FAX : 011-26108426

REGISTERED / AD

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

Old Red Building ~~Room No.210 & 220,2nd Floor~~, 38,M.G.Marg, Civil Lines

~~Office Of Commissioner Of Central Excise,Customs,Service Tax~~, Allahabad-211001

~~ABC APPEAL BRANCH~~

Dated: 17/09/2015

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. A/ 70010-11 /2015- dated 18/09/2015

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section 35-C(1) of the Central Excise and Salt Act, 1944.

Asstt. Registrar(~~ABC~~ Appeal Branch)

Application	Appeal	Name and Address of Appellant
	E/1558 726/07	COMMISSIONER OF CNENTRAL EXCISE, LUCKNOW 7-A, ASHOK MARG, LUCKNOW UP
	Name and Address of Respondent	SRIVASTAVA INTERNATIONAL LTD VILLAGE-GODHRAULI,P.O-AUNG, DISTT-FATEHPUR(UP)

Other Appellants and Respondents as per Annexure

Copy To

3Advocate(s) / Consultant(s): SH AMIT AWASTHI,ADV
H-1, IST FLOOR,RADHEY APARTMENT
PLOT NO 7/116A, SWAROOP NAGAR,
KANPUR..

4 Bar Association, CESTAT, Delhi
5 Director Publications, Customs, Excise. I.P. Estate, Delhi
6 M/s Centax Publications Pvt. Ltd., 1512-B, Bhisham Pitamah Marg, New Delhi-3
7 Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17
8 Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005
9 Easy Service Tax Online Dot Com Pvt. Ltd., 407A, Iscon Mall, Satellite Road, Ahmedabad-15
10 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)
11 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070
12 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad – 38
13 The ICFAI society, 52, Nagarjuna Hill, Punjagutta Hyderabad.-500082
14 C.D.R. 15 Office Copy 16 Guard File

Asstt. Registrar
Regional Bench, Allahabad

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
CIRCUIT BENCH AT ALLAHABAD

Appeal No. E/155 & 726/2007

(Arising out of Orders-in-Appeal No. 136-CE/2006 dated 17.8.2006 and No. 87-CE dated 30.6.2006 passed by the Commissioner of Central Excise & Service Tax (Appeals), Lucknow).

For approval and signature:

Hon'ble Shri P.S. Pruthi, Member (Technical)
Hon'ble Shri S.S. Garg, Member (Judicial)

1.	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	:	No
2.	Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	:	Yes
3.	Whether their Lordships wish to see the fair copy of the order?	:	Seen
4.	Whether order is to be circulated to the Departmental authorities?	:	Yes

Commissioner of Central Excise, Lucknow	Appellant
Vs.	
M/s Srivatsa International Ltd.	Respondent

Appearance:

Shri Govind K Dixit, Addl. Commr. (AR) Shri B.B. Sharma, Asstt. Commr. (AR)	for Appellant
Shri Amit Awasthi, Advocate	for Respondent

CORAM:

SHRI P.S. PRUTHI, MEMBER (TECHNICAL)
SHRI S.S. GARG, MEMBER (JUDICIAL)

Date of Hearing: 16.09.2015

Date of Decision: 18 .09.2015

F.O. ORDER NO. 70010 - 70011/2015

Per: P.S. Pruthi

These appeals arise from Orders-in-Appeal No. 156-CE/2006 dated 17.8.2006 and No. 87-CE dated 30.6.2006 passed by the Commissioner of Central Excise & Service Tax (Appeals), Lucknow.

2. The facts are that the appellant are a 100% EOU manufacturing textile and textile articles. They had permission from Development Commissioner for DTA sales. On such sales, they paid Basic Customs duty, Edu. Cess under the provisions of Section 3(1) proviso of the Central Excise Act, 1944. Under the proviso to this section, the duty payable on any excisable goods manufactured by a 100% EOU is equal to the aggregate of duties of customs leviable on like goods produced or manufactured outside India, if imported into India. Thus, the duty leviable in the present case includes CVD payable under the Customs Tariff Act apart from Basic Customs duty and cess. However, the appellant claimed exemption from payment of CVD under Notification No. 30/04 dated 9.7.2004 issued under Section 5A(1) of the Central Excise Act. The department's contention was that exemption under Section 5A(1) is not applicable to the appellant in view of the proviso to Section 5A(1). The adjudicating authority held that CVD is, therefore, payable at the tariff rate. In appeal proceedings, the Commissioner (Appeals) framed a question for determination as under: -

> "Whether denial of exemption under Notification No. 30/2004-CE dated 9.7.2004 to a 100% EOU for payment of duty in terms of proviso to Section 3(1) of Central Excise Act, 1944 on its clearances in DTA, is sustainable."

The Commissioner (Appeals) held that the appellants are entitled to avail the exemption under Notification No. 29/2004 and not under Notification No. 30/2004. He accordingly set aside Order-in-Original and remanded the matter for re-quantification of duty in terms of Notification No. 29/2004.

3. Revenue is in appeal before us on the ground that as there is no specific mention under Notifications No. 29/2004 and 30/2004 to the effect that the exemptions shall apply to excisable goods produced by a 100% EOU, therefore in terms of provision to section 5A(1), the benefit of both Notifications No. 29/2004 as well as 30/2004 is not admissible.

4. In the Cross-Objections filed in Appeal |No. E/155/2007, the respondent contended that the benefit of Notification No. 30/2004 would be admissible and the proviso to section 5A(1) does not pose a bar as held by the Hon'ble Delhi High Court in the case of *Plastic Processors Vs. Union of India – 2002 (143) ELT 521* which is affirmed by the Hon'ble Supreme Court in *2005 (186) ELT 827 (SC).*

5. Heard both sides and considered the submissions.

6. The facts of the case have been brought out in the above paras. We find that the central issue is whether the proviso to Section 5A(1) will be applicable in the present case while considering application of Notifications 29/2004 and 30/2004. For sake of convenience, Section 5A(1) is reproduced below: -

> "(1) If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by notification in the Official Gazette exempt generally either absolutely or subject to such conditions (to be fulfilled before or after removal) as may be specified in the notification, excisable goods of any specified description from the whole or any part of the duty of excise leviable thereon:
>
> **Provided** that, unless specifically provided in such notification, no exemption therein shall apply to excisable goods which are produced or manufactured –

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(i) in a free trade zone or a special economic zone and brought to any other place in India; or

(ii) by a hundred per cent export-oriented undertaking and brought to any place in India."

6.1 Duties of Central Excise are levied under Section 3(1) of the Central Excise Act. Duties of excise on excisable goods produced by a 100% EOU are levied under proviso to Section 3(1). This duty shall be equal to the aggregate of customs duties. While considering the aggregate of customs duties on like goods produced or manufactured outside India if imported into India, one component of the duties is CVD. The CVD is payable under Section 3(1) of the Customs Tariff Act and is equal to the excise duty leviable on like articles produced or manufactured in India. Prima facie, the CVD in the present case would be equal to the duty leviable under Notification No. 29/2004 or 30/2004 as may be applicable. The objection raised by the Revenue is that the benefit of this Notification will not be applicable in view of the proviso to Section 5A(1) of the Central Excise Act, which is reproduced above. We find that there has been total mis-appreciation of this provision of law. Section 5A(1) only grants power to exempt excise duty leviable under Section 3(1) of the Central Excise Act. The proviso to section 5A(1) is only to state that even if there is exemption from Central Excise duty under section 3(1) on any goods produced in India, it will not imply that the exemption from Central Excise duty will also be automatically available on goods produced and cleared by a 100% EOU. It is quite obvious from this proviso that, by virtue of exemption under Section 5A(1), goods produced by a 100% EOU do not get automatically exempted. This is so because the duty is payable by a 100% EOU is equal to the aggregate of customs duties. In other words, even if excise duty is Nil on a product, the excise duty on a product manufactured by 100% EOU will not be Nil. Such product will still have to bear basic customs duty and cess etc on such customs duty. The duty payable on goods produced and cleared by a 100% EOU is to be seen in terms of provisions of Section 3(1) and while calculating this duty, the CVD component is to be calculated on the basis of excise duty payable on such products produced in India. And if such duty payable is a concessional rate of duty in terms of a Notification, the same notification will apply for calculating CVD on goods produced and cleared by a 100% EOU. The findings of the Commissioner (Appeals) on this issue are not very clear. However, in view of our analysis, we agree with his conclusion that the proviso to section 5A(1) of the Central Excise Act is only applicable to the implementation of main Section 3(1). Our view finds support in the judgment of Hon'ble Delhi High Court in the case of *Satya Metals Vs. Union of India – 2013 (290) ELT 514 (Del)* in which in para 20, it was held that *"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.)."*

6.2 The learned AR contended that the judgment in the case of *Plastic Processors (supra)* was in the context of Board Circular 30/2000 dated 10.5.2000 which was quashed by the Hon'ble High Court to the extent it imposes liability of CVD. We find that in view of the detailed discussion and interpretation of the relevant provisions of law made by us above, the Hon'ble High Court judgment would still hold good in the context of

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the present facts before us. Our view is also supported by the Hon'ble High Court judgment in the case of *Satya Metals (supra)*.

6.3 Although the Commissioner (Appeals) has held that the proviso to Section 5A is not applicable, he has erred in holding that the benefit of Notification No. 30/2004 will not be available. We find that Notification No. 30/2004 is conditional. To be entitled to the concession under this notification, the assessee should not have taken credit of duty on the inputs or capital goods. We find that in the case of goods imported by a 100% EOU, the condition cannot be applied nor can it be enforced. The Revenue's appeal itself says that this condition is for indigenous manufacturer. This condition is obviously not applicable to goods imported. Therefore, we see no reason to deny the benefit of this notification. Reliance is placed on Hon'ble Supreme Court judgment in the case of *SRF Ltd. Vs. Commissioner - 2015 (318) ELT 657 (SC)*. In a similar situation and in the context of similar circumstances of Notification No. 6/2002, the Apex Court held that the assessee were entitled to the exemption from payment of CVD in terms of Notification No. 6/2002 as no credit could be availed nor was availed in respect of the imported goods.

7. In view of the above discussion, the Revenue's appeals are dismissed. The impugned orders are set aside and benefit of Notification No. 30/2004 dated 9.7.2004 is held to be admissible.

(Pronounced in Court on 18-9-15)

Sd/-
(S.S. Garg)
Member (Judicial)

Sd/-
(P.S. Pruthi)
Member (Technical)

Certified True Copy
15.10.15