

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

Excise Appeal No.86619 of 2013

[Arising out of Order-in-Original No.105/NG/COMMR/Th-II/2012dated 24.12.2012 passed by Commissioner of Central Excise (Appeals), Thane-II]

Commissioner of Central Excise-Thane-II

3rd Floor, Navprabhat Chambers Ranade Road,
Dadar West, Mumbai - 400028.

Vs.

Appellant

M/s Trans Freight Containers Ltd.

72-73, Nariman Bhavan, Nariman Point, Mumbai-400021.

Respondent

Appearance:

Shri Sunil Kumar Katiyar, Assistant Commissioner, Authorized Representative for the Respondent

Shri V. M. Doiphode, Advocate for the Appellant

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

Date of Hearing: 25.04.2023

Date of Decision: 25.04.2023

FINAL ORDER NO. A/85853/2023

PER: SANJIV SRIVASTAVA

This appeal is filed by Revenue is directed against Order-in-Original No. 105/NG/COMMR/Th-II/2012dated 24.12.2012 by the impugned order following has been held.

In view of the above discussions and findings, I pass the following order:-

- (i) *I Order M/s. Trans Freight Containers Ltd to pay the Customs duty of Rs. 44,90,571/- (Rupees Forty-four lakhs ninety thousand five hundred and seventy-one only) on imported raw-materials lying un-used in stock at the customs bonded warehouse, semi-finished containers and H.R. coils in terms of Notification No. 52/2003-Cus dated 31.03.2003 and as per para 53,54 and 55 of Chapter 22 of CBEC's Customs Manual.*
- (ii) *The Customs duty amount of Rs. 58,83,085/- (Rupees Fifty eight lakhs eighty three thousand and eighty-five only) paid by M/s. Trans Freight Containers Ltd vide*

TR6 challan Nil dated 28.06.2007 is ordered to be appropriated against the Customs duty ordered to be paid at Sr. no (i) above.

- (iii) I confirm nil Central Excise duty in terms of Notification No. 22/2003-C.Ex dated 31.03.2003 and as per paras 53,54 and 55 of Chapter 22 of CBEC's Customs Manual.*
- (iv) The Central Excise duty amount of Rs 3,90,658/- (Rupees Three lakhs ninety thousand six hundred and fifty-eight only) paid by M/s. Trans Freight Containers Ltd. vide TR6 challan No. nil dated 28.06.2007 may be claimed as refund by the assessee.*
- (v) No personal penalties or penalties on company are imposed under the Customs Act, 1962 and the Central Excise Act, 1944 in terms of the directions given by Hon'ble CESTAT vide para 5.4 of Order dated 29.11.2011.*

2.1 Revenue has filed this appeal stating following grounds:-

4.1 The Hon'ble CESTAT vide order under reference (para 5.4 of the order) directed the Commissioner to re-quantify the duty amount only in respect of the raw material and consumables lying in stock with M/s TFCL from the date of expiry of warehousing license in accordance with the Law. Similarly duty on capital goods could be demanded only after grant of depreciation on the capital goods at the rate prevalent on the date of expiry of the warehousing licence. Therefore before arriving at the total liability of duty on the unused raw materials, finished/semi-finished goods and capital goods the Commissioner was required to give finding regarding the date on which the warehousing licence expired since in terms of Hon'ble CESAT order it is the date relevant for the determination of rate of duty. Similarly for determination of assessable value of finished/semi-finished goods and capital goods, the relevant date will be the date on which the warehousing licence expired. The Commissioner has failed to give any such findings in respect of date on which warehousing license expired

4.2 As per Show Cause Notice dated 27.12.2006 the Warehousing Licence No VII/Cus/TFC/1/97 (6) dated 27.02.1997 was renewed upto 31.12.2002 and it was proposed to cancel the warehousing license with effect from 01.01.2003. The Adjudicating authority therefore was required to give his finding on this issue, which he failed to do.

4.3 The Adjudicating authority has arrived at total Customs duty of Rs. 10,86,385/- on HR Coils. The said working of the duty is as per the duty rate prevailing in the year 2012-13 (Sept, 2012). As per the Hon'ble CESTAT order dated 29.11.2011 the duty on raw materials lying in stock was to be calculated on the date of expiry of the warehousing licence which as per SCN was 31.12.2002. The Adjudicating authority has therefore erred in calculating the Customs duty at the rate prevailing in the year 2012-13 (Sept 2012) and not on the date of expiry of warehousing licence which as per SCN was 31.12.2002.

4.3 As per Show Cause Notice dated 27.12.2006 the duty demanded on Good/Items lying in Bonded Customs Warehousing is Rs35,95,131.33. However, the Adjudicating authority bas at Para 33.3 of the said order has arrived at the duty of Rs. 15,17,853/-. The Adjudicating authority has calculated the duty as per the duty rate prevailing in the year 2012-13 (Sept. 2012). As per the Hon'ble CESTAT order dated 29.11.2011 the duty on Good/ Items lying in Bonded Customs Warehousing lying in stock was to be calculated on the date of expiry of the warehousing licence. The Adjudicating authority has therefore erred in calculating the Customs duty at the rate prevailing in the year 2012-13 (Sept. 2012) and not on the date of expiry of warehousing licence which as per SCN was 31.12.2002.

4.4 As per the findings recorded at Para 33.4 of the said order the Adjudicating authority relying on the Govt. approved valuer viz. Pandya& Associates, has held the value of 20' container as Rs 35,000/- per container and value of 40' container as Rs 56,000/- per container as per their certificated dated 28.09.2012, and has accordingly determined the duty of Rs 18,86,333/- at the rate of duty prevailing in the year 2012-13 (Nov 2012).

As per para 5.2 of the Hon'ble CESTAT's order dated 29.11.2011 "As regards the goods lying in job worker's premises as also on the finished goods manufactured, the duty demand will be sustainable only to the extent of Excise duty leviable on the said product at the time of debonding"

As per Show cause notice, all containers were in semi-finished condition. Therefore, before arriving at the duty liability on these containers, the adjudicating authority was required to record its findings on the excisability of these semi-finished containers, and in case these were non-excisable, duty should have been confirmed on the raw material, consumables, components used in the manufacture of these semi-finished containers as provided in para 7 of the Notification No.53/97-Cus dated 03.06.97 and in case these semi-finished containers were found to be excisable, the value and duty of these semi-finished containers should have been taken as that prevailing on the date of the expiry of warehousing Bond. The adjudicating authority has therefore erred in determining duty on these semi-finished containers treating them as excisable goods, without recording any findings to this effect and taking their value on the basis of Valuers' report and at the rate prevailing in the month of November, 2012.

4.5 The Adjudicating authority has held that duty on capital goods after grant of depreciation at rate prevalent works out to Rs. Nil as worked out in the divisional report as well as that worked out by the assessee and has therefore found that no duty is leviable on capital goods. The divisional report has allowed depreciation on capital goods upto the year 2006-07 and has arrived at the value as Nil in respect of both imported as well as indigeneous capital goods. As per SCN Warehousing Licence No. VII/Cus/TFC/1/97(6) dated 27.02.1997 issued under Section 58 & Section 65 of Customs Act, 1962 was renewed only upto 31.12.2002 Therefore the duty chargeable should have been on the value the date of expiry of warehousing licence which as per SCN was 31.12.2002. The Adjudicating authority has therefore erred by allowing the depreciation on capital goods upto the year 2006-07 and in

holding that no duty is payable on the said capital goods due to their Nil value.

3.1 We have heard Shri Sunil Kumar Katiyar Assistant Commissioner, AR for the Revenue and Shri V. M. Doiphode, Advocate for the appellant. The entire issue in the present case is with regards to the date of debonding of the EOU. As per Revenue the depreciation on account of capital goods should have been allowed only up to the date of cancelation of warehousing license that is 31.12.2002 and not thereafter we as Commissioner as allowed depreciation of till the date of determination by him.

4. It is noted from the order of the Tribunal remanding the matter back to the original authority that Tribunal has observed as follows:-

5.1. In the instant case, there is no dispute about the fact that during the first five year block period of 1997-98 to 2001-02, the appellant had achieved not only the export obligation but also positive net foreign exchange earning. This is confirmed by the letter dated 04/12/2007 of the Assistant Development Commissioner, SEEPZ, Special Economic Zone, addressed to the Commissioner of Central Excise, Thane - II. With respect to the second five year block period commencing from 2002-03 to 2006-07, it is confirmed in the said letter that the unit has achieved positive NFE of Rs. 9.39 lakhs on cumulative basis. Therefore, question of demand of any customs or excise duty on account of non-fulfillment of export obligation does not arise and we hold accordingly.

5.2. The unit had sought for debonding. At the time of debonding, what can be demanded is the customs duty on the unutilized raw material which are lying in stock, at the rate of duty prevalent at the time of payment of duty on the original value of importation. As far as capital goods are concerned, what can be demanded is the duty on the depreciated value of capital goods at the rate of duty prevalent on the date of debonding. As regards the goods lying in the job-worker's premises as also on the finished goods manufactured, the duty demand will be sustainable only to the extent of excise duty leviable on the said products at the time of debonding. In the instant case, we notice that the duty demands have been confirmed in respect of raw materials and consumables consumed and utilised in the manufacture of goods which have been exported during the period

from 1997-98 to 2001-02. Such a duty demand is totally and completely unsustainable.

5.3. As regards the capital goods, in as much as the appellant utilised the same in the manufacture of export goods, depreciation has to be permitted as provided for in the Notification and as clarified in the Board's Circular No. 14/2004. As regards the confiscation of the goods and consequent imposition of penalty, we find that the appellant has achieved export obligation and value addition during the first five year block period and achieved positive NFE during the second five year period. Thus non-fulfillment of the conditions of notifications under which the goods are obtained duty-free does not arise at all. Consequently, confiscation of goods under Section 111(0) of the Customs Act, 1962 cannot be upheld as also the imposition of penalty under Section 112(a) Customs Act, 1962. Same holds good in respect of confiscation proposed under Rule 173Q/Rule 25 of the Central Excise Rules, as it stood at the relevant time and consequent imposition of penalty. The ratio of the order in the Navbharat case cited supra applies squarely to the facts of the present case.

5.4. In view of the above, we set aside the impugned order and direct the Commissioner to re-quantify the duty amount only in respect of the raw materials and consumables lying in stock with the appellant on the date of expiry of the warehousing licence, in accordance with law. Similarly, duty on the capital goods can be demanded only after grant of depreciation on the capital goods at the rate prevalent on the date of expiry of the warehousing licence. In the facts and circumstances of the case, we find that this is not a case warranting imposition of penalties at all as there is no deliberate intention to evade duty.

5. Revenue has filed this appeal relating upon para 5.4 without taking into account the observations made in earlier para 5.1 it is quite clear that the unit was working as and EOU which beyond 31.12.2002 and has achieved – NFE thereafter. As unit continue to work as EOU a warehousing license would have been extended thereafter also accordingly we do not find any merits in the appeal were by demand is to be made by determining depreciation up till 31.12.2002. It is also noted that the exemption notification also do not require the determination of duty on the date of

expiry of warehousing license but it is till the date of payment of duty that is for Commissioner has held. In view of above we do not find any merits in the appeal filed by the Revenue which is dismissed.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

Rasika