IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI

APPEAL NOS: C/1159 & 1193/2008
APPLICATION NO: C/MISC/85509/2018

[Arising out of Order-in-Original No: 12/Central Excise/2008 dated 22nd July 2008 passed by the Commissioner of Central Excise, Pune – I.]

For approval and signature:

Hon'ble Shri C J Mathew, Member (Technical)
Hon'ble Shri Ajay Sharma, Member (Judicial)

1.	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	:	Yes
2.	Whether it should be released under Rule 27 of CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	:	Yes
3.	Whether Their Lordships wish to see the fair copy of the Order?	:	Seen
4.	Whether Order is to be circulated to the Departmental authorities?	:	Yes

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APPEAL NO: C/1159/2008
APPLICATION NO: C/MISC/85509/2018

Capgemini India Pvt Ltd … ***Appellant***

versus

Commissioner of Central Excise
Pune – I ***…Respondent***

APPEAL NO: C/1193/2008

Commissioner of Central Excise
Pune – I … ***Appellant***

versus

Capgemini India Pvt Ltd ***…Respondent***

Appearance:

Shri Tanvir Khan, Advocate for assessee-appellant

Ms. PV Shekhar, Jt. Commissioner (AR) and Shri Rakesh Kumar, Assistant Commissioner (AR) for Revenue

CORAM:

Hon'ble Shri C J Mathew, Member (Technical)
Hon'ble Shri Ajay Sharma, Member (Judicial)

Date of hearing: 28/12/2018
Date of decision: 28/12/2018

ORDER NO: A/88301-88302 / 2018

Per: C J Mathew

In these proceedings we dispose off, in addition to a miscellaneous application, an appeal each of Revenue and of the assessee. Subsequent to the challenge of the impugned order-in-original no. 12/Central Excise/2008 dated 22nd July 2008 of Commissioner of Central Excise, Pune, the appellant-assessee entered into a scheme of amalgamation to merge M/s Pune Software Park Pvt Ltd with M/s Capgemini India Private Limited and obtained the statutory approvals necessitating the present application for alteration

of cause title. Having perused the supporting documents, we allow the application and direct the Registry to make the necessary changes. As the appeals are also listed for disposal today, we take up those with corresponding amendments.

2. The appellant at one time known as Software Technology Park Ltd, was issued with 'private customs bonded warehouse' license under section 58 and section 59 of Customs Act, 1962 valid till December 1998 for its undertaking. The undertaking imported 'earth station equipment' seeking exemption against notification no. 138/91-Cus dated 22nd October 1991 and, after filing bill of entry no. 1854/6.11.1992, warehoused the goods on 9th February 1993. On expiry of the warehouse licence, no application was filed for extension and on investigation, it appeared that the importer had, under an agreement with M/s VSNL, leased the imported goods to the latter and, by agreement dated 21st May 1997, transferred the same with retrospective effect from 16th November 1996 for a consideration of ₹ 95,22,761, the depreciated value in the books of accounts, without intimation to, or approval of, the bond authorities.

3. In this backdrop, proceedings were initiated against the appellant for violation of condition no. 6 of notification no. 138/91-Cus dated 22nd October 1991 and requiring the importer to pay customs duty that had been foregone on the capital goods and office

equipment liable from the date of expiry of warehousing period. The entire duty foregone, ₹ 67,04,023, at the time of import was sought to be recovered in terms of section 72 of Customs Act, 1962. The adjudicating authority ordered recovery of ₹ 36,89,272, while dropping demand of ₹ 30,14,751, and imposed penalty of ₹ 10,000 under section 117 of Customs Act, 1962. Revenue is an appeal against the allowance of depreciation for computing the assessable value as being contrary to circular no. 27/98-Cus dated 21st April 1998 of Central Board of Excise & Customs requiring the higher of the transaction value or the depreciated value to be the assessable value. The assessee-appellant challenges the recovery for failure to cite the correct exemption notification and for having travelled beyond the bar of limitation.

4. According to Learned Author Representative, incorrect citing of a provision in the show cause notice does not vitiate the exercise of legislatively sanctioned authority to recover legislatively approved taxes. Reliance is placed on the decision of *JK Steel Limited v. Union of India [1978 (2) ELT (J355) (SC)]* and *Collector of Central Excise, Calcutta v. Pradyumna Steel Limited [1996 (82) ELT 441 (SC)]* of the Hon'ble Supreme Court. Countering the objection to invoking of the extended period, Learned Authorised Representative contends that the restriction operating on demands under section 28 of Customs Act, 1962 is not attracted to the demand in consequence of liability under

bond furnished as prescribed in the exemption notification or in exercise of authority conferred by section 72 of Customs Act, 1962. Reliance is placed on the decision of the Tribunal in *Alpha Future Retail Pvt Ltd v. Commissioner of Central Excise, New Delhi [2017-TIOL-3651-CESTAT-DEL]* and in *Commissioner of Customs, Tuticorin v. Veeforess Exporters [2007-TIOL-1836-CESTAT-MAD]*.

5. It would appear that Revenue insists that the duty should have been computed on the transaction value of ₹ 95,22,761 being the agreed-upon consideration for transfer of the asset from the importer to M/s VSNL contracted with effect from 16 November 1996. It would also appear that this stand of Revenue is premised on the liability crystallising on transfer of the asset rather than upon removal from the bonded premises. There is an inherent contradiction in this approach. The legal sustenance for a demand sought about a decade and half after the import is the warehousing provision and the non-observance of condition prescribed in the exemption notification; these can be invoked only if transfer of the imported goods does involve removal from a premises during its existence as warehouse. There is no allegation that such removal occurred during the period of validity of the warehousing bond or at any time thereafter. It is seen that the demand for recovery was triggered by the expiry of the warehousing bond that transformed the bonded area into non-bonded area. Adoption of that as the relevant date for computation of the

depreciated value would not be at variance with the circular of Central Board of Excise & Customs cited by Learned Authorised Representative. Any alternative determinant of duty recovery would necessitate recourse to section 28 of Customs Act, 1962 which would, irredeemably, be beyond the competence of any adjudicating authority owing to bar of limitation. The grievance of Revenue is, therefore, misdirected. The acceptable instrument of recovery under section 72 of Customs Act, 1962, read with condition of licence, will have effect only from the date on which the premises ceased to be bonded.

6. In support of the claim of the appellant against the jurisdiction to invoke the extended period and the incorrect citing of the exemption notification, Learned Counsel took us through the two notifications. It is seen that the exemption notification against which the import had been effected was applicable to the appellant whereas notification no. 140/91-Cus dated 22nd October 1991 cited in the show cause notice was not. Nevertheless, the interchanging of the applicable notification is attributable to oversight and, in the context of the decisions of the Hon'ble Supreme Court in *re JK Steel Ltd* and *re Pradyumna Steel Limited*, is not fatal to the proceedings. The submission of the appellant on this aspect does not merit consideration.

7. Though Learned Counsel placed reliance on the decision of

Hon'ble High Court of Bombay in *Dharampal Lalchand Chug and others v. Commissioner of Central Excise [2015 (323) ELT 53 (Bom)]* and of the Tribunal in *Sterlite Optical Technologies Ltd v. Commissioner of Customs and Central Excise [2011 (185) ECR 313 (Tri-Mumbai)]* to challenge the jurisdiction in the face of bar of limitation, it is seen that the decisions were handed down in the context of demand under section 28 of Customs Act, 1962 and section 11A of Central Excise Act, 1944 both of which prescribed the limits within which those provisions could be invoked. Such is not the case in the show cause notice leading to the impugned proceedings: the demand invoked under section 72 of Customs Act, 1962, which is contingent upon expiry of the warehousing period or removal from such warehouse, has no such bar incorporated therein.

8. It is not in dispute that the warehousing period expired in December 1998 and, if the appellant was interested in not extinguishing the privilege of exemption, application for renewal should have been filed. It would appear from the facts and circumstances that the importer appellant had, after ownership had passed on to M/s VSNL, ceased to retain interest in the continued operation of the asset under the exemption notification. However, it was the importer who effected the clearance of goods against, and undertook to comply with the conditions of, the exemption notification. The failure to retain status as warehouse for the location

of the imported goods compromised this obligation with consequence of duty liability and penalties. There is no valid ground for mitigation or escapement in the appeal of the importer that requires consideration by us. Mere technicalities, as pleaded by Learned Counsel, cannot overcome the obligations stipulated in law. The claims of the appellant are without sustenance.

9. In the light of our findings *supra*, we find no reason to entertain either of the appeals. Accordingly, both appeals of Revenue and of the appellant-importer are dismissed.

(Pronounced in Court)

(Ajay Sharma) **(C J Mathew)**
Member (Judicial) ***Member (Technical)***

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