decision: 30.03.2022

FINAL ORDER NO. A/85432/2022

PER: SANJIV SRIVASTAVA

This appeal is directed against the order in original No PUN-EXCUS-001-PR-COM-007-16-17 dated 23.06.2016 of Principal Commissioner Central Excise, Pune - I. By the impugned order, the Principal Commissioner has held as follows:

"ORDER

(i) I confirm the demand of total duty amounting Rs. 1,56,55,368/- (Rupees One Crore, Fifty six Lacs, Fifty Five Thousand, Three Hundred and Sixty Eight Only on the Noticee M/s. Virgo Valves & Controls Ltd. (now Virgo Valves & Controls Pvt. Ltd), Survey No. 277, Village Mann-Hinjewadi, Taluka-Mulshi, Dist. Pune - 411 057, an EOU unit as discussed in Para1.08 & 11.13 above under the provisions of Section 11A (5) of Central Excise Act, 1944 read with Rule 14 of the CCR,2004

for contravention of proviso to Section 3(1) of the Central Excise Act, 1944 read with Para 6.18 of FTP.

(ii) I appropriate the total amount of Rs.83,16,040/-(Eighty Three Lacs, Sixteen Thousand and Forty Only) already paid by the Noticee (Rs.65,05,647/- paid on De-bonding of due to valuation of WIP + Rs. 18,10,393/- paid on De-bonding due to valuation of Stock of Finished goods as against the total duty of Rs. 1,56,55,368/-demanded in the subject SCN.

(iii) I order recovery of interest as applicable on the total differential amount of duty Rs.73,39,328/-payable and stand confirmed as at (i) above under the provisions of Rule 14 of the CCR, 2004, read with Section 11AA of the Central Excise Act, 1944;

(iv) I impose a penalty of Rs.73,39,528/-(Rupees Seventy three Lacs Thirty Nine Thousand Three Hundred and Twenty Eight Only)on the Noticee under Rule 15(2) of the CCR, 2004, read with Section 11AC of the Central Excise Act, 1944.

(v) I also give an option to the Noticee, under the second proviso to Section TTACO the Finance Act, 1994, to pay penalty equivalent to 25% of the differential amount i.e. Rs.18,34,832)-(25% of Rs.73,39,328/-= Rs.18,34,832/-) as determined confirmed, at (i) above, provided they pay the entire said differential amount along with interest payable thereon as ordered vide(iii) above as well as the 25% penalty, within 30 days of the date of communication of this order.

13.00 This order is issued without prejudice to any other action that may be taken against the noticee under the provisions of Chapter-V of the Finance Act, 1994 and/ or the rules made thereunder and/ or any other law for the time being in force."

2.1 Appellant was erstwhile a 100% Export Oriented Unit. After fulfilling the export obligations as per the scheme, the de-bonded and got converted into an DTA unit. At the time of debonding they paid the debonding duty as required and after satisfying in respect of the payment of debonding duty, they were issued "No Dues Certificate" by the jurisdictional Assistant Commissioner, vide his letter dated 21st May 2013. Taking note

of the "No Dues Certificate", Development Commissioner, vide order dated 04.07.2013, issued 'Final Debonding Order'.

2.2 A show cause notice dated 09.02.2016, was issued to the appellant, alleging that they had short-paid the duty at the time of De-bonding, stating following grounds:

(i) Para 6.18 of FTP contains provisions regarding conditions and procedures subject to which an EOU can exit from the EOU scheme. It is provided in Para 6.18 (b) that the assessee shall assess duty liability arising out of de-bonding and after paying applicable duties, it shall obtain "No dues certificate" from Customs and Central Excise authorities. Based on the "No dues certificate" issued by the Customs and Central Excise authorities, Development Commissioner, if satisfied, can issue de-bonding order. The duty payable on goods being de-bonded is an amount equal to aggregate of the Custom duties as per proviso to Section 3(1) of the Central Excise Act, 1944. Entitlement to clear goods at concessional rate of duties as per Section 6.8 of FTP is not available to a de-bonding unit, as the exit from EOU scheme is allowed under Para 6.18.

(ii) The Appellant had classified Work-in-Progress (WIP) as indigenous and imported and the Department accepted it and allowed the unit to pay duty accordingly, vide its letter dated 08-04-2013. It appeared that "This classification of WIP inventory as indigenous and imported was incorrect as Work in Progress was nothing but partially finished product. The provisions of S. No. 3 of Notification No.23/2003 CE dated 31-03-2013 (i.e. payment of duty equivalent to only Central Excise duty when finished goods are manufactured wholly out of indigenous raw materials) was applicable only to finished goods cleared under Para 6.8 of FTP. Since the de-bonding units paid duty under Para 6.18 of FTP, benefit of concessional duty under Para 6.8 cannot be applied to de-bonded units

(iii) Thus Appellant had wrongly availed duty concessions vide Central Excise Notification No. 23/2003-CE dated 31st March 2003" read with Para 6.8 of FTP, since the de-bonding units pay duty under Para 6.18 of FTP; as per the proviso to Section 3(1) of the Central Excise Act, 1944. The Appellant had also contravened the provisions of Section 6.8 of FTP (as this was not

available to a de-bonding unit; as the exit from EOU scheme was allowed under para 6.18).

(iv) Thus there was a short levy of duty on De-bonding due to valuation of WIP (indigenous) of Rs.1,36,07,370/- (Rupees One Crore, Thirty Six Lakhs, Seven Thousand ,Three Hundred Seventy only), as on 30-04-2013 and,

(v) There was a short levy of duty on De-bonding due to valuation of Stock of Finished goods of Rs.20,47,998/- (Rupees Twenty Lakhs, Forty Seven Thousand, Nine Hundred Ninety Eight only), as on 30-04-2013.

2.3 Show Cause notice therefore demanded the duty short levied by invoking extended period of limitation as per Section 11 A (5) read with Rule 14 of CCR, 2004 for contravention of provisions of Section 3 (1) of the Central Excise Act, 1944 read with para 6.18 of FTP. Interest was also demanded on the duty short paid and penalty was proposed as per Section 11AC, *ibid*.

2.4 The show cause notice was adjudicated as per the impugned order referred in para 1, above. Aggrieved by the impugned order, appellants have filed this appeal.

3.1 We have heard Shri S. Narayanan, Advocate for the appellant and Shri Sydney D Silva, Additional Commissioner, Authorized Representative for the revenue.

4.1 We have considered the impugned order along with the submission made in appeal and during the course of hearing.

4.2 In the present case admittedly the appellant was earlier functioning as an 100% Export Oriented Unit and was following the prescriptions as laid down in Foreign Trade Policy, Customs Act, 1962 and Central Excise Act, 1944. After achieving the required NFE norms as determined by the Development Commissioner, they applied for permission to de-bond and exit from the scheme vide their letter dated 29.11.2012./ 03.12.2012. Along with the application they also submitted "*Summary of Imported & Indigenous: Inputs Goods*", which is placed at Exhibit F (p.143) of paper book. The details as stated in the said statement are reproduced below:

1	Indigenous Raw Material
Assessable value	72,415,047

12% Excise Duty	8,689,806
2% Edu. Cess	173,796
1% S & H Edu Cess	86,898
Total Duty	8,950,500
2	Imported raw Material
Assessable Value	120,861,148
Basic Custom Duty	11,394,062
Sub Total	132,255,210
12% Excise Duty	15,870,625
Basic + CVD	27,264,687
2% Edu. Cess	545,294
1% S & H Edu Cess	272,647
Sub Total	148,943,776
4% Additional Duty	5,957,751
Total Duty	34,040,379
3	Finished Goods
Assessable Value	7,921,864
Basic Custom Duty	396,093
Sub Total	8,317,957
12% Excise Duty	998,155
Basic + CVD	1,394,248
2% Edu. Cess	27,885
1% S & H Edu Cess	13,942
Sub Total	9,357,939
4% Additional Duty	374,317
Total Duty	1,810,393
4	Work in Process Imported
Assessable Value	52,003,081
Basic Custom Duty	5,200,308
Sub Total	57,203,389
12% Excise Duty	6,864,407
Basic + CVD	12,064,715
2% Edu. Cess	241,294
1% S & H Edu Cess	120,647
Sub Total	64,429,737
4% Additional Duty	2,577,189
Total Duty	15,003,846
5	Work in Process Indigenous

Assessable value	52,634,686
12% Excise Duty	6,316,162
2% Edu. Cess	126,323
1% S & H Edu Cess	63,162
Total Duty	6,505,647

4.3 After getting permission for "In-principle" exit of unit from the Development Commissioner, appellants approached the jurisdictional Central Excise Authorities for issuance of "No Dues Certificate". After consideration of the request and due verification jurisdictional assistant Commissioner issued the "No Dues Certificate" to the appellant vide his letter dated 21st May 2013. The "No Dues Certificate" issued by the jurisdictional officer is as follows:

"OFFICE OF THE ASSISTANT COMMISSIONER. CENTRAL EXCISE
PUNE-IV DIVN. EXCISE BHAVAN, AKURDI, PUNE-411 044.

F.NO. PIV/Tech (303)VVCL/UT-1/2013-14/1508A

Akurdi, 21st May, 2013.

To,

M/s. Virgo Valves and Controls Ltd.,

277, Hinjewadi, Phase-II, Mann (Mulshi)

Pune-411 057.

Gentlemen,

Sub: -"No dues Certificate" - Issuance of in respect of M/s. Virgo Valves & Controls Ltd. Reg.

Please refer to your letter dated 13.05.2013 and Ref : WVCL:NDC:13-14 dated 21.05.2013 requesting therein for issuance of consolidated " No dues Certificate" in respect of Imported/Indigenous Raw Material, WIP, and finished goods as well as capital goods as required by SEEPZ. On payment of applicable duties a No Dues Certificate' in respect of the Indigenous Raw Material, Imported Raw Material, WIP-Imported/Indigenous and Finished Goods has already been issued by this office on 12.04.2013 and as per the requirement of SEEPZ a consolidated 'No due certificate' is being issued as under :

As per Supdt.C.Ex. Thergaon Range's report under F.No.TR/VVCL/De bonding/12-13/3491 dated 5th April, 2013 duties as appended below have been paid in respect of items at Sr.No. 1 to 5 below. The Capital Goods are being cleared by the unit under the E.P.C.G.License No. 3130007338 dated 07.05.2013 for zero duty issued by Assistant Director General of Foreign Trade, Pune , hence no duty is paid in respect of Capital Goods. All aspects of de bonding against E.P.C.G. License have been examined by the Range Supdt.,C.Ex., Thergaon and found in order.

Sr. No.	Category	Assessable Value Rs.	Duty Amount Rs.
1	2	3	4
1	Indigenous Raw Material	7,24,15,046.51	89,50,500.00
2	Imported Raw Material	12,08,61,147.57	3,38,89,934.00
3	WIP- indigenous	5,20,03 080.96	1,18,03,202.00
4	WIP-Imported	5,26,34,685.95	65,05,647.00
5	Finished Goods	79,21,863.51	17,98,035.00
	Sub-Total	30,58,35,824.50	6,29,47,318.00
6	Additional Duty paid on 3.4.2013.		33,63,446.00
7	Grand total of duty paid		6,63,10,764.00

Capital Goods:

Sr. No.	Category	Assessable Value	Duty Amount
1	2	3	4
1	Capital Goods	2,60,52,015.90	* 70,33,215.16

N.B.* This is amount of duty foregone as per the E.P.C.G. License No.3130007338 dated 7.5.2013 issued by D.G.F.T.Pune; allowing the said EOU for conversion of DTA as per Para 6.18 of FT.P.and Para 5.4 of Handbook of Procedure 2009-14.

In view of the above No dues are payable by the unit in respect of imported/ indigenous capital goods and raw material.

Yours Sincerely,

Sd/-

21/5/2013

(B.S.CHAUHAN)
 Assistant Commissioner,
 C.Ex.Pune IV Division.

Copy to:

*Supdt.,C.Ex., Thergaon Range w.r.t. his letter F.No.TR/VVCL/
 /De-bonding/ 2012-13 dated 05.04.2013 and 16/05.2013 for
 information and to necessary action in respect of the de-bonding
 of capital goods against the above EPCG Licence and ensure the
 compliance of all rules and regulation and to debit the said EPCG
 Licence after verifying the quantity and description of the goods
 as per the said licence."*

4.4 From the perusal of the information submitted by the appellant and the information as recorded in the no due certificate issued, it is quite evident that jurisdictional officers have after due verification arrived at similar assessable value for each category. The categories in respect of which the demand of duty has now been made are included in the no due certificate namely – "Work in Process – Indigenous", and "Finished Goods".

4.5 On the strength of the "No Dues Certificate", appellant approached the Development Commissioner, for getting Final Debonding Order". Development Commissioner has vide his letter dated 04.07.2013, issued the Final Debonding Order to the appellant, as reproduced below:

*"OFFICE OF THE DEVELOPMENT COMMISSIONER
 SEEPZ SPECIAL ECONOMIC ZONE, GOVT. OF INDIA,
 MINISTRY OF COMMERCE & INDUSTRY
 ANDHERI (E), MUMBAI - 400 096.*

Tel :022-28292144 / 2829
 0143

FAX: 022-28291754

E-mail : dcseepz-mah@nic.in

website : www.seepz.gov.in

*No. SEEPZ/IA-II/EOU/33/04-05/Vol.-III 7360
 04.07.2013*

FINAL DEBONDING ORDER

*1. M/s Virgo Valves & Controls Ltd., at 128/2, Telco Road,
 Chinchwad, Pune, Maharashtra (hereinafter referred to as*

'unit) was issued Letter of Permission No. PER:33(2004)/SEEPZ/EOU/ 33/04-05/6910 dated 30.8.2004 to set up unit under EOU Scheme of Foreign Trade Policy, for a period of 5 years for manufacture and export of Control Valves and Ball Valves. The unit was granted continuation of EOU Status for a further period of five years i.e. 2009-10 to 2013-14 vide this office letter No. SEEPZ/EOU/33/04-05/Vol.-II/2578 dated 9.3.2009. The unit had executed Legal Undertaking on 09.09.2004 and 26.03.2009,

2. AND WHEREAS unit', vide letter dated 29.11.2012 has applied for exit from EOU scheme.
3. AND WHEREAS, unit' has achieved positive Net Foreign Exchange of Rs.52212.46 lakhs as per Foreign Trade Policy, 2009-14 (without amortisation).
- 4. AND WHEREAS, the Asstt. Commissioner of Central Excise, Pune IV Division vide letter No. PIV/Tech(303)VVCL/UT-1/2013 14/1508A dated 21.05.2013 certified that there are no dues pending against the unit.**
5. AND WHEREAS, unit vide letter dated 10.04.2013 has given undertaking for exit from EOU Scheme for payment of penalties as may be imposed upon them under FT (D & R) Act, 1992 for violation of any conditions,
6. AND WHEREAS, unit' has submitted an Undertaking that it has not claimed and will not claim any deemed export benefits viz. CST/DBK/TED on the balance stock, if any, of raw material.
7. NOW THEREFORE, the said M/s Virgo Valves & Controls Ltd. is hereby allowed final de-bonding of their project covered under Letter of Permission No. PER:33(2004)/SEEPZ/EOU/33/04 05/6910 dated 30.8.2004 as amended.
8. The Letter of Permission No. PER:33(2004)/SEEPZ/EOU/33/04 05/6910 dated 30.8.2004 as amended for manufacture and export of Control Valves and Ball Valves at A128/2, Telco Road, Chinchwad, Pune, Maharashtra and any other permission

granted to unit' under EQU Scheme is hereby cancelled with immediate effect.

Sd/-

(NPS Monga)

Development Commissioner,

SEEPZ SEZ.

M/s Virgo Valves & Controls Ltd.

S. No. 277, Village - Mann,

Taluka- Mulshi,

Dist.-Pune"

4.6 Thereafter appellant vide their letter dated 13/14.08.2013 approached the jurisdictional Assistant Commissioner for the release of the B-17 Bond executed by them. On the basis of the observation made by Customs Receipt Audit, vide their F No CRA/EOU-REV=2014/AM-16 dated 28.07.2014, correspondences and investigations were under taken against the appellant and the Show Cause Notice issued to them on 09.02.2016.

4.7 Commissioner has vide the impugned order confirmed the demand made by the Show Cause Notice dated 09.02.2016 stating as follows:

"Whether it is correct to demand duty on the stock of materials in WIP treating the same as finished goods for demanding duty thereon.

11.05 In this regards it has been inter-alia stated by the Noticee that as none of the work in progress material shown in the stock as on the date of de-bonding has reached such a stage to be regarded as finished goods which is ready for sale to the customer, the question of regarding their work in progress material as finished product will be totally wrong both on the technical aspect as well as considering the commercial aspect of marketability, which is the core thing in determining an item to be finished product or not and FTP provisions and Notification no. 23/2003-CE deals only with finished product and that work in progress material. In this regard, they had submitted a letter to the department on 06-10-2014 and they would like to mention that no cognizance of the said letter has been taken in to account, while issuing the impugned show cause notice, which

perhaps has led the department for a wrong assumption. Further, in as much as the said letter has not been considered by way of any counter evidence to prove that such work in progress material are nothing but finished products, there is no cause for the department to demand duty as considering the work in progress material as finished product.

11.06 The Noticee further submits that the reference to Sr. no. 3 of Notification No. 23/2003-CE drawn in the impugned show cause notice for payment of duty is purely in the context of finished goods and therefore, the same is not applicable for discharging the applicable duties on work in progress material. Further, since para 6.18 of FTP does not have any reference to discharge of duty on work in progress material and further the guidelines under Appendix 14-I-L which deals with exit from 100% EOU refers only to imported and indigenous capital goods, raw materials, components, consumables, spares and finished goods in stock and it has no reference to work in progress material, it is also reasonable to entertain a thought that no duties are applicable and to be paid on such work in progress material, which view is also supported by a Tribunal decision rendered in this regard.

11.07 It is further stated by the Noticee that the Central Board of Excise and Customs, while issuing clarification to Central Excise matter dealing with reversal of Cenvat on WIP goods written off, under their Circular no.907/27/2009-CX., dated 07-12-2009 issued from F.No.267/141/2009-CX-8 has clarified in the context of WIP goods (which has reached the stage of finished goods) the treatment for reversal of credit applicable to input would be applicable. Though the said reference is in the context of Central Excise but in principle the clarification applies pari materia and hence, what can be demanded at best on the stock of work in progress material is only the duty foregone by the department on the raw material (imported and indigenous) at the time of its procurement from suppliers. Therefore, what could at best be payable and demanded is the Customs duty forgone on the imported material under Notification no. 52/2003-Cus and the Central Excise duty forgone on indigenous material under Notification No. 22/2003-CE and not Notification

no. 23/2003-CE which is referred to by the department, since, the same is applicable only for clearance of finished goods.

11.08 It is observed that the Noticee Unit had in its stock, inter-alia WIP (World In Process) goods in addition to raw materials, capital goods and finished goods at the time of De-bonding of its 100%EOU. It is provided in Para 6.18 (b) that the assessee shall assess duty liability arising out of de-bonding and after paying applicable duties, it shall obtain "No dues certificate" from Customs and Central Excise authorities. Based on the "No dues certificate" issued by the Customs and Central Excise authorities, Development Commissioner, if satisfied, can issue de-bonding order. The duty payable on goods being de-bonded is an amount equal to aggregate of the Custom duties as per proviso to Section 3(1) of the Central Excise Act, 1944. Entitlement to clear goods at concessional rate of duties as per Section 6.8 of FTP is not available to a de-bonding unit, as the Exit from EOU scheme is allowed under Para 6.18. It is further observed that the Noticee at the time De bonding of its 100% EOU has paid total duty of Rs. 2,15,09,493/- towards clearances of WIP goods in stock totally valued Rs.10,46,37.767/- by making separate invoices for WIP (111digenous)for Rs.52634686/- and WIP(imported) for Rs.52003081/- respectively. However, it is also observed that its WIP goods were being manufactured using both indigenous and imported raw materials. Therefore it was obvious that the subject WIP goods had come into existence by consumption of both indigenously procured and imported raw materials. As WIP goods came into being by consumption of such raw materials and accounted as such, then obviously it has to be cleared as such. Whereas, the Noticed appears to have artificially bifurcated the assessable value so arrived by it, in proportionate to indigenous and imported raw materials contained in it for the purpose of assessment at the time of De-bonding and paid the duty foregone by the department with respect to indigenous and imported raw materials as applicable separately, instead of assessing the same as a manufactured goods. Thus it has fraudulently issued invoice for WIP (indigenous) without actually accompanying any goods or any such goods manufactured

exclusively out of indigenously procured raw materials with it. In doing so, the Noticee appears to have misrepresented and fabricated the facts thereby and made the department to believe that it has discharged its duty liability correctly and whereas, by its deliberate act it has in fact effected short assessment of duty and appears to have evaded duty thereby. Not challenging the declaration does not mean that correct duty should not be collected. It is a case of valuation loading of 15%on WIP goods. However, it has been claimed by the Noticee that while arriving at the assessable value of WIP goods it had considered 15% value addition on WIP goods though not produced any evidences in support of the same. But the Noticee stated that the duty so paid thereon was on higher side and hence they are entitled to refund to that extent. In this context it is observed that if there is excess payment then assessee is to prove their case and to follow procedures of claiming refund under the statute. If credit is admissible, then the assessee has to claim with supporting evidences before the Assistant Commissioner i/c of the manufacturing unit. Regarding the Noticee's claim of revenue neutrality in its case, it is observed that duty is required to be paid by the unit who is supposed to pay, so revenue neutrality has no ground for nonpayment of duty. The duty actually payable and paid in this regard is quantified as tabulated below;

1) **DUTY ACTUALLY PAYABLE ON DE_BONDING**

Sr. No.	Issue	Amount (Rs.)
1	Issue WIP (Treated as finished goods)	5,26,34,686/-
2	BCD @ 7.5 %	39,47,601/-
3	Total	5,65,82,287/-
4	CVD @ 12% on Rs.5,65,82,287/- (1+2)	67,89,874/-
5	Edu. Cess @3% of Rs.1,07,37,475/- (BCD + CVD)	3,22,124/-
6	Total	6,36,94,285/-
7	SAD @ 4% on (Rs. 6,36,94,285/-)	25,47,771/-
	Total duty (2+4+5+7)	1,36,07,370/-

DUTY PAID WHILE DE BONDING

Sr. No.	Issue	Amount (Rs)
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1	Issue WIP (indigenous)	5,26,34,686/-
4	C. Ex. duty@12%	6316162/-
5	Edu. Cess @ 3% of	189485/-
6	Total	65,05,647/-

3) Thus Noticee is liable to differential duty liability on WIP goods which is worked out to Rs.71,01,723/- (Rs.1,36,07,370/- (-) Rs.65,05,647/- = Rs.71,01,723/-)

Whether it is correct to deny the concessional duty at 50% of aggregate of Customs duty as applicable to 100% EOU on its clearances of finished goods in DTA at the time of De-bonding in terms of Notification No.23/2003-CE.

11.09 In this regard the Noticee inter-alia stated that during the period in question in the present show cause notice, they did have a +ve NFE and further as they had export clearances of Rs.298,55,27000/- they were also indeed entitled for 50 % DTA clearances of Rs. 149,27,63500/- and hence the clearance of FG on de-bonding to the value of Rs. 79,21,864/-from 100 % EOU Unit to their DTA unit did also qualify for such exemption at concessional rate of duty and thus duly fulfilling the FTP requirement as per Para 6.8 of FTP and thus on this account as well, the said duty paid on de-bonding on FG goods are clearly applicable in law to them, in terms of Notification No. 23/2003-CE and there is no cause for demanding full duty on such DTA clearances, as has been wrongly proposed in the present show cause notice.

11.10 It is also stated by the Noticee that the issue under reference in the present show cause notice while they have considered the concessional rate of duty applicable for DTA clearances on the finished goods held in stock at the time of de-bonding and applied the duties as applicable under Notification No. 23/2003-CE by paying duty of Rs.1810393/ which has been accepted by the department while issuing 'no due certificate' and also accepted by Development Commissioner, but in the present show cause notice, the department has proposed computation on payment of aggregate of customs duties without considering 50% concession, by determining an amount of Rs. 2047998/-, and thereby a differential duty of Rs. 237605/- has been

demanded, which according to them is not correct and valid in law.

11.11 The Noticee further stated that when 100% EOU and DTA units are concurrently operating, they are governed by two independent excise registrations and under the Central Excise law for the purpose of clearance of goods from EOU to DTA or vice versa, they are to be treated as two different entities and payment of duty is regulated in such a manner. When, there is clearance from EOU to DTA, there is a transfer of possession of goods from one to the other and there are book entries passed for recovery of money from one to the other. Hence, it is their submission that till such time all the goods held in stock are cleared from 100% EOU to DTA, these are independent clearances from one entity to another entity and therefore are to be regarded as clearances to a DTA unit. Further, the DTA unit may be belonging to the same company, yet when it comes to clearances from 100% EOU to DTA unit, all the restriction and conditions which are applicable when such goods are sold from 100% EOU to a third party DTA unit, will be equally applicable for clearances from 100% EOU to DTA unit of the same company. Therefore, it is incorrect in law to hold that 100% EOU unit in the instant case, has not effected DTA sale to their unit located in a DTA area.

11.12 The word "Domestic Tariff Area" has been defined in FTP Policy at Para 9.16, the word "Sale" has not been defined either in FTP or in The Customs Act, 1962 and hence, it becomes necessary to fall back on the definition of Section 2(h) as per the CEA, 1944, according to which "sale" and "purchase", with their grammatical variations and cognate expressions, mean any transfer of the possession of goods by one person to another in the ordinary course of trade or business for cash or deferred payment or other valuable consideration. Since, much of the Central Excise provisions have been made applicable for 100% EOU unit, it is therefore observed that as per the aforesaid definition of Section 2(h) of the CEA, 1944, the clearance of finished goods from EOU unit to DTA unit at the time of de bonding has to be considered in law as a normal DTA sale effected by EOU unit.

11.13 It is observed that Para 6.18 of FTP contains provisions regarding conditions and procedures subject to which an EOU can Exit from the EOU scheme. The duty payable on goods being de-bonded is an amount equal to aggregate of the Custom duties as per proviso to Section 3(1) of the Central Excise Act, 1944. Entitlement to clear goods at concessional rate of duties as per Section 6.8 of FTP is not available to a de-bonding unit, as the Exit from EOU scheme is allowed under Para 6.18. Achievement of positive NFE is a requisite to avail export benefits and it has nothing to do with exit of EOU i.e. De-bonding of EOU. Duty foregone concept is available in respect of EOU goods for use in export and not in de-bonding i.e. clearance of goods to unit going as normal unit as no concept DTA apply now. It therefore appears that the Noticee has wrongly considered the concessional rate of duty applicable for DTA clearances on the finished goods held in stock at the time of de-bonding and wrongly applied the duties as applicable under Notification No. 23/2003-CE and paid duty of Rs.1810393/- which has been contested by the department in the present Noticee. In view of these circumstances, it is observed that differential duty of Rs.2,37,605/ (in total Rs.20,47,998/-) demanded from the Noticee, in access of the said amount of duty paid already, by issuance of the present Notice is legally sustainable and hence liable to be confirmed.

11.14 On limitation and penalty:

- (i) It is observed that the Noticee was aware of said provisions but it interpreted the Rules as per its convenience to accommodate such incorrect procedure of duty calculation resulting in the short-payment of total duty of Rs. 1,56,55,368/- as on 30.04.2013 [Rs. 1,36,07,370/- being the short levy of duty on De-bonding due to valuation of WIP + Rs. 20,47,998/- being the short levy of Duty on De-bonding due to valuation of Stock of Finished goods). Therefore, it appears that the Noticee have wrongly availed duty concessions vide Central Excise Notification No. 23/2003-CE dated 31 March 2003" read with Para 6.8 of FTP, since the de-bonding units pay duty under Para

6.18 of FTP. as per proviso to Section 3(1) of the Central Excise Act, 1944. The Noticee has also contravened the provisions of Section 6.8 of FTP (as this is not available to a de-bonding unit, as the exit form EOU scheme is allowed under para 6.18). This has resulted in Short-levy of duty / under assessment of duty involving total duty of Rs. 1,56,55,368/- as on 30.04.2013.

- (ii) It is also observed that its WIP goods were being manufactured using both indigenous and imported raw materials. Therefore it was obvious that the subject WIP goods had come into existence by consumption of both indigenously procured and imported raw materials. As WIP goods came into being by consumption of such raw materials and accounted as such ,then obviously it has to be cleared as such. Whereas, the Noticee appears to have artificially bifurcated the assessable value so arrived by it, in proportionate to indigenous and imported raw materials contained in it for the purpose of assessment at the time of De-bonding and paid the duty foregone by the department with respect to indigenous and imported raw materials as applicable separately, instead of assessing the same as a manufactured goods. Thus it has fraudulently issued invoice for WIP (indigenous) without actually accompanying any goods or any such goods manufactured exclusively out of indigenously procured raw materials with it. In doing so, the Noticee appears to have misrepresented and fabricated the facts thereby and made the department to believe that it has discharged its duty liability correctly and whereas, by its deliberate act it has in fact effected short assessment of duty and appears to have evaded duty thereby.
- (iii) Thus, it is clear that the Noticee, has suppressed the material facts it was under-assessing duty. As per Rules 9 (5) of the CCR 2004, the burden of proof regarding admissibility lies upon the Noticee. The said facts were also not disclosed by it in its monthly returns filed with the Department. The Noticee, being from the organized

sector, being an EOU, and working under self-assessment regime, ought to have interpreted law correctly and accordingly should have made proper and appropriate assessment of duty. In view of these circumstances the various case laws cited by the Noticee in support of their claim that that Central Excise authorities cannot independently decide the issue in such cases without referring the matter to the Development Commissioner, need not be discussed further as they are not relevant to the facts and circumstances of the present case. Therefore the present SCN dated 09.02.2016 proposing to levy duty of Rs. 1,56,55,368/- (Rupees One Crore, Fifty Six Lakhs, Fifty Five Thousand Three Hundred Sixty Eight only), under the provisions of Section 11A (5) of the Central Excise Act, 1944 read with Rule 14 of the CCR, 2004 with proposed levy of interest under the provisions of Rule 14 of the CCR, 2004, read with Section 11AA of the Central Excise Act, 1944 and proposed levy of penalty under Rule 15(2) of the CCR, 2004, read with Section 11AC of the Central Excise Act, 1944 is liable to be confirmed.

- (iv) Reliance is placed on the judgement of the Hon'ble Supreme Court in the case of UOI Vs. Dharmendra Textile Processors (2008-TIOL-192-SC-LB), while holding that mens-rea is not an essential element for imposing penalty for breach of obligations, has also observed that "It is delinquency of the defaulter itself which establishes his blameworthy conduct..... without any further proof of the existence of mens-rea."
- (v) Thus, once it is established that the Noticee has committed breach of the mandatory provisions, the same would constitute a breach of civil obligation cast upon him and irrespective of existence or non-existence of mens-rea, the Noticee shall be liable for statutory penalty. In this regard, the observations of the Hon'ble Supreme Court in the case of M/s Gujarat Travancore Agency, Cochin Vs. C.I.T. (1989 (42) ELT 350 (SC)] are quite relevant, wherein it was held by the Hon'ble Court

thatUnless there is something in the language of the statute indicating the need to establish the element of mens-rea it is generally sufficient to prove that a default in complying with the statute has occurred. In our opinion there is nothing in Section 271(1)(a) (of the I.T. Act) which requires that mens rea must be proved before penalty can be levied under that provision.

- (vi) Further, the Hon'ble Bombay High Court in the case of Malaysian Airlines Vs. UOI - [2010(262) ELT 192 (Bom.)] has, inter-alia, held that - Para 52. It is well settled that when the consequences of the failure to comply with the prescribed requirement is provided by the statute itself, there can be no manner of doubt that such statutory requirement must be interpreted as mandatory.*
- (vii) Thus, in view of the precedential rulings of the Hon'ble Apex Court and the High Court and the fact that the delinquency on part of the Noticee stands proved, they cannot be absolved of their statutory liabilities. Resultantly, by adhering to the principles of strict liability, it have to be held that the Noticee are liable for penalty under the provisions of erstwhile Rule 173 Q of Central Excise(no.2) Rules, 2001/2002, Rule 25(1) (d) read with Section 11AC of the CEA, 1944, for having contravened the provisions of Section 4(1)(a)/4(1)(b) of the CEA, 1944 read with Rule 6 of Central Excise Valuation Rules, 2000. Accordingly, it is felt that the various judgments cited by the Noticee against imposition of penalty need not be discussed as not applicable in view of above facts and discussions."*

4.8 Explaining the concept of bonding and de-bonding in respect of the 100 % EOU Hon'ble Supreme Court has in case of SIV Industries [2000 (117) E.L.T. 281 (S.C.)}

"23. *Concept of bonding or debonding is well understood both under the Act and the Customs Act, 1962. The entire operations of an EOU are to be in customs bonded factory, unless otherwise specifically exempted from physical bonding. The approved unit*

is required to execute a bond/legal undertaking with the Development Commissioner concerned in the form prescribed. Under the conditions laid for EOU, bonding period for units under the EOU Scheme is ten years. This period may be reduced to five years by the Board of Approvals in case of products liable to rapid technological change. On completion of the bonding period it shall be open to the unit to continue under the Scheme or opt out of the Scheme. Such debonding is, however, subject to industrial policy in force at the time the option is exercised. On the satisfaction of the Board of Approvals, EOU may be debonded on its inability to achieve export obligations, value addition or other requirements. Such debonding is subject to such penalty as may be imposed and levy of the following duties:-

- (a) Customs duty on capital goods at depreciated value but at rates prevalent on the dates of import;*
- (b) Customs duty on unused raw materials and components on the value on the dates of import and at rates in force on the dates of clearance."*

4.9 From the facts as stated above it is quite evident that appellants have made complete declaration in respect of their "finished goods" as well 'WIP - Indigenous" while making the request for de-bonding. These were examined and verified by the jurisdictional Central Excise Authorities while issuing the "No Dues Certificate" to the appellant. Even the figures stated in the declaration made by the appellant in their declaration, no dues certificate issued by the authorities do tally. Subsequent to issue of the no due certificate by the jurisdictional officer, the revenue could not have proceeded to issue the show cause notice dated 09.02.2016, by taking the same figures as declared by the appellant to the jurisdictional authorities as early as in 2013. These figures also are reflected in the no dues certificate issued by the jurisdictional authorities. Revenue has invoked extended period of limitation as provided for by Section 11 A of Central Excise Act to make this demand. In case of Crompton Greaves Limited [2-014 (312) ELT 775 (T-Mum)] a coordinate bench has observed as follows:

"5. On careful examination of the submissions made by the Id. DR, we are of the opinion that when the unit was de-bonded and a no dues certificate was issued to the respondent, it is the duty of the officer, who give no dues certificate to verify the contents whether any dues liability is pending against the assessee or he has correctly declared the true facts for de-bonding of unit. When the concerned officer has de-bonded the unit along with no dues certificate, allegation of suppression cannot be alleged against the respondents in this case. Hence, we do not find any infirmity with the impugned order, wherein the lower appellate authority has held that "facts that how the extended period under Section 11A(1) is invocable in the above circumstances, the demand raised against the respondent is time barred". Accordingly, the impugned order is upheld, the appeal filed by the Revenue is rejected."

4.10 In case of Navnitlal Pvt Ltd [2010 (262) ELT 656 (T-Mum)] following was observed:

"8. The extended period is not invocable in the present case in the absence of any suppression, misstatement, etc. as the respondents had made an application for de-bonding to ACCE, after having obtained in principle approval from the Development Commissioner and the ACCE, through letter dated 25-8-2003, required the respondents to pay duty on capital goods, spare parts, packing materials and raw materials. From the above, it is clear that ACCE did not direct the respondents to pay duty on stock of goods-in-progress.

9. The respondents, through their letter dated 5-9-2003, informed their payment of duty on capital goods, spare parts, packing materials and raw materials. The ACCE, through letter dated 17-9-2003, informed the Development Commissioner that the Respondents had paid all dues and there was no objection for issue of final de-bonding order. The duty paid on the goods was taken as credit by the DTA unit. When the respondents have paid duty of Rs. 89,05,616/-, they could not have even attempted to evade duty of Rs. 4,13,369/-,

10. Further, suppression, if any, should be deliberate and with an intent to evade payment of duty and mere act or omission

does not lead to suppression of fact or mis-statement, based on the judgment reported in 1995 (78) E.L.T. 401 (S.C.) - Pushpam Pharmaceuticals.

11. Further, the respondents were under a bona fide belief, based on the provisions of law and letters exchanged with the Department, that the duty is not payable on the in-process material and, hence, there was no suppression on their part and, therefore, extended period is not invocable, based on the following judgments :

(i) 2007 (215) E.L.T. 169 (S.C.) - Chamundi Die Cast

(ii) 2004 (167) E.L.T. 491 (S.C.) - Ugam Chand Bhandari"

4.11 This decision has been affirmed by the Hon'ble Bombay High Court as reported at [2011 (264) ELT A36 (Bom)] stating as follows:

"2. This appeal is directed against the order dated 7th October, 2009 passed by the Customs, Excise & Service Tax Appellate Tribunal, West Zonal Bench. The Tribunal in paras-8, 10 and 11 has recorded its finding of fact stating therein that there was no suppression of fact on the part of the assessee and that the respondent-assessee was under bona fide belief based on the provisions of law and letters exchanged with the department. The correspondence exchanged by the respondent-assessee was placed before us. We are satisfied that the findings of fact recorded by the Tribunal are based on material available on record. No perversity could be demonstrated during the course of hearing. In the circumstance, the view taken by the Tribunal cannot be faulted. Appeal is, thus, dismissed in limine with no order as to costs."

4.12 Further we also find that that on the basis of the 'No Dues Certificate" issued by the concerned jurisdictional authorities, Development Commissioner has issued the Final Debonding Order. If it is the case of the revenue that "No Dues Certificate" was obtained by the appellant by taking recourse to suppression, misstatement, misdeclaration, fraud, connivance or in contravention of the provisions of the law, which would have led to invocation of extended period of limitation as provided for by

Section 11 A of the Central excise Act, 1944, revenue ought to have informed the Development commissioner and requested for initiation of proceeding against the appellants in terms of Foreign Trade Development Act. Central Board of Excise and Customs has vide its Circular No 21/95_Cus dated 10.03.1995 clarified as follows:

"Issue of show cause notice for recovery of Customs Subject : duty on goods imported by 100% EOU - Regarding.

A number of instances have come to the notice of the Board where 100% EOU's had imported capital goods, raw materials and other permissible items under Notification No. 13/81-Cus., dated 9-2-1981 but have failed to export any goods or have closed down after exporting a few consignments. A question has been raised as to the stage at which the customs authorities should proceed to recover duties on imported goods and other goods lying in the factory premises of the 100% EOU.

2. The matter has been examined by the Board in the context of an Audit Objection and I am directed to say that the Board has taken a view that liability of customs duties on goods imported by 100% EOUs arises either at stage of the unit being debonded or if any of the conditions of the exemption Notification No. 13/81, dated 9-2-1981 has been violated or remains unfulfilled. In this regard, it is seen that one of the conditions of the exemption notification is that the importer exports out of India 100% or such other percentage, as may be fixed by the said Board, or articles manufactured wholly or partly from the goods for the period stipulated by the Board or such extended period as may be specified by the said Board. It is, thus, clear that if the competent authority namely the Board of Approval or the Development Commissioner concerned determines that the unit has failed to export the fixed percentage of articles for the specified period, then in such case it may be held that the conditions of the exemption notification has been violated. As this stage, it will be open for this Department to issue a show cause notice to the Unit for demanding the due duty on the imported goods.

3. Normally the customs authorities should immediately inform the Development Commissioner in case a 100% EOU

ceases production prematurely or fails to commence production or export within the stipulated period. In case the Development Commissioner initiates action against the unit for non-fulfilment of export obligation etc. simultaneously the customs authorities should issue show cause notice for failure to comply with conditions of Notification 13/81-Cus., dated 9-2-1981. The demand of duty should be confirmed only after a definite conclusion has been arrived at by the Development Commissioner."

4.13 In following cases tribunal relied upon the aforementioned circular to set aside the demands made by the revenue from the units operating under 100 % EOU scheme without intimating the Development Commissioner have been set aside.

A. Vishal Footwaree Ltd [1999 (114) ELT 60 (T-Del)]

7. The above circular makes it very clear that even in the event of failure to make or continue exports, the Development Commissioner's recommendation is required before duty demands can be confirmed by the Customs authorities. In this case, there is no definite conclusion arrived at by the concerned authority namely the Development Commissioner. On the other hand, the Development Commissioner has vide its letter dated 22-12-1998 extended the period of validity for a further period upto 31-3-1999 and the importers have further requested for further extension. Therefore, in the present case, the duty demand is premature and we see no option but to set aside the same. The penalty imposed on the appellants is also set aside. The order of confiscation is also set aside. Needless to say, it will be open to the Adjudicating authority to take appropriate action for recovery of duties in the event of the recommendations of the Development Commissioner in this regard, in accordance with law.

B. ABN Granites Ltd [2001 (133) E.L.T. 483 (Tri. - Bang.)]

"2 .Arguing for the appellants Shri K.S. Ravi Shankar, learned Advocate, submitted that the appellants being a 100% E.O.U., permission is required from the Development Commissioner to proceed with the matter. Since the same has

not been done, the order is bad in law. In support of his contention he referred to a series of decisions including latest in the case of Kuntal Granites (P) Ltd. & Anr v. Commissioner of Central Excise, Belgaum reported in 2001 (132) E.L.T. 214 (T) = 2001 (43) RLT 829 (CEGAT-Ban). In this case it was held that Commissioner to adjudicate show cause notice in respect of removal of goods without payment of duty by 100% E.O.U., only after referring the matter to Board of Approval/Development Commissioner or after considering the C.B.E. & C.'s order in this regard.

3.Since the matter has not been referred to the Development Commissioner prior to adjudication, in line with the order referred to above, the matter is remanded to the adjudicating authority to follow the procedure as prescribed and to pass an order in accordance with law on providing an opportunity to the party. Thus appeal is allowed by way of remand. Ordered accordingly."

4.14 In view of the discussions as above we do not find any of the ingredients for invoking the extended period of limitation as per Section 11 A of Central Excise Act, 1944 to be present in this case. Since demand cannot be sustained on the issue of limitation we do not discuss the issue on the merits.

5.1 In view of above the appeal is allowed.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)