

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, CHENNAI

REGIONAL BENCH – COURT NO.III

EXCISE APPEAL NO.258 of 2009

(Arising out of Order-in-Original No.02/2009 dated (Commr-De-novo) dated 30.01.2009 passed by Commissioner of Central Excise, Coimbatore)

M/s.BAPL Industries Ltd.

Appellant

Bhuradia Chambers,
123/1, Bharathi Park Road No.2,
Coimbatore 641 043.

Vs

The Commissioner of GST & Central Excise,

Respondent

Coimbatore Commissionerate,
No.6/7, ATD Street, Race Course Road,
Coimbatore 641 018.

AND

EXCISE APPEAL NO.284 of 2011

(Arising out of Order-in-Appeal No.11/2011 dated 21.02.2011 passed by Commissioner of Customs, Central Excise (Appeals), Coimbatore)

M/s.BAPL Industries Ltd.

Appellant

S.F. No.80/2, Nallatipalayam Village,
Coimbatore 641 043.

Vs

The Commissioner of GST & Central Excise,

Respondent

Coimbatore Commissionerate,
No.6/7, ATD Street, Race Course Road,
Coimbatore 641 018.

APPEARANCE:

Shri M. Karthikeyan, Advocate for the Appellant
Ms. Sridevi Taritla, ADC (AR) for the Respondent

CORAM

Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)
Hon'ble Shri Raju, Member (Technical)

FINAL ORDER No. 40141-40142 / 2022

Date of Hearing : 18.04.2022
Date of Pronouncement: 21.04.2022

Per : Sulekha Beevi C.S

Brief facts of the case are that the appellants who are a 100% EOU and holding Central Excise Registration was found to have cleared goods into Domestic Tariff Area (DTA) beyond their entitlement and without payment of appropriate duty. Show cause notices were issued proposing to demand the differential duty along with interest and for imposing penalties. After due process of law, the original authority confirmed differential duty along with interest and held the goods liable for confiscation. Penalties were also imposed. Aggrieved by such orders, the appellants are now before the Tribunal.

2. Ld.Counsel Shri M. Karthikeyan appeared and argued for the appellant. His arguments are as under :

2.1. Appellant is an EOU engaged in the manufacture of cotton yarn, etc. As per the EXIM Policy 1997-2002, EOUs were entitled to clear 25% of the value of production in DTA during the year 1998-99 and 50% of FOB value of Exports exports from 1999-2000 onwards. The Development Commissioner (DC) had permitted them to make the following DTA Sales during the year 1998-99 to 2001-02 based on the physical exports made by the appellant.

Year	FOB Value of Exports	DTA sale Entitlement /Allowed	Reference
1998-99	Nil	Rs.65.83 Lacs	Advance DTA Sale permitted vide DC letter dated 8.10.98
1999-00	Rs.278.40 Lacs	Rs.73.37 Lacs (139.20 -65.83)	DC letter dated 30.8.2000
2000-01	Rs.39.23 Lacs	Rs.19.61 Lacs	DC letter dated 25.2.2002

2001-02 (Up to Sept 01)	Rs.107.95 Lacs	Rs.53.97 lacs	DC letter dated 11.12.2001
Total	Rs.425.58 Lacs	Rs.212.78 Lacs	

2.2 Appellant was issued with two SCNs dated 4.10.2000 and 7.2.2003 wherein it was proposed to demand differential duty of Rs.32,87,981/- for the period 1999-2000 and 2000-2001 and Rs.11,33,862/- for the period January to March 2002 respectively on the ground that the appellant has made excess DTA clearance of Rs.83,94,770/- and Rs.52,69,176/- over and above their DTA Sale Entitlement respectively and the appellant is not entitled to include the deemed exports made by them in the FOB Value of exports for the purpose of DTA Sale Entitlement in terms of Circular dated 7.4.2000.

2.3. The details of DTA Sale Entitlement, DTA Sales made and Deemed exports made during the period of demand covered under the above said first SCN are as follows:

Year	DTA sale Entitlement /Allowed	Actual DTA Sales made	Excess DTA sales made	Deemed Exports made
1998-99	Rs.65.83 Lacs	Rs.59.52 lacs	Nil	Rs.32.92 lacs
1999-00	Rs.73.37 Lacs (139.20 -65.83)	Rs.80.73 lacs	Rs.1.05 lacs	Rs.325.57 Lacs
2000-01 (up to June)	Rs.19.61 Lacs	Rs.23.60 lacs	Rs.3.99 lacs	Rs.640.63 lacs
Total	Rs.158.81 Lacs	Rs. 163.85 lacs	Rs.5.04 lacs	

2.4. Though the excess DTA sales over and above the DTA sale entitlement permitted against the physical exports by the Development Commissioner is only Rs.5.04 lacs, the SCN alleged that the appellant had made excess DTA sale of Rs.83,94,770/- by alleging that during the year 1998-99 the appellant were eligible for a DTA Sale only to the extent 25% of the exports made and actually the appellant had made

Nil Exports during the said year but have sold in DTA to the extent of Rs.59.52 lacs as against the advance DTA sale permission of Rs.65.83 lacs which is required to be adjusted against future entitlement. From the year 1999-2000 onwards the appellant is entitled to sell in DTA up to 50% of the value of exports which worked out to Rs.139.20 and the DC himself had adjusted the advance DTA sale value of Rs.65.83 lacs from such entitlement and allowed DTA sale of Rs.73.37 lacs for the said year. Without accepting the same, the SCN has re-calculated the entitlement and determined the excess sale in DTA as proposed/confirmed which is not correct and not legally sustainable at all.

2.5. Secondly, it is alleged that the clearances made to another EOU which is reckoned as deemed exports and which is considered for fulfilment of stipulated export obligation/NFEE cannot be considered for determining the DTA Sale entitlement.

2.6. Appellant had challenged the above said circular dated 7.4.2000 of the revenue denying DTA Sale Entitlement on deemed exports as *ultra vires* the provisions of the EXIM policy and Foreign Trade (Development & Regulations) Act by filing a Writ Petition No.20451 of 2000 before the Hon'ble High Court of Madras which was dismissed by the Court vide its order 14.11.2006. Appellant preferred a Writ Appeal No. 15/2007 before the Hon'ble High Court of Madras and the Court vide its order dated 3.7.2007 held that since the respondent Commissioner had already issued SCN the appellant is free to raise all

the contentions in reply and the Commissioner shall consider all such contentions in accordance with law.

2.7. Commissioner had adjudicated the first SCN vide his Order in Original No.2/2009 dated 30.1.2009 confirmed differential duty of Rs.30,23,254/- along with interest by holding that the appellant has made excess DTA sales and the DTA Sale Entitlement cannot be determined based on deemed exports. He also rejected the plea of time bar and imposed equal penalty under Rule 173Q of CER.

2.8 In the meanwhile, the appellant had written to the Development Commissioner (DC) vide their letter dated 22.12.2008 and requested for considering the deemed exports value for the purpose of DTA Entitlement by relying on the decision of the Hon'ble Tribunal in the case of *Ginni International* which has been upheld by the Hon'ble Apex Court. The DC vide its letter dated 23.3.2009 denied the request of the appellant in view of the clarification dated 26.12.2008 issued by the Ministry of Commerce. The appellant challenged the above letter dated 23.3.2009 vide a Writ Petition No. 12794 of 2010 before the Hon'ble High Court of Madras the Court vide its order dated 3.11.2010 directed the appellant to file an appeal against the said letter with the DGFT who shall consider the claim in the context of the decision of the Hon'ble Supreme Court in the case of *Virlon Textile Mills*.

2.9. Accordingly, the appellant preferred an appeal before DGFT which was transferred to the Appellate Committee in the Dept of Commerce who vide their order dated 21.9.2011 rejected the appeal.

Since there is no statutory appeal remedy available against such order of the Appellate Committee, the appellant again preferred a Writ Petition No.27387 of 2011 before the Hon'ble High Court of Madras who vide their order dated 14.7.21 directed the Hon'ble CESTAT to look into the principles laid down by the Hon'ble Apex Court in the case of *Virlon Textiles* and to decide the appeals pending before them accordingly.

2.10. Appellant submits that the quantification of DTA Sale done in the impugned SCN without considering the DTA Sale permitted by the DC itself is not sustainable. Further, the Commissioner had traversed beyond the SCN and determined the excess DTA Sale made in a manner not put forth in the SCN is not at all sustainable and consequently the demand of duty confirmed in this regard merits to be set aside.

2.11. Secondly, on the aspect of determination of DTA Sale Entitlement by taking into account the deemed exports made, appellant submits that the Hon'ble Apex Court in the case of *Virlon Textiles* had held in Para 7 of their decision that the Deemed Exports which was known as 'other supplies in DTA' was equated to physical exports which is the general rule for 100% EOU and this equation was necessary because other supplies in DTA gave certain benefits to the economy like preservation of foreign exchange, import substitution, savings of transportation costs and to provide competitiveness and level playing field for exporters. Accordingly, appellant submits that the value of deemed exports made by them is also required to be included in the

FOB value of exports for the purpose of determining DTA Sale entitlement at 50% and impugned orders denying the same merits to be set aside.

2.12 Hon'ble CESTAT in the case of *Ginni International Ltd* 2002 (139) ELT 172 (Tri-Del)) upheld the DTA Clearances determined based not only on the physical exports but also taking into account the deemed exports done and once the Development Commissioner permits such DTA sale the revenue cannot disallow the clearance. Further, in the case of *Amitex Silk Mills Pvt Ltd* - 2006 (194) ELT 344 (Tri Del) the identical issue was in consideration and in view of difference in opinion, the matter was referred to third member who had held similarly as held by the Apex Court in the *Virlon Textiles* and held that the Revenue has no reason to exclude the deemed exports while computing FOB value of Exports and the Revenue was in error in excluding the value of deemed exports. Both the above decisions of the Hon'ble Tribunal was challenged by the Revenue before the Apex Court and such appeals were dismissed by the Apex Court on 16.8.2007 by holding that the matters are squarely covered by the decision in the case of *Virlon Textiles*.

2.13 The appellant also wishes to place reliance on the following decisions which also squarely applies to the issue on hand.

- a) 2015 (321) ELT 436 (Guj) – Sabnam Synthetics - which has been approved by the Hon'ble Supreme Court – 2015 (321) ELT A199 (SC)
- b) 2011 (269) ELT 17 (Guj) – Shilpa Copper Wire Ind – which has also been approved by the Hon'ble Supreme Court – 2018 (361) ELT A84 (SC)

- c) 2017 (346) ELT 461 (Tri Ahd) – Shree Rohini Enterprises – which has also been approved by the Hon’ble Supreme Court – 2017 (346) ELT A137 (SC)
- d) 2005 (184) ELT 214 (Tri-Chn) – Jumbo Bags – which has also been approved by the Hon’ble Supreme Court – 2015 (324) ELT A190 (SC)
- e) 2016 (336) ELT A132 (SC) – Sanju Silk Mills
- f) 2014 (306) ELT 133 (Guj) – Anitha Synthetics
- g) 2019 (368) ELT 148 (Tri Ahd) – Surya Life Sciences Ltd
- h) 2018 (363) ELT 658 (Tri Chn) – General Optics

2.14 The Commissioner in the impugned order had rejected the plea of time bar raised by the appellant on the ground that the appellant had executed necessary bond. In this regard, the appellant wishes to place reliance on the decision of the Hon’ble High Court of Gujarat in the case of *Meghmani Dyes & Intermediates* reported in 2013 (288) ELT 514 (Guj.) wherein it has been held that when all the clearances made in DTA have been declared in the periodical returns filed, the Revenue’s contention that the details submitted in the Returns were not sufficient enough to find out whether the respondents exceeded the permissible limit of DTA clearance is not tenable in law. The above decision has been followed by the Hon’ble Tribunal in the case of Surya Life Sciences Ltd cited in the earlier para.

2.15 Appellant submits the second SCN also proposed to demand duty of Rs. 11,33,862/- for the period January to March 2002 only on the same grounds that they have made DTA sales in excess of entitlement and deemed exports cannot be considered for determining DTA sale entitlement. The Additional Commissioner of Central Excise, vide his

Order-in-Original No. 02/2010 dated 29.1.2010 has confirmed the entire demand of duty along with interest and has imposed penalty of Rs.1 lac under Rule 25 of CER. Appellant preferred an appeal before the lower Appellate Commissioner who vide his Impugned Order-in-Appeal 11/2011 CE dated 21.2.2011 rejected the appeal without prejudice to the outcome of the appeal preferred by the appellant before the DGFT as per the directions of the Hon'ble High Court of Madras. Appellant submits for the above reasons the above orders confirming the demand of duty of Rs.11,33,862/- along with interest and penalty is not sustainable and merits to be set aside accordingly.

2.16. Appellant also plead for cum tax benefit in case the entire demand of duty or a portion of the same is upheld.

3. In view of the above, he prayed that the appeal may be allowed.

4.1 Ld. A.R Ms. Sridevi Taritla supported the findings in the impugned order. She explained that as per para-9.9 (b) of EXIM Policy 1997-2002, the assessee is entitled to sell the final products upto 25% of value of production into Domestic Tariff Area that was amended to 50% of FOB value of exports from 1999-2000 onwards. For this purpose, the appellant had obtained permission from the Development Commissioner, MEPZ, Chennai who is the statutory authority to determine the DTA entitlement. The goods can be sold in DTA only on payment of applicable duties.

4.2 As per para (f) of guidelines of sale of goods in DTA, the DTA sale entitlement shall accrue only after the goods are physically exported during the relevant period as intimated to the Development Commissioner. However, on request made by the appellant, the Development Commissioner had permitted advance DTA sale for a total value not exceeding Rs.65.83 lakhs for the year 1998-99 vide letter dt. 08.10.1998 which included the value of Rs.82,125/- which had already been permitted. As per the guidelines, apart from the advance DTA sales permission for Rs.65.83 lakhs as stated above, the appellant obtained permission for DTA clearances for the year 1999-2000 for an amount of Rs.73.37 lakhs based on the export performance of Rs.278.40 lakhs after adjusting the advance DTA sale of Rs.65.83 lakhs already granted for the previous year. They also obtained permission for DTA clearance for the year 2000-2001 for an amount of Rs.19.61 lakhs vide Development Commissioner's letter dt. 25.02.2002. These permitted DTA sale entitlement can be availed within three years of the accrual of the entitlement which starts from the close of respective final year.

4.3 However, the appellant sold cotton yarn worth Rs.59,52,226/- into DTA in the year 1998-99 itself. They exported goods to the value of Rs. Rs.2,77,28,602/- in the year 1999-2000. They thus fulfilled their export obligation of Rs.2,38,08,904/- for the advance DTA sales entitlement.

4.4 As per the guidelines, advance sale entitlement is applicable only for the first year. It was seen that appellant sold the goods worth

Rs.80,72,823/- into DTA before the accrual of entitlement. The details of the DTA sales and exports made by appellant for the period 1998-2001 (upto June 2000) along with their DTA entitlement for the respective financial years are as under :

Year	DTA entitlement as per the permission given by DC, MEPZ	DTA Sales (Rs.)	Exports (Rs.)
1998-1999	Rs.65.83 lakhs	59,52,226	2,77,28,602
1999-2000	Rs.73.37 lakhs	80,72,823	1,56,855
2000-2001 (upto June)	Rs.19.61 lakhs	23,60,223	1,56,855

4.5 The clearance of goods effected by appellants against the permitted DTA entitlement is as under :

During 1998-99, the DTA entitlement was 25% of the export value and with effect from 1.4.1999, it was increased to 50%. The value of DTA clearances during 1998-99 was Rs.59,52,226/-. The export obligation during 1998-99 worked out to be Rs.2,38,08,904/- that is four times the value of DTA clearances of Rs.59,52,226/-. The actual FOB value of exports for 1999-00 and 2000-01 was Rs.2,78,85,457/-. After deducting the FOB value of Rs.2,38,08,904/- from the above said amount, the balance FOB value is Rs.40,76,553/-. For such amount, DTA entitlement at the enhanced rate of 50% FOB value for the year 1999-2000 is only Rs.20,38,276/- whereas the actual DTA sale effected by the appellant is Rs.1,04,33,046/- for the period 1999-00 and 2000-01 Thus, there is excess DTA sale of Rs.83,94,770/-. The duty liability on this excess DTA sale is worked out to be Rs.32,87,981/-.

4.6 Appellant had also cleared cotton yarn to another 100% EOU. They requested to consider the said clearances made to other EOUs as 'deemed export'. This has not been permitted by the Development Commissioner. In terms of Circular F.No.305/48/2000 FTT dated 7.4.2000 issued by CBEC, New Delhi, the deemed export cannot be considered as par with the exports made to foreign buyers and therefore such clearances were not taken into account for arriving at the entitlement for sales at concessional rate for DTA clearances. The demand confirmed is therefore legal and proper.

5. Heard both sides.

6. First issue that arises for consideration is whether the quantification of DTA sale value in the SCN without adjusting the advance DTA sale allowed by the DC is correct or not. Second issue is for determination of DTA sale entitlement, whether the 'deemed export' made by the appellant has to be included or not. According to the appellant, the quantification of duty on DTA sale has been done without considering DTA sale permitted by the Development Commissioner himself. It is also contended by the Ld. Counsel that the adjudicating authority has traversed beyond the SCN and determined the excess DTA sale in a manner which is not put forth in the SCNs. In page 63 of the appeal paper book the appellant has furnished the letter issued by the Development Commissioner dt. 08.10.98 in which they have been allowed to sell in DTA for a total value not exceeding Rs.65.83 lakhs, including the value of Rs.82,125/- already permitted vide letter dt. 02.09.1998 as advance DTA sale on trail production. The

quantification alleged in the SCN without considering the permitted DTA sale is erroneous.

7. The department has refused to include the deemed exports for DTA sale entitlement on the basis of Board circular dt. 7.4.2000 (supra). Needless to say that Board circular is not binding the Tribunal. The issue whether the deemed exports made by the appellant has to be included for determination of DTA sale entitlement has been considered in various decisions. In *CCE Vs Sabnam Synthetics Ltd.* - 2015 (321) ELT 436 (Guj.), the Hon'ble High Court had occasion to consider an identical issue. The relevant para reads as under :

“The Commissioner of Central Excise & Customs, Surat-II has filed this Tax Appeal under Section 35G of the Central Excise Act, 1944 proposing to formulate the following substantial questions of law for determination and consideration of this Court :

(a) Whether, the deemed export made by the noticee to other 100% EOU in the country in terms of para 9.20 of Exim Policy 1997-2002 were to be considered for the purpose of para 9.9(a), 9.9(b) and 9.20 of Exim Policy 1997-2002 after taking into consideration the definition of Export as described under Section 2(18) of Customs Act, 1962 as the term Export is neither defined in Exim Policy 1997-2002 nor in Central Excise Act, 1944?

(b) If Deemed Export cannot be treated as Export in terms of Notification No. 2/95 C.E., dated 4-1-1995, then can M/s. Sabnam Synthetics be permitted to clear goods in DTA against the Deemed Export?

2. This Court has issued notice on 29-1-2010 for final disposal making it returnable on 5-2-2010. An 29-1-2010 when Mr. Sanjay Sharma, full-time paid employee of the assessee was present. He informed that the authorized signatory of the assessee is not available for the week and hence the notice could not be served. Mr. Bhatt, however, submitted that issue involved in this Tax Appeal is similar to one which is involved in Tax Appeal No. 968/2008, which is being heard today. We have, therefore, considered Mr. Bhatt's submission even for this appeal too. Since Mr. A. Suryanarayan is appearing in Tax Appeal No. 968/2008, his submission on law point are considered even for this appeal.

3. It is the case of the Revenue that the Adjudicating Authority, after issuing the show cause notice and after considering the reply filed on behalf of the respondent-Assessee and after considering the submissions made by the learned Counsel appearing for the respondent-Assessee, has passed the Order-in-Original on 2-11-2001 directing the respondent-Assessee to pay an amount of Rs. 15,12,661/-, in terms of Section 11A(2) of the Central Excise Act, 1944. Another Order-in-Original was passed on 5-11-2001 determining an amount of Rs. 24,11,127/- in terms of Section 11A(2) of the Central Excise

Act, 1944. One more Order-in-Original was passed on 5-11-2001 determining the amount of Rs. 34,00,011/- payable in terms of Section 11A(2) of the Central Excise Act, 1944.

4. Being aggrieved by the said orders, the respondent-Assessee has preferred three separate appeals before the learned Customs, Excise and Gold (Control) Appellate Tribunal, Mumbai being Appeal Nos. E/3835/2001 to E/3837/2001 [[2003 \(152\) E.L.T. 123](#) (Tri. - Mumbai)]. These appeals came to be allowed by the Tribunal in favour of the assessee. After recording the facts of the case, the Tribunal observed that since the issue in dispute was, as to whether it is only actual or physical exports, or even deemed export can be taken into account. The pre-deposit of duty was required to be waived and appeals itself are required to be disposed of with the consent of the parties. The Tribunal, further, observed that in the case of *Ginni International Ltd. v. Commissioner of Central Excise, Jaipur* [[2002 \(139\) E.L.T. 172](#)], the Tribunal has held that when 100% EOU has submitted the permission to sell goods manufactured by them in DTA in accordance with para 9.9 of the Exim Policy, the Government cannot go beyond such permission and dispute the value of clearance allowed by the Competent Authority which in that case is Development Commissioner.

5. After reproducing the relevant extracts from the said decision, the Tribunal set aside the three orders passed by the Adjudicating Authority and allowed the said three appeals.

6. The order of the Tribunal is under-challenge in the present Tax Appeal. It appears that the Revenue has challenged the order passed in three different appeals in one Tax Appeal preferred before this Court.

7. Be that as it may, there was an understanding between the parties that the issue in question is identical with the issue involved in Tax Appeal No. 968/2008 and we have extensively dealt with this issue in the said appeal being Tax Appeal No. 968/2008, which has been also heard today and disposed of by a judgment of even date.

8. Following the said decision, we are of the view that no question of law, much less any substantial question of law arises, out of the order of the Tribunal.

9. We, therefore, dismiss this Tax Appeal.”

8. The above decision was affirmed by the Hon’ble Supreme Court as reported in *Commissioner Vs 2015 (321) ELT A199 (SC)*. The Hon’ble Apex Court while dismissing the SLP relied upon their decision in the case of *Virlon Textiles Mills Ltd. Vs CCE Mumbai* reported in 2007 (4) SCC 440.

9. The jurisdictional High Court vide judgement dt. 14.7.2021 quoted para -7 from the judgement in the case of *Virlon Textiles Mills*

Ltd. (supra) and directed the Tribunal to look into the applicability of the said decision with reference to the facts and circumstances of the case.

10. In the case of *CCE Vs Shilpa Copper Wire Industries* - 2011 (269) ELT 17 (Guj.) similar view was taken . Relevant para is reproduced as under :

“14. We have heard the learned Counsel appearing for the parties and after considering their submissions, we are of the view that the issue raised by the Revenue in the present Tax Appeal is squarely covered by the decision of *Amitex Silk Mills Pvt. Ltd.* (supra), *Commissioner of Central Excise v. Ginni International Ltd.* and *Sanghi Textiles Ltd. v. Commissioner of Customs & Central Excise* - [2006 \(206\) E.L.T. 854](#) (Tri.- Bang.). So far as the decision of the Tribunal in the case of *Amitex Silk Mills Pvt. Ltd.* (supra) is concerned, it is true that the appeal is admitted by the Apex Court, however, no stay was granted by the Apex Court. It is, however, more important to note that the decision of the Tribunal in the case of *Ginni International Ltd.* (supra) was also challenged before the Apex Court and the Apex Court vide decision reported in [2007 \(215\) E.L.T. A102](#) (S.C.) held while dismissing the Revenue’s appeal against the Tribunal’s order, that once Development Commissioner giving permission to the appellant, a 100% EOU, to sell goods in DTA up to a specified value, Revenue cannot go beyond the permission and dispute it holding that for fixing the limit only physical exports and not deemed exports should have been taken into account. It is also important to note that the decision of the Tribunal in the case of *Sanghi Textiles Ltd. v. Commissioner of Customs & Central Excise* (supra) was also challenged by the Revenue before the Apex Court and the Apex Court vide order dated 16-8-2007 dismissed the Revenue’s appeal. While dismissing the said appeal, Apex Court has referred to its decision in the case of *Ginni International Ltd.* (supra) and reiterated that the Tribunal in its impugned order had held that once Development Commissioner giving permission to the appellant, a 100% EOU, to sell goods in DTA up to a specified value. Revenue cannot go beyond the permission and dispute it holding that for fixing the limit only physical exports and not deemed exports should have been taken into account.

15. In view of the above settled legal position and considering the fact that the issue is settled by the Apex Court by those very judgments on which the Tribunal has placed reliance while deciding the case of the present respondent, we are of the view that no purpose will be served in keeping this matter pending, awaiting the outcome of the Apex Court’s decision in the case of *Amitex Silk Mills Pvt. Ltd.* (supra), especially when in two other matters, the Apex Court has already dismissed the appeals filed by the Revenue.

16. In the above fact situation, we are of the view that no question of law much less any substantial question of law, arises out of the order of the Tribunal and even if it arises, the answer is very obvious and we, therefore, hold that the Tribunal is justified and has not committed any substantial error of law in dismissing the appeal of the Revenue and confirming the order of the learned

Commissioner (Appeals) holding that the clearances made by one 100% EOU to another 100% EOU which are deemed exports are to be treated as physical exports for the purpose of entitling refund of unutilized Cenvat credit contemplated under the provisions of Rule 5 of the Cenvat Credit Rule, 2004.

17. We, therefore, hold that Tribunal is justified and has not substantially erred in law in dismissing the appeal of the Revenue and confirming the order of the learned Commissioner (Appeals) granting the refund of Rs. 5,21,009/-.

18. This appeal is, therefore, dismissed without any order as to costs.”

11. The said decision was upheld by the Hon’ble Apex Court reported in 2018 (361) ELT A84 (SC).

12. The Tribunal in the case of *Shree Rohini Enterprises* - 2017 (346) ELT 461 (Tri-Ahmd.) held that value of deemed export is to be treated as export sale determined on FOB value of export. The same was confirmed by the Supreme Court reported in 2017 (346) A137 (SC).

13. From the decisions cited above, it is clear that value of deemed export have also to be included for computing (FOB) value of exports. Following the same, we are of the view that the demand raised alleging that appellant has exceeded DTA sale entitlement is without any basis. The demand cannot sustain on merits.

14. The first show cause notice is issued invoking extended period. Ld. Counsel has relied upon the decision in the case of *Maghmani Dyes & Intermediates Ltd.* - 2018 (288) ELT 514 (Guj.) to argue that when the details of total quantity of goods exported are easily available for verification from the accounts, it cannot be said that appellant had indulged in fraud, collusion, wilful misstatement and suppression of facts with intention to evade payment of duty. We find force in this

argument. The entire details are available in the records. Further they have made several requests before the Development Commissioner showing their clearances and to include the deemed exports for computing DTA sale entitlement. On this ground, we find that first SCN for the period 1999-2000 issued invoking the extended period cannot sustain and has to be held as time-barred.

15. In the result, impugned orders are set aside. Appeals are allowed with consequential relief, if any, as per law.

(Pronounced in court on 21.04.2022)

(SULEKHA BEEVI C.S.)
Member (Judicial)

(RAJU)
Member (Technical)