

Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench at Ahmedabad

REGIONAL BENCH-COURT NO. 3

EXCISE APPEAL NO. 10601 of 2021- DB

(Arising out of OIA-DMN-EXCUS-000-COM-045-052-20-21 dated 12/11/2020 passed by
Commissioner of Central Excise, Customs and Service Tax-DAMAN)
TUFROPES PVT LTDAppellant

SURVEY NO 328/1/1/1 TIPCO ROAD MASAT
SILVASSA
GUJARAT

VERSUS

Commissioner of C.E. & S.T.-DAMANRespondent
3RD FLOOR...ADARSH DHAM BUILDING, VAPI-DAMAN ROAD, VAPI
OPP.VAPI TOWN POLICE STATION,
VAPI, GUJARAT-396191

WITH

i. EXCISE APPEAL NO. 10137 of 2021- DB (MUNESHWAR NATH MODI)

ii. EXCISE APPEAL NO. 10139 of 2021- DB (ARUN GOYAL)

[(Arising out of OIO-DMN-EXCUS-000-COM-045-052-20-21 dated 12/11/2020 passed by
Commissioner of Central Excise, Customs and Service Tax-DAMAN)]

APPEARANCE:

Shri Anand Nainawati, advocate appeared for the Appellant
Shri Mihir G Rayka, Additional Commissioner (AR) appeared for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. RAJU

Final Order No. 12572-12574/2024

DATE OF HEARING: 15.10.2024

DATE OF DECISION: 04.11.2024

RAMESH NAIR

Brief facts of the case are that the appellant are 100% EOU and are engaged in manufacture of HDPE/PP Ropes, Nylon Ropes, Polyester Rope, PP Multifilament Ropes falling under Chapter 56 and plastic waste & scrap falling under Chapter 39 of the First Schedule to the Central Excise Tariff Act, 1985. The Appellant procured raw materials from domestic suppliers and also imported. The factory premises was visited by the officers and during the investigation it was observed that the Central Excise Duty equivalent to the aggregate of the Customs duties leviable on the like goods produced or manufactured outside India if imported into India, is leviable on the goods cleared by the assessee in the DTA under para 6.8(a) of Foreign Trade Policy in view of proviso to Section 3(1) of Central Excise Act, 1944 read with Sr. No. 2 of Table to Notification No. 23/2003-CE dtd. 31.02.2003. Thus the appellant, by wrong availment of benefit under Sr. No. 3 of Table

to Notification No. 23/2003 –CE dtd. 31.03.2003, have paid the lower rate of central excise duty than the applicable rate of duty as prescribed under Sr. No. 2 of Table to Notification No. 23/2003-CE dtd. 31.03.2003 and as a result, they have short paid Central Excise Duty. Accordingly, as details show cause notice dtd. 02.08.2011 proposing differential duty on the goods cleared into DTA during the period 01.07.2006 to 31.05.2011 by denying the benefit of Notification No. 30/2004-CE dtd. 09.07.2004 and benefit of Sr. No. 3 and Sr. 4 of the Notification No. 23/2003-CE dtd. 31.02.2003. Appellant were also issued with periodical show cause notices by the department. In Adjudication, Ld. Commissioner vide impugned Order-In-Original No. DMN-EXCUS-000-COM-045-054-20-21 dtd. 12.11.2020 confirmed the demand of differential duty, dropped the demand of third time cess and imposed penalty on the appellant under Section 11AC of the Central Excise Act, 1944 read with Rule 25(1) of the Central Excise Rules, 2002 in relations to show cause notices. The Ld. Commissioner in impugned order held as under : -

- a) Duty of customs leviable under Section 3(5) of the Customs Tariff Act is required to be added in the aggregate duties of customs while availing benefit under Sl. No. 2 of Notification No.23/2003- CE Dated 31.3.2003.
- b) Benefit under Sl. No.3 of Notification No.23/2003-CE Dated 31.3.2003 has been wrongly claimed by the Appellant inasmuch as they violated condition no.3 of the said Notification inasmuch as considering their finished goods having beenmanufactured wholly from raw materials manufactured or produced in India.
- c) Benefit under Sl. No.4 of Notification No.23/2003-CE Dated 31.3.2003 has been wrongly claimed by the Appellant inasmuch as they violated condition no.4 of the said Notification inasmuch as considering their finished goods as wholly exempted from central excise duty under Notification No.30/2004-CE Dated 9.7.2004 and having been manufactured wholly from raw materials manufactured or produced in India. It was held that finished goods are chargeable to excise duty @8% in terms of Notification No.29/2004-CE.

- d) Wrong availment of benefit under Sl.No.3 and 4 on plastic waste & scrap cleared in DTA.
- e) The Appellant have not maintained the separate accounts or records for consumption of raw materials imported and locally procured. Further, at production floor it was not possible to segregate physically the WIP or finished goods manufactured out of imported raw materials of locally procured raw materials.
- f) Finished goods are exempted from payment of VAT/Central Sales Tax in UT of Dadra and Nagar Haveli against C-form and therefore additional duty of customs under Section 3(5) is required to be added in aggregate duty of customs as per proviso to Section 3(1) of the Central Excise Act, 1944.
- g) The appellant suppressed the facts in as much as they did not inform the department that their final products were manufactured from both imported and indigenous raw materials and they willfully availed wrong benefit of Notification No. 23/2003-CE with an intent to evade payment of duty. The clearances were made by the appellant in DTA by contravening provisions of Rules 4, 8, 10, 12 and 17 of Central Excise Rules, 2002, provisions of FTP 2004-09, conditions of Notification No. 23/2003-CE and terms and conditions of B-17 Bond executed by the appellant. Therefore, differential duty was recoverable by invoking extended period of limitation.
- h) Even though the said goods were not physically available for confiscation, redemption fine in lieu of confiscation was imposable under Section 34 of the Central Excise Act, 1944 in view of the B-17 Bond executed by the appellant.
- i) Penalty has been imposed and demand of interest has been confirmed.

Aggrieved by the impugned order, the appellant have filed the present appeal.

2. Shri Anand Nainawati , learned counsel appearing for the appellant submits that during the period 01.07.2006 to 28.02.2007 appellant have correctly taken into account Notification No.30/2004-CE for the purpose of clause (iii) of Condition No. 4 of Notification No.23/2003-CE to avail Sl. No.4 of Notification No.23/2003-CE. Ld. Commissioner in the impugned Order has held that the effective rate of excise duty on all goods other than cotton falling under Chapter 56 (except 5601 10, 5607 10, 5608 11) of First Schedule to Central Excise Tariff Act, 1985 was prescribed under Notification No. 29/2004-CE dated 9.7.2004 which was 8% Adv. during the period 1.7.2006 to 28.2.2007. Hence, the said goods were not wholly exempt from excise duty or chargeable to nil rate of duty and therefore, clause (iii) of Condition No. 4 to Notification No. 23/2003-CE was not fulfilled. The aforesaid finding of the Ld. Commissioner is incorrect. Onus was on the department to show that which condition had not been fulfilled by the appellant. In the absence of specific allegation in the Show Cause Notice that clause (iii) of Condition No. 4 was not fulfilled, the impugned Order has travelled beyond the Show Cause Notice. It is settled that Revenue cannot travel beyond the show cause notice. He placed reliance on the decision of CC Vs. Toyo Engineering India – 2006 (201) ELT 513 (SC).

2.1 He also submits that clause (iii) of Condition No. 4 of Notification No.23/2003-CE had been fulfilled by the appellant for availing benefit of the said Notification. It is an undisputed fact that the appellant have fulfilled Condition No. 4(ii) of Notification No.23/2003-CE. The finding that the appellant used imported raw materials for the manufacture of the goods cleared into DTA is unsubstantiated in the impugned Order.

2.2 He further submits that in any case, re-quantification of the demand by the Ld. Commissioner under Sl. No. 2 is incorrect in as much as CVD should be Nil instead of 8% plus education cess adopted by the Show Cause Notice and the impugned Order. In the present case, the like goods imported into India would be entitled to nil rate of CVD by virtue of Notification No. 30/2004-CE. Exemption under Notification No. 30/2004-CE cannot be denied on the ground the said Notification provides no cenvat credit of duty paid on inputs shall be availed and it was not possible to fulfill this condition in the case of import of any goods. He placed reliance on the decisions of SRF Ltd. Vs. CC – 2015 (318) ELT 607 (S.C.).

2.3 He argued that reliance placed by the Ld. Commissioner in the impugned Order on the decision of Hanil Era Textiles Ltd. Vs. CCE – 2014

(312) ELT 324 (T) is incorrect. Hanil Era Textiles Ltd. is no longer good law after the Supreme Court's judgment in case of SRF Ltd. Vs. CC. The Commissioner has erred in not considering as to how the said binding precedent of the Hon'ble Supreme Court is not applicable. In view of the decision of SRF cited supra, the condition not capable of being fulfilled must be treated as fulfilled. Further, subsequent availment of benefit under Sl. No. 3 for the same goods will not make any difference. The Appellant were well within their right to seek correct quantification of demand under Sl. No. 2 of Notification No. 23/2003-CE by considering nil CVD in terms of Notification No. 30/2004-CE.

2.4 Further he submits that demand confirmed in the impugned Order is not maintainable as the same is based on assumptions and presumptions only and there is absolutely no evidence whatsoever for confirming the demand of differential duty. The Commissioner in the impugned order has assumed that since the raw material was imported, the same would have been used in the manufacture of goods cleared into DTA. Neither the Show Cause Notice dated 2.8.2011 nor the impugned Order relies on any concrete evidences to establish that imported raw material was used in the manufacture of goods cleared into DTA. Hence, demand confirmed in the impugned Order-in-Original is based on assumptions and presumptions only. The imported goods have been used in the manufacture of exported goods only. No part of imported goods has been used in the manufacture of goods cleared into DTA. The appellant have only used indigenous raw material for the manufacture of goods which were cleared into DTA. No part of imported material was used in the manufacture of goods cleared into DTA. The appellant have maintained all the records from which it can be established that imported materials were not used in manufacture of goods cleared into DTA. The goods manufactured from imported raw material were very less as compared to the goods exported and therefore the entire finished goods manufactured out of the raw material had been exported. The appellant submit that no part of the goods manufactured from the imported raw material were cleared into DTA. Hence, the denial of benefit under Sl. No.4 of Notification No.23/2003-CE is incorrect and without any basis.

2.5 Without prejudice, he also submits that the benefit of Sl. No.4 of the Notification cannot be denied to the entire quantity of goods cleared into DTA. In the worst-case scenario, benefit of Sl. No.4 can be denied to the extent of the value of finished goods cleared into DTA which could have been manufactured from the imported raw material.

2.6 He also submits that denial of benefit of Sl. No.4 of Notification No.23/2003-CE for the period prior to 6.7.2007, on the ground that goods procured from domestic suppliers who had availed deemed export benefit on such supply, is incorrect. During the period from 28.4.2007 to 20.8.2009, the appellant received some supplies from Reliance Industries Ltd., EOU unit at Jamnagar (also referred as "RIL EOU") under CT-3 on which RIL EOU availed deemed export benefit. The appellant have treated this supply at par with imported raw materials and the same has therefore been used only for manufacture of finished goods which were exported by the appellant. The appellant have therefore complied with Explanation II to Notification No. 23/2003-CE. Further as stated in statement dated 21.6.2011 of Muneshwar Nath Modi, Director of the appellant recorded during the investigation, the appellant did not receive any supply from 100% EOU or SEZ till 27.4.2007. Therefore, the demand for the period prior to 28.4.2007 will not sustain in any case. Further, in any case, the demand for the period from 1.7.2006 to 5.7.2007 on this ground is not maintainable. Explanation II was inserted in Notification No. 23/2003-CE with effect from 6.7.2007. Such amendment made in the notification is prospective and cannot have retrospective effect.

2.7 As regards the allegation that the appellant procured raw material from another 100% EOU and in terms of Explanation II to Notification No.23/2003-CE, the said goods should be treated as imported goods he submits that the appellant have not procured raw material from another EOU during the period 1.7.2006 to 28.2.2007. In fact, Mr. Muneshwar Nath Modi, Director of the appellant vide statement dated 21.6.2011 recorded during the investigation stated that the appellant did not receive any supply from 100% EOU or SEZ till 27.4.2007.

2.8 He also submits that the goods in question cleared by the appellant into DTA were not exempted from sales tax / VAT. Hence, Sl. No.1 of Notification No.23/2003-CE was applicable. The goods in question cleared by the appellant into DTA were not liable for SAD. Sl. No. 1 of Notification No. 23/2003-CE dated 31.3.2003 exempts all goods falling under any Chapter in the schedule of the Central Excise Tariff Act, manufactured by 100% EOU and brought to any place in India in accordance with the provisions of FTP from so much of the duty of excise leviable thereon under Section 3(5) of the Customs Tariff Act as specified in Column 4 of the said table. Column 4 of the table itself provides the quantum of exemption available. Column 4 against Sl.No.1 of the Notification No.23/2003 provides the amount of exemption. Thus, if the goods manufactured by 100% EOU and cleared into

DTA are not exempted by the State Government from the payment of sales tax or VAT, then such goods are exempt from so much of the duty of excise leviable thereon as is equivalent to the additional duty of customs leviable on such goods under sub-section (5) of Section 3 of the Customs Tariff Act, 1975 read with the proviso to sub section (1) of Section 3 of the said Central Excise Act. The goods in question manufactured by the appellant are not specified in the First Schedule of the Dadra and Nagar Haveli VAT Regulation, 2005. The goods in question manufactured by the appellant did not find mention in any Schedule of the Dadra and Nagar Haveli VAT Regulation, 2005. Therefore, applicable VAT rate on goods manufactured by the appellant was 12.5% under Dadra and Nagar Haveli VAT Regulation, 2005. Therefore, the goods in question were not exempted from the payment of sales tax or VAT when sold to a customer in the said Union Territory.

2.9 He argued that the goods were sold by the appellant into DTA during the course of inter-state sale against 'C' Form, the goods were exempt from payment of Central Sales Tax and therefore as per the department the appellant were required to take into account 4% SAD element while calculating the aggregate of customs duty under Sl. No.2 of Notification No.23/2003-CE. Thus, the crux of the whole issue is whether the goods in question can be said to be exempt by the State Government/Union Territory from payment of sales tax or VAT when the appellant were availing concession under Section 8(5)(a) of the Central Sales Tax Act which was applicable only to certain type of industry and that too only when the buyer furnished 'C' Form. When Condition No.1 of Notification No.23/2003-CE stipulates that the goods cleared to DTA are not exempt from payment of sales tax or VAT, it means that such goods as a class such goods should have been exempt. In other words, the expression "the goods being cleared to DTA are not exempt from payment of sales tax or value added tax" would not refer to the concession extended to specified industry by notification issued by State Government under Section 8(5)(a) of the Central Sales Tax Act.

2.10 He also argued that section 5A(1) of the Central Excise Act empowers the Central Government to exempt any goods from payment of excise duty subject to such conditions as it may deem necessary. In fact, in a series of decisions it has been held that the goods cleared for export or the goods procured without payment of duty for use in the manufacture of export

product, are not goods which are exempted from excise duty. He placed reliance on the decisions of following judgments.

(i) Hindustan Zinc Limited Vs. CCE – 2008 (223) ELT 149 (Raj.).

(ii) Perfect Synthetics – 2008 (3) tmi 454 (sc)

2.11 He also submits that the re-quantification of demand under Sl. No. 2 was not correct in as much as exemption from SAD has not been extended by the Show Cause Notice as well as the impugned Order. SAD should have been Nil instead of 4% considered by the Show Cause Notice since the appellant fulfil the condition of SAD exemption as mentioned hereinafter. Sl. No. 2 of Notification No. 23/2003-CE dated 31.3.2003 as amended by Notification No. 22/2006-C.E., dated 1-3-2006. Amended Sl. No. 2 provides for exemption from payment of SAD. However, there is a condition that finished goods cleared into DTA is not exempt from payment of sales tax. In other words, goods manufactured by 100% EOU and cleared to DTA are exempt from payment of excise duty equivalent to SAD leviable under Section 3(5) of the Customs Tariff Act only when such goods are not exempted by the State Government from payment of sales tax or VAT. In the present case, the finished goods cleared by the appellant into DTA had not been exempted by State Government from payment of sales or VAT. The Commissioner in the impugned Order has rejected the contention that while re-quantifying demand under Sl. No. 2, exemption from SAD was not extended despite the fact that goods in question were not exempted from sales tax / VAT by placing reliance on the decision of CESTAT Larger Bench in case of Moser Baer India Ltd. Vs. CCE reported at 2009-TIOL-1058-CESTAT-DEL-LB. The goods in question are exempted from payment of additional duty of customs leviable under Section 3(5) of the Customs Tariff Act, in view of Notification No. 89/82-Cus dated 25.3.1982.

2.12 He also submits that the impugned Order has denied benefit of Sl. No.4 of Notification No.23/2003-CE for the waste and scrap cleared by the appellant. Denial of benefit of Sl. No.4 of Notification No.23/2003-CE on the ground that imported raw material was used in manufacture of raw material is incorrect and without any basis. The entire raw material procured by the appellant was used in manufacture of finished goods only and no part of the raw material has been used in waste and scrap. It is well settled that when a by-product or waste arises in the manufacturing process, it cannot be said that the said by-product had been manufactured from the raw material

procured by the appellant. Hence, the finding of Commissioner that imported raw material was used in the manufacture of waste and scrap is incorrect and without any basis.

2.13 For the period 01.03.2007 to 06.07.2007 he submits that the imported raw material has been used in the manufacture of exported goods only. No part of imported goods has been used in the manufacture of goods cleared into DTA. Denial of benefit of Sl.No.3 of Notification No.23/2003-CE for the period prior to 6.7.2007, on the ground that goods were procured from domestic suppliers who availed deemed export benefit on such supply, is incorrect. Denial of benefit of Sl.No.3 of Notification No.23/2003-CE for the period prior to 6.7.2007, on the ground that goods were procured from domestic suppliers who in turn availed deemed export benefit on such supply is incorrect. Explanation II was inserted in the Notification only with effect from 6.7.2007 and has prospective effect. Hence, denial of benefit of Sl. No.3 for the period prior to 6.7.2007 is incorrect.

2.14 He also submits that the Ld. Commissioner in the impugned Order has denied benefit of Sl. No.3 of the Notification No.23/2003-CE for the entire quantity of goods cleared to DTA during the period 1.3.2007 to 6.7.2007. The benefit cannot be denied to the entire quantity of goods cleared into DTA. In the worst-case scenario, benefit of Sl. No.3 can be denied to the extent of the value of finished goods cleared in DTA which could have been manufactured from the imported raw material. During the period 1.3.2007 to 6.7.2007, the percentage of finished goods which could have been manufactured from the imported raw material was very less than the quantity of the finished goods which has been manufactured from the indigenous raw material. Therefore, the denial of benefit of Sl. No.3 to the entire quantity of goods cleared to DTA is incorrect and not sustainable. The appellant were procuring their basic raw material like PP/HDPE/LDPE granules from Reliance Industries Limited (RIL). The Jamnagar unit of RIL became a 100% EOU from June 2007. Hence, the appellant submits that they have not procured raw material from another EOU till June 2007. Therefore, benefit of Sl. No.3 of Notification No.23/2003-CE cannot be denied for the period till June 2007. Hence, the demand for the period 1.3.2007 to June 2007 on this ground is incorrect and liable to be set aside.

2.15 He further submits that the benefit of Sl. No.3 of Notification No.23/2003-CE has been denied on the ground that the imported raw material has been used in the manufacture of waste and scrap. Admittedly

neither show cause notice nor impugned order has made out any case on any discrepancy in utilization of raw materials. There is no dispute as to the receipt and consumption of raw materials for manufacture of finished goods. There is also no dispute that emerging of waste & scrap in manufacturing process is inevitable and such waste & scrap in the facts of the present cases is well within the limit. Thus, entire raw material procured by the appellant has been used in the manufacture of finished goods only and no part of the raw material has been used only in waste and scrap. It is well settled in light of the decision of the Hon'ble Supreme Court in SwadeshiPolytex that the entire quantity of raw material has gone into the manufacturing of finished goods and no part of inputs is used to manufacture waste & scrap more so, when emergence of waste & scrap in the process is inevitable. Hence, the finding of Commissioner that imported raw material was used in the manufacture of waste and scrap is incorrect and without any basis.

2.16 As regard the disputed period 07.07.2007 to 29.02.2008 he submits that The imported raw material has been used in the manufacture of exported goods only and not in the manufacture of goods cleared to DTA. Further, the goods procured from DTA on which DTA supplier has availed deemed export benefit and goods procured from another EOU have also not been used in the manufacture of goods cleared to DTA. The appellant have maintained all the records from which it can be established that the imported raw material and material procured from 100% EOU and DTA unit on which DTA unit availed deemed export benefit, have not been used in the manufacture of goods cleared in to DTA.

2.17 He also submits that Ld. Commissioner has denied benefit of Sl. No.3 of the Notification No.23/2003-CE for the entire quantity of goods cleared to DTA during the period 7.7.2007 to 29.2.2008. The benefit cannot be denied to the entire quantity of goods cleared into DTA. In the worst-case scenario, benefit of Sl. No.3 can be denied to the extent of the value of finished goods cleared in DTA which could have been manufactured from the imported raw material and raw material procured from another EOU or DTA unit which availed deemed export benefit. During the period 7.7.2007 to 29.2.2008, the percentage of finished goods which could have been manufactured from the imported raw material and raw material procured from another EOU or DTA unit which availed deemed export benefit is very less than the quantity of the finished goods which has been manufactured by the appellant from indigenous raw material procured without availing any benefit. Therefore,

the denial of benefit of Sl. No.3 to the entire quantity of goods cleared into DTA is incorrect and not sustainable.

2.18 He also argued that for the reasons already submitted above, benefit of Sl. No.3 of Notification No.23/2003-CE for the waste and scrap cleared by the appellant cannot be denied. Denial of benefit of Sl. No.3 of Notification No.23/2003-CE on the ground that the imported raw material has been used in the manufacture of waste and scrap is incorrect and without any basis. The entire raw material procured by the appellant has been used in the manufacture of finished goods only and no part of the raw material has been used exclusively in waste and scrap. It is well settled that when a by-product or waste arises in the manufacturing process, it cannot be said that the said by-product or waste has been manufactured from the raw material procured by the appellant. Hence, the finding of the Commissioner that imported raw material was used in the manufacture of waste and scrap is incorrect and without any basis.

2.19 He also submits that appellant have claimed during period 01.03.2008 to 24.08.2009 benefit of Sl. No.2 of Notification No. 23/2003-CE and the same has not been disputed by the department. The only dispute is with respect to demand of SAD for the period 1.3.2008 to 24.8.2009. In view of the above, addition towards SAD in aggregate duties of custom is not sustainable. In any case, Sl. No. 2 of Notification No. 23/2003-CE is beyond the scope of Section 3(5) of the Customs Tariff Act, 1975. By Notification No. 22/2006-CE, Sl. No. 2 of Notification No. 23/2003-CE was amended. The levy in terms of Sl. No.2 of Notification No.23/2003-CE as amended by Notification No.22/2006-CE is the amount equal to aggregate of duties of customs of like goods. If the case of the department is that the goods in question cleared by the appellant on inter-state basis were exempt from payment of sales tax, then on like goods imported, no SAD should be leviable since SAD is leviable under Section 3(5) of the Customs Tariff Act to counter balance the local taxes, VAT etc. leviable on like goods on its sales, purchase, transportation etc. in India. Therefore, for the purpose of computing the aggregate duties of customs, SAD itself cannot be taken into account. Further, amendment vide Notification No. 22/2006-CE made to Sl. No.2 to Notification No. 23/2003-CE is not in consonance with the provisions of Section 3(5) of the Customs Tariff Act. Notification No.23/2003-CE dated should be read as a whole and should be read in the light of the purpose of levying SAD under Section 3(5) of the Customs Tariff Act, which is to counter balance the local taxes, VAT leviable on like goods on its sale,

purchase etc. If the like goods are exempt from payment of sales tax or VAT, then on the like goods imported into India, levy of SAD itself is not warranted and in fact there cannot be any levy of SAD on such goods imported into India. Hence, when the goods are manufactured and cleared to DTA, no SAD is leviable. In fact, when SAD was introduced in the year 1998, the finance minister in his budget speech, had specifically stated that the Government of India is imposing the Special Additional Duty in order to counterbalance the sales tax which was imposed on domestically procured like goods. The finance minister also stated that the levying of SAD was a protectionist measure to ensure that the imported goods get the same taxing treatment as domestically procured like goods. The Ld. Commissioner in the impugned Order has not given any finding on these submissions of the Appellant and same is thus in violation of principles of natural justice and this part of the impugned order is liable to be set aside.

2.20 For the period 25.08.2009 to 31.05.2011 he submits that after 20.8.2009, the department in the Show Cause Notice and the impugned Order has accepted the fact that the appellant were maintaining following records in their usual course of business from which it can be easily established that finished goods manufactured were from imported raw material or from indigenous raw material:

- i) Goods Receipt Note
- ii) Form IV Register (Raw material stock register)
- iii) Raw material issue slip
- iv) Extrusion Log Book
- v) Daily production and downtime report (Common book but showing separate details for local and export production)
- vi) Rope Machine wise log book (Common book but showing separate details for local and export production)
- vii) RG-1 Finished Goods Register

2.21 He further submits that the appellant have maintained separate records for the goods manufactured from imported raw material and from indigenous material. In the material issue slip, it is disclosed that the raw material is imported or indigenous. The goods manufactured out of imported raw material have been separately processed and recorded in the daily

production register. Based on the records maintained by the appellant and which are not disputed by the department, it is quite possible to bifurcate finished goods manufactured out of indigenous raw material or imported raw material. Further, from the records, it can also be established that which goods have been exported or cleared into DTA. In view of the above, the imported goods have been used in the manufacture of exported goods only. No part of imported goods has been used in the manufacture of goods cleared into DTA. In the present case it has been established beyond doubt that goods cleared to DTA had been manufactured wholly out of raw materials manufactured in India based on separate records of receipt and consumption of raw materials maintained for said purpose. Therefore, the present case is not a doubtful case. Hence, despite the fact that export goods and DTA cleared goods were manufactured on common manufacturing lines and by using common inputs, benefit of Notification No. 8/1997-CE (at present 23/2003-CE) is available to the appellant. The above position has also been clarified by the Board through subsequent modification of Circular No. 85/2001 dated 21.12.2001.

2.22 He also submits that the Board's Circular No. 85/2001 clarified that it was not the intention of the Board vide Circular No. 442/8/99 dated 4.3.1999 that benefit of Notification 8/1997-CE should be denied to those assesseees who manufacture export goods and goods cleared into DTA by using common inputs, common machinery, common godowns and common manufacturing process (which would amount to establishing a separate factory within the factory). Therefore, the finding in the impugned Order that benefit of Notification No. 23/2003-CE was not available to the appellant since export goods and goods cleared into DTA were manufactured on common manufacturing lines and by using common inputs which were stored commonly is not correct. He placed reliance on the decision of CCE Vs. Padmini Polymers-2003 (151) ELT 358 (T).

2.23 He also submits that the Ld. Commissioner erred in discarding reliance placed by Appellant on issue slip indicating use of goods for export or DTA. Ld. Commissioner erred in not appreciating the submission that the source of raw material can be inferred on the basis of destination i.e., if the Raw Material Issue Slip pertains to DTA, then it clearly means that the appellant have consumed indigenously procured raw material. Further, entire basis of show cause notice and impugned order to discard the submission of the Appellant that separate records are maintained is based on the fact that during preventive visit the Appellant were not in position to identify WIP or

finished goods whether manufactured out of indigenous raw material or imported. As it can be seen from Show Cause notice as well as statement of Shri Modi that what was stated that merely by seeing it is not possible to identify the batch is from indigenous raw material or imported raw material. It was informed by them they are not maintaining records at production floor. However, department wrongly inferred to mean that segregation is not possible. There was no need to maintain separate records at WIP stage so as to show that the said WIP was arising out of imported raw material or indigenous raw material. Thus, though it was not possible to bifurcate finished goods only on the basis of on-floor record but if all the records were to be seen together, it was very much possible to bifurcate the finished goods manufactured from imported raw material or from indigenous raw material. Hence, the finding of the Commissioner in the impugned Order is incorrect and liable to be set aside. Ld. Commissioner categorically ignored the fact that the Appellant are able to identify finished goods for DTA and export and packing is done accordingly. Impugned order has failed to consider submissions and evidence in proper perspective and on this ground also same is liable to be set aside.

2.24 He also submits that the entire quantity of imported raw material has been used in the manufacture of export goods. The department ought to have verified these details at the time of investigation based on input output ratio which would have conclusively proved that entire quantity of imported raw material has been used in manufacture of export goods. On this ground alone the finding of the Ld. Commissioner that imported raw material were used for manufacture of finished goods cleared in DTA is not sustainable. The Ld. Commissioner in the impugned Order has held that the appellant have maintained records for 2-3 months only and the same have been destroyed thereafter. Therefore, the Commissioner has held that since it was not possible to verify the said documents, it was to be presumed that separate records were kept only from February 2011 and not prior to that. Firstly, show cause notice read with statement of Mr.Modi itself suggest that prior in time i.e. w.e.f. 20.8.2009 the Appellant are maintaining separate accounts. This fact is not in dispute. Therefore, the finding of the Ld. Commissioner is contrary to facts on record.

2.25 He also submits that as a matter of practice, the appellant have always processed each customer's order separately by running different batch. This is because characteristics of every order are unique and distinct in terms of rope size, strength, density, colour etc. Further, the appellant have duly

recorded details of each and every batch which corresponds to separate customer's order in their Log Book and the same has been seized by the department vide Panchanama dated 19.5.2011/20.5.2011. Reference in this regards can be made to paragraphs 2.2 and 2.3 of first Show Cause Notice dated 2.8.2011. When officers from the Preventive Wing visited their factory premises, they could have easily verified Log Book maintained by the appellant of past 2 – 3 months which was readily available with the appellant. Since the department failed to verify the Log Book, the adverse inference ought to be drawn against the department for such failure to verify.

2.26 He also submits that the denial of benefit of Sl.No.3 of Notification No.23/2003-CE for the period 25.8.2009 to 31.5.2011, on the ground that goods procured from domestic suppliers who in turn availed deemed export benefit on such supply, is factually incorrect. After 20.8.2009, the appellant have procured raw material from DTA and the said DTA suppliers have not availed deemed export benefit. The appellant have not procured raw material from another 100% EOU after 20.8.2009 and therefore the finding of the Commissioner that raw material received from another EOU has been used in manufacture of goods cleared to DTA is factually incorrect. The appellant stopped procuring raw material from RIL, Jamnagar, a 100% EOU after 20.8.2009. Hence, the appellant submits that they have not procured raw material from another EOU after 20.8.2009. Further, from 14.4.2009, the appellant stopped procuring from RIL EOU even on payment of duty. Hence, the finding of the Commissioner in the impugned Order is factually incorrect and liable to be set aside on this count alone.

2.27 He also submits that during the period September 2009 to December 2009, the appellant have claimed benefit of Sl. No.2 of Notification No. 23/2003-CE for clearance of Nylon Rope and the same has not been disputed. The only dispute is with regards to demand of SAD for the period September 2009 to December 2009 for the clearance of Nylon Rope into DTA. The said demand is not sustainable. During the period September 2009 to December 2009, they availed benefit of Sl. No.2 of Notification No.23/2003-CE since the imported raw material and material procured from another EOU were in stock and used the same in manufacture of some quantity of Nylon Rope. The impugned Order has demanded SAD on said Nylon Rope cleared during the period September 2009 to December 2009 since the Nylon Rope was cleared without payment of Central Sales Tax. The reasoning to reject the contention of the Ld. Commissioner above is

applicable to present period for the clearance of Nylon Ropes also. Hence, demand of SAD is incorrect and therefore, portion of impugned Order is liable to be set aside. For the same reasons, demand in respect of goods cleared during the period January 2010 to May 2010, (as referred to in Annexure A(viii) of the Show Cause Notice) by availing benefit of Sl. No. 2 of Notification No.23/2003 is not sustainable.

2.28 He also argued that during the period from 1.6.2011 to 30.11.2015 and from 1.4.2016 to 28.2.2017, the appellant availed benefit of Sl. No. 3 of Notification No. 23/2003-CE and discharged excise duty of 8% / 12% plus education cess on clearance of finished goods into DTA. The Commissioner in the impugned Order has denied the benefit of Sl. No. 3 and re-quantified the demand under Sl. No. 2 of the said Notification. The reason for denial is same as for the first show cause notice dated 2.8.2011. It is already stated that the appellant have substantiated that separate records were maintained, it was ensured that domestic raw materials alone were consumed for manufacture of finished goods cleared into DTA and excise duty has been discharged under Sl. No. 3. Therefore, denial of benefit of Sl. No. 3 is not correct and the portion of impugned Order is liable to be set aside. In any case, re-quantification of demand under Sl. No. 2 is incorrect in as much as SAD should be Nil instead of 4% taken by the impugned Order.

2.29 He also argued that the demand beyond the normal period of limitation is liable to be set aside. There is nothing on record to show the existence of fraud, collusion or suppression of materials facts or information. There is no iota of evidence on record to prove that the appellant have wrongly availed the exemption benefit under Sr Nos. of Notification No. 23/2003-CE specifically with intent to evade payment of duty. In support of above argument he also placed reliance on various judgments and decisions.

3. On the other hand, Shri M.G. Rayka the Learned Additional Commissioner appearing on behalf of revenue reiterated the findings of the impugned order.

4. Heard both sides and perused the records of the case. We find that during the disputed period Appellant have imported certain quantities of raw materials viz. HDPE granules, PP granules, Nylon yarn etc. and also procured domestically. The finished goods were manufactured and cleared for export as well as in DTA. The present demand of differential duty pertains to

clearance of finished goods namely HDPE/PP Ropes, Nylon Ropes, Polyester Rope in DTA by availing benefit of concessional rate of duty in terms of Notification No. 23/2003-CE dtd. 01.03.2003 from time to time. Regarding the issue of eligibility of the appellant for concessional rate when cleared to DTA, we note that the exemption was denied on various grounds. We find that the multiple grounds have been disputed in the present matter. All these grounds are summarized as under :

Period	Issue Involved
01.07.2006 to 28.02.2007	(i) Wrong availment of Sr. No. 4 of Notification No. 23/2003-CE for clearances of finished goods.
01.03.2007 to 29.02.2008	Wrong availment of Sr. No. 3 of Notification No. 23/2003-CE (for clearance of final products as well as plastic waste & scrap)
01.03.2008 to 24.08.2009	(i) Non-inclusion of SAD under Sr. No. 2 of Notification No. 23/2003-CE (for clearances of final products) (ii) Wrong availment of Sr. No. 3 of Notification No. 23/2003-CE (for clearances of plastics waste & scrap)
25.08.2009 to 31.05.2011	Wrong availment of Sr. No. 3 of Notification No. 23/2003-CE (For clearance final products as well as plastic waste & scrap)
Sept. 2009 to Dec. 2009	Non-inclusion of SAD under Sr. No. 2 of Notification No. 23/2003-CE (For clearance of final products viz., Nylon Ropes)
01.06.2011 to 30.11.2015	Non -inclusion of SAD under Sr. No. 2 of Notification No. 23/2003-CE for clearances of goods in DTA.
01.06.2011 to 30.11.2015	Wrong availment of Sr. No. 3 of

01.04.2016 to 28.02.2017	Notification No. 23/2003-CE for finished goods and waste & scrap
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4.1 We find that the benefit under Sr. No. 4 of Notification No. 23/2003-CE dtd. 31.03.2003 can only be availed subject to fulfilment of condition No. 4 of the said Notification. The said condition reads as under.

If,-

(i) the goods are produced or manufactured wholly from the raw materials produced or manufactured in India;

(ii) such finished 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; and

(iii) the goods, if manufactured and cleared by the unit other than export oriented undertaking are wholly exempt from duties of Excise or are chargeable to "NIL" rate of duty.

4.2 We find that during the period from 01.07.2006 to 28.02.2007, Appellant cleared their final products viz. HDPE/PP Ropes (CTH 56074900), Nylon Ropes (CTH 56075040), Polyester Ropes (CTH No. 56075090) etc. in DTA by paying concessional central excise duty by availing benefit under Sr. No. 4 of Table to Notification No. 23/2003-CE dtd. 31.03.2003 by considering the same as having been wholly exempted from central excise duty portion under Notification No. 30/2004-CE dtd. 09.07.2004 and wholly manufactured from the raw materials manufactured or produced in India. We find that Notification No. 30/2004-CE dtd. 09.07.2004 exempted goods falling under heading No. 5607 from whole of the duties of excise if such goods were manufactured by a unit other than EOU and if no credit of duty paid on the inputs used in the manufacture of the same was taken. Relevant portion of Notification No. 30/2004-CE is reproduced hereunder :

In exercise of the powers conferred by sub-section (1) of section 5A of the Central Excise Act, 1944 (1 of 1944) read with sub-section (3) of section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957) and in supersession of the notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 07/2003-Central Excise, dated the 1st

March 2003, published in the Gazette of India vide No. G.S.R. 137(E), dated 1st March 2003, the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the excisable goods of the description specified in column (3) of the Table below and falling within the chapter, heading No. or sub-heading No. of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) (hereinafter referred to as the Central Excise Tariff Act), specified in the corresponding entry in column (2) of the said Table, from whole of the duty of excise leviable thereon under the said Central Excise Act : Provided that nothing contained in this notification shall apply to the goods in respect of which credit of duty on inputs or capital goods has been taken under the provisions of the Cenvat Credit Rules, 2002. -

TABLE

S. No.	Chapter or heading No. or sub-heading No.	Description of goods
(1)	(2)	(3)
11	56 (except 5601.10, 5607.10,	All goods

4.3 We observed that the finished goods manufactured by the appellant namely HDPE/ PP Rope, Nylon Rope, Polyester Rope and PP Multifilament Rope undisputedly fall under Tariff heading No. 5607 49 00, 5607 50 40, 5607 50 90 and 5607 90 90 respectively. Clearly, the goods manufactured by the appellant are not covered by any of tariff subheading Nos. 5601.10, 5607.10 and 5608.11. Therefore, if the goods manufactured by the appellant, were manufactured by a unit other than EOU, then such goods were undisputedly covered by Notification No. 30/2004-CE. The only condition provided to avail the benefit of said Notification is that the credit should not be availed on the inputs. In the present matter appellant have also not availed Cenvat credit on the inputs used in the manufacture of finished goods during the period 01.07.2006 to 28.02.2007. Therefore, if the goods manufactured by the appellant were manufactured by an identically placed unit other than 100% EOU, the goods in question would be wholly exempt or chargeable to NIL rate of duty. In the present matter the revenue nowhere disputed that the Appellant have not availed cenvat credit. Therefore in our view the condition provided in clause (iii) of condition No. 4 of Notification No. 23/2003-CE dtd. 31.03.2003 as mentioned above stand fulfilled. Further it is an undisputed fact that the Appellant have fulfilled condition No. 4(ii) of Notification No. 23/2003-CE. However as regard the

condition No. 4 (i) the Ld. Commissioner held that appellant have imported raw materials viz. Nylon yarn, Polyester yarn, lead wire, HDPE granules etc, without payment of customs duties and used the same along with other indigenously purchased raw materials for manufacture of final products. We find that the Adjudicating authority has assumed that since the raw material was imported, the same would have been used in the manufacture of goods cleared into DTA. In this context we find that neither show cause notice nor impugned order relied on any concrete evidence to established that the imported raw material was used in the manufacture of goods cleared into DTA.

4.4 The appellant also produced before us the details regarding the total production during the period 01.07.2006 to 28.02.2007 and clearance of finished goods into DTA and exports, the product-wise standard input output ratio, details of maximum possible production from the imported raw materials by applying input output ratio. From the said details we find that the goods manufactured from imported raw material were very less as compared to the goods exported. Therefore we find that the entire finished goods manufactured out of imported raw material were exported. In view of above details we agree with the submission of appellant that no part of the goods manufactured from the imported raw material were cleared into DTA. Clearly, the denial of benefit under Sr. No. 4 of Notification No. 23/2003-CE is incorrect. We find that all the condition of Sr. No. 4 are duly fulfilled by the appellant.

4.5 Without prejudice, we also find that the Ld. Adjudicating authority has denied benefit of Sr. No. 4 of Notification No. 23/2003-CE to the entire quantity of goods cleared into DTA during the period 01.07.2006 to 28.02.2007. However, the benefit of Sr. No. 4 of the notification can be denied to the extent of the value of finished goods cleared into DTA which could have been manufactured from the imported raw materials. The denial of benefit of Sr. No. 4 to the entire quantity of goods cleared into DTA is incorrect and not justifiable.

4.6 We also find that in the present matter denial of benefit of Sr. No. 4 of Notification No. 23/2003-CE for the period prior to 06.07.2007, on the ground that goods procured from domestic suppliers who had availed the deemed export benefit in such supply, is also legally not sustainable. We

noticed that the show cause notice dtd. 02.08.2011 alleged that in terms of Explanation II to the Notification No. 23/2003-CE, the goods supplied to EOU under the claim of deemed export benefits were to be treated as imported goods for the purpose of payment of duty on DTA sale. Thus according to revenue, the benefit of Sr. No. 4 of Notification No. 23/2003-CE was not available to the appellant. We find that Explanation II was inserted in Notification No. 23/2003-CE w.e.f. 06.07.2007 provides as under :

Explanation II. - For the purposes of this notification, following supplies shall be treated as imported goods :

- (i) goods received from any export oriented undertaking or Software Technology Park unit or Electronic Hardware Technology Park unit, as the case may be;*
- (ii) goods received from Domestic Tariff Area under benefits of deemed exports under Paragraph 8.3(a) and (b) of the Foreign Trade Policy."*

In this regard we find that during the period from 28.04.2007 to 20.08.2009 the appellant received some supplies from M/s Reliance Industries Ltd., EOU unit at Jamnagar under CT-3 on which M/s RIL EOU availed deemed export benefit. Appellant submitted before us Illustrative chain of documents evidencing consumption of input received from M/s RIL EOU for manufacture of finished goods cleared for export. We find that Appellant have treated this supply at par with imported raw material and the same has therefore been used only for manufacture of finished goods which were exported by the appellant. Therefore, in our view appellant have complied with the Explanation II to Notification No. 23/2003-CE. Further we have also gone through the statement dtd. 21.06.2011 of Muneshwar Nath Modi, Director of Appellant wherein he stated that appellant did not receive any supply from 100% EOU or SEZ till 27.04.2007. Therefore demand for the period prior to 28.04.2007 will not sustain in this matter. We also agree with the arguments of the appellant that demand for the period from 01.07.2006 to 05.07.2007 on this ground is not maintainable. Explanation -II was inserted in Notification No. 23/2003-CE with effect from 06.07.2007 and such amendment made in the Notification is prospective and cannot have retrospective effect. In this context we also find the support from the Hon'ble Supreme Court decision in case of UOI Vs. Martin Lottery Agencies Ltd. -2009 (14)STR593(SC) wherein it was held that when a substantive

law was introduced by way of an Explanation, it will not have retrospective effect. In our view the amendment made in the Notification No. 23/2003-CE cannot have retrospective effect.

4.7 We further find that the case of the revenue in the present matter is also that appellant have cleared their final products in DTA by paying concessional central excise duty by availing benefit of Sr. No. 2 of Table to Notification No. 23/2003-CE dtd. 31.03.2003. The Appellant, for purpose of paying the central excise duty on the finished goods have calculated the central excise duty in the manner as laid down under proviso to Section 3(1) of Central Excise Act, 1944 which is equivalent to the aggregate of the customs duties leviable on the like goods is imported from out of India but they have not included the additional duty of customs leviable under Section 3(5) of Customs Tariff Act 1975 in the aggregate duties despite the facts that above said products are exempted from payment of VAT/Central Sales Tax in the Union Territory of Dadra and Nagar Haveli against C form. Whereas appellant contended that re-quantification of demand under Sr. No. 2 was not correct. For the ease of reference column No. 4 against the Sr. No. 2 of Table of Notification No. 23/2003-CE dtd. 31.03.2003 is reproduced herein below.

"In excess of the amount equal to the aggregate of duties of Customs leviable on like goods, as if,-

(a) duty of customs specified in the First Schedule to the Customs Tariff Act, 1975 (51 of 1975), read with any other notification in force was reduced by 75%, and

(b) no additional duty of customs was leviable under sub-section (5) of the section 3 of the said Customs Tariff Act:

Provided that while calculating the aggregate of customs duties, additional duty of customs leviable under sub-section (5) of the section 3 of the Customs Tariff Act shall be included if the goods cleared into Domestic Tariff Area are exempt from payment of sales tax or value added tax.

4.8 We find that Sl. No. 2 provides for exemption from payment of SAD. However, there is condition that finished goods cleared into DTA is not exempt from payment of sale tax. In other words, goods manufactured by 100% EOU and cleared to DTA are exempt from payment of excise duty equivalent to SAD leviable under Section 3(5) of the Customs Tariff Act only when such goods are not exempted by the state government from payment

of sale tax or VAT. In this regard we also gone through the section 3(1) read with Section 4 of the Dadra and Nagar Haveli VAT Regulation 2005 which provides that in terms of Section 3(1) read with Section 4 of the Dadra and Nagar Haveli VAT Regulation, 2005 there shall be levied a Value Added Tax (output tax) on the turnover of sales of goods at rates provided hereinbelow:

- (a) In respect of goods specified in Second Schedule @ 1%
- (b) In respect of goods specified in Third Schedule @ 4%;
- (c) In respect of goods specified in Fourth Schedule at the rate of 20%; and
- (d) In respect of other goods not specified in First, Second, Third and Fourth Schedule at the rate of 12 ½ %.

4.9 We find that the goods specified in the First Schedule to the above Regulation are exempted from whole of the tax leviable thereon. Thus, the goods specified in said First Schedule are exempted goods. However as regard the the goods in question manufactured by the appellant we find that the goods are not specified in the First Schedule of the Dadra and Nagar Haveli VAT Regulation, 2005. The goods in question manufactured by the appellant did not find mention in any Schedule of the Dadra and Nagar Haveli VAT Regulation, 2005. Therefore, applicable VAT rate on goods manufactured by the appellant was 12.5% under Dadra and Nagar Haveli VAT Regulation, 2005. Therefore, the goods in question were not exempted from the payment of sales tax or VAT when sold to a customer in the said Union Territory. In this case it is not disputed that such goods when sold in DTA had not been exempted by the State Govt. by any Notification. We are unable to accept the contentions raised by the revenue and the findings recorded by the adjudicating authority for the reason that , it is the fact that the clearance of disputed finished goods from EOU to DTA are not exempted from payment of sales tax by the State Government by any notification and revenue is unable to bring on record any notifications issued by the State Government or otherwise to indicate that finished goods cleared by appellant to DTA are exempted. We also noticed that the case of the revenue is based on the ground that when goods were sold by the appellant into DTA during the curse of inter-state sale against 'C' form, the goods were exempted from payment of Central Sales Tax and therefore appellant were required to take into account 4% SAD element while calculating the aggregate of customs duty under Sr. No. 2 of Notification No. 23/2003-CE.

We do not agree with the argument of the revenue when the condition stipulates that the goods cleared to DTA are not exempt form payment of Sale Tax or VAT, it means that such goods is a class of such goods should have been exempt. In the present matter concession provided under Section 8(5) of the Central Sales Tax act in respect of sale of goods by specified industries is not in the nature of exemption since was applicable only when the buyer furnished 'C' form. In this connection , it will be apposite to refer to the Hon'ble High Court decision in Hindustan Zinc Ltd. Vs. CCE – 2008(223)ELT 149 (Raj.) wherein it was held that goods which were otherwise dutiable but cleared without payment of duty for following certain procedure, were not exempted goods. We also noticed that Central Government allowed removal of excisable goods for exports under Rule 19(1) or procurement of excisable goods for the purpose of export under Rule 19(2) of the Central Excise Rules. Notifications issued under Rule 19(1) or Rule 19(2) is not an exemption from payment of duty even though it allows the goods to be removed without payment of duty. On the same analogy, Section 8(5)(a) of the Central Sales Tax Act subject to various conditions including production of 'C' form. This does not means that the goods cleared without payment of sale tax by availing the concession under Section 8(5)(a) have become exempted from payment of sale tax. In fact, if the buyer who fails to produce the 'C' Form, Central Sales Tax is payable on the goods sold to such buyer.

4.10 We also find that the Appellant in the present matter claimed the exemption as per the Sr. No. 1 of Notification No. 23/2003-CE which provides as under :

TABLE

Sr. No.	Chapter or heading No. or sub-heading No.	Description of Goods	Amount of Duty	Condi-tions
(1)	(2)	(3)	(4)	(5)
1.	Any Chapter	All goods	Duty of excise leviable thereon as is equivalent to the special additional duty of customs leviable on such goods under section 3A of the Customs Tariff Act, 1975 (51 of 1975) read with proviso to sub-section (1) of section 3 of the said Central Excise Act, 1944.	1

The aforesaid exemption is subject to the condition stipulated in Condition No. 1 which reads as under:

Sr. No.	Conditions
1.	If the goods being cleared into Domestic Tariff Area are not exempted by the State Government from payment of sales tax.

4.11 We find that as per the Sr. No. 1 of Notification No. 23/2003-CE the goods manufactured by 100% EOU and cleared into DTA are exempt from payment of excise duty equivalent to Special Additional Duty under Section 3(5) of the Customs Tariff Act, leviable in such goods only if such goods are not exempted by the state Government from payment of Sale tax or VAT. We already discussed in above para that the finished goods cleared by the appellant in questions were not exempted from payment of sales tax or VAT when sold to a customer in the Union Territory. Hence, the condition No. 1 of Notification No. 23/2003-CE was fulfilled by the appellant in the present case. Accordingly they correctly did not include the element of 4% SAD leviable under Section 3(5) of the Custom Tariff Act while calculating the excise duty payable by them.

4.12 We also find that in the present matter duty demand is also based on the denial of benefit of Sr. No. 3 of Notification No. 23/2023-CE for the period prior to 06.07.2007 on the ground that the goods were procured from domestic suppliers who availed the deemed exports benefit on such supply. In this context we already observed in above para that Explanation –II was inserted in the Notification only with effect from 06.07.2007 and has prospective effect. Hence denial of benefit of Sr. No. 3 for the period prior to 06.07.2007 by the Ld. Commissioner in the present matter is legally not correct and cannot be sustained.

4.13 Without prejudice, we further find that in this matter the benefit cannot be denied to the entire quantity of goods cleared into DTA. The Ld. Commissioner in the impugned order has denied the benefit of Sr. No. 3 of the Notification No. 23/2003-CE for the entire qty. of goods cleared to DTA during the period 01.03.2007 to 06.07.2007. The documentary evidences produced by the appellant clearly show that there is very less quantity of the imported raw material as compared to the quantity of finished goods

manufactured and exported. We also find that the Appellant were procuring their basic raw material from Reliance Industries Ltd. The Jamnagar unit of M/s RIL became a 100% EOU from June 2007. Hence, we find force in the submission of appellant that they have not procured raw material from another EOU till June 2007 and demand confirmed in the impugned order for the period 01.03.2007 to June 2007 on this ground is incorrect.

4.14 We also find that in the present matter the benefit of Sr. No. 3 of Notification No. 23/2003-CE was denied for the period 07.07.2007 to 29.02.2008 on the ground that the imported raw material has been used in the manufacture of export goods only and not in the manufacture of goods cleared to DTA. Further the goods procured from DTA on which DTA supplier has availed the deemed export benefit and goods procured from another EOU have also not been used in the manufacture of goods cleared to DTA. In this context we observed that the benefit of Sr. No. 3 of Table to Notification No. 23/2003-CE dtd. 31.03.2003 can only be availed subject to fulfilment of condition No. 3 of the said Notification. The condition No. 3 of the Notification is reproduced as under :

If,-

- (i) the goods are produced or manufactured wholly from the raw materials produced or manufactured in India;*
- (ii) such finished 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; and*
- (iii) the goods, if manufactured and cleared by the unit other than export oriented undertaking are wholly exempt from duties of Excise or are chargeable to "NIL" rate of duty.*

4.15 We find that the appellant produced before us the details regarding the total production during disputed period and clearance of finished goods into DTA and exports, the product-wise standard input output ratio, details of maximum possible production from the imported raw materials by applying input output ratio. From the said details we find that the goods manufactured from imported raw materials and raw material procured from another EOU to DTA unit which availed deemed export benefit were very less as compared to the goods exported. Therefore we find that the entire

finished goods manufactured out of imported raw material and raw material procured from EOU were exported. In view of above details we agree with the submission of appellant that no part of the goods manufactured from the imported raw material and material procured from EOU were cleared into DTA. Clearly, the denial of benefit under Sr. No. 3 of Notification No. 23/2003-CE by the Ld. Commissioner is legally not correct.

4.16 We also find that during the period 01.03.2008 to 24.08.2009 the appellant have claimed benefit of Sr. No. 2 of Notification No. 23/2003-CE. The only dispute is with respect to demand of SAD for the period 01.03.2008 to 24.08.2009. The said demand is not sustainable in this matter as we already discussed that the goods cleared by the appellant in question were not exempted from payment of sale tax/VAT. Therefore, for the purpose of computing the aggregate duties of customs, SAD itself cannot be taken into account.

4.17 As regard the demand for the period 25.08.2009 to 31.05.2011 we find that after 20.08.2009 the department in the present matter accepted the fact that the appellant were maintaining records by which it can be easily established that finished goods manufactured were from imported raw material or from indigenous raw materials. Further we also find that the benefit of notification No. 8/1997-CE (at present 23/2003-CE) also cannot be denied on the ground that export goods and DTA cleared goods were manufactured on common manufacturing lines and by using common inputs. In this context we find that the said position has also been clarified by the Board through circular No. 85/2001 dtd. 21.12.2001. The relevant portion of circular dtd. 21.12.2001 reproduced below.

“2. The matter has been examined. It is reiterated that the benefit of notification No. 8/97-C.E., dated 1-3-97 may be allowed to the units using imported as well as indigenously procured raw materials provided the unit is able to satisfy the jurisdictional authorities beyond doubt that the goods to be sold in DTA are manufactured out of wholly indigenous raw materials by way of maintenance of records etc. as provided in the said Board’s Circular. Maintenance of separate records would include, inter alia, separate raw material registers for indigenously procured goods and imported ones, separate finished goods registers - one for final products manufactured out of indigenously procured raw materials and the other for final products manufactured out of imported materials, batch-wise production and dispatch

*registers in respect of the quantity manufactured and sold in DTA etc. The jurisdictional officers would thus need to satisfy themselves that the goods under DTA sale have been manufactured wholly out of indigenous raw materials. The Circular referred to above even enjoins the jurisdictional officers to get the input-output norm fixed by the Cost Account so as to ensure that imported inputs, if common, are not used in the manufacture of the final products to be cleared in DTA. **But the intention is certainly not to insist upon separate machinery, separate godowns and separate branches of manufacturing process (which would amount to establishing a separate factory within the factory) before extending the benefit of the above-said Circular.***

The Board vide above circular clarified that it was not the intention of the Board that benefit of Notification should be denied to those assessee who manufacture export goods and goods cleared into DTA by using common inputs, common machinery, common godowns and common manufacturing process. Therefore, we find that the finding in the impugned order that benefit of Notification No. 23/2003-CE was not available to the appellant since export goods and goods cleared into DTA were manufactured on common manufacturing lines and using common input which were stored commonly is not correct and against the true spirit of above exemption notification.

4.18 We also find that in the present matter Appellant produced the issue slips indicating use of goods for exports or DTA. If, the raw material issue slips pertain to DTA, then it means that the appellant have consumed indigenously procured raw materials. Further Appellant produced the evidences that entire quantity of imported raw material has been used in the manufacture of export goods. However without verifying the said records and details the denial of benefit of Notification by the Ld. Commissioner in the present is not sustainable.

4.19 We also find that the impugned order demanded SAD for the period September 2009 to December 2009 with respect to Nylon rope cleared to DTA by the appellant on the ground that the Nylon rope was cleared without payment of Central Sale Tax. We find that during the disputed period Appellant have claimed benefit of Sr. No. 2 of Notification No, 23/2003-CE. In this context we have already discussed in above para that the goods in question were not exempted from sales tax/VAT. Hence, demand of SAD in the present matter is not correct.

4.20 We also find that the during the period 01.06.2011 to 30.11.2015 and from 01.04.2016 to 28.02.2017, the appellant availed the benefit of Sr. No. 3 of Notification No. 23/2003-CE and discharge excise duty on clearance on the finished goods. The Ld. Commissioner vide impugned order has denied the benefit and re-quantified the demand under Sr. No. 2 of the said Notification. We find that the reason for denial is same as far the above discussed periods. We already discussed that appellant have substantiated that separate records were maintained, it was ensured that domestic raw materials alone were consumed for manufacture of finished goods cleared into DTA . Therefore denial of benefit of Sr. No. 3 by the Ld. Commissioner in the present matter is also not correct.

4.21 In view of the above discussion, we hold that the appellant is entitled for benefit of exemption Notification No. 23/2003-CE.

4.22 On limitation, we find that the demand proposed in the first Show Cause Notice is for the period 1.7.2006 to 31.5.2011. The said Show Cause Notice was issued on 2.8.2011. Therefore, the demand for the period 1.7.2006 to 31.7.2010 is beyond the normal period of limitation of one year. The Ld. Commissioner has held that the violation/contravention of the Notification by the appellant came to the notice of department only during the course of investigation by the Preventive wing of the Commissionerate. The violation/contravention of the Notification by the appellant could not have come to the notice in the normal course unless all relevant details were furnished by the appellant, it was not possible for the department to visualize the manner and quantum of evasion on account of violation of the conditions of the Notification. Therefore, extended period of limitation under proviso to Section 11A(1) was invocable as there was clear suppression of fact and wilful mis-statement on part of the appellant as well as contravention of the provisions of the Central Excise Act and Rules made thereunder with intent to evade payment of duty. However we find that the appellant were regularly filing their ER-2 returns. The appellant filed all

the particulars mentioned in the ER-2 returns. The appellant have disclosed the fact that the goods were cleared into DTA also. The department also carried out various audits from time to time during which the appellant have disclosed all the details asked for. Thus, all the required facts were in the knowledge of the department. It is well settled that when facts are known to the department there cannot be suppression of facts on the part of the appellant. We also noticed that the appellant have categorically informed the Superintendent of Central Excise vide letter dated 8.12.2008 regarding computation of excise duty. The appellant have submitted computation of duty vide their letter dated 7.7.2009 and 28.2.2010. Thus, when computation of duty paid by the appellant has been submitted to the department, all the facts have been disclosed to the department. Further, the fact that appellant were not paying SAD while paying excise duty under Sl.No.2 of Notification No.23/2003-CE was specifically disclosed to the Central Excise department in the above letters. The Show Cause Notice dated 2.8.2011 fails to prove that the appellant have acted with any malafide intent. Even the Show Cause Notice does not give any evidence to show that the appellant have acted with malafide intent. There is nothing on record to show the existence of fraud, collusion or suppression of materials facts or information. There is no iota of evidence on record to prove that the appellant have wrongly availed the exemption benefit under Sl. Nos. 3 and 4 of Notification No. 23/2003-CE specifically with intent to evade payment of duty. Therefore, as the ingredients of proviso to Section 11A(1) of the Central Excise Act, 1944 are not present in the present matter, hence the larger period of limitation is not invocable in the facts of the present matter.

4.23 We also find that, the issue involved in this matter is purely involves interpretation of statutory provisions. Hence, invocation of extended period

of limitation is incorrect. It is well settled that where the issue involved is purely legal in nature, extended period of limitation cannot be invoked.

4.24 Accordingly, extended period of demand was not invokable in the present proceedings. Hence, the demand for the extended period is not sustainable on limitation also, apart from merit of the case.

5. Based on the above observations, we set aside the impugned order and allow the appeals with consequential relief, if any, as per law.

(Pronounced in the open court on 04.11.2024)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)