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

Excise Appeal No. 85393 of 2013

(Arising out of Order-in-Appeal No. BR(370)M-I/2012 dated 15.10.2012 passed by the Commissioner of Central Excise (Appeals), Mumbai-I)

M/s. Godfrey Phillips India Ltd. **Appellant**
Chakala, Andheri (E), Mumbai 400 093.

Vs.

Commissioner of Central Excise, Mumbai-I **Respondent**
115, New Central Excise Building,
Maharshi Karve Road,
Churchgate, Mumbai 400 020.

Appearance:

Shri Rajesh Ostwal, Advocate, for the Appellant
Shri Xavier Mascarenhas, Superintendent, Authorised Representative for the Respondent

CORAM:

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

Date of Hearing: 24.02.2023
Date of Decision: 24.02.2023

FINAL ORDER NO. 85469/2023

PER: SANJIV SRIVASTAVA

This appeal is directed against Order-in-Appeal No. BR(370)M-I/2012 dated 15.10.2012 passed by the Commissioner of Central Excise (Appeals), Mumbai-I. By the impugned order, Commissioner (Appeals) has upheld Order-in-Original No. K-I/38/2012 dated 27.03.2012 passed by the Deputy Commissioner of Central Excise, Division K-I, Mumbai-I, vide which following has been held:-

"ORDER

30 In view of the above discussion and findings, I pass the following order.

i) I confirm the Central Excise duty totally amounting to Rs.4,52,942/- (Rupees Four Lakh Fifty Two Thousand Nine Hundred Forty Two Only) under the provisions of Section 11A(1) *of the Central Excise Act, 1944 and order recovery of the said amount from M/s GPIL.*

ii) I confirm and order recovery of interest from M/s GPIL under the provisions of Section 11AB of Central Excise Act, 1944;

iii) I impose a penalty of Rs. 1,00,000/-(Rs. One Lakh) on M/s GPIL, under Rule 25 of the Central Excise Rules, 2002, for wrongly availing Notification No. 46/2001 CE(N.T.) dated 26.06.2001 and clearing the goods without payment of duty to M/s Nuance Group India Pvt Ltd, Mumbai

iv) Further, I impose a penalty of Rs.50,000/- (Rs. Fifty thousands) on M/s Nuance Group India Pvt Ltd, Mumbai, under Rule 26 of the Central Excise Rules, 2002."

2.1 Appellant is manufacturer of cigarettes falling under Chapter Sub-Heading 2402 and has cleared the same to M/s. Nuance Group (India) Pvt. Ltd. at the duty-free shop situated at Bangalore International Airport. The clearances affected to M/s. Nuance Group without payment of duty were deemed to be provisional as these were based on the undertaking given by M/s. Nuance Group.

2.2 Alleging that M/s Nuance Group India Pvt. Ltd. was not eligible for exemption from payment of Central Excise Duty, as

- there was no valid provision in terms of a notification under Section 5A of the Central Excise Act, 1944 or Rule 19 of the Central Excise Rules, 2002, were in force at the relevant time;
- they had not taken registration under Rule 9 of the Central Excise Rules, 2002,

a show cause notice dated 10.05.2010 was issued to appellant, asking them to show cause as to why:-

i. *The Central Excise duty totally amounting to Rs 4,52,942/- (Rupees Four Lakh Fifty Two Thousand Nine Hundred Forty Two Only) should not be demanded and recovered from them under Section 11 A (1) of the Central Excise Act, 1944 as shown in Annexure 'A' to this notice.*

ii. *Interest should not be recovered from them under the provisions of Section 11 AB of the Central Excise Act, 1944.*

iii. *Penalty should not be imposed on them under Rule 25 of the Central Excise Rules, 2002, for wrongly availing of the benefit of Notification No 46/2001 CE (NT) dated 26.06.2001 and clearing the goods without payment of duty to M/s Nuance Group India Pvt. Ltd.*

2.3 Show Cause Notice was adjudicated by the Deputy Commissioner as per order in original referred to in para 1, supra.

2.4 Aggrieved by the order of Deputy Commissioner, Appellant preferred appeal before the Commissioner (Appeals). The appeal was disposed of by the Commissioner (Appeals) as per the impugned order.

2.5 Aggrieved appellants have preferred this appeal.

3.1 We have heard Shri Rajesh Ostwald, advocate for the appellant and Shri Xavier Mascarenhas, Superintendent, Authorized Representative for the revenue.

3.2 Arguing for the Appellant, learned advocate submits-

- The issue is no longer res integra and in appellant's own case vide final order No. A.87017/2021 dated 22.10.2021 Tribunal has decided the issue in favour of the appellant.
- Appellants effected these clearance vide ARE-I dated 14.05.2009 in terms of the permission accorded by the Commissioner of Central Excise vide their letter dated 23.12.2008. The said permission was valid till 16.5.2009.
- Nuance Group has not obtained registration since
    - They being Merchant Exporters have been listed in the "Non-Assessee" category and exempted from registration under Rule 9 of the Central Excise Rules, 2002. This position has been reiterated in the CBEC Circular No. 919/9/2010-CX., dated 23.3.2010;
    - Notification No. 36/2001-CE. (NT) dated 26.6.2001 exempt persons from taking registration under Rule 9 of the Central Excise Rules, 2002, in case where

the assessee is manufacturing excisable goods by following the warehousing procedure under the Customs Act, 1962.

- o By Notification No. 9/2013 - CE (NT) dated 23.5.2013, para 2A is inserted in Notification No. 36/2001 - CE (NT), whereby it is declared that a godown or retail outlet of a Duty Free Shop is appointed or licensed under the provisions of 58 of the Customs Act, 1962, such godown or retail outlet shall be deemed to be registered as warehouse under Rule 9 of the Central Excise Rules, 2002.
- o Therefore registration under Rule 9 for duty free shop of Nuance Group was not warranted especially when their premise was registered under Section 58 of the Customs Act, 1962.

➢ CBEC Circular No. 970/04/2013 -CX., dated 23.5.2013 clarifies at para 1(i) it that duty free shops licensed under Section 58 of the Customs Act, 1962 shall be deemed to be registered under rule 9 of the Central Excise Rules, 2002 for the purpose of warehousing of excisable goods meant for sale to international passengers in terms of the Notification No. 7/2013-CE (NT), dated 23.5.2013.

➢ Undisputedly, the cigarettes were consigned directly to duty free shop, which was a Customs Bonded Warehouse licensed under Section 58 of the Customs Act, 1962, from where they were sold to the outbound/inbound passengers against payment in foreign currency. Therefore, the impugned cigarettes have been exported by the appellant through merchant exporter namely Nuance Group, and would be covered by the definition of export as per Section 2(19) of the Customs Act, 1962, and hence no duty was required to be paid. [Hotel Ashoka Vs. Asst. CCT – 2012 (276) ELT 433 (SC)].

➢ Once, the factum of exports is not under dispute, the substantive benefit of duty exemption cannot be denied even if procedural deficiencies.

➢ The permission letter dated 23.12.2008, fixed liability to pay duty on Nuance Group in the event of any lapse and also secured the revenue by requiring Nuance Group to execute Bond. The appellants cannot be held liable for alleged omission on the part of Nuance Group in taking registration under Rule 9 of the Central Excise Rules, 2002. Therefore, if any duty is to be demanded the same should be done from Nuance Group only as has been held in the following cases

- o Eves Fashions [2006 (205) ELT 619 (T)]
- o Kishore Pumps Ltd. [2004 ELT 45 (T)]
- o Tejal Paper Mills Pvt. Ltd. [2003 (156) ELT 364 (T)]

➢ As demand itself is not sustainable and hence, penalty is not imposable, and interest is not chargeable

3.3 Learned Authorized Representative reiterates the findings recorded by the Deputy Commissioner and the Commissioner (Appeals) in the impugned order.

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

4.2 Undisputed facts as recorded in para 3 to 6 of the show cause notice are reproduced below:-

"3. M/s Nuance Group (India) Private Limited. (hereinafter referred to as M/s Nuance Group) having office at Eureka Towers, C-Wing, 1 Floor, Mindspace, Link Road, Malad (West), Mumbai 400 064 are having Private Bonded Warehouse License No. 01/2008 in respect of the premises at Bangalore International Airport, Bangalore and Private Bonded Warehouse License No. 02/2008 in respect of the premises at Rajiv Gandhi International Airport, Hyderabad issued under Section 58 of the Customs Act, 1962. M/s Nuance Group made applications through M/s.GPI under their letter dt.25.09.2008 to the Commissioner of Central Excise, Mumbai-IV requesting clearance of cigarettes, manufactured by M/s GPI without payment of any central excise duties, to M/s/Nuance Group(India) Private Limited, for sale by them through their Duty Free Shop (DFS) situated at International Airports at Hyderabad and Bangalore.

4. WHEREAS on the basis of said application/representation, the Commissioner of Central Excise, Mumbai IV had granted the *permission to M/s Nuance Group and M/s GPI vide Letter F.No: V-30(109)T-2/Permission/MIV/08 dated 23.12.2008. The said permission was valid up to 16.05.2009 in respect of premises at Bangalore Airport and valid up to 11.03.2009 in respect of Hyderabad Airport.*

The permission under the above referred letter was granted for availing of the procedure of removal and receipt in bond, of cigarettes, without payment of duty, manufactured by M/s GFL. Mumbai and disposal by M/s Nuance Group through their (Nuance Group's) said Duty Free Shops, on the conditions mentioned therein and also subject to the compliance of conditions of Notification No.45/2001CE(NT)dated26.06.2001 and the procedure as prescribed under Circular (No.581/18/2001-Cx dated 29.06.2001. The permission so granted was also subject to following conditions and procedure laid down under Board's letter F.No.24/10/69-CX- IV/S dated 22.06.1970 and on execution of bonds and on furnishing the bank guarantees by M/s Nuance Group.

5. WHEREAS in pursuance of said application/ representation made by M/s Nuance Group and on the basis of said permission given as mentioned in para 4 above, M/s. GPI cleared 2,50,000 Nos of cigarettes cf different brands, without payment of duty during May,2009 to M/s Nuance Group, Bangalore International Airport and said cigarettes were received by M/s Nuance Group for sale by them (Nuance Group) at their Duty Free Shop situated at International Airport at Bangalore. M/s Nuance Group also umished Bond and Bank guarantee for covering the clearances of said non-duty paid ogarettes received by them from M/s GPI.

6. WHEREAS it was found that the cigarettes received by M/s Nuance Group from M/s GPI, without payment of duty, for sale through their Duty Free Shop situated at International Airport at Bangalore, was neither exempted by virtue of any notification issued under Section SA of Central Excise Act, 1944 nor under any notification issued under Rule 19 of the Central Excise Rules, 2002, deeming such removal as export, nor registered under Rule 9 of Central Excise Rules, 2002. Accordingly the said

Cigarettes were found liable to Central Excise duties at the rate applicable from time to time."

4.3 From the facts as stated above, as per the show cause notice it is quite evident that M/s Nuance Group were granted permission to receive the impugned goods without payment of duty from the appellant for being bonded in their bonded ware house licensed under Section 58 of the Customs Act, 1962, for sale through their duty free shops located at International Airport, Bangalore. Para 5, also records that impugned goods were received by M/s Nuance Group in their bonded warehouse. Nuance Group had executed Bond with prescribed Bank Guarantees from time to time for covering the clearances of the said non duty paid cigarettes received by them from the Appellant. It is not the case of the revenue that these goods were cleared by the appellant in contravention of any of the conditions as per the permission accorded to them by the Commissioner.

4.4 Rejecting the contentions raised by the appellant in their appeal, Commissioner (Appeal) has observed as follows:

"04. I have carefully gone through the case records; written and oral submissions made by appellants and also relevant provisions of law relating to subject matter. The issue involved is duty liability on goods cleared to Duty Free Shop. The definition of export goods as per Section 2(19) of the Customs Act, 1956 says "any goods which are to be taken out of India to a place outside India". The subject goods were not taken out of Indian territory. Hence do not qualify as export goods. There is not evidence showing that goods were exported under valid S/B. Airways bill etc. The Board's letter no. 24/10/09/CXIV/8 dated 22.06.1970 was applicable only to ITDC run duty free shops.

05. The excisable goods are chargeable to Central Excise duty unless exempt. Appellant have not shown any order or authority of the department showing their eligibility for any exemption from payment of Central Excise duty as there was no provision of law for exemption from payment of Central Excise duty on these cigarette, neither a notification under section 5A of Central

Excise Act, 1944 nor under any, notification issued under Rule 19 of Central Excise Rules, 2002 were in force for the relevant period. Moreover, there was no provision in existence deeming such removal as exports. The recipient of said cigarettes M/s. Nuance was also not registered under Rule 9 of Central Excise Rules 2002, warehouse under Section 58 of the Customs Act is authorized to store only imported goods without payment of duty and such warehouse is registered under license by Customs authorities. Normally, imported goods are required to pay Customs duty to Government when they enter India but exemption has been made under Section 58 of Customs Act 1962 to let imported goods remain in India without payment of duty to such warehouse established under Customs Act. Domestic goods can only be cleared without payment of duty to the warehouse registered under Rule 9 of Central Excise Rules, 2002. Furthermore, Notification No. 46/2001CE (NT) dated 26.06.2001, Board's Circular No. 579/16/2001 dated 26.06.2001 and Board's Circular No. 635/26/2002 dated. 18.04.2002 lay down the procedure and other conditions for removal of goods without payment of duty from the factory to warehouse. Such warehouse can be registered only by Commissioner, Central Excise under Rule 9 of Central Excise Rule, 2002. As M/s. Nuance does not hold this registration. The appellant cannot remove cigarettes without payment of Central Excise duty to the duty free shop. Such removal without payment of duty attract penal provisions.

07. Even permission granted vide C. No. VIII/48/27/18/2008/AP dated 17.05.2008 says "The premises described in Paragraph 2 & 3 hereof being in occupation of M/s. Nuance Group (India) Pvt. Ltd., International Airport. Bangalore is hereby licensed under Section 58 (1) of Customs Act, 1962 (No. 52 of 1962) as private bonded warehouse for storage of imported sensitive goods such as Liquor, Perfumes, Cosmetics, Tobacco and Cigarettes and non-sensitive goods such as Fashion Apparel, Accessories, Chocolates and Electronics for sale to transit, outgoing and incoming international passengers". Similarly, permission issued under C. No. S/26/Misc/07/08/AP dated March 2009 the says the under mentioned Duty Free Shop outlet is being the property of

M/s. Nuance Group (India) Pvt. Ltd., office located at PTB, Rajiv Gandhi International Airport, Shamshabad, under lease agreement with GHIAL for a period of 7 years, is hereby licensed under Section 58 of Customs Act 1962 as amended, as a Customs bonded warehouse for sale of Liquor, tobacco/ cigarettes, fashion apparels, fashion accessories, food and confectionaries, perfumes and cosmetics, technology and electronics etc. permitted to be sold from their four outlets at level D, E & F of the Passenger Terminal Building of the Rajiv Gandhi International Airport, Shamshabad (PTB), without payment of Customs Import Duties on Bond to Bond transfer from their Warehouse located at level B of the PTB, subject to the conditions described on reverse. The four Duty Free Shop outlets of level D, E and F of the Passenger Terminal Building of the new International Airport, Shamshabad are at the distance of about LIPS Kilometers from the Central Excise Hqrs. Office, Hyderabad". Thus it reveals that subject permission is only for imported goods and provide storage of subject goods without payment of Customs Import duties. No where it provides non payment Central Excise duty.

07. Thus, appellant have contravened provisions of rule 4 of Central Excise Rules, 2002 read with Rule 8 ibid and liable for the recovery of duty under the provisions of Section 11A (1) of Central Excise Act, 1944 and also liable for interest under Section 11AB beside liable for penalty under Rule 25 of the Central Excise Rules, 2002 for wrongly availing benefit of Notification No. 46/2001 CE. (NT) dated 26.06.2001 and clearing the goods without payment of Central Excise duty."

4.5 We are not in position to agree with the findings recorded by the Commissioner (Appeals) simply for the reason that clearance of the impugned goods on 14.05.2009 was made by the Appellant in terms of the proper permission accorded by the Commissioner, to M/s Nuance Group, for receiving the non duty paid goods from the appellant. It is not even the case of the department that these goods were cleared contrary to the permission accorded by the Commissioner.

4.6 At the time of granting the permission, Commissioner would have satisfied himself in respect of fulfillment of all the conditions prescribed and in our view he was right in doing so. The conditions for registration under Rule 9 of the Central Excise Rules, 2002 as per Circular No 581/18/2001-CX dated 29.06.2001 was qua the exporter who intended to clear the goods for export from his warehouse. M/s Nuance Group have been granted the license under Section 58 of the Customs Act, 1962 for operating such a bonded warehouse to receive, store and subsequently clear for export the goods so received. Once he fulfilled these conditions the condition of registration under rule 9 of Central Excise Rules, was merely procedural and could not have been reason for the denial of substantial benefit that was claimed by M/s Nuance Group. Subsequently Central Government issued Notification No 07/2013-CE (NT) dated 23.05.2013 dispelled any doubts that existed, stating as follows:

"In exercise of powers conferred by sub-rule (1) of rule 20 of the Central Excise Rules, 2002, the Central Government hereby extends the facility of removal of all excisable goods falling under the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) from the factory of production, intended for storage in a godown or retail outlet of a Duty Free Shop in the Departure Hall or the Arrival Hall, as the case may be, of International Airport, appointed or licensed as "warehouse" under Section 57 or 58 of the Customs Act, 1962 (52 of 1962), as the case may be, and for sale therefrom, against foreign exchange to passengers going out of India or to the passengers or members of crew arriving from abroad, subject to limitations, conditions and safeguards as may be specified by the Central Board of Excise and Customs in terms of sub-rule (2) of rule 20 of Central Excise Rules, 2002."

& Circular No 970/04/2013 dated 23.05.2013 stating as follows:

(1) <u>Registration of warehouse</u>:

(i) *The godowns and the retail outlets of Duty Free Shops in the departure/ arrival side of the International Airport appointed/licensed under Section 57 or 58 of the Customs Act, 1962 shall be deemed to be registered under rule 9 of the Central Excise Rules, 2002 for the purpose of warehousing of excisable goods meant for sale to international passengers in terms of the aforesaid notification.*

(ii) *For the purpose of control over the receipt, storage and sale of such excisable goods, the officers of Customs having jurisdiction over these godowns and retail outlets have been appointed as officers of Central Excise vide notification No. 08/2013-C.E.(N.T.), the dated 23rd May, 2013.*

4.7 Further even if we agree to the contentions of the Commissioner (Appeals) then also the demand of duty should have been made from M/s Nuance Group, who had executed the Bond and Bank Guarantees for availing the benefit of duty free clearances and not the appellant. In case of Kishore Pumps Ltd., referred to by the Appellants it has been held

"***3.*** *Since the commitment to complete the export has been given by the merchant-exporter, the department is required to recover the duty from the merchant-exporter in terms of the bond executed before the Maritime Commissioner. I, therefore, hold that there is no case for demanding duty from the appellants and the order of the lower authorities is required to be set aside. Accordingly, I allow the appeal and set aside the orders passed by the lower authorities*."

4.8 In case of Tejal Paper Mills referred to by the counsel, following has been held:

"3.*I have heard both sides and gone through the record. The bare perusal of the impugned order shows that the duty demand has been confirmed against the appellants mainly on the ground that while clearing the goods, the merchant-exporter failed to produce Block Transfer Certificate which was required to be procured before that, from the Maritime Commissioner. The certificate was produced only on 13-7-1995 whereas the clearance of the goods from the factory premises of the appellants took place on 26-6-1995. But it remains undisputed that the merchant-exporter executed B-1 Bond before the Maritime Commissioner, Bombay, from where the goods were exported. There is nothing on the record to suggest if the goods were so cleared by the appellants, were never exported by that exporter or that the said exporter committed any breach or violation of the terms of the bond. There is also no material to suggest if any action for breach of any provisions of the bond had been initiated or taken against that exporter. The Block*

Transfer Certificate as even admitted by the Commissioner (Appeals) in the impugned order, was to be taken by the merchant-exporter and not by the appellants.

4.*Regarding the duty liability where the goods had been exported by manufacturer through the merchant-exporter on execution of B-1 bond, in favour of the Maritime Commissioner, Bombay, the Board Circular is quite clear. The Board vide Circular No. 87/87/94-CX., dated 26th December, 1994 has clarified that in such a situation, the liability will be of the merchant-exporter. Therefore, the action, if any, called for was against the exporter and not the present appellants. As observed above, there is no material on the record to suggest if any action had been taken against the exporter. Moreover, the initial lapse, if any, committed by the exporter, of not obtaining the Block Transfer Certificate in time, stood rectified as the same was produced after the clearance of the goods as is evident from the impugned order itself. Therefore, for the minor lapse on the part of the merchant-exporter, the appellants could not be saddled with the duty demand and penalty."*

4.9 Similar view has been expressed in the following decisions were the issue was in respect of non fulfillment conditions of erstwhile Chapter X procedure by the consignee/ receiver of the goods:

- Ferro Alloy Corporation [1994 (71) ELT 931 (T)]
- Vikram Enterprises [2008 (226) ELT 437 (T)]
- IBP Co Ltd [1999 (110) ELT 900 (T)]
- Hindustan Petroleum Corporation Ltd. [2011 (269) ELT (T)]

4.10 The Circular No 581/18/2001, referred by Commissioner (Appeal) states as follows:

"4.2 Execution of bond

4.2.1 Every exporter registered in the aforesaid manner, shall execute before the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise having jurisdiction over the warehouse a general bond under Rule 19 of the Central Excise (No.2) Rules, 2001 for export of goods from the warehouse in the B-3 Bond (General Security) Form annexed to *this Circular at Annexure-I. The exporter availing this scheme shall be required to furnish security equal to 25% of the bond amount. In case any bank guarantees are furnished, it shall be the sole responsibility of the exporter to renew its validity.*

4.2.2 A "Running Bond Account" will be opened in the format specified at Annexure-II. This register shall be maintained by the exporter in the warehouse and shall be made available to the officer-in -charge or officers of Internal Audit for scrutiny and checkings.

5. Warehousing Procedure

5.1 For removal of excisable goods from a factory or any other premise approved by the Commissioner to a warehouse, procedure laid down in Circular No. 579/16/2001-CX dated 26.6.2001 issued under rule 20 of the said rules will be applicable. It is clarified that the Notification No. 46/2001-CE(NT) dated 26.6.2001 do not cover removal from one warehouse to another.

5.2 The Central Excise Officer in-charge of the warehouse will issue certificate in duplicate of removal in the Form CT-2 specified at Annexure-III indicating details of the general bond executed by the exporter. The CT-2 shall bear per-printed serial numbers running for the whole financial year beginning on the 1st April of each year. The said officer will issue twenty five CT-2 certificates at a time, signing each of the leaf with the official stamp. More certificates can be issued if it is so requested by the exporter on the grounds of large number of procurements. The exporter will fill up the relevant information in CT-2. After making provisional debit in the Running Bond Account, he will indicate the same in the CT-2. One copy of CT-2 will be forwarded to Officer-in charge of the warehouse. One copy will be sent to the consignor and one copy will remain with the exporter.

5.3 The consignor will prepare an application for removal in the Form specified in Annexure-IV (hereinafter referred to as ARE-3) and an invoice (under rule 8 taking into account CT-2 certificate) and follow the procedure specified in Circular No. 579/16/2001-CX dated 26.6.2001 issued under rule 20. The serial number of the corresponding CT-2 shall be mentioned on *the top of the each copy of ARE-3. Any nominal variations between the provisional debit indicated in the CT-2 and the actual duty involved in the goods removed as indicated in ARE-3, can be ignored. Immediately on receipt of goods, the provisional debit shall be converted into actual debit on the basis of the details mentioned in ARE-3.*

5.4 The officer-in-charge of the warehouse will countersign application and despatch to the Range Office having jurisdiction over the factory / other approved premise of removal within one working day of receipt of the application. He will make suitable entry in his own record accordingly.

5.5 The assessees shall maintain private record (Warehousing Register) containing information relating to details of ARE-3 and invoice, date of warehousing certificate, description of goods received including marks and numbers, quantity, value, amount of duty, details of operation in the warehouse and new packages and their marks and number, clearance from the warehouse for export (ARE-1 No., Invoice No., quantity, value, duty) and clearance for home consumption. They shall produce this Register to the Central Excise Officers in-charge of the warehouse whenever required."

Except for stating that M/s Nuance Group, has not obtained registration under Rule 9, it is not even the case put forth by the revenue that other conditions as prescribed at para 4 and 5 were not complied with. It is also not the case that the goods were not received in the ware house and cleared from the ware house in the manner as prescribed for export.

4.10 Once it is admitted that the goods cleared by the appellant were received in the warehouse, the circular says in case of any diversion to domestic tariff area, the duty is required to be paid by the warehouse operator. Para 10 of the Circular reads as follows:

10. Diversion of goods for home-consumption :

10.1 Goods can be diverted for home-consumption from the warehouse with the permission of the jurisdictional Assistant/Deputy Commissioner. The clearance shall be effected on invoice prepared under rule 8 on payment of duty, interest *and any other charges on TR-6 Challans and after making necessary entries in the export warehouse register maintained by the exporter in the warehouse. Credit will be permitted in the Running Bond Account equivalent to the duty involved in the goods so diverted, which shall not exceed amount of duty debited on the basis of ARE-3 on which such goods were received in the warehouse. If entire quantity is not diverted, calculation shall be done on pro-rata basis.*

10.2 Goods can be diverted for home-consumption even after the clearance from the warehouse on ARE.1. For cancellation of documents, provisions of notification no. 46/2001-CE(NT) dated 26.6.2001 shall be followed. The intimation shall be given to Assistant/Deputy Commissioner having jurisdiction over the warehouse. Credit in Running Bond Account will be permitted in the same manner as mentioned on Para 10.1 above.

10.3 Where the goods are diverted for home-consumption in full or in part the exporter shall be liable to pay interest @24% per annum on the amount of duty payable on such goods from the date of clearance from the factory of production or any other premises approved, till the date of payment of duty and clearance."

4.11 In view of the above discussions we are not in position to uphold the impugned order, wherein the demand has been made from the manufacturer of the impugned goods.

5.0 The appeal is allowed and the impugned order set aside.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

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