CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
CHENNAI

Appeal No.E/133/2011

[Arising out of Order-in-AppealNo.81/2010dt.20.12.2010passed by the Commissioner of Customs &Central Excise (Appeals), Salem]

Commissioner of Central Excise, Salem Appellant

Versus

Sri Gugan Mills Respondent

Appeal No.E/335/2011

[Arising out of Order-in-Appeal No.24/2011 dt.28.3.2011 passed by the Commissioner of Customs &Central Excise (Appeals), Salem]

Commissioner of Central Excise, Salem Appellant

Versus

Saradha Terry Towels Ltd. Respondent

Appearance:

Shri R.Subramanian, AC (AR)
For the Appellant

Ms. D.Naveena, Advocate
For the Respondent

CORAM :

Hon'bleMs. Sulekha Beevi C.S. Member (Judicial)
Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of hearing / decision : 10.5.2018

Per Bench

FINAL ORDER No.41711-41712/2018

The issue in these appeals being the same, they were heard together and disposed by this common order. The facts in Appeal No.133/2011 is narrated for reference.

The respondents are manufacturers of Terry Towels or Terry Fabrics of cotton. As per para 6.8 of Foreign Trade Policy, they are allowed to clear 50% of FOB value of exports to DTA. The rate of duty for clearances made to DTA is governed by notification No.23/2003 CE dt.31.3.2003 and the duty has to be paid as per the calculation mentioned in the said notification. It was noticed that respondents cleared the Terry Towels to DTA by calculating the additional duty of excise (CVD) at the effective rate of 4% adv. As under notification No.29/2004 CE dt.9.7.2004 issued under Section 5A of Central Excise Act, 1944. Department was of the view that appellants cannot avail the concessional duty as under Notification 29/2004 and are liable to pay @ 8% as per tariff rate against CTH 63026000 of Central Excise Tariff Act, 1985. Show Cause Notices were issued which after adjudication confirmed the demand, interest and penalties. In appeal, the Commissioner (Appeals) set aside the same. Hence these appeals by department.

2. The Ld.AR, Sh.R.Subramanian reiterated the grounds of appeal. The notification 29/2004 does not state specifically mention that it is applicable to EOU and therefore as per Section 5A, of Central Excise Act, 1944, the concessional rate of duty of the said notification is not applicable to EOU. The respondents are therefore liable to pay the merit duty.

3. On behalf of respondent, Ld.Counsel Ms.Naveena Durairaj submitted that the issue stands settled by various decisions. She argued that respondents have cleared the goods to DTA by following the notification 23/2003-CE (Sl.No.2). Thus while calculating the aggregate of duties, respondents have taken the effective rate of duty

which is 4% as under notification 29/2004 dt.9.7.2004. The contention of the department that being 100% EOU, as per provisions of Section 5A, exemption notification 29/2004 is not applicable is legally correct. She relied on the decisions in the case of ***CCE Vs Shanta Biotechnics Ltd 2010 (259) ELT 447 (Tri.-Bang.) and CCE Vs Srivatsa International Ltd 2015 (326) ELT 699 (Tri.-All.)***

4. Heard both sides.

5. For better appreciation, the relevant portion of Sec.5A is extracted as under :-

> "*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 :*
>
> <u>*Provided that, unless specifically provided in such notification, no exemption therein shall apply to excisable goods which are produced or manufactured ----*</u>
>
> *(i) in a [free trade zone [for a special economic zone]] and brought to any other place in India; or*
>
> *(ii)* <u>*by a hundred percent export-oriented undertaking*</u> *and [brought to any place in India]*

Explanation. --- *In this proviso, ["free trade zone", ["special economic zone"]] and "hundred per cent export-oriented undertaking" shall have the same meanings as in Explanation 2 to sub-section (1) of section 3".*

5.1 Undisputedly respondents are 100% EOU. The argument of the department is that as per Section 5A unless a notification specifically mentions that the same is applicable to EOU, the respondents cannot avail the benefit of such notification. Section 5A has to be read alongwith notification 23/2003 which grants exemption to DTA clearances made by EOU. Sl.No.2 of this notification is reproduced for better understanding.

Sr.No.	Chapter or heading No. or sub-heading No.	Description of Goods	Amount of Duty	Condi-tions
(1)	(2)	(3)	(4)	(5)
2.	Any Chapter	All goods	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, Electronic Hardware Technology Park unit or Software Technology Park 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 : [* * * *] *Illustration* .- Assuming product X has the value of Rs.100 under section 14 of the Customs Act, 1962 and is chargeable to basic custom duty of 25% *ad valorem,* additional duty of 16%*ad valorem* and special additional duty of 4% *ad*	2

			valorem. The computation of duty required to be paid would be as follows : Basic Customs duty = Rs.25/- Value for the purpose of calculation of additional duty = Rs.100/- + Rs.25/- = Rs.125/- Additional duty = 16% of Rs.125/- = Rs.20/- Value for the purpose of special additional duty if leviable = Rs.100/- + Rs.25/- + Rs.20/- = Rs.145/- Special additional duty if leviable = 4% of Rs.145/- = Rs.5.8/- Total duty payable but for this exemption = Rs.25/- + Rs.20/- + Rs.5.80/- = Rs.50.80/- 50% of aggregates of the duties of customs =50% of Rs.50.80/- = 25.40 Duty required to be paid in accordance with this notification is Rs.25.40/- provided it is not less than the duty of excise leviable on like goods produced or manufactured outside the oriented undertaking etc.	

5.2 It would be worthwhile to note that as per proviso stated in Sl.No.2, the duty payable in accordance with this notification shall not be less than the duty of excise leviable on the like goods produced or manufactured outside the EOU, which is specified in the said Schedule read with any other relevant notification issued under sub section (1) of Section 5A of Central Excise Act, ibid. Thus for calculating the duty of excise for the purpose of discharging CVD liability, any notification issued in respect of the goods cleared by EOU also has to be taken into consideration. The respondents have thus calculated the CVD on the basis of the concessional rate of duty as in notification 29/2004 or 30/2004. They have not directly claimed the benefit of concessional rate of duty of 29/2004 or 30/2004, instead they have adopted the concessional rate for the purpose of calculation of CVD for claiming exemption for clearances to DTA as per notification 23/2003.

5.3 In ***UOI vs Plastic Processors 2005 (186) ELT 427 (S.C.),*** the hon'ble Apex Court maintained the decision of the Hon'ble Delhi High Court that CVD was payable at effective rates and not at tariff rates on clearances made by 100% EOU into DTA. In **Lucky Star International vs UOI,** a similar issue was analysed by the Hon'ble High Court of Gujarat and the Circular No.38/2000 Cus – dt.10/5/2000 was quashed. The decision was maintained by the Hon'ble Apex Court by dismissing the SLP filed by department as reported in 2002 (141) ELT 490 (S.C.)

5.4 The very same issue was considered by the Tribunal in the case of ***CCE, Lucknow vs Srivatsa International Ltd 2015 (326) ELT 699 (Tri.-All.).*** The relevant portion is reproduced as under :

> "**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 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 [Himachal Pradesh] High Court in the case of *Satya Metals* v. *Union of India* - 2013 (290) E.L.T. 514 (H.P.) 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.)."*

5.5 Similar view was taken in **Shanta Biotechnics Ltd** (supra). The relevant portion read as under :

"7. The issue involved in this case is whether the duty payable by the assessee respondent shall be determined exactly in the same manner as is done in respect of imported goods, as the clearances effected by the assessee respondent is a 100% export oriented. The provisions of clearances made to DTA would apply to the current case, which is mandated under provisions of Section 3(1) of the Central Excise Act, 1944. It is seen from the Order-in-Original that the Adjudicating Authority has recorded the following findings while setting aside the proceedings initiated by the Show Cause Notices.

"I have gone through the decisions and cases relied and referred in their defence reply. I find that as per proviso to Section 3(1) of the Central Excise Act, the duties of excise charged on goods sold in DTA by a 100% EOU is equal to the aggregate of the duties of Customs leviable under the Customs Act, or any other law in force, on like goods produced or manufactured outside India, if imported into the country. In other words, the duty payable shall be determined in exactly the same manner as is done in respect of imported goods. This implies that for determining the duties of excise under proviso to section 3(1) of the Central Excise Act, 1944 on the goods cleared to the DTA by the EOUs, the exemption under the relevant Customs Notifications and Excise Notifications, if any, have to be provided. Therefore, I am of the view that the assessee is liable to pay only the effective rate of Additional Duty of Customs under section 3(1) of the Customs Tariff Act on clearances of the goods into the DTA. This view is supported by the ratio of the decisions referred and relied briefly dealt as under.

(a) *U.O.I.* v. *Plastic Processors* [2005 (186) E.L.T. A27 (S.C.)]. The Apex Court maintained the decision of the Delhi High Court that CVD was payable at effective rates and not at tariff rate on clearances by a 100% EOU into the DTA. The Delhi High Court [2002 (143) E.L.T. 521 (Del.)] had disposed of certain writ petitions challenging the legality of Circular No. 38/2000-Cus. dated 10th May, 2000 issued by the Central Board of Excise & Customs, issued to clarify doubt regarding levy of Additional Duty of Customs (CVD) on Domestic Tariff Area (in short DTA) sale of reprocessed plastic agglomerates/granules (reprocessed out of plastic scrap) by Export Oriented Units (in short EOU)/Export Processing Zone (in short EPZ) units. In paragraph 3 of the circular, it was *inter alia* stated as follows :

"In so far as levy of additional duty of customs (CVD) on imports of reprocessed plastic materials viz., plastic granules/agglomerates, is concerned, condition (1) above will not be satisfied because the reprocessing has not been done in India. Thus, in case of normal imports of reprocessed plastic materials, the importers/domestic manufacturers are liable to pay, among other duties, additional duty for customs (CVD). It, therefore, follows that no CVD exemption will be available when reprocessed plastic materials are cleared in Domestic Tariff Area (DTA) by EOUs and EPZ units. In other words, the plastic processor EOUs/EPZ units are liable to pay, among other duties, excise duty equivalent to CVD payable on imported reprocessed plastic materials (e.g. plastic granules/agglomerates) in respect of their DTA clearances of such materials/goods."

The Delhi Court relied upon the decisions of the Supreme Court in *Hyderabad Industries* [1999 (108) E.L.T. 321 (S.C.)] and *Thermax Private Limited* [1992 (61) E.L.T. 352(S.C.)] and held as under :

"8. As observed in the aforesaid quoted portions by the Apex Court, for the purpose of attracting additional duty under Section 3 of the Tariff Act, on the import of a manufactured or produced article, the actual manufacture or production of a like article in India is not necessary. Said provision specifically mandates that CVD will be equal to the excise duty for the time being leviable on a like article if produced or manufactured in India. This position was also elaborated in Thermax Private Limited case (supra).

9. In essence, what has to be imagined is that importer had manufactured the goods in India and then the amount of excise duty that he would have called upon to pay in that event has to be determined.

10. In view of the above discussion, the inevitable conclusion is that the impugned circular is not in accordance with law, direction contained in it to make assessment in a particular fashion only is indefensible. In the result, impugned Circular No. 38/2000-Cus. dated 10th May, 2000" is quashed to the extent it imposes the liability of CVD."

(b) *CCE Jaipur* v. *Maiden Trading Company (P) Limited* - 2001 (132) E.L.T. 431 (Tri.-Delhi) —"Clearances to Domestic Tariff Area (DTA) to be taken as produced in India - Benefit of exemption under Notification Nos. 5/98-C.E. dated 2-6-1998 and 5/99-C.E. dated 28-2-1999 available and no counterveiling duty leviable on such goods". The CESTAT, in the aforesaid decision, relied upon the decisions of the Apex Court in *Hyderabad Industries* [1999 (108) E.L.T. 321 (S.C.)]; *Thermax Pvt. Limited* v. *Collector* [1992 (61) E.L.T. 352(S.C.) and *Varsha Exports* v. *UOI* - 2000 (40) RLT 9 (Guj.)

(c) *Ratnagiri Textiles Ltd.* v. *Commissioner of Central Excise, Jaipur-II* [2003 (161) E.L.T. 975 (Tri.-Del.) :- The CESTAT relied upon the earlier decision of the Hon'ble Gujarat High Court in the case of *Varsha Exports* and *Others* v. *UOI* and *Others* - 2000 (40) RLT 9 (Guj.) and letter F. No. 305/113/94-FTT, dated 19th February, 1998 of the Central Board of Excise and Customs, to hold that the additional duty of Customs (CVD) was payable

> at effective rate and not at tariff rate in the case of clearance of goods by an 100% EOU in the DTA. Appeal filed by the department in Supreme Court against the decision of the High Court, was dismissed. The Tribunal also relied on Board's clarification in letter F. No. 305/113/94-FTT dated 19th February 1998 which laid down that effective rate of duty was payable."
>
> **8.** It can be seen from the above reproduced findings of the Adjudicating Authority that he has correctly followed the law as has been decided by the Tribunal and upheld by the higher judiciary. There is no dispute that the goods, which are manufactured and cleared by the assessee, are exempt from payment of Central Excise Duty under Notification 4/2006-C.E."

5.6 Taking note of facts and following the decisions as above, we are of the view that Commissioner (Appeals) has correctly appreciated the facts and applied the law to reach the conclusion in setting aside the demand.We find no grounds to interfere in the impugned order. The appeals filed by department are dismissed.

(Operative part of the order pronounced in open court)

(Madhu Mohan Damodhar)	**(Sulekha Beevi C.S)**
Member (Technical)	**Member (Judicial)**

vsr