

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
Mumbai

Regional BENCH –Mumbai

Custom Misc. Application No. 85038 of 2019-DB

(on behalf of appellant)

in

Custom Appeal No. 245 of 2010

(Arising out of Order-in-Original No. 31/BR-27/TH-I/2009 dated 30/09/2009 passed by the Commissioner of Central Excise, Thane)

**M/s International Research Park
Laboratories Ltd.**

G-2m MIDC,
Badlapur (E)

Appellant

VERSUS

**Commissioner, Central Excise,
Thane**

4th Floor,
Navprabhat Chambers,
Ranade Road Dadar (West),
Mumbai- 400028

Respondent

APPEARANCE:

Mr. D.B. Shroff, Advocate with Mr. Kazan Shroff Advocate for the Appellant
Mr. S.K. Mathur, Special Counsel for the Respondent

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)

HON'BLE MR. C.J. MATHEW, MEMBER (TECHNICAL)

FINAL ORDER NO. A/85712 / 2022

Date of Hearing: 14.02.2022

Date of Decision: 12.08.2022

ANIL CHOUDHARY:

The appellant-International Research Park Laboratory Limited
(IRPL for short) is a 100% EOU. Under appendix 23 of the Import and

Export policy 1985 – 88, provided for setting up of export oriented unit. It permitted import into India, free of duty, raw materials, components, intermediates, consumables, capital goods, equipments for the purpose of manufacturing goods exclusively for 100% export of production, with value addition of 20% or more. The Central Government issued exemption Notification No. 13/81– Cus dated 09/02/1981 exempting the specified goods when imported into India by a 100% EOU, which have been granted a license to import. The appellant made application to Secretariat for Industrial Approvals (SIA) for grant of industry license as a 100% EOU for manufacture of assorted cosmetics, perfumery, et cetera. The unit was to be set up in association with M/s Estee Lauder international INC and its affiliates. In the application it was stated that at present the appellants had an order of Rs. 2.5 crores for immediate export to the USSR. It was specifically stated that in the 1st year they would only re-package and label finished products imported from the associates and then subsequently, import raw materials in bulk and other consumables as required.

2. The appellant was issued letter of intent (LOI) by the SIA – Ministry of Industry *vide* letter No. LI/953 (85) EO No. 68 (85) IL dated 6th August 1985, for manufacture of assorted cosmetics, perfumery and toiletry products, falling under chapter 33 of the Central Excise Tariff Act, 1985 with an annual capacity of 3000 tons and export of the same, which was later on converted into an Industrial license No. IL/184 (91) dated 12th September 1991.

3. On 14th October 1985, the SIA permitted the appellant to import finished products and re-export the same after repackaging

and labelling during the gestation period of one year, provided value addition would be not less than 20%. By classification letter dated 17th October 1985, the Central Government clarified that the LOI stood transferred from the appellant promoters name, to the name of the appellant company.

4. The appellant entered into an agreement with the President of India which recorded, *inter alia*, that the appellant had been permitted to import capital goods worth 25 lakhs and that during the gestation period of one year, the unit had been permitted to import finished goods and re-export the same after repacking and labelling. The appellant was issued customs warehousing license No. S/15–34/85/86D dated 15th November 1985 under Section 58 of the Customs Act and were granted sanction for manufacture inbond vide letter dated 6th December 1985 under Section 65 of the Customs Act, for manufacturing, filling, packing, labelling etc. of assorted cosmetics, perfumery and toiletry products for a period of one year. Thus appellants obtained the requisite license under Section 58 of the Act for storage of the product, without payment of customs duty. By permission dated 6th December 1985, the Assistant Collector of Customs – Bond, informed the appellant that they have been granted permission for repackaging and labelling of the products in bond under the supervision of the preventive officer. The permission was subject to the following conditions: –

- i) the entire 100% production shall be exported;
- ii) the value addition shall be minimum 20%;
- iii) the gestation period for achieving export target by the undertaking shall be one year and the period of export obligation

shall commence immediately thereafter.

5. The appellant entered into the following 3 contracts with the USSR Corporation for exporting various packaged Estee Lauder Cosmetics, total value of which was Rs. 5,78,33, 000:—

Details of the 3 contracts are-

i	Contract No. 27/561001 dated 17/06/1985 for: 67,500 pieces of Estee perfume spray and Estee moisturising body lotion; (a) 15,000 pieces of Cinnabar perfume natural spray and cinnabar perfume body lotion; (b) 67,500 pieces of Alliage perfume spray and body moisturiser.	Total amount of contract: INR 2,70,37,500.
ii	Contract No. 27/561183 dated 23/9/1985 for: (a) Code 1701 Truscany Eau De Toilette-20,000 pieces; (b) Code 1705 Truscany Eau De Toilette natural spray 12,000 pieces.	Total amount of contract: INR 4,84,40,000.
iii	Contract No. 27/661250 dated 10/1/1986 for: (a) Art. 0667 Moisture Balance Free Powder Compact White with Gold I Gold Box-150,000 pieces; (b) Art. 4261 Estee Super Silken Tassel Perfume Flacon-100,000 pieces.	Total amount of contract- 2,59,51,500.

6. The appellant imported 3 consignments of finished goods alongwith consumables namely – cartons, liners, labels for compact, labels for cartons and carriers, flacons, caps, tassels, pouches and setup boxes and carriers and film wraps. They filed 3 bills of entry as follows: –

15/11/1985	(i) B/E NO 2756 dt 15/11/85 CIF value Rs. 2,02,42,660.
1/12/1985	(ii) B/E No A11195 dt 1/12/85 CIF value Rs. 3,62,15,106/-
25/7/1986	(iii) B/E No 1640 dt 25/7/86 CIF value Rs. 1,92,72,345
Total CIF value Rs. 7,57,30,111/-	

the aforesaid 3 bills of entry included consumables having CIF value

Rs.1,21, 73,788/-.

7. The appellant also imported the following capital goods *vide* bill of entry for warehousing No. 1481 for CIF value Rs. 3,08,131/- namely i) labelling machine, ii) strand carton iii) wrapping machine and iv) embossing machine.

The appellant brought the imported goods to the bonded warehouse and utilised all the imported cosmetics and consumables in repacking and re labelling the goods during the period 1986–1987. This was done under the supervision of the customs authority. All the repacked and re-label goods were exported –

A) with respect to contract No. 27/861001, the appellant filed shipping bill dated 10th December 1985 along with invoice dated 12th December 1985, showing the quantity as per the contract, packing list, receipt register of the private bonded warehouse, certified copy by preventive officer showing quantity bonded, issued utilised and nil balance, statement of issue of consumables.

B) Export documents relating to contract No. 27/561183, the appellant filed shipping bill dated 26th December 1985 along with invoice dated 23rd December 1985, showing quantity as per contract, packing list, statement of issues showing quantity issued utilised, wastage, balance.

C) With respect to Contract No. 27/661250 the appellant filed shipping bill dated 29th September 1986 alongwith invoice dated 25th September 1986 and packing list, (ii) shipping bill dated 4th October 1986 with invoice dated 4th October 1986, packing list and (iii) shipping bill dated 14th October 1986 with invoice dated 8th October 1986 and packing list.

10. The appellant addressed letter to the Ministry of Commerce dated 2nd June 1986, informing that the LOI specifically permitted them during the gestation period of one year, to import finished goods and re-export the same after repackaging/relabelling. The appellants pointed out that they had made export only to the tune of 110 tons, whereas the license capacity was 3000 metric tons, which is much below the license capacity. The enclosed statement of materials imported and re-exported of the packing and evidently they had achieved value addition of 20% or more. By letter dated 29th April 1987 Government of India – Ministry of industrial development approved the extension of the validity period of the LOI upto 8th April 1995 subject to the following conditions: –

as already aforementioned, 100% export of production, value addition of minimum 20% and gestation period for achieving export target by the appellant shall be one year and export obligation shall commence immediately thereafter.

11. The appellant represented against the hardships imposed by the terms and conditions set out in the extension permission dated 29th April 1987. They also sent a letter dated 30th June 1987 to the Export Promotion Officer, Joint Director wherein they provided list of imports of consumables amounting to Rs. 1,21,73,788/- alongwith the shipping bills duly certified by the customs officers. Thereafter, the Government of India issued another letter dated 7th April 1989 modifying the terms and conditions of the LOI.

12. The office of CCI and E issued show cause notice dated 25th July 1989 wherein it was accepted that the appellant had re-exported the finished goods imported, and had achieved the minimum value

addition, but had not taken any keen interest in setting up of the unit and therefore failed to fulfill the export obligation. Thus action was proposed under Section 4-I.

13. The appellant started receiving the capital goods imported by them for setting up of the factory unit in April 1990, which was set up in the Industrial Area at MIDC, Thane. By order dated 7th November 1990, the Additional Controller confirmed the show cause notice dated 25th July 1989.

14. On 11th November 1990, the appellant entered into an agreement with the USSR for supply of goods worth Rs. 10.02 crores. The supplies were to be effected from the 1st quarter of 1991. However, soon thereafter, the USSR disintegrated. Thus due to supervening impossibility or difficulty, the appellant were unable to start the export.

15. On 12th September 1991 the appellants were granted the industrial license. Thereafter, warehousing license dated 25th November 1992, under Section 58 was issued for storage of raw materials and packaging materials in respect of the said plot. The appellants were permitted to manufacture in those premises under bond as per section 65 of the Act.

16. That the appellants regularly corresponded with the authorities for extending the validity of the industrial license and the same was extended up to 11 September 1996. In the meantime, the Import & Export Control Act, 1947 was repealed and Foreign Trade (Development and Regulation) Act, 1992 was enacted. After issue of the new Act, the Additional Director General of foreign trade issued

fresh notice to the appellants, and thereafter *vide ex parte* order dated 28th September 1996, imposed penalty of Rs. 50 Lacs and debarred the appellants from getting any import licence etc. for the period up to 31st March 1999. Being aggrieved the appellant filed an appeal against this order.

17. As per the audit report issued by the director audit/CRA, it was stated that from the Annual Performance Report for 1994–95 as well as from the Joint Commissioner's letter dated 17th January 1996, addressed to the Ministry, it appeared that the appellant unit had not started production, but had instead imported bulk quality of finished products and exported finished goods (same goods) after repacking and labelling them during the period 1985–86 and 1986–87. It was further stated that the unit had procured indigenous finished goods and had also exported the same. However, the unit never went into production. However the LOI was extended up to 11th September 1996, but as the production had not started, hence the benefit under Notification No. 13/1981 should be withdrawn and the duty along with interest should be recovered. It was also alleged that the appellant failed to achieve 20% minimum value addition in the activity of import of finished goods and re-export of the same after repacking and labelling.

18. The appellant filed the reply to the audit report on 2nd December 1996, giving details of the aforementioned 3 contracts (for supply to USSR), the import value and export value and also enclosed a statement of calculation of the value addition, clarifying that the value addition was 22.96, 23.10 and 23.01 percentage, in respect of the 3 contracts. It was pointed out that the figures were taken from

the audited balance sheet which was also enclosed. It was also urged that the allegation in the audit report of having not achieved 20% value addition is erroneous.

19. With respect to the appeal filed by the appellant against the order dated 20th September 1996 passed by the Additional DGFT wherein penalty of Rs. 50 lakhs was imposed, the Appellate Authority advised the appellant to furnish the bank guarantee of Rs. 1 lakh. Such bank guarantee was furnished on 14th December 1996. However, the Appellate Authority rejected the appeal of the appellant for non-submission of bank guarantee erroneously. This order was never communicated/served on the appellant. Appellant came to know about this order for the first time, in the course of hearing of their stay application before this Tribunal, when this was filed by the revenue before this Tribunal in the month of October/November 2011.

20. No action was taken by the Customs Department after filing of the reply to the audit objection in December 1996, till 12th April 2000. On 13th April 2000, the present show cause notice was issued demanding custom duty of Rs. 33,00,23,404/- allegedly for non-fulfilment of the condition— achievement of 20% value addition and further demand of Rs. 64,08,325/- on the capital goods imported for setting up of the factory and manufacture under bond, which had been warehoused and had not been de-bonded till date. Further penalty was also proposed. It is noteworthy that there is no allegation of suppression, in respect of these demands. The appellant contested the SCN and filed the detailed reply on 26th September 2000.

21. During pendency of the adjudication of the SCN, the Commissioner of Central Excise, Thane addressed a letter dated 23rd August 2004 to the Member-CBEC with respect to the affairs of the appellant, *inter alia* stating that: –

- i) The Show Cause Notice issued by the Ministry of Commerce in 1989 and the Show Cause Notice issued by the Additional DGFT in 1995 were not taken into consideration in issue of the Show Cause Notice dated 15/04/2000 (by customs dept).
- ii) On scrutiny of the photocopies received from the Development Commissioner it can be seen that the import of consumables valued at Rs. 1,21,73,788/- form part of the invoice no. 5531 dated 1/7/86. The Audit's proposition that the EOU had imported consumables valued at Rs. 1,21,73,788/- in addition to imports valued at Rs. 5,69,00,000/- on the bill of entry is erroneous. After excluding the value of Rs. 1,21,73,788/- the value addition is above the minimum limit of 20% and therefore the EOU has complied with the conditions described.

22. The appellants attended the personal hearing which was held on 24th July 2009, and also filed the written submissions on 3rd August 2009. Thereafter the impugned order-in-original dated 5th October 2009 was passed. The learned Commissioner observed and held as follows: –

- i) The Additional Director General of Foreign Trade had come to the conclusion that export obligation was not fulfilled and therefore imposed penalty of Rs. 50 lacs and debarred the appellants from importing goods and receiving import license.
- ii) Appellants failed to fulfil export obligation.
- iii) Since there is no exit from EOU, the date of customs duty would be the date at the time of import
- iv) Appellants failed to fulfil conditions of notification therefore cannot claim benefits of the scheme and notification and therefore required to be paid customs duty
- v) No adjudication order in respect of the demand of duty earlier therefore Appellant's contention that the matter was already

adjudicated and cannot be reopened, was rejected.

- vi) Appellants had not started manufacturing activities from inception of the unit thus, the proposed duty and penalty were confirmed.

23. Being aggrieved the appellant preferred the present appeal before this Tribunal. Vide stay order dated 21st November 2011, this Tribunal had directed the appellant to make pre-deposit of Rs. 1.5 crores. Being aggrieved the appellant had preferred Customs Appeal No. 14 of 2012 before Hon'ble Bombay High Court. The appellant also filed a separate Writ Petition No. 6353 of 2012, before the Hon'ble Delhi High Court, challenging the communication of the Appellate Authority – DGFT, dated 13th October 1997.

24. The Hon'ble Bombay High Court taking notice of the letter of the learned Commissioner dated 23rd August 2004 addressed to the member CBEC, as aforementioned, set aside the stay order of this Tribunal and directed for hearing of the appeal without any pre deposit.

25. By order dated 24th November 2014, the Hon'ble Delhi High Court in WP No. 6353 of 2012 was pleased to set aside the rejection of appeal communicated by letter dated 13th October 1997 and remanded the matter back to the Appellate Committee of DGFT. The Appellate Committee by its order dated 14th March 2017 held that as the matter was very old and many records were not available, but with available records and submissions made, it appeared that the appellant had availed of duty free benefit of import with the condition that they would export. This has not happened hence, the appellant are defaulter and hence, there is no scope for reducing the penalty. Being aggrieved the appellant filed writ petition before Hon'ble Delhi

High Court being WP No. 7863 of 2017, challenging the order, and by order dated 6th September 2017, the Hon'ble Delhi High Court have issued notice giving directions to file affidavit. The said matter is still *sub judice* before Hon'ble Delhi High Court.

26. Appearing for the appellant, learned Senior Counsel Mr Darius Shroff urges that basically there are 2 demands which have been confirmed *vide* impugned order along with penalty: –

- i) Rs. 33,00,23,408/- (Annexure II of SCN)
- ii) Rs. 64,08,325/- (Annexure I of SCN)

27. So far the first demand is concerned, the same relates to 4 items of finished goods, as set out in Annexure 2 to the SCN. The learned Commissioner ignoring the facts on record, as well as his own report/letter dated 23rd August 2004 addressed to the Member CBEC, as aforementioned, have confirmed the demand, merely on the presumption that the appellant have not achieved the minimum value addition of 20%, by referring to the order of the Additional DGFT.

28. The allegation is that the appellant have not achieved 20% of value addition in respect of goods valued at Rs. 8,79,08,899/-. It is urged that it was pointed out to learned Commissioner that though there are 4 items, mentioned in Annexure 2 to the SCN, for the purpose of calculating the customs duty, in the SCN, has only taken into consideration three consignments of finished goods, as set out at serial No. 1–3 of the Annexure 2. But for the purpose of calculating the value addition, the revenue have also taken the value of consumables, being CIF Rs. 1,21,73,788/- which was set out in item 4 of Annexure 2. No duty was demanded in respect of item No. 4 as no separate bill of entry was filed for the same, as actually, these

consumables being packing materials had been imported along with the 1st three items and were inclusive in the value of the same. This fact have also been accepted by the learned Commissioner, Thane, in his communication dated 23rd August 2004. Thus, this amount has been erroneously added to the value of the imported goods, resulting in double consideration of the same amount. Once this amount is reduced, (added double), the appellant have evidently achieved value addition of more than 20%, as has been accepted by the learned Commissioner in his communication dated 23rd August 2004. Thus, the 1st demand of Rs. 33,00,23,408/- is fit to be set-aside.

29. It is also urged that the said letter dated 23rd August 2004 has been filed and relied upon by the revenue at the time of hearing of the stay application before this Tribunal and brought on record. Hence, the same is a good and reliable piece of evidence which cannot be ignored. Accordingly, the penalty imposed of matching amount is also fit to be set-aside.

30. With respect to the 2nd demand of Rs. 64.08 lakhs approx., it is urged that the learned Commissioner have erred in holding that the appellant is liable to pay duty on capital goods, without considering the fact that Serial No. 1 of Annexure 1 to the SCN, relates to import of capital goods which were used to repack/re-labelling the imported finished goods listed at of Annexure II to the SCN. Thus the duty has been demanded mechanically without application of mind.

31. It is further submitted that the capital goods as set out at No. 2-4 of Annexure-I were imported and installed in the bonded warehouse (factory premises) sometime in 1990. The appellant had set up the factory at great expense. The factory was set up being

bonded premises with a view to manufacture cosmetics, which were to be exported to the USSR. Unfortunately soon after the import of machinery, and by that time the factory could be established and production started, the USSR disintegrated in the year 1991. The appellant tried their best to manufacture and export but were unsuccessful. It was for this very reason that the LOI was extended from time to time up to 11th September 1996. It is further submitted that the capital goods/machinery are still under the control of the Customs Department (lying under bond) and have never been cleared to the DTA nor has been disposed of. In spite of several requests, made by the appellant to the Customs Authorities for permitting them to de-bond the machinery, the same was never allowed for no good reason.

32. It is further urged that there can be no question of demanding any duty before the capital goods are de-bonded. It is further urged that on de-bonding the machinery, the appropriate custom duty is payable as per rules (subject to depreciation). It is well settled law that the rate of duty that has to be taken into consideration on the machinery, is rate of duty that is prevalent on the date of de-bonding and not the rate of duty that was prevalent on the date of importation.

33. The learned Commissioner have erred in holding that the duty is not to be recovered on the depreciated value, on the ground that customs duty on depreciated value of capital goods was recoverable, at the time of de-bonding only, after the stipulated period. Whereas, in the instant case, the duty was being demanded for non-fulfilment of the conditions of the notification.

34. It is further urged that the Department cannot, on the one hand, refuse to permit the appellant to de-bond the capital goods from the warehouse, after the warehousing period has expired, and on the other hand, purport to demand duty under Section 72 (b) of the Act. The revenue cannot be permitted to take advantage of its own wrong. It is submitted that the order of confiscation of the capital goods and the demand of duty and penalty is bad in law, erroneous and deserves to be set-aside.

35. It is further urged that even if the condition of notification was not fulfilled, it is well settled that the rate of duty has to be the rate prevalent at the time of the de-bonding. There can be no question of demanding any duty on capital goods before de-bonding. The observation of learned Commissioner – " since there is no exit of EOU, the rate of custom duty will be the rate prevailing at the time of import", is evidently baseless and without the authority of law.

36. Further the order of confiscation of capital goods is bad as the goods are still lying under bond in the bonded warehouse (factory premises). Evidently, the appellant have not violated any of the conditions/rules of warehousing. The learned Commissioner in para- 26 of the impugned order have admitted that the bonded goods were not cleared from the warehouse even after the expiry of the warehousing period. Thus holding of the goods liable to confiscation under Section 111 (j) of the Customs Act, holding dutiable goods removed or attempted to be removed from the customs area or warehouse by not paying custom duty even after expiry of the warehousing period, is erroneous and illegal.

37. It is further urged that evidently, the appellant could not

manufacture and export finished goods to the USSR as it disintegrated in the year 1991, when still the factory of the appellant was under the setup stage. Thereafter, in spite of the best efforts, the appellant could not get export orders from the separated countries of the USSR. Thus, there was genuine reason due to supervening impossibility in performance of its contract, as required under the Bond, submitted to the Customs Department. Thus, under the provisions of the Contract Act, the performance of the contract cannot be insisted upon due to supervening impossibility. Admittedly, there is no allegation of any *mala fide* on the part of the appellant, for not fulfilling the condition of the notification or any provision of the Act or any Regulation. Admittedly, the exports could not be made due to subsequent event of unforeseen force majeure conditions. Accordingly, the penalty imposed is also fit to be set-aside.

38. It is further urged that the CBEC *vide* Circular No. 122/95 – Cus have clarified that in all issues like non-fulfilment of export obligation, action had to be initiated in consultation with the Development Commissioner or the Commerce Ministry. In the present case, the action has not been taken in consultation with the Development Commissioner or the Commerce Ministry. Thus, the action of the Customs Department in issuing the show cause notice and passing the present impugned order is contrary to the binding instructions given by the Board. It is well settled law that clarifications /instructions given by the CBEC are binding on the officers of the Department.

39. So far the bald allegation made in the SCN, that the appellant

have suppressed the facts to the effect that they have also exported indigenous finished goods without seeking permission, is erroneous and bad. It is urged that no duty has been demanded or proposed in respect of such export, and thus the issue was wholly irrelevant. Evidently, the appellant had taken proper permission for importing finished goods – toiletries in bulk and for re-exporting the same after repacking and labelling.

40. It is further urged that under the facts and circumstances, the show cause notice is bad for invoking the extended period of limitation. Evidently, no case of *mala fide* could be made out in the facts and circumstances.

41. It is further urged that no separate penalty is imposable under Rule 173 Q(1) of CER 1944. Evidently, in the facts and circumstances when the goods were imported for manufacturing under Bond for export and earning net foreign exchange, no excise duty is attracted under the provisions of Central Excise Act. Thus, the imposition of penalty under Central Excise Rules is unwarranted and fit to be set-aside.

42. Accordingly the learned Counsel for the appellants prays for allowing the appeal with consequential benefits.

43. Opposing the appeal, Learned Authorised Representative for revenue contended that there is a clear finding by the Additional DGFT to the effect that the appellant have failed to fulfil the export obligation and thereafter, action have been initiated by the Adjudicating Authority, there being a clear finding by the Competent Authority. The Competent Authority have come to the conclusion that the appellant have not fulfilled the terms and conditions of the LOI

and approval granted for setting up of the EOU. The appellant have violated the terms and conditions of Notification No. 13/1981 – Cus as amended, and therefore, they have been rightly held liable to duty as demanded for non-fulfilment of export obligation. The learned AR also relies on the ruling of the Hon'ble Bombay High Court in the case of **Bombay Hospital Trust vs. CCE 2006 201 ELT 555**, wherein it have been held that violation of post clearance condition of exemption notification would attract the provisions of Section 111 (o) of the Customs Act, whereby the imported goods can be confiscated with an option to redeem the same by imposing fine in lieu of confiscation under Section 125(1) of the Customs Act. Therefore, the Customs Authorities are justified in seeking to recover the duty and fine from the appellant-assessee under Section 125 (2) of the Act, even though the assessee have not opted to redeem the goods by paying fine in lieu of confiscation. He further urges that demand, in respect of 100% EOU can be raised as per provisions of the B-17 Bond executed by the unit and there is no time limit for demanding duty. It is further urged that in respect of imports made by a 100% EOU, exemption is granted under the provisions of the Customs Act and once the exemption has been availed, under the provisions of the notification issued under the Customs Act, then for violation of the terms and conditions of the notification, duty can be demanded under the provisions of the Customs Act. It is further urged that in case of non-fulfilment of export obligation by EOU, the goods imported can be confiscated under Section 111 (O) of the Customs Act, 1962. It is further urged that demand of duty under Section 28 of the Customs Act for non-fulfilment of export obligation have been validly made.

44. Having considered the rival submissions, we find that so far the 1st demand of Rs. 33 crores approx is concerned, the same have been imposed on the allegation of non-fulfilment of export obligation – achievement of min. 20% value addition. We find that this demand is bad and illegal in view of the admitted facts on record, particularly, the communication of the learned Commissioner, Thane to the Member CBEC dated 23rd August 2004, wherein, it has been admitted that there have been error in the calculation and the appellant have achieved min. value addition of 20%, and therefore have complied with the condition. Accordingly, we set aside the demand of Rs. 33,00,23,408/- along with the penalty imposed.

45. So for the 2nd demand of Rs. 64 lakhs approx is concerned, we find that admittedly the appellant pursuant to import have brought the capital goods to the factory (in the bonded warehouse). Such goods have admittedly, not been removed by the appellant and are still lying under bond, under the control of the Customs Department. In spite of several requests by the appellant for de-bonding, the Customs Department have not cared to allow the de-bonding, which is wholly arbitrary. It is established law that duty can be demanded on the capital goods from an EOU on the event of de-bonding. Accordingly, we set aside the demand with penalty. We further direct the respondent Commissioner to allow the de-bonding of the capital goods and the appellant shall be liable to pay duty on the depreciated value, as per the applicable rate on the date of de-bonding.

46. Under the facts and circumstances, we hold that there being no liability to pay duty on import of the goods (for re-export) under the provisions of the Central Excise Act r/w the Customs Tariff Act, the

penalty imposed under Rule 173 Q(1) of Central Excise Rules is bad and accordingly we set aside the same.

47. In view of our findings and observations, the appeal is allowed and the impugned order is set aside with consequential relief to the appellant. Miscellaneous applications stands disposed off accordingly.

(order pronounced in the open Court on 12/08/2022)

C.J. Mathew Member (Technical)	Anil Choudhary Member(Judicial)
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