CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 1246 OF 2012

[Arising out of Order-in-Original No: 23/CEX/COMMR/KOP/2012 dated 22nd August 2012 passed by the Commissioner of Central Excise & Service Tax, Kolhapur.]

Jadhav Exports Pvt Ltd
Plot No. 109, 110, 111 Vasantdada Industrial Estate
Sangli – 416 416 … ***Appellant***

versus

Commissioner of Central Excise
Vasant Plaza, Bagal Chowk, Kolhapur …***Respondent***

WITH

EXCISE APPEAL NO: 1861 OF 2012

[Arising out of Order-in-Original No: 23/CEX/COMMR/KOP/2012 dated 22nd August 2012 passed by the Commissioner of Central Excise & Service Tax, Kolhapur.]

Jadhav Exports Pvt Ltd
Plot No. 109, 110, 111 Vasantdada Industrial Estate
Sangli – 416 416 … ***Appellant***

versus

Commissioner of Central Excise
Vasant Plaza, Bagal Chowk, Kolhapur …***Respondent***

APPEARANCE:

Shri D H Nadkarni, Advocate for the appellant

Shri Anand Kumar, Additional Commissioner (AR) for the respondent

CORAM:

HON'BLE MR S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)

FINAL ORDER NO: A / 85872-85873 /2023

DATE OF HEARING: 02/11/2022
DATE OF DECISION: 01/05/2023

PER: C J MATHEW

The demand of ₹ 1,15,22,678 under section 28 of Customs Act, 1962, along with interest thereon under section 28AB of Customs Act, 1962, and of ₹ 87,034 as duties of central excise under section 11A of Central Excise Act, 1944, along with interest thereon under section 11AA of Central Excise Act, 1944, the confiscation of goods valued at ₹ 2,23,04,089 under section 111(o) of Customs Act, 1962 and of goods valued at ₹ 61,353 under rule 25 of Central Excise Rules, 2002 but permitted to be redeemed on payment of fine of ₹ 1,00,00,000 and ₹ 2,00,000 respectively, and imposition of penalties under section 112 of Customs Act, 1962 as well as under section 11AC of Central Excise Act, 1944 and rule 25 of Central Excise Rules, 2002 in order[1] of Commissioner of Central Excise, Kolhapur is impugned before us in this appeal of M/s Jadhav Exports Pvt Ltd. Two separate appeals have been filed in relation to the duties under the two statutes and both are taken for disposal in this common order.

2. The appellant operates ‘100% export oriented unit (EOU)’,

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[1] [order-in-original no. 23/CEX/COMMR/KOP/2012 dated 22nd August 2012]

issued with letter of permission (LoP) dated 7th August 2000 by the Secretariat for Industrial Approvals (SIA) entitled them to procure capital goods, inputs and consumables – from abroad and from domestic sources – for the manufacture and export of 'footwear' for a period of 10 years and, in accordance with the extant procedure, had secured 'private bonded warehouse (PBWH)' license for their designated premises both under Central Excise Act, 1944 and Customs Act, 1962. The issue in dispute pertains to the dutiability of capital goods, valued at ₹ 1,99,70,416, and raw materials, valued at ₹ 23,33,673, imported by availing the benefit of notification no. 53/97-Cus dated 3rd June 1997 and raw materials, valued at ₹ 6,13,353, procured domestically by availing exemption under notification no. 1/95-CE dated 4th January 1995 and notification no. 22/2003-CE dated 31st March 2003 and subject to conditions prescribed therein.

3. It was alleged by customs authorities that, in the first five years of operation up to March 2007, the appellant had effected exports of US $136571 (₹ 61,45,695) only against obligation of US $ 69,61,500 (₹ 31,32,67,500) and, consequently, the ineligibility thereof to continue to be entitled to exemption from duties of customs and duties of central excise on the goods procured, domestically as well as from abroad, arose with duty liable to be recovered for not having fulfilled the condition of usage for the purposes approved in the 'letter of permission (LoP)' issued to them. In the impugned order, the duty

liability was charged on the capital goods at the original value of import and the liability on raw materials was computed also on the entirety of goods – imported or procure domestically – on which exemption had been claimed.

4. It is contended by Learned Counsel for the appellant that they had been manufacturing, and exporting goods, till 2002-2003 and that. in computation of the duty liability on the capital goods, benefit of depreciation should have been granted in accordance with the decision of the Tribunal in *Baglan Taluka Grape Growers Coop Society Ltd v. Commissioner of Central Excise, Nashik [2019 (369) ELT 1162 (Tri-Mumbai)]*, in *Shriram Grape Growers Coop Society Ltd v. Commissioner of Central Excise & Customs, Nashik [2018 (364) ELT 420 (Tri-Mumbai)]*, in *Commissioner of Customs & Central Excise, Vadodara v. Solitaire Machine Tools P Ltd [2003 (152) ELT 384 (Tri-Mumbai)]*, in *International Knitting Ltd v. Commissioner of Central Excise, Mumbai [2012 (283) ELT 584 (Tri-Mumbai)]*, in *Trans Freight Containers Ltd v. Commissioner of Central Excise, Thane-II [2012 (277) ELT 168 (Tri-Mumbai)]*, in *P Suresh v. Commissioner of Customs & Central Excise, Guntur [2011 (266) ELT 226 (Tri-Bang)]*, in *Suvarna Aqua Farm & Exports Ltd v. Commissioner of Customs, Guntur [2005 (190) ELT 284 (Tri-Bang)]* and in *Profitex Pvt Ltd v. Commissioner of Customs & Central Excise, Raigad [2008 (226) ELT 711 (Tri-Mumbai)]*.

5. Further reliance is placed by him on circular no. 14/2004 dated 13th February 2004 of Central Board of Excise & Customs (CBEC) on grant of depreciation with effect from commencement of commercial production. It was also contended that duty liability on raw materials procure domestically will continue to subsist only to the extent of stock in hand on date of the bonding. It is contended that the unit having been lying idle since 2006, the value of the raw materials is 'nil' and, hence, not liable to duty.

6. Learned Authorised Representative relies upon notification no. 6/98-CE (NT) dated 2nd March 1998 on the correctness of recourse to the general bond for recovery of duties forgone in the event of non-fulfilment of obligation/conditions in notification. He also placed reliance on the decision of the Hon'ble High Court of Bombay in *Commissioner of Central Excise, Thane-II v. Bee International [2013 (298) ELT 193 (Bom)]*. He pointed out to the contents of Notification no. 53/97-Cus dated 3rd June 1997 and circular no. 12/2008-Cus dated 24th July 2008 of Central Board of Excise & Customs (CBEC). According to him the decisions of the Tribunal in *Noel Agritech Ltd v. Commissioner of Central Excise, Mangalore [2006 (195) ELT 88 (Tri-Bang)]* and in *Dinesh Agro Products Ltd v. Commissioner of Central Excise Pune-III [2009 (241) ELT 404 (Tri-Mum)]* offers legal precedent for upholding the impugned order.

7. The appellant was issued with permission to operate under the 'export-oriented unit (EOU)' scheme in the Foreign Trade Policy (FTP) by the competent authority in 2000. Admittedly, the appellant was unable to fulfil the prescribed export obligation for the first five years of operation and, therefore, in accordance with the policy prescriptions and corresponding exemption notifications issued under Central Excise Act, 1944 and Customs Act, 1962, became liable to duties in accordance with the scheme. Furthermore, the appellant also was liable to be proceeded under the Foreign Trade (Development & Regulation) Act, 1992 by the designated authority competent to impose penalties for such failure.

8. Between 2002-03, when the appellant ceased to export and the effective closure of the factory in 2006 as well as the proceedings initiated under Customs Act, 1962/Central Excise Act, 1944 in 2011, several changes had been made to the scheme. Concurrently, the perception on liabilities arising from non-fulfilment of export obligation had also undergone transformation in terms of judicial determination. In *re Shriram Grape Growers Co-op Society Ltd*, it was held that

> *'4. The privilege of the scheme was the entitlement import, or procure domestically, capital goods, consumables and raw materials required for the manufacture of the export product. These were available to applicants on Letter of Permission issued by the Secretariat for Industrial Approvals in the Ministry of Commerce and Industry, Government of India and, subsequently,*

by the Development Commissioner; the Letter of Permission had been issued to the appellant by the former. The Letter of Permission contained all the obligations and privileges the default on the applicant. The case against the applicant is that condition of fulfilment of export obligation in the Letter of Permission having been breached, as evidenced in the proceedings initiated and completed by the Development Commissioner, the consequence of duty liability specified in the said Letter of Permission would arise.

5. It must be noted here that the operationalising of the scheme, insofar as exemption from duties are concerned, depended on Customs Act, 1962 and Central Excise Act, 1944. A proceeding for recovery of duties cannot be based on authority other than these notifications. A cursory perusal of the impugned order would indicate that violation of the conditions of the notifications are not the basis of the confirmation of demand and the detriments enumerated therein. This alone should be sufficient aside the impugned order.

6. The mandate of export obligation under this scheme has altered substantially over the time that this dispute has persisted. The computation thereof, either applicable at the time of issue of Letter of Permission or applicable at the time of issuing of the show cause notice, vary substantially. It would appear that the impugned order has not distinguish between the two.… It is further contended that the action to recover duties premature since the unit does not cease to operate till debonding and that eligibility for depreciation, as prescribed in the circulars of Central Board of Excise & Customs, has not been extended to them.

7. All the above contentions have not been considered in the impugned order.……

8. It is now well-settled by the decision of the Tribunal in Commissioner of Customs & Central Excise, Vadodara v. Solitaire Machine Tools P Ltd [2003 (152) ELT 384 (Tri-Mumbai)] holding -

> *'6. Items like Jiggs and fixtures are for repeat, long-term use can manufacture. Therefore, they form part of the excitement used in production, as opposed to raw*

> *materials, parts, etc., which are consumed and manufacture. Evidently, they qualify to be treated as capital goods. Further, these items were specifically figuring in the list of capital goods for import as approved by the authorities. In such circumstances, we are not able to find any merit in the objection raised by the Revenue authorities. With regard to the period of depreciation also the appellant is right in claiming depreciation up to March, 97. This is clear from the terms of the Notification itself. Explanation to Notification No. 13/81 states that "the depreciation… shall be allowed for the period from… Up to the date of payment of duty". The contention of the Revenue that the depreciation shall be allowed only to the date of application for debonding is contrary to the provision of Notification itself.'*

that depreciation must be fact that in for duty computation.

9. It is, therefore, adequately certain that the duty liability on imported, or indigenously procured, capital goods is erased by sheer efflux of time. The appellant has been functioning export-oriented unit since 1992 and capital goods procured in that year should be eligible for depreciation over the period that the unit has been in existence. As on the date of the impugned order, the appellant has been in existence for over a decade and, by application of the straight-line depreciation approved by the Central Board of Excise & Customs, the value of capital goods would be nil. Consequently, no duty liability would arise.'

9. In *re Baglan Taluka Grape Growers Co-op Society Ltd*, it was held that

'4. The 'export-oriented unit scheme' in the Foreign Trade Policy is implemented through relevant notification providing for exemptions of duties of Customs and duties of Central Excise issued under Section 25 of Customs Act, 1962 and 5A of Central Excise Act, 1944 which are attached conditions that are to be fulfilled. The scheme envisages procurement of capital goods,

consumables and from materials without payment of duty and, since 2003, the consequent export obligations prescribed with reference to foreign exchange outflow though, in the period preceding, the prescription not only obliged the unit to neutralise the outflow but also to add prescribed value in the manufacturing process. Now, units that are in that foreign exchange positive on annual, as well as cumulative, performance is to be considered to be compliant with the export obligation prescription. Non-compliant units would be subject to proceedings for recovery of duty foregone on the procurement of raw materials in excess of that utilized for manufacture of export goods and on consumables as well as the amortised value of capital goods proportion to the ascertained efficiency. Thus, the export-oriented unit scheme has undergone changes over a period of time and, more significantly, during the tenor of the 'letter of permission' of the appellant. The amending notifications issued under Customs Act, 1962 and Central Excise Act, 1944 superseded, and substituted, the existing notifications. Hence, the condition subject to which the goods are imported were not the same for the respective years of evaluation for compliance to determine the continuance of the privilege of duty exemption on capital goods and recovery of duties. We hold that the duty liability, if any, should be with reference to Notification No. 52/2003-Cus.

5. The duty liability on capital goods, for any period, in which the exports do not match the value of the inputs and consumables, imported and consumed during the period, and the amortised value of capital goods for the period shall be that proportion of duty on the amortised value which bears to the unfulfilled export obligation. On debonding, duty liability would have to be discharged on the imported inputs and consumables lying in stock while capital goods would be subject to such duties as applicable on the original value netted for depreciation at 10% per annum. It is also clear from the circular of Central Board of Excise and Customs supra that the value of the machinery is to be written down to 'nil' over a ten year period. Accordingly, at the time of the debonding, echoed that has been put to use for 10 years would not *be liable to duty. The duty that is to be collected on plant and machinery that is yet to complete ten years in the possession of the unit would be such as is leviable on assessable value equal to the original value netted for such annual depreciation of ten per cent. In the instant case, that the missionary is been put to use is evident from the finding that 'commercial production' commenced in 1992. With a lapse of time since the commencement of 'commercial production', the value of the missionary appreciates to 'nil' and demand of duty is thus erased. At the same time, the proceedings for recovery of duty, under the applicable notification granting exemption from duty, for annual deficiency is independent, and exclusive, of the proceedings for debonding. In the present dispute, the proceedings appear to have originated with completion of the period of warehousing which should be applicable only if the warehouse goods whenever put to use and, on completion of the warehousing., The duty liability would be computed on value as assessed originally without benefit of depreciation. In the present circumstances, owing to utilization, depreciation is not reliable. The depreciation over the entire tenor result in 'nil' value for the purpose of assessment….'*

10. It would appear that these decisions of the Tribunal, and several others thereafter establishing the consistent view of judicial determination on duty liability of such units unable to continue exportation, was not available to the original authority which precluded a judicious disposal of the issue as proposed in the show cause notice. We are conscious that the decision *supra* is on the value to be adopted for assessment at the time of closure/exit from the scheme. As the substantial part of the amount in dispute pertains to capital goods and the adjudicating authority would need to reappraise the demand in accordance thereof requiring the matter to be

remanded, it would also be in consonance thereof for the dispute relating to raw materials also to be reconsidered at the same time.

11. To enable such re-determination, we set aside the impugned order and remand the matter back to the original authority for a fresh decision in accordance with the law as enacted and as judicially determined.

(Order pronounced in the open court on 01/05/2023)

(S.K. MOHANTY)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*