IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHENNAI

REGIONAL BENCH – COURT NO. III

Excise Miscellaneous Application No. 40089 of 2020
(on behalf of Appellant)
In
Excise Appeal No. 40263 of 2013

(Arising out of Order-in-Appeal No. 39/2012-Cus. dated 14.12.2012 passed by the Commissioner of C.Ex. (Appeals), No.1, Foulk's Compound, Anai Medu, Salem – 636 001)

M/s. Blue Mount Textiles **: Appellant**
(A Unit of M/s. Sharadha Terry Products Ltd.)
Badrakaliamman Kovil Road, Nellithurai (P.O.)
Mettupalayam – 641 305

VERSUS

The Commissioner of Central Excise **: Respondent**
No. 1, Foulk's Compound, Anai Medu, Salem – 636 001

WITH

Excise Miscellaneous Application No. 40088 of 2020
(on behalf of Appellant)
In
Excise Appeal No. 40265 of 2013

(Arising out of Order-in-Appeal No. 39/2012-Cus. dated 14.12.2012 passed by the Commissioner of C.Ex. (Appeals), No.1, Foulk's Compound, Anai Medu, Salem – 636 001)

M/s. Sri Gugan Mills **: Appellant**
(A Unit of M/s. Sharadha Terry Products Ltd.)
Badrakaliamman Kovil Road, Nellithurai (P.O.)
Mettupalayam – 641 305

VERSUS

The Commissioner of Central Excise **: Respondent**
No. 1, Foulk's Compound, Anai Medu, Salem – 636 001

AND

Excise Miscellaneous Application No. 40087 of 2020
(on behalf of Appellant)
In
Excise Appeal No. 40368 of 2013

(Arising out of Order-in-Appeal No. 68/2012-CE dated 14.12.2012 passed by the Commissioner of C.Ex. (Appeals), No.1, Foulk's Compound, Anai Medu, Salem – 636 001)

M/s. Kadri Wovens **: Appellant**
(A Unit of M/s. Kadri Mills (Cbe) Ltd.)
SIPCOT, Perundurai – 638 052

VERSUS

The Commissioner of Central Excise **: Respondent**
No. 1, Foulk's Compound, Anai Medu, Salem – 636 001

APPEARANCE:

Shri S. Durairaj, Learned Advocate for the Appellant(s)

Shri M. Ambe, Learned Deputy Commissioner for the Respondent

CORAM:

HON'BLE MRS. SULEKHA BEEVI C.S., MEMBER (JUDICIAL)
HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)

FINAL ORDER NOs. 40178-40180 / 2023

DATE OF HEARING: 14.02.2023

DATE OF DECISION: 17.03.2023

Order : [Per Hon'ble Mrs. Sulekha Beevi C.S.]

The issue involved in all these appeals being the same, they were heard together and disposed of by this common order.

2. Brief facts of the case are that the appellants herein were 100% Export Oriented Unit (EOU) for the purpose of manufacture of excisable goods. They procured imported capital goods and raw materials without payment of duty under Notification No. 52/2003-Cus. dated 31.03.2003 and procured indigenous excisable goods (capital goods, spares, raw material, fuel, etc.) without payment of duty under Notification No. 22/2003-C.Ex. dated 31.03.2003. During the year 2011, they intended to exit the EOU scheme. They obtained an 'in principle' exit permission from MEPZ, Chennai and then, worked out the duty incidence. The appellants, thus, remitted the duty on both imported goods as well as indigenously procured excisable goods and goods in the nature of finished and semi-finished goods produced and held as stock on the date of de-bonding of the unit. Subsequently, they submitted a letter to the Department along with work-sheet and payment details with a request to issue 'No Due' Certificate in the matter. After verification, 'No Due' Certificate was issued

and subsequently, the Final Exit Order was issued to the appellants.

3. The appellants then filed refund claim on the ground that they had paid an excess amount of duty. The plea on the part of the appellants was that they are eligible to pay duty on the manufactured items only as per Sl. No. 2 of Notification No. 23/2003-C.E. dated 31.03.2003. It was thus contended that they are only liable to pay the duty on the manufactured items as per the above Notification at the rate of 50% of the Basic Customs Duty (BCD) to arrive at the aggregate dues. However, the Range Officer, Mettupalayam Range, directed them to calculate the Basic Customs Duty without considering the method stipulated in Notification No. 23/2003-C.E. In such circumstances, they have paid the excess amount of duty.

4. After due process of law, the refund sanctioning authority rejected the refund claims observing that the tax paid by the appellants are correct and that there is no excess payment to be refunded. In appeal, the Commissioner (Appeals) vide orders impugned herein upheld the same. Hence, the appellants are now before the Tribunal.

4.1 On behalf of the appellants, Learned Counsel, Shri S. Durairaj, appeared and argued the matter. He submitted that during de-bonding, the appellants had paid the Customs and Excise Duties as if the goods are cleared under DTA, under protest, as directed by the Revenue on the semi-finished goods, work-in-progress and finished goods; however, the appellants are liable to pay duty, as per Sl. No. 2 of Notification No. 23/2003-C.E. Thus, the appellants had made payment of an excess amount. The appellants had therefore claimed refund of 5% excess Basic Customs Duty (BCD) so paid by them, but the same was rejected by the authorities below. The difference in the method of calculation of duty between the appellants and the Revenue was furnished by the Learned Counsel for the appellants, as below:-

Appellants' method		**Revenue's method**	
BCD	5%	BCD	10%
CVD	10%	CVD	10%
Edu. Cess – Excise	2%	Edu. Cess – Excise	2%
Sec. Edu. Cess - Excise	1%	Sec. Edu. Cess - Excise	1%
Cus. Edu. Cess	2%	Cus. Edu. Cess	2%
Cus. Sec. Edu. Cess	2%	Cus. Sec. Edu. Cess	2%
Additional Customs Duty	4%	Additional Customs Duty	4%
Sl. No. 2 of the Table in Notification No. 23/2003-C.E. are applicable.		Sl. No. 2 of the Table in Notification No. 23/2003-C.E. is applicable for DTA clearances as per para 6.8 of FTP. In the present case, it is de-bonding as per para 6.18 of FTP and not DTA clearances.	

4.2 He submitted that the goods were in the nature of semi-finished goods, work-in-progress and finished goods; no duty is required to be paid on such goods for the reason that semi-finished goods / work-in-progress goods have not completed the stage of manufacture so as to attract the levy; all goods were exported. Therefore, the entire duty is refundable. However, the appellants have restricted their claim only to the excess 5% BCD as they have taken CENVAT Credit of the CVD (10%) and ACD (4%). Learned Counsel for the appellants argued that the excess 5% of the BCD paid by them is refundable irrespective of whether Sl. No. 2 of the Table provided in Notification No. 23/2003-C.E. is applicable or not. To support his contention, he relied upon the following decisions:-

(i) C.G.S.T. & C.C.E., Trichy v. M/s. EID Parry India Ltd. [2018 (8) TMI 1494 – CESTAT Chennai];

(ii) M/s. Jubilant Life Sciences Ltd. v. C.C.E., Meerut [2018 (5) TMI 466 – CESTAT Allahabad];

(iii) M/s. Jubilant Life Sciences Ltd. v. C.C.E., Meerut-II [2014 (301) E.L.T. 649 (Tri. – Del.)]; and

(iv)M/s. Fateh Granites Ltd. v. Commr. of C.Ex., Jaipur-II [2013-TIOL-2636-CESTAT-DEL]

4.3.1 He argued that, without prejudice to the submissions made above, Section 3 of the Central Excise Act, 1944 would itself make it clear that the appellants have paid excess duty. It can be seen that the proviso to Section 3(1) and Notification No. 23/2003-C.E. are applicable to those goods manufactured in an EOU and brought to any other place in India. "To be de-bonded goods" have to be considered as 'goods manufactured in an EOU and brought to any other place in India'. That because of this reason, the appellants had calculated the duty liability on the basis of the proviso to Section 3(1) read with Sl. No. 2 of Notification No. 23/2003-C.E. by duly taking into account 50% of the Customs Duty; that otherwise, they need not take into account the Customs Duty element to determine the duty liability.

4.3.2 It was argued that "To be de-bonded goods" are to be treated on par with DTA clearances covered by the definition "goods manufactured in EOU and brought to any other place in India." That prior to 11.05.2001, the proviso to clause (ii) of sub-section (1) of Section 3 of the Central Excise Act, 1944, read as:-

> *"Provided that the duties of excise, which shall be levied and collected on any excisable goods, which are produced or manufactured, - (ii) by a hundred per cent export-oriented undertaking and allowed to be sold in India, shall be the amount equal to the aggregate of the duties of customs."*

4.3.3 The phrase "allowed to be sold in India" created some anomaly and thereafter, this phrase was replaced by "brought to any other place in India". The new phrase has a wider amplitude to cover all goods that were manufactured in EOU but were not exported. Some of the

EOUs would have been permitted by the FTP to clear goods other than exports. Some of the EOUs might still default by clearing the goods without permission. In order to distinguish between the *bona fide* and defaulter, Notification No. 23/2003-C.E. was issued by giving concession in the rate of duty to the *bona fide*; defaulters could not avail this Notification; otherwise, the same anomaly would continue. Therefore, according to the Learned Counsel, the legislative intention of such amendment and the issue of Notification No. 23/2003-C.E., is to distinguish between the *bona fide* and the defaulter; therefore, de-bonding as per paragraph 6.18 of the FTP would be covered by the phrase "brought to any other place in India" and is squarely covered by Sl. No. 2 of the above Notification.

4.4 He submitted that the conditions at Sl. No. 2 of the Notification are not applicable since it is applicable only for DTA clearances as per paragraph 6.8 of the FTP; if the view of the Department that "de-bonding" (6.18 of the FTP) is not covered by the phrase "brought to any other place in India", the proviso to Section 3(1) will not apply and thus, sub-section (1) of Section 3 itself will not apply.

4.5 He prayed that since there is an excess payment due to the method of calculation insisted upon by the Department, the appellants may be granted the benefit of refund. It is also stated that the appellants had paid the amount only under protest.

5. Shri M. Ambe, Learned Authorized Representative for the respondent, supported the findings in the impugned order. It is submitted by the Department that the appellants have paid the duty in accordance with the provisions of law and that there is no excess payment for granting refund. He prayed that the appeals may be dismissed.

6. Heard both sides.

7. The issue to be decided is whether the appellants have made payment of excess duty and if so, whether they are eligible for refund.

8. The Learned Counsel for the appellants has stated that they have paid the duty as per Section 3(1) of the Central Excise Act, 1944 without taking the benefit of concessional rate of duty as per the proviso to Section 3(1). Being EOUs, the appellants are eligible to avail the benefit of Sl. No. 2 of Notification No. 23/2003-C.E. dated 31.03.2003 while paying duty. However, the Department was of the view that at the time of de-bonding, the said benefit of concessional rate of duty cannot be availed and that the duty has to be paid as per paragraph 6.8 of the FTP as if finished goods are cleared to DTA. The refund claim is only with respect to the duty paid on semi-finished goods and finished goods. On behalf of the appellant, it is submitted that the monthly ER-2 returns for EOU for the period prior to the date of Final Exit Order would establish that the entire goods were exported. Further, no duty is required to be paid on such semi-finished goods / work-in-progress goods as those have not completed the manufacturing stage. Therefore, the appellants, though would be eligible for refund of the entire duty paid, are limiting their claim to the concessional rate of duty as per Sl. No. 2 of Notification No. 23/2003-C.E. The Department has taken the view that at the time of de-bonding, the appellants cannot claim the concessional rate of duty as per the Notification and that they have to pay the duty as per Section 3(1) of the Central Excise Act, 1944. Sub-section (1) of Section 3 specifies the Excise Duty that has to be paid on excisable goods produced or manufactured in India. The proviso to sub-section (1) of Section 3 specifies the duty that has to be paid for excisable goods which are produced or manufactured: (i) by 100% EOU and (ii) in a free trade zone.

9. Prior to 11.05.2001, the said proviso read as *"Provided that the duties of excise, which shall be levied and collected on any excisable goods, which are produced*

or manufactured, - (ii) by a hundred per cent export-oriented undertaking and allowed to be sold in India, shall be the amount equal to the aggregate of the duties of customs." After 11.05.2001, the phrase "allowed to be sold in India" was replaced by "brought to any other place in India". After such amendment, the appellants are eligible to get the concessional rate of duty as per the Notification in regard to finished goods since it is a case of de-bonding and not DTA sale.

10. In respect of the duty paid on semi-finished goods, the Learned Counsel for the appellants submitted that no duty can be levied on semi-finished goods. The Learned Counsel relied on the decision in the case of *M/s. Jubilant Life Sciences Ltd. v. C.C.E., Meerut-II [2013 (11) TMI 1213 = 2014 (301) E.L.T. 649 (Tri. – Del.)],* the relevant paragraph of which reads as under:-

> *"7. On going through the provisions, of Appendix 14-I-L, we find that in terms of Note-(ii) to this Appendix, a 100% EOU must be continued to be treated as EOU/EHTP/STP unit till the date of final exit order. Based on this note, the Tribunal in the cases of Solitaire Machine Tools Pvt. Ltd. (supra) and Bajaj Foods Ltd. (supra) has held that a unit would continue to be treated as EOU unit till the date of final exit order and would be subject to monitoring of the stipulated obligations under the relevant schemes. The Tribunal in the case of Solitare Machine Tools P. Ltd. (supra) has held that the goods lying in stock at the time of debonding would be liable to duty only at point of time of removal of those goods from place of manufacture. In this case, admittedly, there was no removal of goods into DTA from EOU and before the final debonding order the goods had been exported out of India under advance authorization claim. In terms of para 6.18 (e) of the Foreign Trade Policy, while between the date of issue of no dues certificate by the Customs and Central Excise Authorities and the date of final debonding order by the Development Commissioner, the EOU unit shall not be entitled to claim any duty exemption for procurement of capital goods or inputs, the unit can claim advance authorization/DEPB/duty draw back. Thus, during the intervening period between the date of no objection certificate by the Central Excise Authorities and the date of issue of final debonding order by the Development Commissioner, an EOU can export the finished goods under claim for advance authorization/DEPB/duty draw back and that no excise duty can be charged in respect of such goods as the same*

have not been cleared into DTA. In view of this, the impugned order rejecting the refund claim is not sustainable. The same is set aside. The appeal is allowed."

11. Further, reliance was placed on the decision of the Tribunal in the case of *M/s. Jubilant Life Sciences Ltd. v. Commissioner of Central Excise, Meerut [2018 (5) TMI 466 – CESTAT, Allahabad]* by the Learned Counsel for the appellants. In the above case, after hearing both the sides, the Tribunal had held as under: -

"5. Having considered the rival contentions and on perusal of the facts on record, we find that the differential Central Excise duty of Rs.3,37,48,484/- is not sustainable for the reasons that the differential duty was demanded on the goods which had not came into existence and on the goods which were not removed from the factory of manufacture of appellant or their job workers. Therefore, we hold that the confirmation of demand of Rs.3,37,48,484/-, interest thereon and equal penalty are not sustainable. Further, we find that in respect of the issue relating to the rate of duty and value in respect of Remnants, the rate of duty was decided through the proceedings initiated by Show Cause Notice dated 17/03/2008 and therefore, the present demand on the issue of rate of duty is hit by limitation. We also find that the confirmation of demand of under valuation on Remnants is not sustainable because the same was confirmed by relying on CBEC Circular dated 29/09/1994, which is rescinded through Circular dated 16/08/2010. We, therefore, hold that the demand of differential Central Excise duty of Rs.8,12,05,337/-, interest thereon and equal penalty are not sustainable. Further, we also hold that the confirmation of demand of Rs.9,64,168/- was on the ground that they were not capital goods since they were not put to use is not sustainable because catalyst on first charge were treated as capital goods and that there was no such allegation in the Show Cause Notice and therefore, the adjudication proceedings travelled beyond the Show Cause Notice and therefore confirmation of demand is not sustainable. We, therefore, set aside the impugned Order-in-Original and allow the appeal. The appellant shall be entitled for consequential benefit, as per law."

12. It is submitted that the Tribunal in the case of *M/s. Fateh Granites Ltd. (supra)* has taken a similar view. The relevant paragraph of the order is as below:-

> *"4. As regards the verification of goods exported, learned advocate submits that they have placed on record entire evidence in the shape of stock register as also the other statutory records indicating that the goods manufactured by them even after debonding are exported by them. Such documents have not been examined and looked into by the lower authorities. For the said limited purpose, I set aside the impugned order and remand the matter to the adjudicating authority for verification of the documents maintained by the appellant and to find out as to whether the goods as available on the date of debonding were exported by the appellant. If that be so, the appellant would be entitled to refund. The above exercise would be done by the original adjudicating authority within a period of two months from the date of receipt of the order."*

13. In the case of *M/s. EID Parry India Ltd. (supra),* the Tribunal held that the demand of duty in respect of semi-finished goods cannot sustain. The Tribunal followed the decision in the case of *M/s. Tirumala Seung Han Textiles Ltd. v. C.C.E., Hyderabad [2009 (237) E.L.T. 145 (Tribunal – Bangalore)]* to set aside the demand.

14. After appreciating the facts and following the ratio laid down in the above decisions, we are of the view that the rejection of refund is without any legal or factual basis.

15. The appellants have also filed miscellaneous applications seeking consideration of the decision in the case of *M/s. Jubilant Life Sciences Ltd. v. C.C.E., Meerut-II [2013 (11) TMI 1213 = 2014 (301) E.L.T. 649 (Tri. – Del.)]* and other decisions. There is no new plea put forward by the appellants and these applications are only a prayer for consideration of the application of the proposition of law laid down in these judgements. The same have already been considered.

16. In the result, the impugned orders are set aside.

17. The appeals are allowed with consequential reliefs, if any. The miscellaneous applications filed by the appellants are disposed of accordingly.

(Order pronounced in the open court on **17.03.2023**)

Sd/-
(SULEKHA BEEVI C.S.)
MEMBER (JUDICIAL)

Sd/-
(VASA SESHAGIRI RAO)
MEMBER (TECHNICAL)

Sdd