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IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA

REGIONAL BENCH – COURT NO.1

Excise Appeal No.254 of 2010
(On behalf of Appellant)

(Arising out of Order-in-Original No.42/Commr./CE/Kol.III/2009-10 dated 18.01.2010 passed by Commissioner of Central Excise, Kolkata)

M/s A.R.Stanchem Private Limited
127/F, B.T.Road, Panihati, Dist.-24 Parganas (North), West Bengal

Appellant

VERSUS

Commissioner of Central Excise, Kolkata III
180, Shantipally, Rajdanga Main Road, Kolkata-700107

Respondent

WITH

Excise Appeal No.720 of 2010
(On behalf of Appellant)

(Arising out of Order-in-Original No.09/Commr./CE/Kol.III/2009-10 dated 31.08.2010 passed by Commissioner of Central Excise, Kolkata)

M/s A.R.Stanchem Private Limited
127/F, B.T.Road, Panihati, Dist.-24 Parganas (North), West Bengal

Appellant

VERSUS

Commissioner of Central Excise, Kolkata III
180, Shantipally, Rajdanga Main Road, Kolkata-700107

Respondent

APPERANCE :

Shri N.K.Chowdhury, Advocate for the Appellant
Shri K.Chowdhury, Authorised Representative for the Respondent

CORAM:
HON'BLE MR.ASHOK JINDAL, MEMBER (JUDICIAL)
HON'BLE MR.K.ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NO. 77310-77311/2023

DATE OF HEARING : 21.09.2023

DATE OF PRONOUNCEMENT : **16.10.2023**

Per Ashok Jindal :

Both the appeals are having a common issue, therefore, both are disposed off by a common order.

2. The facts of the case are that the appellant is a 100% Export Oriented Unit (EOU) and is manufacturing Linear Alkyl Benzene Sulphuric Acid (LABSA) falling under Central Excise Tariff No.34029091 and Spent Sulphuric Acid emerging as a by-product by Heading No.28070010 out of the inputs i.e. Liner Alkyl Benzene Sulphuric Acid and Spent Sulphuric Acid. In terms of Notification No.2/2008 dated 01.03.2008, the appellant was paying 14% duty ADV. They are clearing Spent Sulphuric Acid to the fertilizer companies, which are exempted from payment of duty in terms of Notification No.4/2006-CE dated 01.03.2006 as amended.

2.1 The Revenue is of the view that the said Notifications were issued under Section 5A (1) of the Central Excise Act, 1944. The proviso to the said Section provides that under exemption of Section 5A shall not apply to excisable goods, which are produced or manufactured by a 100% EOU and brought to any place in India. Therefore, the appellant is not eligible for those exemption Notifications.

2.2 The proceedings were initiated against the appellants by issuing show-cause notices to demand differential duty along with interest and to impose penalties on the appellants.

2.3 Against the said order, the appellants are before us.

3. The ld.Counsel for the appellants submits that the duty payable by 100% EOU is covered by the provisions of Section 3(1)(b)(ii) of the

Central Excise Act, 1944. In view of the said provisions, duty is to be levied and collected from a 100% EOU would the duty of Customs payable as if the goods produced or manufactured outside India have been imported into India. This is the basic charging section of duty leviable on a 100% EOU when clearing the goods to DTA. The Notification No.23/2003-CE dated 31.03.2003 as amended is applicable to 100% EOU in terms of Sl.No.2 of the table appended to the said notification providing for exemption from payment of duty in excess of the amount equivalent to the aggregate of duty of customs leviable on like goods. Against (a) under Sl.No.2, it has been stated that duty of customs specified in the first schedule to the Customs Tariff Act, 1975 read with any other notification in force was reduced to 50%. Therefore, other notifications also may be considered for the purpose of calculating duty. Further, the aspect to be considered is that in view of the existence of effective rate of duty under Notification No.2/2008-CE dated 01.03.2008, the DTA units would be paying the duty @ 14% and at the same time EOU units cannot be asked to make payment of duty while manufacturing the goods out of raw-materials received from the domestic market at a higher rate. It is something impossible and hence, the relevant notifications in force are required to be considered while clearing the goods by 100% EOU to DTA.

3.1 Further, he submits that with reference to clearance of Spent Sulphuric Acid to the fertilizer companies, the appellant has also eligible for payment of 'nil' rate of duty in terms of Notification No. 4/2006-CE dated 01.03.2006, as amended, the exemption would be

mutatis mutandis be applicable like Notification No.2/2008-CE dated 01.03.2008.

3.2 He further submits that the above aspect has been cleared on a query from the Revenue in the appellant's own case including its sister unit, by which, a clarification was sought for as to why the General Exemption No.52A cannot be made available in view of Section 5A of the Central Excise Act, 1944 to the EOU when the DTA units are not paying duty while cleared the goods to the fertilizer companies. The said query was replied. Section 3 of the Central Excise Act, 1944 is the guiding factor for calculating the duty and the restrictions on EOU for applying exemption would render Section 3 of the Central Excise Act redundant.

3.3 He further submits that the CVD shall be paid on importation, which is equal to Excise duty as applicable on the manufactured goods and in that view of the matter, the exemption of Central Excise duty shall also be applicable for computation of the duty on the DTA clearance and thus, there is no bar even in view of restrictions under proviso to Section 5A and the unit will be liable to pay duty based on applicable Customs duty and additional Customs duty in terms of Notification vide Sl.No.32 of Notification No.4/2006 on Sulphuric Acid subject to the condition No.2 of the Annexure to the said Notification. There is no allegation in this case regarding involvement to Condition No.2. Therefore, the question of denying benefit of exemption does not arise.

3.4 He further submits that a letter was issued by the appellants' sister unit seeking a guidelines mentioned in para 4 of the letter 02.04.2008 issued by the Chief Commissioner of Central Excise, Bombay. In response to the said letter, the Superintendent of Central Excise, Kalyan, has intimated to follow the proper CT-2 Procedure.

3.5 He also refers a Circular No.4/2008-09 dated 22.04.2008 clarifying the position and in the said Circular, it has been made clear that the Notification No.2/2008-CE dated 01.03.2008 would be applicable while making clearance of the goods from EOU to DTA and the nil rate of duty would be applicable in case of clearance of Spent Sulphuric Acid to fertilizer companies.

3.6 It is also submitted that the adjudicating authority in spite of specific statutory provisions mis-interpreted the same and denied the exemption contending that the letter dated 02.04.2008 is in conflict with the statutory provisions and hence, the exemption benefit cannot be extended.

3.7 It is also submitted that the said finding is not maintainable in view of the expressed statutory provisions, which has also been quoted by the Commissioner in his finding. The said provisions would clearly show that the guiding factory for computation of duty of the clearance of the goods by EOU under Section 3(1)(a)(ii) of the Central Excise Act, 1944 and in that view of the matter, the CVD would be payable at the prevailing rate, at which the manufactures of DTA would pay the duty and hence, the appellant would be eligible for the benefit of the said Notifications.

3.8 He relies on the decision of the Hon'ble High Court of Himachal Pradesh in the case of Satya Metals Vs. Union of India reported in 2013 (290) ELT 514 (H.P.).

3.9 He further submits that for the subsequent period, the proceeding against the appellants has been dropped by the adjudicating authority vide order dated 17.03.2021.

3.10 The said order was affirmed by the ld.Commissioner (Appeals) vide its Order dated 07.10.2022

3.11 He, therefore, submits that the impugned proceedings are not sustainable.

4. On the other hand, the ld.A.R. for the Revenue, supported the impugned order.

5. Heard both the parties and considered the submissions.

6. A short issue involved in this matter is that whether the appellant being a 100% EOU for clearance in DTA, is entitled to take the benefit of Notification No.2/2008-CE dated 01.03.2008 for clearance of Linear Alkyl Benzene Sulphuric Acid and Notification No.4/2006-CE dated 01.03.2006 for clearance of Spent Sulphuric Acid to fertilizer companies, or not ?

7. We find that for the subsequent period, the appellant's own case, the proceeding has been dropped by the adjudicating authority and the said order has been confirmed by the ld.Commissioner (Appeals), wherein it has been observed as under :

6.2.1 The point of dispute is whether a 100% EOU can avail of the benefit of reduced duty as provided in Notification No. 02/2008-CE dated 01/03/2008 as amended. On this issue, as contended by the assessee, I find it relevant to go into the details of Notification No. 23/2003-CE dated 31/03/2003, which states --

> "In exercise of the powers conferred by sub-section (1) of section 5A of the Central Excise Act, 1944, the Central Government exempts excisable goods produced or manufactured in an Export Oriented Undertaking Unit, and brought to any other place in India in accordance with the provisions of Export and Import Policy and subject to the relevant conditions specified in the Annexure to this Notification".

Now, at Sl. No. 2 of the said Notification, it is specifically mentioned that in respect of all goods under any Chapter, the Central Government exempts goods from so much of the duty of excise leviable thereon as is in excess of the amount equal to fifty per cent of the duty leviable under section 3 of the Central Excise Act, provided that the duty payable in accordance with this notification in respect of the said goods shall not be less than the duty of excise leviable on the like goods produced or manufactured outside the Export Oriented Undertaking Unit, which is specified in the said Schedule read with the any other relevant notification issued under sub-section (1) of section 5A of the Central Excise Act.

6.2.2 So, the duty payable in accordance with this notification in respect of the said goods shall not be less than the duty of excise leviable on the like goods produced or manufactured outside the EOU Unit, which is specified in the said Schedule read with the any other relevant notification issued under sub-section (1) of section 5A of the Central Excise Act.

I find that the Tariff rate of the said excisable goods is 16% adv. So, the duty payable in terms of this Notification is 50% of 16% adv., which is 8% adv. However, the duty of Excise leviable on like goods produced or manufactured outside the EOU Unit is 10% adv. in terms of Notification No. 02/2008-CE dated 01/03/2008 as amended by

Notification No. 58/2008-CE dated 07/12/2008. But, the Notification also provides that the duty payable here shall not be less than the duty of excise leviable on like goods produced or manufactured outside the EOU Unit. So, in the instant case, the assessee shall have to discharge duty liability at a rate not less than 10% adv. Here, I find that the assessee have paid Duty @ 10% adv. So, I come to the conclusion that the assessee have correctly paid their duty liability for clearance of LABSA during the relevant period in terms of Notification No. 23/2003-CE dated 31/03/2003 read with Notification No. 02/2008-CE dated 01/03/2008 as amended by Notification No. 58/2008-CE dated 07/12/2008.

6.2.3 It has also been expressly provided in Notification No. 23/2003-CE dated 31/03/2003 that it is subject to fulfilment of certain conditions –

If, -

(i) the goods are cleared into Domestic Tariff Area in accordance with sub-paragraphs (a), (b), (d) and (h) of Paragraph 6.8 of the Export and Import Policy;

(ii) exemption shall not be availed until Deputy Commissioner of Customs or Assistant Commissioner of Customs or Deputy Commissioner of Central Excise or Assistant Commissioner of Central Excise, as the case may be, is satisfied with the said goods including Software, Rejects, Scrap, Waste or Remnants;

(a) being cleared in Domestic Tariff Area, other than scrap, waste or remnants are similar to the goods which are exported or expected to be exported from the units during specified period of such clearances in terms of Export and Import Policy;

(b) the total value of such goods being cleared under sub-paragraphs (a), (b) (d) and (h) of Paragraph of the Export and Import Policy, into Domestic Tariff Area from the unit does not exceed 50% of the Free on Board value of exports made during the year (starting from 1st April of the year and ending with 31st March of next year) by the said unit;

(c) the balance of the production of the goods which are similar to such goods under clearance into Domestic Tariff Area, is exported out of India or disposed of in Domestic Tariff Area in terms of Paragraph 6.9 of the Export and Import Policy;

(iii) clearance of goods into Domestic Tariff Area under sub-paragraphs (a), (b), (d) and (h) of Paragraph 6.8 of the Export and Import Policy shall be allowed only when the unit has achieved positive Net Foreign Exchange Earning ; and

(iv) clearance of goods into Domestic Tariff Area under sub-paragraph (a) of Paragraph 6.8 of the Export and Import Policy in excess of 5% of free on board valuc of exports made by the said unit during the year (starting from 1st April of the year and ending with 31st March of the next year).

6.2.4 So far the aforesaid conditions in the Notification are concerned, the instant Show Cause Notices have not disputed the facts that the assessee had not satisfied the NFE percentage as well as the export of goods; or that, the total value of the goods cleared to DTA exceeded 50% of the FOB value of the goods exported including Spent Sulphuric Acid; or any of the other conditions specified in the Notification.

6.2.5 In terms of the provisions of 6.8(g) of the Foreign Trade Policy, Bye-product, included in the LOP, can be sold in DTA subject to achievement of positive NFE, on payment of applicable duties, within overall entitlement of sub-paragraph 6.8(a) of the Foreign Trade Policy. Spent Sulphuric Acid is shown as a bye-product and accordingly, they also specified NFE and the total clearance of the goods to DTA also did not exceed the 50% of the value of the goods exported by them. Hence, there is no reason to deny the benefit of Notification No.23/2003-CE dated 31.3.2003 to the assessee.

6.2.6 I find that the DTA clearances made by the assessee were in terms of the LOP granted by the Development Commissioner. The permission for DTA sale was granted in terms of para 6.8 of the Foreign Trade Policy (2009-14) which reads as under : "*Entire Production of EOU/EHTP/STP/BTP units shall be exported subject to following :*

> *Units, other than gems and jewellery units, may sell goods up to 50% of FOB value of export, subject to fulfilment of positive NFE, on payment of concessional duties. Within entitlement of DTA sale, unit may sell in DTA, its products similar to goods which are exported or expected to be exported from units. However, units which are manufacturing and exporting more than one product can sell any of these products into DTA, up to 90% of FOB value of export of the specific products, subject to the condition that total DTA sale does not exceed the overall entitlement of 50% of FOB value of exports for the unit, as stipulated above".*

In terms of the above provision, the assessee has been granted LOP for two categories of products – Linear Alkyl Benzene Sulphonic Acid (LABSA) and Spent Sulphuric Acid (By-product). The DTA sale of finished products is permissible in terms of Para 6.8 of the FTP 2009-2014. The Development Commissioner granted permission for DTA sale from time to time on the basis of the export obligation fulfilled by the assessee in various financial years.

It is to be noted that the 100% EOU scheme is licensed and administered by the Department of Foreign Trade through the Development Commissioner. The letter of permission as well as the permission for DTA sale, on the basis of export obligation fulfilled by the EOU, is determined by the Development Commissioner.

So, on perusal of records, it appears that manufacture and sale of goods in the DTA is not in question since it was as per the permission letter granted by the Learned Development Commissioner.

6.3 Regarding the issue of clearance of Spent Sulphuric Acid by the assessee to Fertilizer manufacturing units at "Nil" rate of duty availing exemption under Notification No. 4/2006-CE dated 01-03-2006 (Sl. No. 32) as amended, the SCN alleged that no exemption shall apply to excisable goods which are produced or manufactured by a 100% EOU and brought to any place in India unless specifically provided in such Notification. By violating the provisions of Notification No. 4/2006 dated 01-03-2006, as amended, the assessee short paid Central Excise duty during the material period.

6.3.1 On the issue of benefits of exemption notification issued under section 5A of Central Excise Act on goods cleared into DTA by EOUs, the assessee have taken resort to F. No. DGEP/EOU/03/2007/ 879 dated 02.04.2008 issued by the Directorate General of Export Promotion (CBEC, Department of Revenue, Ministry of Finance, Govt. of India), New Delhi.

Going through the aforesaid letter issued by the DGEP, I find that EOUs are required to pay duties on their clearance to DTA equating such clearance at par with imports in terms of proviso to Section 3 of the Central Excise Act, 1944. For the purpose of calculating additional duty (CVD) on imported goods, any general excise exemption as well as conditional excise exemption, if conditions are satisfied, would be applicable for determining the CVD liability. Thus, there is no bar in applying an exemption notification issued under section 5A of the Central Excise Act for the purpose of computation of CVD to be paid by EOUs on the goods cleared into DTA. The restriction on EOUs for applying exemptions issued under section 5A of the Central Excise Act is for the purpose that EOUs should not pay excise duty only as in the case of clearances from DTA units, unless so intended. This would render section 3 of the Central Excise Act redundant which require EOUs to pay central excise duty equivalent to the aggregate of customs duties. However, as in the case of import, wherein CVD is paid equal to excise duty as applicable, exemptions of central excise duty shall also be applicable to EOUs for computation of duty on DTA clearances. It is, thus, viewed that there is no bar under the proviso to Section 5A ibid for considering excise exemption while calculating the additional customs duty component payable by an EOU on DTA clearances. Hence, the unit would be liable to pay duties based on applicable basic custom duty and applicable additional customs (CVD) in terms of the exemption vide Sl. No. 32 of Notification No. 4/2006-CE dated 01.03.2006 on Sulphuric Acid subject to the condition 2 of the Annexure to this Notification. This was issued with approval of the Member (Cus & EP), CBEC.

6.3.2 Consequent to the above DGEP clarification, the assessee contended that proviso to Section 5A of the Central Excise Act, 1944 cannot be taken as a bar in calculating CVD making DTA clearances, stands settled by the judgment of the Delhi High Court in the case of Plastic Processors -Vs- Union of India reported in 2002(143) ELT 521 (Del.) which has expressly been upheld by the Hon'ble Supreme Court of India as reported in

2005(186) ELT A 27(S.C.). This has been noted by the Hon'ble High Court of Himachal Pradesh in the case of Satya Metal reported in 2013(290) ELT 514 (H.P.). This issue also came up for consideration before the Tribunal in the case of Shanta Bio-Techniques Ltd. reported in 2010(259) ELT 447(Tri.-Bang.) wherein, it has been held that the provision of clearances made to DTA would apply to the current case which is mandated under the provisions of Section 3(1) of the Central Excise Act, 1944. Such provisions specifically mandated that CVD will be equal to the excise duty for the time being on a like article being produced or manufactured in India. The CVD would be payable at the effective rate and not at tariff rate. Since the goods manufactured and cleared by the assessee are exempted from payment of Central Excise duty under Notification No. 4/2006-CE dated 01.03.2006, they would not be required to pay any duty on account of CVD. The same issue also stands decided in the case of Srivatsa International Ltd. reported in 2015(326) ELT 699(All.) wherein the Hon'ble Tribunal held that the proviso to Section 5A(1) of the Central Excise Act, 1944 is only applicable to the implementation of the main Section 3(1) of the Central Excise Act, 1944. Same view was also taken in the case of Saritha Synthetic & Industries Ltd. reported in 2019(369) ELT 1152 (Tri.- Hyderabad).

6.3.3 In this connection, I am drawn to Chapter 6 of the Foreign Trade Policy (FTP), issued under Section 5 of the Foreign Trade (Development and Regulation) Act, 1992, which contains the policy in relation to 100% 'EOU' units etc. A 100% EOU unit has the following features :-

(a) An EOU unit is required to export its entire production except permissible sales in DTA as per FTP. As regards exports, there is no excise duty incidence on the export goods. However, for the purpose of making domestic clearances which are referred to as DTA clearances, a 100% EOU unit is required to pay excise duties under the proviso to Section 3 of the Central Excise Act, 1944 equivalent to the rates of customs duties. The goods cleared into the DTA are virtually treated at par with imported goods and are charged duties equivalent to customs duties.

(b) For sales to the DTA, the following duties equivalent to customs duties as per the proviso to Section 3 of the Act are payable :

(i) Basic customs duty (BCD) at rates specified in the First Schedule.

(ii) Additional Customs Duty, which is equivalent to the Excise duty payable by other domestic units on the same products known as Countervailing Duty (CVD). The duty equivalent to CVD chargeable on DTA clearances is equal to the excise duty that similar domestic units have to pay on their clearances. Therefore, if there is an exemption for excise duty which is applicable to a domestic unit, that exemption also applies for the purpose of calculating CVD. The CVD is intended to countervail the Indian taxes and is ordinarily levied on imported goods in order to allow a level playing field to the Indian industry.

8. Further, in the case of, Satya Metals (supra), the Hon'ble High Court of Himachal Pradesh on the same issue has observed as under :

> ***"20.*** *After hearing learned counsel for the parties and analyzing the pleadings of the petitioners and rival contentions of the respondents, following aspects are being noted :-*
>
> *(a) The proviso to Section 5A of 'Act' cannot be taken as a bar in calculating 'CVD' for the purpose of computing the duties payable by a 100% EOU unit while making DTA clearances, stands settled by the judgment of the Delhi High Court in the case of Plastic Processors v. Union of India - 2002 (143) E.L.T. 521 (Del.) which has expressly been upheld by the Hon'ble Supreme Court in Union of India & Others v. Plastic Processors & Others - (2009) 12 SCC 747 = 2005 (186) E.L.T. A27 (S.C.).*
>
> *(b) Only the effective rate of duty applicable to the goods cleared by the domestic unit can be applied for computing the CVD payable. The respondent's impugned actions are contrary to the settled position of law on the issue by the Supreme Court in Hyderabad Industries Limited (supra) and Thermax Private Limited (supra), where the Hon'ble Supreme Court has observed that while calculating CVD it has to be assumed that the goods were manufactured in India and the applicable rate of duty to such manufactured goods has to be applied to the imported goods. The effective rate of excise duties for a unit located in the specified area mentioned in 50/2003-C.E. is Nil and it is this rate alone which can be applied for the purpose of calculating 'CVD' in terms of the observations of the Hon'ble Supreme Court. The impugned order dated 17-3-2011, therefore, being contrary to the law laid down by the Hon'ble Supreme Court is liable to be quashed.*

(c) Both sides have heavily referred to the provisions of Section 5A of 'the Act' for projecting their case. The petitioners have all along been submitting that for calculating Additional Duty of Customs under Section 3(1) of the Customs Tariff Act, 1975, there is no bar to consider benefit of Notification No. 50/2003-C.E., whereas, contrary to this, the respondents have drawn the attention of this Court to the expression "specifically provided" appearing in the proviso to the Section 5A(1) of the 'Act' and has submitted that Area based Central Excise Exemption notification does not specifically include 100% 'EOU' unit.

(d) On analyzing of Section 3 of the 'Act' and which is the basic provision for levy and collection of the Central Excise duty on the goods, other than Special Economic Zones, produced or manufactured in India following aspects appear :-

(i) Towards the goods manufactured or produced, other than 100% EOU, attract the rate of duty set forth the first schedule of the Central Excise Tariff Act, 1985 (5 of 1986) and also special duty of excise at the rate set forth in the second schedule to the Central Excise Tariff, 1985.

(ii) Specific provision for levy and collection of excise has been laid down for 100% 'EOU' when brought the excisable goods to any other place in India and thereby indicates that such amount of excise duty should be equal to aggregate duty of Customs which would be leviable under the Customs Act, 1962 or any other law for the time being in force on like goods produced or manufactured outside India if imported into India. Explanation 1, states that where any duty of Customs for the time being is leviable at different rates than such duty, for the purpose of the proviso of Section 3 of the 'Act' shall be deemed to be leviable at the highest of those rates.

Reading of Section 3 of 'Act' it appears that for 100% 'EOU' effecting clearances to DTA, it requires only to work out the aggregate of the duties of Customs which would be leviable under the Customs Act, 1962 or any other law for the time being in force as becomes applicable on the goods produced outside India and imported therefrom. It is such collection of aggregate duty of Customs leviable under the Customs Act, 1962 which would be considered appropriate for payment as excise duty by 100% 'EOU'.

(iii) It is also evident from the impugned order dated 17-3-2011 of 'DGEP' that the duties of customs leviable on the goods imported into India are as under :-

(a) Customs duty under Section 12 of the Customs Act, 1962

(b) Additional duty of customs under Section 3(1) of the Customs Tariff Act, 1975.

(c) Special Additional Duty etc.

The basic Customs duty under Section 12 of the Customs Act, 1962 have already been paid by the petitioners on effecting clearances to DTA and thereby discharging one of the their liabilities required for working out the aggregate duties of Customs under Section 3 of the 'Act'.

The provisions of Section 3(1) of the Customs Tariff Act, 1975 requires that for determining the said duties of Customs, it has to be equal to the excise duty for the time being leviable on a like article if produced or manufactured in India. The expression "the excise duty for time being leviable on a like article if produced or manufactured in India" means the excise duty for the time being in force which would be leviable on a like article if produced or manufactured in India. Therefore, it is only for the purpose of calculation of Additional Duty of Customs under Section 3(1) of

the Customs Tariff Act, 1975 that one is required to look and consider as to what would be the quantum of excise duty which the goods might have discharged by the importer.

21……..

22…….

23. *After analyzing the provisions of Section 3 of the 'Act', and Section 3(1) of the Customs Tariff Act, 1975, the next issue for dispute is as to what would be the effective rate of excise duty leviable on a like kind of goods, if produced in India. The whole debate here requires consideration of Section 3(1) of the Customs Tariff Act, 1975. It is undisputed that Notification No. 50/2003-C.E., dated 10-6-2003 for the State of Himachal Pradesh, like Notification No. 56/2002-C.E., dated 14-3-2002 for the State of Jammu & Kashmir, both known as Area Based Exemption Notifications under Central Excise issued by the Central Government under the provisions of Section 5A of the 'Act'. The claim of the petitioners that their unit squarely falls within the specified area of Notification No. 50/2003-C.E., dated 10-6-2003 is not disputed. The petitioners further claim that the excisable goods manufactured by them even do not fall in the negative list annexed to the said notification and further the petitioner unit is a new industrial unit started after 7-1-2003. The petitioners also filled their declaration with the Assistant Commissioner of Central Excise, Shimla and thereby complying with the conditions of the notification for claiming exemption for the purpose of calculating Additional Duty of Customs under Section 3(1) of the Customs Tariff Act, 1975. This notification is applicable to any unit because of use of expression "a unit" appearing in main para of the notification and the scope of extending the benefit is therefore applicable for discharging their liability to pay Additional Duty of Customs under Section 3(1) of the Customs Tariff Act for clearances effected to 'DTA' by a 100% 'EOU'.*

To support their above claim, the petitioners relied on the O.M. dated 7-1-2003. In the said O.M. it was declared by the Government of India to grant 100% excise duty exemption for a period of 10 years from the date of commencement of commercial production to the new industries and thereby also declaring state of Himachal Pradesh being the special category state including State of 'Uttranchal'. In view of such background of the said declaration, the respondents have also not denied that Notification No. 50/2003-C.E., dated 10-6-2003 has been issued to serve the basic objective of the new industrial policy for the State of Himachal Pradesh introduced by the Ministry of Commerce on 7-1-2003. The petitioners in support of their claim that 100% 'EOU' are included in New Industrial Policy of Ministry of Commerce, Government of India has also relied on the state industrial policy of Government of Himachal Pradesh and the Rules regarding grant of incentives, concessions and facilities to industrial units in Himachal Pradesh, 2004. Undisputedly, such policy of state and the Rules framed by the state in the year 2004 were in compliance of O.M. dated 7-1-2003.

24. *For calculation of excise duty payable by a 100% 'EOU', the provisions of Section 5A of the Central Excise Act had been so enacted so that the provisions of Section 3 of the 'Act' do not become redundant. It is for such reason that the expression "specifically provided" was introduced in the Proviso to Section 5A(1) of the 'Act'. Quite obviously any exclusive benefit of Central Excise exemption notification for a 100% 'EOU' cannot be made applicable particularly when the duties have to be determined by way of aggregate duty of Customs leviable under the Customs Act, 1962.*

25. *The 'DGEP' in their Circular No. DGEP/'EOU'/221/2007, dated 18-1-2008 and in circular of even no. dated 6-4-2009, while providing their clarifications in extending even benefit of*

area based exemption notification to 100% 'EOU' in calculating the additional Customs duty under Section 3(1) of the Customs Tariff Act, 1975 (CVD), considered the provisions of Section 5A of the 'Act', Section 3(1) of the Customs Tariff Act, 1975, and thereby explained the scope of the expression "SPECIFICALLY PROVIDED" in Section 5A of the Central Excise Act, 1944.

26. *There is otherwise no bar in Area based exemption notification, referred above for 100% 'EOU' for calculation the Additional Duty of Customs under Section 3(1) of the Customs Tariff Act, 1975. It is only by discharging the liability to pay the Additional Duty of Customs and which is equal to excise duty leviable on like goods when produced in India that such exemption notification has been considered. It is by way of specific provision of Section 3(1) of the Customs Tariff Act, 1975 that Area based exemption can be considered for finding about the excise duty on like goods chargeable when produced in India. Moreover, the order dated 17-3-2011 of DGEP while upholding DGEP clarification dated 24-9-2010 does not dispute the reasoning appearing for the expression "specifically provided" in Section 5A of the 'Act', as appearing in letters dated 18-1-2008 and 6-4-2009. In fact the judgments of Hon'ble Delhi High Court in the case of Plastic Processors, as well as judgments of Gujarat High Court in the case of Lucky Star International (supra), were confirmed by Hon'ble Supreme Court, showing that for extending benefit of Central Excise exemption notification, the provisions of Section 5A(1) and its Proviso under the 'Act', were duly considered, hence the objection raised by the Government of India towards the expression "specifically provided" does not carry any force as a 100% 'EOU' unit only discharges his liability for payment of Additional Duty of Customs under Section 3(1) of the Customs Tariff Act by considering effective rate of excise duty provided under the Central Excise exemption notification and by*

doing so it is only discharging his liability for payment of Customs duty.

27. *The plea of the respondent/Union of India that excise exemption notification is not applicable for calculating the Additional Duty of Customs, otherwise cannot be sustained particularly when the clarification letters dated 18-1-2008, 6-4-2009, 24-9-2010 and even order dated 17-3-2011 does not dispute that for calculating Additional Duty of Customs under Section 3(1) of the Customs Tariff Act, 1975, Central Excise exemption notification, unconditionally or conditionally, on satisfaction of the conditions can be considered for calculating Additional Duty of Customs. In the present case the petitioners undisputedly comply with all the conditions laid down in Area based exemption notification of Central Excise and therefore, where there is no bar in such notification for 100% 'EOU' to take benefit. There is no justification or logic to stop such free flow, so long, as it is not disputed that State of Himachal Pradesh is integral part of India, wherein the specified areas are located, where petitioner unit is established, as such, the applicability of such notification in question to the petitioners is also justifiable.*

The petitioners have drawn my attention to Section 5A(1A) of the 'Act' to justify that where the effective rate of excise duty, for the units located in the specified areas of Himachal Pradesh manufacturing the goods other than the negative list is absolutely exempted, such rate is binding. The provisions of Section 5A(1A) does not allow the manufacturer complying with the conditions of the area based exemption notification and claiming thereto to opt out. There thus exist only one rate i.e. NIL rate of duty. In fact the circulars of 'DGEP' and impugned order dated 17-3-2011 does not bar the applicability of Central Excise exemption notification for calculating Additional Duty of Customs under Section 3(1) of

the Customs Tariff Act, 1975, as such, the impugned order dated 17-3-2011 is legally not sustainable.

28. *The order dated 17-3-2011 refers to there being two rates of duties under Section 3(1) of the Customs Tariff Act, 1975. The concept of two rate of duties under Section 3(1) of the Customs Tariff Act applies where the goods are not being produced in India in the State of Himachal Pradesh, whereas, the issue of charging highest rate of duties when chargeable has already been settled by Hon'ble Supreme Court in the case of Good Year India Limited v. Collector of Customs, Bombay, (1997) 2 SCC 582 = 1997 (90) E.L.T. 7 (S.C.). Relying on the said decision, the effective rate of duty would be NIL rate for calculating the Additional Duty of Customs.*

29. *Regarding contention of the respondent/Union of India that extending benefits of Area base Central Excise notification to the petitioners may create disparity vis-à-vis other manufacturers who are not 100% 'EOU', it may be seen that when the benefits are provided under Foreign Trade Policy to the 100% 'EOU', can bring raw material and capital goods without payment of Customs and excise duty. As such the petitioner unit cannot be compared with other manufacturers regarding granting of benefit. In this connection it can't be ignored that by benefit granted under FTP, a 100% 'EOU'/the petitioner unit is accountable for the earning of net foreign exchange (NFE) for the country unlike other manufacturers. Moreover, the petitioners are paying basic Customs duty under Section 12 of the Customs Act, 1962, whereas, other manufacturers while functioning in the State of H.P. though are claiming benefits of area base exemption but are not paying such Customs duty. The Central Government has consciously and intentionally provided the tax incentive benefit including 100% excise duty exemption to the special category State of Himachal Pradesh, as such, any disparity with other*

manufacturer of India, located in different parts, shall not be created."

9. In view of the above decision, which is applicable to the facts of this case, the charging section for duty on DTA clearance is under the provisions of Section 3(1)(b)(ii) of the Central Excise Act, 1944 and as per the said provisions, the duty is to be levied and collected from a 100% EOU, would be the duty of Customs payable if the goods produced and manufactured outside India and the same have been imported into India. This is the basic charging section of duty leviable on a 100% EOU when clearing the goods to DTA. As per the said provisions, the duty of excise shall be levied and collected on any excisable goods, which are produced and manufactured by a 100% EOU and brought to any other place in India, shall be an amount equal to the aggregate of duties of customs which would be leviable under the Customs Act, 1962 or any other law for the time being in force, on like goods produced and manufactured outside India if imported into India and where the said duties of excise are chargeable with reference toe their value, the value of such excisable goods shall, notwithstanding anything contained in any other provisions of this Act, be determined in accordance with the provisions of the Customs Act, 1962 and the Customs Tariff Act, 1975.

10. On this issue, the Notification No.23/2003-CE dated 31.03.2003 was issued, which states as under :

"In exercise of the powers conferred by sub-section (1) of Section 5A of the Central Excise Act, 1944, the Central

Government exempts excisable goods produced or manufactured in an Export Oriented Undertaking Unit, and brought to any other place in India in accordance with the provisions of Export and Import Policy and subject to the relevant conditions specified in the Annexure to this Notification."

11. We find that at Sl.No.2 of the said Notification, it is specifically mentioned that in respect of all goods under any Chapter, the Central Government exempts goods from so much of duty of excise leviable thereon is in excess of the amount equal to 50% of the duty leviable under Section 3 of the Central Excise Act, 1944, provided that the duty payable with this Notification in respect of the said goods shall not be less than the duty of excise leviable on the like goods produced and manufactured outside EOU, which is specified in the said schedule read with any other relevant Notification issued under Section 5A(1) of the Central Excise Act, 1944.

12. Therefore, the duty payable in accordance with this Notification in respect of the said goods shall not be less than the duty of excise leviable on the like goods produced or manufactured outside EOU Unit, which is specified in the said Schedule read with the any other relevant Notification issued under Section 5A(1) of the Central Excise Act, 1944.

13. We, therefore, hold that the appellant is entitled to pay the duty in terms of Notification No.2/2008-CE dated 01.03.2008 and Notification No.04/2006-CE dated 01.03.2006.

14. In view of this, we do not find any merit in the impugned orders and the same are set aside.

15. In the result, both the appeals are allowed with consequential relief, if any.

(Pronounced in the open Court on **16.10.2023**)

Sd/

(Ashok Jindal)
Member (Judicial)

Sd/
(K.Anpazhakan)
Member (Technical)

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