2016 (344) E.L.T. 461 (Tri. - Del.)

IN THE CESTAT, PRINCIPAL BENCH, NEW DELHI

[COURT NO. III]

S/Shri S.K. Mohanty, Member (J) and B. Ravichandran, Member (T)

MARAL OVERSEAS LTD.

Versus

COMMISSIONER OF CENTRAL EXCISE, INDORE

Final Order Nos. A/51087-51088/2016-EX(DB), dated 1-4-2016 in Appeal Nos. E/1059/2007-EX(DB) and C/410/2007-CU(DB)

Export Oriented Unit, 100% EOU - Debonding - Rate of duty payable on finished stock - Duty liability to be discharged by 100% EOU as pre-condition for final debonding and conversion to DTA unit - Issue regarding duty liability already settled in decision of Tribunal in 2011 (270) E.L.T. 554 (Tribunal), holding that post-amendment of statutory provisions in 2001, duty on finished goods on debonding payable as aggregate of Customs duty - Appellant's reliance on Apex Court decision in 2000 (117) E.L.T. 281 (S.C.) not sustainable as said decision not pertaining to post-amended provision of Section 3(1) of Central Excise Act, 1944 - After the substitution, proviso to Section 3(1) ibid cannot be restrictively interpreted to apply to such finished goods and not bound by any criteria of permission to sell in India - Term "allowed to be sold in India" in Foreign Trade Policy does not apply to finished goods lying in stock when EOU intends to exit scheme itself - Final debonding and conversion of Export Oriented Unit to a domestic tariff area unit legally permissible only on discharging all duty liabilities on capital goods, raw-materials, finished goods, etc., lying in EOU - Legally not tenable to argue that the rate of duty applicable to a normal Central Excise Unit should be applicable to EOU even before the EOU becomes a normal Central Excise Unit - Demand of duty upheld - Proviso to Section 3 (1) of Central Excise Act, 1944. *[paras 7, 9, 12]*

Penalty - Export Oriented Unit, 100% EOU - While converting to domestic tariff area, 100% EOU wrongfully availing exemption and paying lesser duty on goods lying in stock - Rate of duty applicable on finished goods lying in EOU at time of debonding involves interpretation of legal provisions and case laws - Penalty under Rule 25 of Central Excise Rules, 2002, not imposable - Rule 25 of Central Excise Rules, 2002. *[para 14]*

Appeals dismissed

CASES CITED

Century Yarn v. Commissioner — 2011 (270) E.L.T. 554 (Tribunal) — *Referred*..... [Paras 5, 9, 10]
Himalya International Ltd. v. Commissioner — 2003 (154) E.L.T. 580 (Tribunal-LB) — *Referred* [Para 10]
Siv Industries Ltd. v. Commissioner — 2000 (117) E.L.T. 281 (S.C.) — *Referred*..... [Paras 4, 5, 9]
Tirumala Seung Han Textiles Ltd. v. Commissioner — 2009 (237) E.L.T. 145 (Tribunal) — *Referred* [Paras 5, 9, 11]

DEPARTMENTAL CLARIFICATIONS CITED

C.B.E. & C. Circular, dated 13-2-2002..... [Para 5]
C.B.E. & C. Circular, dated 5-1-2004..... [Para 5]

REPRESENTED BY : S/Shri B.L. Narasimhan and Vipul Agarwal, Advocates, for the Assessee.
Ms. Neha Garg, DR, for the Department.

[Order per : B. Ravichandran, Member (T)]. - There are 2 appeals, one by the assessee and another by Revenue against the same order-in-original dated 13-2-2007 passed by the Commissioner of Central Excise, Indore. The brief facts of the case are that the appellant-assessee was a 100% Export Oriented Unit (EOU). In September, 2005 they applied for permission to exit the EOU scheme which was granted in principle on 27-9-2004 by the Development Commissioner. The permission is subject to the assessee paying applicable Customs/Excise Duties on the goods lying in stock. Based on the in principle approval by the Development Commissioner, the assessee approached the Central Excise Department for debonding their unit and to pay the duty liability on raw-materials, consumables, capital goods and the finished goods. The present dispute is relating to quantum of duty payable on finished goods lying in stock at the time of debonding of the EOU. The appellant-assessee calculated the duty liability on the finished goods after availing the benefit of exemption Notification No. 23/2003-C.E., dated 31-3-2003. A show cause notice dated 29-8-2006 was issued to the appellant-assessee to demand a differential duty of Rs. 88,69,040/- by denying the exemption under the above said notification.

2. The case was adjudicated and the ld. Commissioner vide the impugned order confirmed the demand with

appropriate interest.

3. Aggrieved by this the appellant-assessee filed appeal before us. The Revenue also filed appeal against non-imposition of penalty under Rule 25 of Central Excise Rules, 2002.

4. The ld. counsel for the appellant-assessee contested the demand of differential duty mainly on the following grounds :-

(a) No benefit has been availed by the EOU on the finished goods themselves. Once the benefit availed on inputs, consumables and capital goods are surrendered then for all purposes, the unit becomes a normal DTA Unit.

(b) The issue of payment of duty under proviso to Section 3 of Central Excise Act upon debonding of EOU was considered by the Hon'ble Supreme Court in the case of *Siv Industries Ltd.* - 2000 (117) E.L.T. 281 (S.C.). The Hon'ble Supreme Court held that duty payable on debonding cannot be equated with the expression "allowed to be sold in India" used in Proviso to Section 3 of the Central Excise Act. The Supreme Court did not agree with the Revenue on the contention that permission to withdraw from the EOU Scheme by itself is permission to sell goods in India. Though the expression "allowed to be sold in India" used in Proviso to Section 3 was replaced by the expression "brought to any other place in India" with effect from 11-5-2001. The ratio followed by the Hon'ble Supreme Court will continue to apply thereafter also.

5. The ld. AR reiterated the findings in the impugned order and supported the demand on the following grounds.

(a) The exemption in terms of Notification No. 23/2003-C.E. on the finished goods in an EOU at the time of debonding is not available. This has already been conceded by the appellant/assessee. As the said notification applies only to functioning EOU and not in respect of debonding EOU.

(b) The decision of the Hon'ble Supreme Court in *Siv Industries* (supra), is not applicable to the present case. The expression "allowed to be sold in India" appearing in proviso to Section 3(1) was the focus of discussion, analysis and decision by a Hon'ble Supreme Court. After the decision of Hon'ble Supreme Court the issue was taken note of by the C.B.E. & C. and on 11-5-2001 vide Section 120 of Finance Act, 2001 the wordings of proviso to Section 3(1) were suitably amended. The scope of the amendment was also explained in the Circular dated 13-2-2002 though the circular was withdrawn vide Circular dated 5-1-2004 it has been clarified that the duty on finished goods manufactured in an EOU before debonding should be in terms of rate applicable under proviso to Section 3 (1) of the Central Excise Act, 1944.

(c) Reliance was placed on the decisions of the Tribunal in *Century Yarn* v. *Commissioner of C.Ex., Indore* - 2011 (270) E.L.T. 554 (Tri.-Del.) and *Thirumala Seung Han Textiles Ltd.* - 2009 (237) E.L.T. 145 (Tri.-Bang.).

(d) The reliance placed by the appellant/assessee on Notification No. 52/2003-Cus. and Notification No. 22/2003 is not relevant. A plain reading of the notifications will reveal that the scope of terms "brought to any other place in India" as appearing in proviso to Section 3(1) is correctly applicable to the present situation.

7. We have heard both the sides and examined the appeal records. The main point of dispute is that the quantum of duty payable on the finished goods at the time of debonding of EOU is to be in terms of main Section 3(1) or proviso to Section 3(1) of the Central Excise Act, 1944. As stated earlier originally the proceedings against the appellant/assessee was to deny the concession claimed by them in terms of Notification No. 23/2003-C.E. Now both the sides agree that the said notification is not applicable to the appellant-assessee in respect of finished goods at the time of debonding. However, the appellant/assessee is contending that they are liable to duty on the finished goods only in terms of main Section 3(1), in other words, as if the goods are manufactured and cleared by a normal Central Excise Unit. The case of the Revenue is that the duty calculation has to be in terms of proviso to Section 3(1) which is applicable to goods manufactured in 100% EOU.

9. It is an admitted fact that the finished goods which are lying in stock are manufactured by an EOU. The duty liability thereupon has to be discharged as a pre-condition for final debonding of the unit which will convert them to a normal domestic Central Excise Unit. The appellant/assessee heavily relied on the decision of the Hon'ble Supreme Court in *Siv Industries* (supra). We have perused the said decision carefully. We have also examined the Tribunal's order which was subject-matter of the Hon'ble Supreme Court's decision. The Hon'ble Supreme Court has mainly focused and discussed the wordings of proviso to Section 3(1). The Supreme Court after having taken note of the Revenue's plea regarding applicability of proviso to Section 3 (1), held that the term "allowed to be sold in India" is applicable in respect of permission of Development Commissioner for selling the goods up to a limit of 25% by the EOU. The Hon'ble Supreme Court held that debonding and permission to sell in India are two different things having no connection with each other. No permission is required to sell the goods manufactured by a 100% EOU lying at the time of granting of permission to debond. We have noticed that the proviso to Section 3(1) has been amended in 2001. The new proviso reads "provided that the duties of excise which shall be levied and collected on any excisable goods which are produced or manufactured by a 100% Export Oriented Undertaking and *brought to any other place in India* shall be an amount equal to aggregate of duties of customs……" The term "allowed to be sold in India" was interpreted by Supreme Court to mean only goods which are permitted to be sold by the Development Commissioner in respect of their functioning EOU. This much has been categorically held by the Hon'ble Supreme Court in *Siv Industries* (supra). Apparently, after the substitution of the terms in 2001 the proviso to Section 3(i) cannot be restrictively interpreted to apply to such finished goods, which are only permitted to be sold in India by the Development Commissioner. It is clear that the scope of the term as per the revised proviso to Section 3(i) is much wider and not bound by any criteria of permission to sell in India.

10. The Tribunal in *Century Yarn* (supra), examined this issue in detail. The Tribunal also took note of the Larger Bench decision in the case of *Himalaya International Ltd.* - 2003 (154) E.L.T. 580 (Tri.-L.B.) and observed as below :-

> "10. In both the decisions, the Larger Benches have clearly distinguished the decision of the Apex Court in *Siv Industries Ltd.* case. Indeed the issue for consideration before the Apex Court in *Siv Industries* was relating to the duty liability after debonding and not at the time of debonding and this is apparent from the Paragraph 4 of the said decision wherein it is recorded that "Once the debonding of the unit is permitted, finished goods earlier manufactured in the 100% EOU could be cleared for Domestic Tariff Area (DTA) on levy of duty of Central Excise. The dispute is at what rate this duty is to be levied." Apparently, therefore, the decision is not relevant to a situation arising at the time of debonding of the unit.
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> 11. In the facts of the case in hand, we are concerned at the stage of debonding and provisions of the scheme and in particular clause 6.18 of Chapter 6 of the Foreign Trade Policy as was in force at the relevant time, sub-clause (e) specifically provided that "Units proposing to exit from EOU scheme should obtain permission for in principle approval and submit details of imports and exports made to the Central Excise/Customs Authority. After such verification, the said authority will assess the duty payment and the unit will pay the duty so assessed and obtain 'no due certificate' from the excise authority. During the period between such payment of customs duty and obtaining the final debonding letter, the unit will not be entitled to claim any exemption for procurement of capital goods or inputs." It is therefore, clear that at the time of debonding, the question of availing the benefits available to DTA unit cannot arise.
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> 12. Both the authorities below on detailed discussions about applicability of the proviso the Section 3(1) of the said Act in the facts of the case have clearly applied the provisions of law as they are applicable to the facts of the case and therefore, we do not find any infirmity in the impugned order in that regard. Commissioner (Appeals) was justified in observing that the concessional duty under the said exemption notification would apply only in a situation where the goods are brought to DTA under specified paragraphs (a), (d), (e) and (g) of the Foreign Trade Policy which is not the case when the unit exits from EOU scheme to DTA unit. The benefit under the said notification is restricted to the sale allowed to be sold from EOU to DTA and not in relation to the goods at the time of debonding."

11. In the case of *Thirumala Seung Han Textiles Ltd.* (supra), the Tribunal examined this issue and held that after the amendment of the proviso to Section 3(i), the Revenue is justified in calculation of Central Excise Duty as the aggregate of Customs Duty.

12. The ld. counsel for the appellant/assessee submitted that the language employed in the Foreign Trade Policy continued to be "allowed to be sold in India". He contended that the amendment brought in 2001 has not materially changed the situation. We are unable to agree with the said submission of the ld. counsel. The Foreign Trade Policy apparently deals with the goods which are allowed to be sold in India by an EOU in terms of the policy and the same is applicable to a functioning EOU. It cannot be said that such expression in the Foreign Trade Policy applies to the finished goods lying in stock when the EOU intents to exit the scheme itself. We notice that the final debonding and conversion of EOU to a DTA Unit is legally permissible only on discharging all the duty liabilities on capital goods, raw materials, finished goods, etc., lying in the EOU. In such a situation, it is not legally tenable to argue that the rate of duty applicable to a normal Central Excise Unit should be applicable to a EOU even before the EOU becomes a normal Central Excise Unit.

13. After careful analysis of the facts of the case and legal position, we find no merit in the appeal filed by the appellant/assessee and accordingly dismiss the same.

14. We find no merits in the appeal filed by the Revenue for the imposition of penalty under Rule 25 of Central Excise Rules, 2002 on the appellant/assessee. As discussed above, the rate of duty applicable on the finished goods lying in an EOU at the time of debonding involves interpretation of legal provision and applicability of various case laws and it is not a fit case for penal action against assessee for adopting a particular course of action. Accordingly, the appeal filed by the Revenue is also dismissed.

(Pronounced in the open Court on 1-4-2016)

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