

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 30.11.2017

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR

and

THE HONOURABLE MR.JUSTICE R.SURESH KUMAR

C.M.A.No.3342 of 2017

The Commissioner of Customs and Central Excise,
Customs and Central Excise Commissionerate,
6/7, A.T.D. Street, Race Course Road,
Coimbatore - 641 018. .. Appellant/Respondents

Vs.

M/s.India Actuators (P) Ltd.,
No.1056 C, II Floor,
U.R.House, Avinashi Road,
Coimbatore - 641 018. .. Respondent / Appellant

Prayer: Civil Miscellaneous Appeal filed under Section 130 of the Customs Act, 1962, against the Final Order No.723 of 2009, dated 04.06.2009, on the file of the Customs, Excise and Service Tax Appellate Tribunal, Chennai.

For Appellant : Mr.A.P.Srinivas

JUDGMENT

(Judgment of this Court was made by S.MANIKUMAR, J.)

Civil Miscellaneous Appeal is filed against the Final Order No.723 of 2009, dated 04.06.2009, on the file of the Customs, Excise and Service Tax Appellate Tribunal, Chennai.

2.1. Short Facts leading to the appeal are that M/s.India Actuators Pvt. Ltd., a 100% EOU was found to be a defunct unit. The capital goods raw material procured duty free were lying unused for many years. The records maintained by the unit revealed that procurement of capital goods and raw material were done without payment of duty, as early as 1993,

and during 1995. After effecting few exports, the said EOU became defunct, as their product became outdated and un-marketable. Since the project was unviable, they applied for de-bonding and got the de-bonding permission from Secretariat of Industrial Assistance (SIA) vide letter No.EO.95/1992 dated 25.03.1997. The first condition for permitting de-bonding, by the Secretariat of Industrial Assistance is that they should pay "applicable Customs and Excise duties on the imported and indigenous capital goods, raw materials, components, consumables spares and finished goods in stock".

2.2 Note to the Appendix 16C of the Hand Book of Procedures (Vol.I) of the EXIM POLICY reads as follows:

"The unit would fulfill the above mentioned standard conditions in a period of 6 months from the date of issue of 'in principle' de-bonding letter and obtain final de-bonding permission from the Development Commissioner/SIA as the case may be, failing which the approval granted would lapse automatically". The EOU did not pay the applicable Customs and Excise duties on the capital goods/raw materials thereby, not fulfilling the first condition of the "standard condition for de-bonding" and so the permission given by SIA lapsed automatically. DGFT also initiated action against the EOU by issuing a show cause notice vide F.No.9/7/98-99/ECA II/218 dated 29.05.1998, proposing to impose penalty under Foreign Trade (Dev. & Reg) Act, 1992.

2.3. Against the annual capacity of 40,000 units, EOU had manufactured and exported only 1990 units, during the period 27.09.1993 to 22.01.1996. Actuators, the device to tilt dish antennas by then, became technologically outdated, and could not be marketed and so, the capital goods and raw material lying in the factory, became outdated and could not be disposed of, in the local market. A show cause notice was issued by the Deputy Commissioner of Central Excise, vide C.No.VIII/10/1/2000 dated 11.04.2000, proposing recovery of duty and interest. Based on the amount of duty involved, and on the above issue, show cause notice was taken up by Commissioner, for adjudication.

2.4. The Commissioner of Central Excise, Coimbatore, vide order-in-original No.7/2001-Cus, dated 28.12.2001, rejected the plea of the EOU, for permission to destroy the capital goods, as well as the raw material, on the ground that, as per the Notification No.53/97-Cus, which governs the EOU, there was no provision for destruction of the capital goods till 22.05.2000, while the show cause notice was issued on 11.04.2000, which is prior, to the above date. The Commissioner demanded customs duty of Rs.26,82,677/- on the imported capital goods and customs duty of Rs.5,46,607/-, on the imported raw materials and central excise duty of Rs.13,541/-, on the duty free raw material, procured indigenously, and second hand machinery should be released on payment of the above duty only, after the fulfillment of the

conditions prevailed, in Import Export Policy.

3. Aggrieved by the order of the CESTAT, Chennai, respondent filed an appeal in E/156/2002, before the CESTAT, Chennai. The Appellate Tribunal after hearing both sides, allowed the application for permission to destroy the obsolete goods in terms of Notification No.71/2000-Cus- dated 22.05.2000.

4. Aggrieved by the same, instant Civil Miscellaneous Appeal is filed on the following substantial questions of law:-

"I) Whether the Tribunal is right in according permission for destruction of obsolete goods under Notification No.71/2000-Cus which became effective only from 22.05.2000, to the goods that became obsolete in the past, well before the Notification No.71/2000-Cus came into effect and for which show cause notice was issued on 11.04.2000 for the goods imported and purchased during 1993 and 1995 respectively?

II) Whether the Tribunal is right in according permission to destroy indigenously procured raw materials covered under Notification No.1/95-Cus by Notification No.71/2000-Cus dated 22.05.2000 which is not at all related to Notification No.1/95-Cus?

III) Whether the Tribunal was right in relying on Customs Notification No.133/94-Cus dated 22.06.1994 and Circular No.18/98-Cus dated 16.03.1998 applicable for the units within an export processing zone or a free trade zone specified in Annexure-II and applying the same to an 100% EOU falling outside the said export processing zone or a free trade zone?"

5. Supporting the abovesaid substantial questions of law, Mr.A.P.Srinivas, learned counsel for the appellant, submitted that the decision of CESTAT, Madras, is based on the customs Notification No.133/94-Cus, dated 22.06.1994 and Circular No.18/98-Cus, dated 16.03.1998. The said notification is applicable to the units, within the export processing zone or a free trade zone specified, in Annexure-II to the notification, whereas, the instant case, relates to an 100% EOU unit, not covered, under the above zones specified under the said notification. Hence, the notification, as well as the circular, referred to, in the CESTAT order, is not applicable to M/s.India Actuators Pvt. Ltd. 100% EOU.

6. Learned counsel for the appellant also submitted that the order-in-original passed by the Commissioner, covers three types of goods; (a) capital goods and (b) raw materials

imported and covered under Notification 53/97-Cus dated 03.06.1997 and (c) raw materials (indigenous), covered under notification 1/95-Cus.

7. CESTAT, Madras, in its order, has directed that permission to destroy obsolete goods be allowed, by the appropriate authority, under Notification No.71/2000-Cus dated 22.05.2000. Notification No.71/2000-Cus, is an amending notification to the Original Notification No.53/97-Cus dated 03.06.1997, and not an amending notification of 1/95-Cus. Hence, the direction of CESTAT, Madras, is not applicable to the raw material purchased indigenously, under notification No.1/95-Cus. Insertion of para 12(A) under Notification No.71/2000-Cus dated 22.05.2000 is, reproduced.

"The Assistant Commissioner of Customs or Deputy Commissioner of Customs may, subject to such conditions as he may specify, permit destruction of capital goods without payment of duty inside the unit, or outside the said unit, where it is not possible or permissible to destroy the same within the said unit, in the presence of custom officer."

8. According to the learned counsel for the appellant, from the above, it is seen that permission could be granted for destruction of capital goods only, and raw material imported/purchased indigenously. Moreover, insertion of the above para 12(A) under Notification No.53/97-Cus, vide Notification No.71/2000-Cus, is effective from 22.05.2000 whereas, show cause notice dated 11.04.2000 covers capital goods imported during 1993, and indigenous raw materials purchased during 1995.

9. Learned counsel for the appellant submitted that there was no discussion, by CESTAT, Madras, in its order, as to how, Notification effective from 22.05.2000 can be applied, for the past happenings, and to the show cause notice, issued earlier, to the amendment. The assessee opted for de-bonding on his own, and the same was accepted by the Secretariat of Industrial Assistance, vide letter dated 25.03.1997. Thus, it is clear that the assessee wanted de-bonding, well before the issuance of the Notification No.71/2000-cus, dated 22.05.2000.

10. Learned counsel for the appellant further submitted that the obsolete goods, as per the assessee, is the Actuators, i.e. goods intended to be manufactured by importing/purchasing Capital goods/Raw materials. Just because the prospect of marketing of Actuators was unviable/outdated, captial goods/raw materials cannot be termed, as obsolete goods. This was also observed by the adjudicating authority, vide para 33 of the Order-in-Original.

11. Learned counsel for the appellant further submitted

that in, para 13 of the Order-in-Original, the adjudicating authority has clearly observed that the second hand capital goods, imported by the assessee were restricted items, as per para 5.3 of the policy and a specific licence from DGFT is required to release the same. CESTAT, Madras, made no reference on this aspect. By according permission for destruction of the alleged obsolete goods, by the appropriate authority, in terms of Notification No.71/2000-Cus dated 22.05.2000, CESTAT, Madras, has prompted the above question of law, for consideration by this Court.

12. Heard Mr.A.P.Srinivas, learned counsel for the appellant and perused the materials available on record.

13. Before advertng to the submissions, it is necessary to have a cursory look at circular No.18/1998-Cus, dated 16.03.1998, issued in respect of EPZ/FTZ-Destruction of Scrap/Waste, in the Export Processing Zone:-

"I am directed to refer to Notification No.133/94-Cus, dated 22-06-1994 governing 100% EOUs set up in various Export Processing Zones/Free Trade Nones. Under the above notification, seven earlier notifications each governing 100% EOU in an Export Processing Zone, were rescinded. In this connection, the following doubts have been raised;

(i) Whether the actions taken earlier under these seven Notifications which were issued for seven Export Processing Zones, are deemed to have been done or taken under the corresponding provisions of the current Notification No.133/94-Cus., which has rescinded all these seven notifications.

(ii) Whether defective or sub-standard computers and its parts which are not required (useful) for current production and have also not been used can be destroyed out side the zone i.e. whether the goods which were imported under an earlier notification could be allowed destruction under the present Notification No.133/94-cus.

(iii) Whether the goods which are permitted for destruction within the zones can be taken for destruction outside the zones, as the notification only provides for destruction within the zone?

2. The issue has been examined by the Board. It is clarified that action taken under the rescinded seven notifications will be deemed

to have been done or taken under the corresponding provisions of the current Notification No.133/94 and the goods which were imported under any one of the earlier notifications could be allowed destruction under present notification. Under para 7 (ii) of Notification No.133/94-Cus., the imported goods as such may be allowed destruction and under para 7(iii), the scrap/waste obtained in the process of manufacture may also be allowed destruction. In the cases where goods cannot be destroyed within the Zone because of the safety reasons or Municipal Corporation's regulations, the Commissioner may permit destruction outside the zone subject such conditions as may be prescribed by the Commissioner since this is only a procedural requirement and non-substantive in nature.

3. Pending cases may be processed accordingly and the receipt of this letter may kindly be acknowledged."

14. Circular No.49/2000-Cus, dated 22.05.2000, in respect of EOU/EPZ/STP/EHTP Scheme - Amendments in Exim Policy and Handbook of Procedures, 1997-2002, is extracted hereunder:

"Government of India
Ministry of Finance (Department of Revenue)
Central Board of Excise & Customs, New Delhi

Subject : Amendments in Exim Policy and Handbook of Procedures, 1997-2002 - relating to EOU/EPZ/STP/EHTP Scheme - Issuance of Customs/Central Excise Notifications - reg.

I am directed to refer to Chapter 9 of the revised Exim Policy 1997-2002 and Handbook of Procedures, Vol. 1. The changes made therein have necessitated amendments in notifications governing duty free import/procurement of goods by EOU/EPZ/STP/EHTP units. These amendments have been made vide notification Nos. 71/2000-Cus., and 40/2000-C.E., both dated 22-5-2000. A copy each of the notifications is enclosed for reference. The revision of Exim Policy and HOP has also necessitated amendments in existing Circulars/instructions, and the same has been made wherever necessary.

The salient features of the changes are given below :

Inclusion of a new activity, viz. trading :

2. Paragraph 9.1 of the Exim Policy lists

various activities, viz. manufacture, services, development of software, agriculture etc. for which a unit can be set up under EOU/EPZ/EHTP/STP Scheme. A new activity, viz. 'trading' has been included in this paragraph. This has been subsequently elaborated in paragraph 9.21, as per which trading units would be allowed to import/procure from DTA goods duty free for the purpose of exports. The trading units may also undertake re-packing, labeling, minor processing etc. for which they shall be eligible for duty free procurement of packing, labeling materials etc. and the required capital goods. Further, the trading units may also procure goods without payment of duty from other EOU/EPZ/EHTP/ STP units for exports. The trading units shall be required to achieve positive NFEP and export performance as prescribed in Appendix I of the Export and Import Policy.

3. The provision concerning trading units in Paragraph 9.21 is in lieu of the earlier Paragraph, which dealt with setting up of private bonded warehouses in the EPZs. It may be noted that in case of these units the usual entitlements like DTA sale, deemed export benefits, inter-unit transfer, sub-contracting etc., otherwise available to EOU/EPZ units, shall not be available. The trading units would, however, be allowed to supply goods to other EOU/EPZ/EHTP/STP units or supply goods to DTA against valid advance licences or specific duty-free import entitlements. The notifications governing duty free procurement and import by EOU/EPZ units have been amended suitably to incorporate the said changes.

Leasing of Capital Goods :

4. Under Paragraph 9.4 of the Policy, an EOU/EPZ/EHTP/STP unit is on the basis of a firm contract between the parties, allowed to source capital goods from a domestic/foreign leasing company. In such cases, the EOU/EPZ/EHTP/STP unit and the domestic/foreign leasing company are required to jointly file the documents to enable import of the capital goods without payment of duty. This paragraph has been amended now to allow EOU/EPZ/STP/EHTP units to source indigenous capital goods without payment of duty.

Access to central facility for software development by DTA units :

5. In terms of Paragraph 9.2 of the Policy, STP/EHTP/EPZ are allowed to import free of duty all types of goods for creating a central facility for use by software development units in STP/EHTP/EPZ. An amendment has been made in this paragraph to the effect that the central facility for software development could also be accessed by units in the DTA for export of software. Necessary arrangements may be made to implement this Policy provision. It may be noted that the software exported by DTA units by availing of such central facility of EPZ/STP/EHTP will be considered as export made by DTA unit only.

DTA sale of rejects :

6. Paragraph 9.9(a) of the Policy provides for DTA sale of rejects. Prior to the revision of the Policy, rejects above 5% of the FOB value of exports were counted against DTA sale entitlements, which was allowed upto 50% of the FOB value of export. An amendment has been made in this paragraph to stipulate that all sales of rejects in DTA shall be counted in the overall limit of 50%. As hitherto, the DTA sale entitlement shall be worked out on the basis of physical exports only.

DTA sale by software units :

7. Prior to revision, under para 9.9(g) of the Policy, the software units were allowed DTA sale in any mode including on-line data communication upto 50% of FOB value of exports. Under the amended provision, DTA sale of service upto 50% of foreign exchange earned against sale of such services has been allowed. It means that in case services are sold in DTA against foreign exchange, the unit shall be entitled to DTA sale upto 50% of foreign exchange earned against such sale of services.

Supplies to bonded warehouses authorized to carry out manufacturing operations in bond :

8. As per Paragraph 9.10(d), supplies to bonded warehouses set up under 11.14 of the Policy are counted towards fulfillment of NFEP and export performance. In the same paragraph, an amendment has been made to include bonded warehouses authorized to carry out manufacturing operations in bond under section 65 of the Customs Act, 1962, meaning thereby that supplies made by EOU/EPZ/EHTP units to these warehouses shall also be counted towards fulfillment of

export obligation and NFEP. As per the existing notifications, supplies from EOU/EPZ/EHTP units to bonded warehouses registered or appointed under notification No. 26/98-C.E. (N.T.), dated 15-7-1998 are allowed without payment of duty. Notifications governing duty free import/procurement by EOU/EPZ/EHTP units have been amended suitably to allow supplies from these export oriented units to warehouses authorised to carry out manufacturing operations in bond under section 65 of the Customs Act, 1962 and under Manufacture and Other Operations in Warehouse Regulations, 1966, without payment of duty.

Supplies to foreign missions/diplomats :

9. Presently, under Para 9.10 (f) of the Export and Import Policy, supply of goods to defence and internal security forces are counted towards fulfillment of export obligation and NFEP provided they are entitled to duty-free import of such items. This paragraph has been amended to include foreign missions/diplomats, meaning thereby that supplies made by EOU/EPZ/STP/EHTP units to missions/diplomats, who are entitled to duty free import of goods, shall also be counted towards fulfillment of export obligation and NFEP.

Sub-contracting on behalf of DTA units :

10. Under para 9.17(d), the EOU/EPZ units in specific sectors were allowed to undertake job work for export on behalf of DTA units. This paragraph has been amended to extend this facility to all sectors. It has also been provided that DTA units shall be entitled to brand rate of duty draw back.

11. The EOU/EPZ units in textiles, ready made garments and granite sectors were allowed to undertake job work on behalf of DTA units by Board's Circular 69/98-Cus., dated 14th September 1998. This facility was subsequently extended to the EOU/EPZ units in aquaculture, animal husbandry, hardware, software sector vide Boards <<15183\$Circular No. 74/99-Cus., dated 5th Nov., 1999. >> Now, it has been decided to extend this facility to EOU/EPZ units in all sectors. Further, it has been decided that the DTA units shall be entitled to avail of the

brand rate of duty drawback for such jobwork undertaken by EOUs/EPZ units concerned. Board's <<15083\$Circulars 67/98-Cus., dated 14-9-1998 >> and <<15183\$74/99-Cus., dated 5-11-1999 >> stand modified to the above extent.

Disposal of Capital goods

12. Para 9.19 of the Exim Policy has been amended to allow destruction of obsolete capital goods and spares without payment of duty with prior permission of Customs. To align with the revised provision of the Policy, all notifications governing duty free import/procurement by EOU/EPZ/STP/EHTP units have been amended suitably to provide that destruction of capital goods shall be allowed by the Assistant/ Deputy Commissioner of Customs/Central Excise in charge of the EPZ/EOU/STP/EHTP units without payment of duty. Such destruction shall be carried out in the presence of Customs/Central Excise officer inside the Zone or outside the Zone/unit, where it is not permissible or possible to carry out destruction within the Zone/unit. The officers supervising destruction may exercise due caution to ensure that capital goods are destroyed fully rendering them unfit for further use and give certificate to that effect. After destruction of capital goods, if the remains have scrap value, the same may be cleared by the unit in DTA on payment of duty applicable to scrap.

Replacement/Repair of imported/indigenous goods :

13. Paragraph 9.24 has been amended to allow replacement of goods imported and found to be defective, either from the foreign suppliers or from their authorised suppliers in India. It may please be noted that in the case of replacements from the authorised suppliers in India, such authorised suppliers shall not be eligible for any duty free import against such replacements of defective imported goods made to EOU/EPZ/STP/EHTP units.

Duty-free import facility for additional items :

14. Paragraph 9.8 of HOP provides the list of items, which are allowed to be imported duty free by EOU/EPZ/STP/EHTP units for the purposes specified in the Policy. This Paragraph has been revised to include additional items, such as, uninterrupted power supply (UPS) system, pollution control equipment, quality assurance

equipment, storage systems, special racks for storage, modular furniture, computer furniture, anti-static carpet, tele-conference equipment, servo control systems, air-conditioners, panel for electricals, security systems etc. The notifications governing EOU/EPZ/EHTP/STP Schemes have been amended for extending duty free facility to above items. The same may be perused for further details.

Special provisions for granite sector under EOU/EPZ Scheme :

15. Under paragraph 9.10(a) of the HOP, agricultural and allied sector units in EOU/EPZ are allowed to supply/transfer capital goods and other inputs in the farms/fields. In the revised HOP, the paragraph has been amended to allow granite sector units in EOU/EPZ to transfer/supply capital goods and inputs to the quarries with prior intimation to the jurisdictional Assistant/ Deputy Commissioner of Customs. To effect the above changes, two separate notifications (Nos. 58/2000-Cus., dated 8-5-2000 and 38/2000-C.E., dated 8-5-2000) have been issued (copies enclosed) to allow granite sector units in EOU/EPZ Scheme to import/procure specified capital goods, equipment and inputs etc., duty free and to use them in their own quarries. The granites so quarried would be brought back to the EOU/EPZ units for further manufacturing/processing and export thereof. This facility of duty free import/ procurement of equipment for quarrying of granite shall be available only to the units which have a manufacturing/processing unit operating under EPZ or EOU Scheme. The granite so quarried shall not be allowed to be exported as such and shall be transferred to the processing unit of the importer/user industry (in case of procurement) operating under EOU/EPZ Scheme. However, the granite so quarried may be supplied to other granite processing EOU/EPZ units without payment of duty. The granites quarried shall not be allowed to be sold in DTA. The granite manufacturing/processing units under EOU/EPZ Scheme would be governed by notifications applicable to EOU/EPZ units and the granite quarrying unit shall be governed by the notification Nos. 58/2000-Cus., dated 8-5-2000 and 37/2000-C.E., dated 8-5-2000 referred to above.

Disposal of scrap/waste/remnants :

16. As per para 9.30 of the HOP,

scrap/waste/remnants arising out of the production process upto 5% of FOB value of exports are allowed to be sold in DTA. In case waste/scrap/remnants generated is more than 5%, it shall be approved by Development Commissioner in accordance with the norms provided in Appendix 41 of HOP. In the revised edition of HOP, the limit i.e. 5% of FOB value of exports has been withdrawn. The waste/scrap/remnants shall be allowed as per the norm stipulated in Appendix 4 of HOP. For items not covered by Appendix 41, the norms shall be fixed by the Board of Approval.

Depreciation norms for capital goods :

17. As per para 9.35 of HOP, at the time of debonding, depreciation upto 90% is allowed in respect of capital goods. This maximum limit (i.e. 90%) is achieved over a period of 8 years. For computer and computer peripherals, accelerated depreciation was allowed i.e. the limit of 90% was achieved over a period of 4 years and 3 months. Under the revised HOP, further accelerated depreciation for computers and computer peripherals has been provided i.e. maximum limit of 90% would be achieved over a period of 2 years and 9 months in lieu of 4 years and 3 months as at present. Board's <<15043\$Circular 27/98-Cus, dated 21-4-98, >> provides depreciation norms for computer and computer peripherals upto the limit of 90%, and for the capital goods other than the computers upto a limit of 75%. <<15043\$Circular 27/98-Cus., dated 21-4-1998 >> was subsequently modified by <<15059\$Circular No. 43/98-Cus., dated 26-6-1998 >> in order to provide depreciation for capital goods other than computer and computer peripherals upto a limit of 90%. To implement the changes made in the HOP, it has been decided to allow a further accelerated depreciation for computer and computer peripherals as under :

For every quarter in the first year
@10%

For every quarter in the second year
@8%

For every quarter in the third year
@7%

For every quarter in the fourth year
5%

and thereafter @

Subject to a maximum of 90%

<<15043\$Circular Nos. 27/98, dated 21-4-1998 >>
and <<15059\$43/98-Cus., dated 26-6-1998 >> stand
modified to the above extent.

Powers of approval of Development Commissioner :

18. At present, under Paragraphs 9.37 of the HOP, DG sets up to capacity of 1000 KVA is approved by Development Commissioner (DC) and of capacity beyond 1000 KVA is approved by Board of Approvals. This Paragraph has been amended so as to allow the DC to permit import/procurement of DG sets without any limit in regard to the capacity of such sets. All notifications governing EOU/EPZ/EHTP/STP Schemes have been amended suitably to reflect the above change.

Allowing Export of Call Centre Services under STP scheme :

19. The notification Nos. 138/91-Cus. and 140/91-Cus., both dated 22-10-1991, governing STP scheme presently allow duty-free imports for certain purposes viz. development of software, data entry or data conversion, data analysis and control or data management for export out of India. Call Centre Services are not listed in the notification as one of the specific purposes. In recent past, a number of proposals has been received regarding setting up of units under STP scheme for the purpose of export of Call Centre Services in addition to development of software. Considering that the Call Centre Service is a growing area of export and has substantial potential for foreign exchange earning, Notification Nos. 138/91-Cus. and 140/91-Cus., both dated 22-10-1991 have been amended to include Call Centre Services as one of the purposes under STP scheme.

Duty-free Import of DG Set by STP Units :

20. Hitherto, STP units were not allowed to import captive power plants and captive generating sets duty free under Notification Nos. 138/91-Cus. and 140/91-Cus., both dated 22-10-1991. However, the same was allowed under Notification No. 1/95-C.E., dated 4-1-1995. In order to provide a uniform Policy in this area, Notification Nos. 138/91-Cus., dated 22-10-1991 and 140/91-Cus., dated 22-10-1991 have been amended so as to allow STP units to import captive power plants and captive generating sets without payment of duty.

Duty-free Import of Additional Items for Software Exports :

21. Notification No. 153/93-Cus., dated 13-8-1993, allows duty-free import of telematic infrastructural equipment for software exports under the STP scheme. The equipments imported under this notification are used for creating a Central facility for the purpose of export of software. Ministry of Information Technology has requested for inclusion of additional items, which are stated to be required for setting up of STP Complexes. These additional items are uninterrupted power supply, diesel generating sets, servo control system, air conditioner, private automatic branch exchange, fax machine, video projection system, security system, computer furniture, tool, kits and spares for the above. Accordingly, Notification No. 153/93-Cus., dated 13-8-1993 has been amended to allow duty-free import of the additional items as mentioned above.

Duty-Free Import/Procurement of Accessories of Capital Goods under EOU/EPZ/STP/EHTP Scheme :

22. The notifications governing duty-free import/procurement of goods by EOU/EPZ/STP/EHTP units allow duty-free import of capital goods and spares. However, in these notifications, there is no specific entry for accessories of capital goods. The notifications have since been amended to allow import/ procurement of accessories of capital goods also.

Furnace Oil for Boilers :

23. Notification Nos. 133/94-Cus., dated 22-6-1994, 53/97-Cus., dated 3-6-1997 and 1/95-C.E., dated 4-1-1995, provide for duty-free import/procurement of furnace oil for boiler in textile units only. The Ministry of Commerce has requested that the boiler is required for units other than textiles also. It has also been pointed out that Notification No. 126/94-C.E., dated 2-9-1994, does not allow duty-free procurement of furnace oil even for the textile units. The matter has been considered, and Notification Nos. 133/94-Cus., dated 22-6-1994, 53/97-Cus., dated 3-6-1997, 1/95-C.E., dated 4-1-1995 and 126/94-C.E., dated 2-9-1994 have been amended to allow duty-free import/procurement of furnace oil for boilers in all EOU/EPZ units.

Import/ Procurement of HSD for Aquaculture and Agriculture Sector :

24. Aquaculture and agriculture sector EOUs

operate under notification Nos. 196/94-Cus., dated 8-12-1994 & 10/95-C.E., dated 23-2-1995 and 126/94-Cus., dated 3-6-1994 & 136/94-C.E., dated 10-12-1994 respectively. These units are not amenable to physical bonding. Therefore, the units are allowed to import/procure duty free only some specified goods HSD is not included in the duty-free import category. Ministry of Commerce and Trade have been requesting persistently that HSD is an essential item required by the aquaculture and agriculture units and, therefore, it should be allowed duty free. Considering the erratic power situation in the country and the fact that the units are allowed to import/procure DG sets duty free, it has been decided to allow duty-free import/procurement of HSD by the aquaculture and agriculture sector on the basis of the recommendation of the Board of Approval. In other words, BOA will fix norms for each unit on the basis of which duty-free import/ procurement of HSD should be allowed. The units importing/sourcing indigenously/duty-free HSD shall maintain proper account of import/procurement and utilisation of such duty free HSD, in the same way as accounts of duty free imported/indigenously sourced goods are being maintained by any other bonded EOUs. Notification Nos. 196/94-Cus, dated 8-12-1994, 10/95-C.E., dated 23-2-1995 and 126/94-Cus., dated 3-6-1994, 136/94-CE, dated 10-12-1994 have been amended to allow duty free import/procurement of HSD for use in the diesel generating sets by aquaculture/agriculture sector EOUs, on the recommendation of the Board of Approvals.

Other Issue :

25. In the notifications governing duty-free procurement of indigenous goods by EOU/EPZ, there is a provision that the EOU/EPZ units are allowed to clear the goods (including rejects, wastes, scraps and remnants) into DTA on payment of appropriate duty of excise. In Budget 2000-2001, Notification No. 1/95-CE, dated 4-1-995, governing duty free procurement of indigenous goods by EOU/EHTP/STP units has been amended to provide that the goods so cleared into DTA which are not excisable, excise duty equal in amount to that leviable on the inputs obtained under this notification and used for the purpose of manufacture of such articles, which would have been paid but for the exemption under this notification, shall be payable at the time of

clearance of goods. Similar amendments have been carried out in Notification Nos. 126/94-CE, dated 2-9-1994, 136/94-CE, dated 10-11-1994 and 10/95-CE, dated 23-2-1995 in order to achieve uniformity in provisions of all the notifications.

26. Wide publicity may be given to the above changes by issue of a Public Notice in this regard.

27. Difficulties, if any, faced in understanding or in implementation of the above changes, may be brought to the notice of the Board at an early date.

Kindly acknowledge receipt of this Circular."

15. Let us now consider, as to how the Commissioner of Central Excise, Coimbatore, original authority, has considered the issue. Paragraphs Nos.23 to 31, are extracted hereunder:-

"23. He brought to my notice that MEPZ had already given NOC for destruction of obsolete capital goods imported by them. He further stated that the Ministry had also issued a clarification vide Notification No.49/2000 dated 22.05.2000 wherein it has been clarified that in accordance with the amendment made in the EXIM Policy 2000, disposal of obsolete capital goods have been permitted without payment of duty (Vide para 12). In view of the above he finally requested for permission for destruction of all the obsolete capital goods lying in their factory which were imported in the year 1993 except one number of Butler Hi-Tect 10/60 Injection Moulding Machine, one set category 1 spares 1 and 500 kgs of alluminium alloy as discussed above.

24. Commissioner of Central Excise, Coimbatore, gone through the case records carefully and considered all the points agitated by the assessee in their reply to the show cause notice and points put forth at the time of personal hearing, record the following findings.

25. The CIU attached to Hqrs. office Coimbatore visited M/s India Actuators Pvt. Ltd. a 100% EOU and found it to be defunct. It was found that their product become obsolete and outdated, as the foreign buyer had not lifted the goods already exported and also there was no

market within India. Since their project was not viable, they got debonding permission from Secretariat of Industrial Assistant (SIA) with the condition that they shall pay applicable customs and excise duties on the imported and indigenous capital goods, raw materials, components and spares and finished goods in stock. Even after a lapse of 2 years the assessee have not paid the duty and the permission given by SIA has lapsed automatically. The DGFT has also issued a show cause notice proposing to impose penalty for which they replied that they agree to pay duty on depreciated value of the capital goods and requested to waive off the interest on the duty.

26. Shri. A.C.Mahesh, Director of the Company agreed that the annual production capacity is 40,000 units of actuators but they actually manufactured and cleared only 1990 units of Actuators during the period 27.9.93 to 22.1.96. He also admitted that the unit has been closed since February 1996 without obtaining extension of warehousing period and the machineries are hypothecated to the State Bank of Mysore, Coimbatore.

27. The show cause notice proposes to demand duty by denying the depreciated value and adopt the assessable value declared at the time of import, on the ground that the EOU had not obtained permission from the BOA and also debonding permission granted by the SIA had lapsed. The rate of duty shall be that which was prevalent on the day of payment of duty as per the provisions of Section 15 of Customs Act 1962 read with condition 5(a) of the Notification 53/97 Cus.

28. Notification No. 67/95 Cus dated 1.11.95 exempts interest accrued on the duty on capital goods warehoused. The same is applicable to the machineries imported even prior to 1.11.1995 in terms of clarification given by Board in Circular No. 31/96 Cus dated 7.6.96. But it is proposed to deny the exemption in terms of Notification No. 53/97 Cus as amended by Notification No. 65/99 Cus dated 19.5.99. As per the amendment, if the AC is satisfied that the capital goods are not used (for the purpose for which they are imported) within the warehouse, interest at the rate of 20% has to be charged on the duty. On the same analogy, it is also proposed to demand duty and interest on the

imported and indigenous raw materials.

29. It was emphasized by the EOU that the Obsolete capital goods are eligible for destruction in terms of Customs Circular No. 49/2000-Cus dated 22.5.2000 and as recommended by the Development Commissioner, MEPZ, Chennai. But the Development Commissioner has recommended the destruction of obsolete capital goods subject to the observance of Customs and excise formalities. The EOUs are governed by the provisions of Notification No. 53/97- Cus as amended, which did not have any provision for destruction of capital goods till 22.5.2000, when para 12A was inserted vide Notification NO.71/2000- Cus dated 22.5.2000 allowing the destruction of capital goods subject to the satisfaction of the Asst. Commissioner. The show cause notice had been issued on 11.4.2000 demanding duty when there was no provision for allowing the destruction of capital goods. The destruction of capital goods is claimed on the ground that they have become obsolete and outdated. But this claim cannot be accepted, as only their manufactured goods are obsolete and outdated and not the capital goods. It can be seen from the Annexure to the show cause notice that the following capital goods can be used for other purpose.

1. Precision Rotor Balancing Machine
2. Precision Comutator Turning Lathe.
3. Spot welder.
4. Insulation Testor Etc.
5. Press with press fixers
6. Drilling Machine
7. Hardness Tester.
8. Precision winding Treatment Furnace.
9. Winding Machine.
10. Reed Sensor.
11. Dies and Moulds (This can be altered to required dimensions)
12. High Tech Injection Moulding Machine.

Hence the request for destruction cannot be considered. The depreciated value cannot be allowed, as the debonding letter of SIA had already lapsed and also depreciation is allowed based on the usage of capital goods which is very meager period not deserving any depreciation on the capital goods. The production was stopped as early as January 1996 on the ground that it had become outdated and in

order to reduce the loss, immediate steps should have been taken after appraising the facts to the concerned Departments to dispose off the duty free capital goods procured and also raw material / components lying in stock. The present action is the outcome of the visit of the CIU, Coimbatore to Mis India Actuators Pvt. Ltd., Coimbatore and not of their own initiative. Hence not only destruction but also depreciation on the capital goods cannot be extended to them. On the same analogy, raw materials I components could have been disposed off in the local market in view of the final products having become obsolete, with due permission of the concerned authorities and hence the duty on the imported and indigenous raw materials I components is also to be paid by the EOU.

30. On the question of demanding 20% interest on the duty demanded, Notification No. 53/97 Cus has been amended by Notification No. 65/99-cus dated 19.5.99 to the effect that if the Asst. Commissioner is satisfied that the capital goods are not used (for the purpose for which they are imported) within the warehouse, interest at the rate of 20% has to be charged on the duty from the date of import till the date of payment of duty. The amended provisions of Notification No. 53/97 Cus can be invoked only for the imports made after 19.5.99, the date of amendment, and it cannot have a retrospect effect. Hence interest as per Notification No.53/97 Cus cannot be charged on the duty payable by the 100% EOU on the goods covered by show cause notice.

31. In view of the above, Commissioner of Central Excise, Coimbatore, pass the following order:-

a) To Restrict the demand of customs duty to Rs.26,82,677/- (as per Annexure I) on the imported Capital goods from M/s.India Actuators Pvt Ltd., Coimbatore in terms of the conditions of the Bond executed by them.

b) To Restrict the demand of customs duty to Rs.5,46,607/- (As per Annexure II) on the imported Raw Materials and Central Excise duty of Rs.13,541/- (As per Annexure III) on the duty free raw materials procured indigenously within India in terms of the above Bond.

c) To order that the said second hand machineries should be released on payment of above duty only after fulfillment of the conditions prescribed in the Import - Export Policy."

16. When the abovesaid decision of the Commissioner of Central Excise, confirming the demand of Customs duty of Rs.26,82,677/- on the imported capital goods and customs duty of Rs.5,46,607/- on the imported raw materials and central excise duty of Rs.13,541/- on the duty free raw material, was challenged before, CESTAT, Madras, after considering the rival submissions, vide Final Order No.723 of 2009 dated 04.06.2009, CESTAT, Madras, has ordered as hereunder:-

"3. We have heard both sides. We find force in the submission of the appellants that since the relevant Exim policy had already been amended prior to the issue of show cause notice, and it provides for destruction of obsolete capital goods, raw materials and finished goods and the request for destruction was made after the issue of the show cause notice, and the impugned order was passed well after the Notification itself had been amended to provide for destruction with the permission of the Assistant Commissioner, and since there is no dispute that the capital goods and raw materials had become unfit for manufacture and become obsolete in the market for actuators, the permission sought for destruction of the capital goods, raw materials and finished goods etc. by the appellants can be accepted. We find that Circular No.18/98-Cus dated 16.03.1998 issued by the CBEC clarifies that destruction of waste/scrap obtained in the process of manufacture in the Export Processing Zone when goods were imported under earlier notification not providing for destruction could be permitted under the notification currently in force. The Circular reads as under:-

"Destruction of scrap/waste in the Export Processing

I am directed to refer to Notification No.133/94-Cus, dated 22-06-1994 governing 100% EOUs set up in various Export processing Zones/Free Trade Zones. Under the above notification, seven earlier notifications each governing 100% EOU in an Export Processing Zone, were rescinded. In this connection, the following doubts have been raised;

(i) Whether the actions taken earlier under these seven Notifications which were

issued for seven Export Processing Zones are deemed to have been done or taken under the corresponding provisions of the current Notification No.133/94-Cus, which has rescinded all these seven notifications.

(ii) Whether defective or sub-standard computers and its parts which are not required (useful) for current production and have also not been used can be destroyed outside the zone i.e. whether the goods which were imported under an earlier notification could be allowed destruction under the present Notification No.133/94-Cus.

(iii) Whether the goods which are permitted for destruction within the zones can be taken for destruction outside the zones, as the notification only provides for destruction within the zone?

(2) The issue has been examined by the Board. It is clarified that action taken under the rejoined seven notifications will be deemed to have been done or taken under the corresponding provisions of the current Notification No.133/94 and the goods which were imported under any one of the earlier notification could be allowed destruction under present notification. Under para 7 (ii) of Notification No.133/94-Cus, the imported goods as such may be allowed destruction and para 7(iii), the scrap/waste obtained in the process of manufacture may also be allowed destruction. In the cases where goods cannot be destroyed within the Zone because of the safety reasons or Municipal Corporation's regulations, the Commissioner may permit destruction, outside the Zone subject to such conditions as may be prescribed by the Commissioner since this is only a procedural requirement and non-substantive in nature.

3. Pending cases may be processed accordingly and the receipt of this letter may kindly be acknowledged".

4. In the light of the above discussion, we direct that the application for permission to destroy the obsolete goods be allowed by the appropriate authority in terms of Notification No.71/2000-Cus, dated 22.05.2000."

17. Show cause notice has been issued on 11.04.2000 for the goods imported and purchased during 1993 and 1995.

Paragraph 2 of the circular No.18/1998-Cus, dated 16.03.1998, issued in respect of EPZ/FTZ-Destruction of Scrap/Waste in the Export Processing Zone, are extracted hereunder:-

"2. The issue has been examined by the Board. It is clarified that action taken under the rescinded seven notifications will be deemed to have been done or taken under the corresponding provisions of the current Notification No.133/94 and the goods which were imported under any one of the earlier notifications could be allowed destruction under present notification. Under para 7 (ii) of Notification No.133/94-Cus., the imported goods as such may be allowed destruction and under para 7 (iii), the scrap/waste obtained in the process of manufacture may also be allowed destruction. In the cases where goods cannot be destroyed within the Zone because of the safety reasons or Municipal Corporation's regulations, the Commissioner may permit destruction outside the zone subject such conditions as may be prescribed by the Commissioner since this is only a procedural requirement and non-substantive in nature."

18. Paragraph No.12 of the Circular No.49/2000-Cus, dated 22.05.2000, in respect of EOU/EPZ/STP/EHTP Scheme - Amendments in Exim Policy and Handbook of Procedures, 1997-2002, is extracted hereunder:-

"12. Para 9.19 of the Exim Policy has been amended to allow destruction of obsolete capital goods and spares without payment of duty with prior permission of Customs. To align with the revised provision of the Policy, all notifications governing duty free import/procurement by EOU/EPZ/STP/EHTP units have been amended suitably to provide that destruction of capital goods shall be allowed by the Assistant/Deputy Commissioner of Customs/Central Excise in charge of the EPZ/EOU/STP/EHTP units without payment of duty. Such destruction shall be carried out in the presence of Customs/Central Excise officer insider the Zone/unit, where it is not permissible or possible to carry out destruction within the Zone/unit. The officers supervising destruction may exercise due caution to ensure that capital goods are destroyed fully rendering them unfit for further use and give certificate to that effect. After destruction of capital goods, if the remains have scrap value, the same may cleared by the unit in DTA on payment of duty applicable to scrap."

19. Show cause notice dated 11.04.2000, has resulted in order in original dated 28.12.2001. Having regard to the intention, in issuing the above circulars, and considering the

reasons assigned by CESTAT, Madras, in granting permission to destroy the absolute goods, we are of the view that the order impugned before us cannot said to be erroneous. Question whether, it is within the export processing zone or free trade zone, does not arise, for consideration.

20. In the result, instant Civil Miscellaneous Appeal is dismissed. No costs. Substantial questions of law raised are answered against the revenue.

Sd/--

Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

dm

To
The Commissioner of Customs and Central Excise,
Customs and Central Excise Commissionerate,
6/7, A.T.D. Street, Race Course Road,
Coimbatore - 641 018.

2.Mr.A.P.Sriivas, Advocate, SR No.85624

C.M.A.No.3342 of 2017

SJ(CO)
kas(03/02/2018)