

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHENNAI**

REGIONAL BENCH – COURT NO. I

Customs Appeal Nos. 40578 to 40587 of 2016

(Arising out of Order-in-Appeal C.Cus. II No. 37 to 46/2016 dated 13.01.2016 passed by the Commissioner of Customs (Appeals-II), 60, Rajaji Salai, Custom House, Chennai – 600 001)

M/s. HLG Trading

: Appellant

Space “E”, 3rd Floor, Surya Kiran Complex, 92, The Mall,
Ludhiana – 141 001

VERSUS

Commissioner of Customs (Chennai IV)

: Respondent

Custom House, No. 60, Rajaji Salai,
Chennai – 600 001

WITH

Customs Appeal No. 40096 of 2017

Customs Appeal No. 41828 of 2017

(Arising out of Order-in-Appeal C.Cus.-I No. 133 & 134/2016 dated 29.02.2016 passed by the Commissioner of Customs (Appeals-I), 60, Rajaji Salai, Custom House, Chennai – 600 001)

M/s. Aditya International Limited

: Appellant

Suite No. 226, Bussa Industrial Premises Co-op. Soc. Ltd.,
Century Bazar Lane, Prabhadevi,
Mumbai – 400 025

VERSUS

Commissioner of Customs (Chennai-VII)

: Respondent

New Custom House, Meenambakkam,
Chennai – 600 027

WITH

Customs Appeal No. 40032 of 2021

(Arising out of Order-in-Appeal Seaport C.Cus. No. II/994-995/2020 dated 29.10.2020 passed by the Commissioner of Customs (Appeals-II), 60, Rajaji Salai, Custom House, Chennai – 600 001)

Commissioner of Customs

: Appellant

Chennai-II Commissionerate
Custom House, No. 60, Rajaji Salai,
Chennai – 600 001

VERSUS

M/s. Aditya International Limited

: Respondent

Suite No. 226, Bussa Industrial Premises Co-op. Soc. Ltd.,
Century Bazar Lane, Prabhadevi,
Mumbai – 400 025

Appeal No(s).: C/40578-40587/2016-DB
C/40096 & 41828/2017-DB
& C/40032 & 40034/2021-DB

AND

Customs Appeal No. 40034 of 2021

(Arising out of Order-in-Appeal Seaport C.Cus. No. II/996-999/2020 dated 29.10.2020 passed by the Commissioner of Customs (Appeals-II), 60, Rajaji Salai, Custom House, Chennai – 600 001)

Commissioner of Customs

: Appellant

Chennai-II Commissionerate
 Custom House, No. 60, Rajaji Salai,
 Chennai – 600 001

VERSUS

M/s. Microweb Enterprises Private Limited

: Respondent

Suite No. 226, Bussa Industrial Premises Co-op. Soc. Ltd.,
 Century Bazar Lane, Prabhadevi,
 Mumbai – 400 025

APPEARANCE:

Shri B. Satish Sundar, Advocate
 Smt. J. Ragini, Advocate
 Shri M.A. Mudimannan, Advocate

for the Assessee(s)/Importer(s)

Shri R. Rajaraman, Assistant Commissioner
 Smt. Anandalakshmi Ganeshram, Superintendent

for the Revenue

CORAM:

HON'BLE MR. P. DINESHA, MEMBER (JUDICIAL)

HON'BLE MR. M. AJIT KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NOS. 40902-40915/2023

DATE OF HEARING: 03.10.2023

DATE OF DECISION: 12.10.2023

Order : [Per Hon'ble Mr. P. Dinesha]

A common issue being involved in all these appeals,
 they are taken up for common disposal, for the sake of
 convenience. The details of the appeals filed by the
 assessees/importers are as follows: -

Appeal No(s).: C/40578-40587/2016-DB
C/40096 & 41828/2017-DB
& C/40032 & 40034/2021-DB

Sl. No.	Appeal No.	Appellant	Impugned Order No. & Dt.	Bill-of-Entry No.	Date of Bill-of-Entry
1.	C/40578/16	HLG Trading	Order-in-Appeal C.Cus. II No. 37 to 46/2016 dated 13.01.2016	2079449	30.07.2015
2.	C/40578/16	HLG Trading		2079071	30.07.2015
3.	C/40578/16	HLG Trading		2079080	30.07.2015
4.	C/40578/16	HLG Trading		10415	31.07.2015
5.	C/40578/16	HLG Trading		10419	31.07.2015
6.	C/40578/16	HLG Trading		10420	31.07.2015
7.	C/40578/16	HLG Trading		10421	31.07.2015
8.	C/40578/16	HLG Trading		2246791	14.08.2015
9.	C/40578/16	HLG Trading		2247668	14.08.2015
10.	C/40578/16	HLG Trading		2286708	18.08.2015
11.	C/40096/17	Aditya International Ltd.	Order-in-Appeal C.Cus.-I No. 133 & 134/2016 dated 29.02.2016	2349159	24.08.2015
12.	C/41828/17	Aditya International Ltd.		2340218	24.08.2015

2.1 Brief facts which are relevant for our consideration are that the assessees are engaged in the business of wholesale trading of polyester spun yarn, blankets, fabric, knit fabrics, etc., covered under Chapters 50 to 63 of the Customs Tariff Act, 1975 / Central Excise Tariff Act, 1985, imported the same through Chennai Sea Port and also claimed the benefit of Notification No. 30/2004-C.E. dated 09.07.2004, as amended by Notification No. 34/2015-C.E. dated 17.07.2015 and Notification No. 37/2015-C.E. dated 21.07.2015. It is the case of the assessee-importer that since the Notification was not uploaded in the EDI system, the importer approached the assessment group for filing the bills-of-entry manually, but the same having not been accepted, they paid the duty under protest and thereafter preferred appeals before the first appellate authority.

2.2 The assessee-importers also appears to have approached the Hon'ble High Court of Judicature at Madras by filing Writ Petition in W.P. No. 24507 of 2015 and W.P. Nos. 26010-26011 of 2015 thereby challenging the *vires* of Notification Nos. 34/2015 and 37/2015 *ibid.*, and it is a matter of record that by means of an interim order, the Hon'ble High Court acceded to the request of the importer thereby permitting the importer to file manual bills-of-entry seeking the benefit of Notification No. 30/2004 *ibid.*

2.3 It is also a matter of record that vide judgement in the above Writ Petitions in the assessee's own cases dated 30.10.2015 reported in 2016 (331) E.L.T. 561 (Mad.), the Hon'ble High Court dismissed the batch of Writ Petitions, the first appellate authority vide respective impugned Orders-in-Appeal also rejected the appeals filed by the importers and it is against these orders that the present appeals have been preferred before this forum.

3.1 Heard Shri B. Satish Sundar, Ld. Advocate for the assessee at Sl Nos. 1 to 10 of the above table and Smt. J. Ragini, Ld. Advocate for the assessee at Sl. Nos. 11 and 12 therein. He would contend that the issue in these appeals lie on a very narrow compass and the only issue, according to him, is whether the assessee is entitled to the benefit of Notification No. 30/2004 *ibid.*, as amended. He would rely on the following decisions of the Hon'ble Apex Court to contend that identical issue has been decided by the Hon'ble Apex Court: -

Appeal No(s): C/40578-40587/2016-DB
C/40096 & 41828/2017-DB
& C/40032 & 40034/2021-DB

- i. *Hyderabad Industries Ltd. v. Union of India* [1999 (108) E.L.T. 321 (S.C.)]
- ii. *SRF Ltd. v. Commissioner of Customs, Chennai* [2015 (318) E.L.T. 607 (S.C.)]
- iii. *Aidek Tourism Services Pvt. Ltd. v. Commissioner of Cus., New Delhi* [2015 (318) E.L.T. 3 (S.C.)]

3.2 He would also refer to the following orders of various co-ordinate Benches of the CESTAT in his support: -

- i. *Sri Vasavi Gold & Bullion Pvt. Ltd. v. Commissioner of Cus., Chennai* [2016 (343) E.L.T. 429 (Tri. – Chennai)]
- ii. *Artex Textile Pvt. Ltd. v. Commissioner of Cus. (I&G), New Delhi* [2016 (339) E.L.T. 592 (Tri. – Del.)]
- iii. *Commissioner of Customs (Port), Kolkata v. Enterprise International Ltd. & ors.* [Civil Appeal Diary No. 9454/2017 dated 24.07.2017 (S.C.)]
- iv. *Artex Textile Pvt. Ltd. v. Commissioner of C.Ex. & Cus., Faridabad* [Final Order No. 57663 of 2017 dated 01.11.2017 in Customs Appeal No. 51730 of 2016 – CESTAT, New Delhi]
- v. *Artex Textile Pvt. Ltd. v. Commissioner of Cus., Delhi* [Final Order No. 51850 of 2019 dated 21.10.2019 in Customs Appeal No. 50869 of 2019 – CESTAT, New Delhi]
- vi. *Commissioner of Cus., Patparganj v. Artex Textile Pvt. Ltd.* [Final Order Nos. 50875-50921 of 2017 dated 15.02.2017 in Customs Appeal No. 50043 of 2017 & ors. – CESTAT, New Delhi]
- vii. *Commissioner of Cus. (Port), Kolkata v. Enterprise International Ltd.* [Final Order Nos. 76658-76659 of 2018 dated 20.09.2018 in Customs Appeal Nos. 76229-76230 of 2017 – CESTAT, Kolkata]
- viii. *Commissioner of Cus. (Port), Kolkata v. Enterprise International Ltd.* [2019 (369) E.L.T. 1108 (Tri. – Kol.)]
- ix. *Artex Textile Pvt. Ltd. v. Commissioner of Cus., ICD, Patparganj* [Final order Nos. 50953-50954 of 2019 dated 24.07.2019 in Customs Appeal Nos. 50492-50493 of 2019 – CESTAT, New Delhi]
- x. *Elegant Fabric v. Commissioner of Cus., Chennai* [2011 (263) E.L.T. 623 (Tri. – Chennai)]

Appeal No(s): C/40578-40587/2016-DB
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- xi. Commissioner of Cus. (Seaport-Export), Chennai v. Enterprises International Ltd. [2017 (346) E.L.T. 423 (Tri. – Chennai)]*
- xii. International Steel Corporation v. Commissioner of Cus., Jamnagar (Prev.) [2015 (325) E.L.T. 881 (Tri. – Ahmd.)]*
- xiii. Royal Impex v. Commissioner of Cus., Chennai-II [2019 (366) E.L.T. 820 (Mad.)]*

3.3 It is also his contention that the appellants have filed Special Leave Petitions against the above judgement of the Hon'ble High Court in the Writ Petitions (*supra*) and the Hon'ble Supreme Court was pleased to grant leave in *Petition for Special Leave to Appeal (C) No. 16798 of 2016 dated 11.03.2019*. He would also contend that special leave having been granted against the said order of the Hon'ble High Court, the impugned judgement of the Hon'ble High Court would be in jeopardy; the subject matter of the *lis*, unless determined by the Hon'ble Supreme Court, cannot be said to have attained finality. In this regard, he would rely on the following: -

- i. Kunhayammed v. State of Kerala [2001 (129) E.L.T. 11 (S.C.)]*
- ii. Union of India v. West Coast Paper Mills Ltd. [2004 (164) E.L.T. 375 (S.C.)]*

3.4 Ld. Advocates representing other appellants adopted the same arguments advanced by Shri B. Satish Sundar, Ld. Advocate in respect of M/s. HLG Trading.

3.5 He would thus pray for allowing the appeals thereby reversing the impugned orders.

4.1 *Per contra*, Shri R. Rajaraman, Ld. Assistant Commissioner defending the impugned order, would submit that the first appellate authority has applied the change in law brought about by means of amendments, which were in vogue as on the date of filing of the impugned bills-of-entry and therefore, the Revenue cannot be held to have applied the improper law as on the dates of the imports.

4.2 He would also invite our attention to the said judgement of the Hon'ble High Court in the above Writ Petitions (*supra*) wherein the Hon'ble High Court, having taken note of the change in law, has clearly held that the law declared in *Aidek Tourism Services Pvt. Ltd. v. Commissioner of Cus., New Delhi* [2015 (318) E.L.T. 3 (S.C.)], *Hyderabad Industries Ltd. v. Union of India* [1995 (78) E.L.T. 641 (S.C.)], *SRF Ltd. v. Commissioner of Customs, Chennai* [2015 (318) E.L.T. 607 (S.C.)], *Thermax Pvt. Ltd. v. Collector of Customs* [1992 (61) E.L.T. 352 (S.C.)] were not applicable since the said judgements were passed based on the existing / prevalent law at the relevant point of time, before the amendments.

4.3 He would also invite our attention to the judgement of the Hon'ble Supreme Court in the case of *M/s. SRF Ltd. (supra)*, to start with, to indicate that what was considered by the Hon'ble Supreme Court was a different Notification and hence, the Hon'ble Supreme Court did not deal with

the amended Notifications impugned in the present appeals.

4.4.1 Smt. Anandalakshmi Ganeshram, Ld. Superintendent, invited our attention to the common order of CESTAT, New Delhi in the case of *M/s. Soir International & ors. v. Assistant Commissioner of Customs, Delhi & ors. [Final Order Nos. 50356-50372 of 2023 dated 21.03.2023 in Customs Appeal Nos. 52158-52164 of 2016 & ors. – CESTAT, New Delhi]* and connected appeals, wherein the co-ordinate Bench has, after following the decision of the Hon'ble Madras High Court in the Writ Petitions (*supra*), dismissed the appeals. She would invite our attention to paragraph 21 of the said order, which reads as under: -

"21. Another internationally accepted principle of trade is "National Treatment" which subjects the imported goods to the same restrictions as are applicable to domestically manufactured goods. If the appellant's submissions are accepted, it will result in preferential treatment to imported goods which is not warranted."

4.4.2 She would also refer to paragraph 27, which reads as under: -

"27. Therefore, in our considered view, the benefit of the exemption notification 30/2004-CE dated 9.7.2004 as amended by Notification No. 34/2015-CE dated 17.7.2015 will not be available to the goods which are imported. We have considered the contrary views taken by coordinate benches of this Tribunal in Enterprise International Ltd., Artex Textiles Pvt. Ltd and Sedna Impex India. However, we find the Hon'ble High Court of Madras in HLG Trading and in Prashray Overseas held that the benefit of the exemption notification will not be available to the imported goods"

4.4.3 She would finally refer to paragraph 30, which reads as under: -

"30. In the facts of these cases, the matters pertained to the period after the amendment 34/2015-CE dated 17.7.2015 adding the new condition that central excise duty should have been paid on the inputs was introduced and further after the explanation was inserted by 37/2015-CE dated 21.07.2015. The undisputed position is that there are two conditions (1) no CENVAT credit should have been availed which is fulfilled and (2) that excise duty should have been paid on the inputs which has not been fulfilled."

4.5 The Ld. Assistant Commissioner also pointed out that most of the judgements and orders of co-ordinate Benches relied upon by the Ld. Advocate were given prior to the change in law brought about vide amended Notification Nos. 34/2015 and 37/2015 *ibid.* and hence, they are not applicable.

4.6 Insofar as the order in the cases of: -

- (i) *Commissioner of Cus. (Port), Kolkata v. Enterprise International Ltd. [Final Order Nos. 76658-76659 of 2018 dated 20.09.2018 in Customs Appeal Nos. 76229-76230 of 2017 – CESTAT, Kolkata]*
- (ii) *Commissioner of Cus. (Port), Kolkata v. Enterprise International Ltd. [2019 (369) E.L.T. 1108 (Tri. – Kol.)] [Final Order Nos. A/75172-75176/KOL/2019 dated 17.01.2019 – CESTAT, Kolkata]*
- (iii) *Artex Textile Pvt. Ltd. v. Commissioner of Cus., ICD, Patparganj [Final order Nos. 50953-50954 of 2019 dated 24.07.2019 in Customs Appeal Nos. 50492-50493 of 2019 – CESTAT, New Delhi]*
- (iv) *Sedna Impex India Pvt. Ltd. v. Commissioner of Cus., Mundra [Final Order Nos. A/10106-10190/2022 dated 18.02.2022 in Customs Appeal Nos. 10514 to 10598 of 2017 – CESTAT, Ahmedabad]*

are concerned, wherein though the co-ordinate Benches have considered the above Notification Nos. 34/2015 and 37/2015 *ibid.*, he would submit that in view of the binding decision of the Hon'ble jurisdictional High Court in the assessee's own cases (*supra*), the same are not applicable.

4.7 He would thus pray for sustaining the impugned orders.

5. Heard both sides and perused the documents placed on record. We have very anxiously considered the various decisions of higher judicial fora and we have also considered the orders of the co-ordinate Benches of the CESTAT.

6. After hearing both sides and considering the fact that by the time the assessee-importers had filed their bills-of-entry the new / amended Notifications having come into force, the issue to be decided by us is: whether the appellants are entitled to the benefit of Notification No. 34/2015-C.E. dated 17.07.2015 and Notification No. 37/2015-C.E. dated 21.07.2015?

7.1 At the outset, given the undisputed facts, we do not find any reasons at all to interfere with the impugned Orders-in-Appeal since we find that the Hon'ble High Court of Judicature has analysed the law and the change brought about by subsequent Notification Nos. 34/2015 and 37/2015 *ibid.* has been followed. The Hon'ble High Court has in fact considered the following decisions in W.P. No.

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24507 of 2015 & ors. dated 30.10.2015 as reported in 2016 (331) E.L.T. 561 (Mad.) wherein two of the appellants namely, M/s. HLG Trading and M/s. Aditya International Ltd. were the petitioners: -

- *Ahujasons Shawl Wale (P) Ltd. v. Commissioner of Cus., New Delhi [2015 (319) E.L.T. 576 (S.C.)]*
- *Aidek Tourism Services Pvt. Ltd. v. Commissioner of Cus., New Delhi [2015 (318) E.L.T. 3 (S.C.)]*
- *Ashok Traders v. Union of India [1987 (32) E.L.T. 262 (Bom.)]*
- *Collector of C.Ex., Vadodara v. Dhiren Chemical Industries [2002 (139) E.L.T. 3 (S.C.)]*
- *Collector of C.Ex., Patna v. Usha Martin Industries Ltd. [1997 (94) E.L.T. 460 (S.C.)]*
- *Commissioner of C.Ex., New Delhi v. Hari Chand Shri Gopal [2010 (260) E.L.T. 3 (S.C.)]*
- *Commissioner of C.Ex., Jalandhar v. Kay Kay Industries [2013 (295) E.L.T. 177 (S.C.)]*
- *Commissioner of Cus. (Prv.), Amritsar v. Malwa Industries Ltd. [2009 (235) E.L.T. 214 (S.C.)]*
- *Hyderabad Industries Ltd. v. Union of India [1995 (78) E.L.T. 641 (S.C.)]*
- *Khandelwal Metal & Engineering Works v. Union of India [1985 (20) E.L.T. 222 (S.C.)]*
- *Motiram Tolaram v. Union of India [1999 (112) E.L.T. 749 (S.C.)]*
- *SRF Ltd. v. Commissioner of Customs, Chennai [2015 (318) E.L.T. 607 (S.C.)]*
- *Thermax Pvt. Ltd. v. Collector of Customs [1992 (61) E.L.T. 352 (S.C.)]*

7.2 Though the vires of amended Notification Nos. 34/2015-C.E. dated 17.07.2015 and 37/2015-C.E. dated 21.07.2015 were challenged before the Hon'ble

jurisdictional High Court, the Hon'ble High Court has held
 as under: -

"74. Though Para 7 of the Circular extracted above indicates that the domestic manufacturer would continue to be exempt from Excise Duty or subject to concessional rate of Duty as the case may be, as they were prior to 17-7-2015, we do not think that by a Circular, the notification issued in exercise of the statutory powers could be whittled down. Moreover, we are called upon in this case to test the vires of the notifications dated 17-7-2015 and 21-7-2015. The vires of these notifications can be tested only on the touchstone of the source of power or the Constitutional provisions or other legally accepted parameters. The validity of the notifications statutorily issued cannot be tested on the basis of a Circular issued by the department, post facto. Therefore, the above argument of the writ petitioners cannot be accepted.

75. One more contention raised by Mr. R. Yashodh Vardhan, learned senior counsel for the petitioner is that the Court should make a distinction between a condition precedent and a condition subsequent, before finding out whether the benefit of the exemption notification is available to an importer or not. In other words, his contention is that if the exemption notification imposes a condition that can be complied with only at the pre-production stage by the domestic manufacturer, such a condition precedent cannot be expected to be complied with by an importer. On the contrary, if the exemption notification prescribes a condition that could be complied post-production by the domestic manufacturer, as it happened in the case of Aidek Tourism, then an importer can be expected to comply with such a condition. A condition which is impossible of being complied with by an importer, such as the conditions that arise at the pre-production stage, cannot be put against the importers.

76. Though the aforesaid argument has a sound logical basis, it does not have a legal basis. This can be seen, if we take a relook at the nature of the exemptions contemplated under Section 5A. We have given in a previous paragraph, a chart. It can be found from the chart that certain exemptions could be absolute and unconditional. If an exemption notification is absolute and unconditional, all domestic manufacturers, will be entitled to the benefit of the same. As a consequence, the importers will also be entitled to the benefit of the same.

77. But in cases where the exemption is only conditional, it is only those domestic manufacturers

who fulfil the conditions, who will be entitled to the benefit of the exemption notification. A domestic manufacturer who does not fulfil the condition prescribed in the exemption notification, will not be entitled to the benefit of exemption.

78. Let us go by the very logical premise on which the Supreme Court decided *Thermax or Hyderabad Industries*. If we do so, we have to imagine the writ petitioners herein or all importers for that matter, as if they are domestic manufacturers. To this extent there is no difficulty. But after we imagine an importer to be a domestic manufacturer of a like product, the next question that we should address ourselves is as to whether he would be entitled to the benefit of the exemption notification, after or without fulfilling the conditions stipulated in the notification.

79. So far, the Courts were not confronted with a situation where some domestic manufacturers are entitled to the benefit of the exemption notification and some domestic manufacturers are not. If by virtue of the conditions imposed in the exemption notification, some domestic manufacturers will be left without the benefit of the exemption notification, then the question arises whether the importer would be placed along with those domestic manufacturers who got the benefit or whether they will be placed along with the domestic manufacturers who do not get the benefit.

80. An answer to the above question can be found out by taking a very interesting example provided by Mr. S. Murugappan, learned counsel for the petitioner in the course of his submissions. The learned counsel gave the example of a domestic manufacturer who has suffered a duty of Excise to the extent of Rs. 100/- on the inputs, with which he manufactured another product. Assuming that the duty of Excise leviable on the product manufactured by him is Rs. 200/- and assuming such duty of Excise is exempt by virtue of a notification subject to the condition that the manufacturer has not taken CENVAT credit, he would have two options. The first option for him would be not to take CENVAT credit but to claim the benefit of the exemption notification. In such an event, he need not pay Rs. 200/- as duty of Excise on the product manufactured by him. But he would have used inputs which had already suffered a duty of Excise to the extent of Rs. 100/-. In other words, he is a person who gets the benefit of an exemption from payment of Rs. 200/-, due to his refusal to claim CENVAT credit to the extent of Rs. 100/-.

81. The second option open to him is to claim Cenvat credit. In which case, he will not be entitled to the benefit of the exemption notification. As a consequence, he has to pay Rs. 200/- as Excise duty on the goods manufactured by him. But due to his claim for Cenvat credit, he will end up paying Rs. 100/-.

82. An importer, if the argument of the petitioners are accepted, will have the benefit of the best of both the options. Since he is manufacturing goods outside the country, he would not have paid duty of Excise to the Government of India on the inputs used in his product. Nevertheless he would equate himself with a person who has not claimed CENVAT credit and avail the benefit of the exemption notification. **The result is that a domestic manufacturer pays an extra amount of Rs. 100/-, in the example given above, while the importer does not pay anything. Neither Section 3 of the Customs Tariff Act, 1975, nor Article III of GATT required that an importer should be placed in a more advantageous position than the domestic manufacturer. The only requirement under GATT and even under Section 3 of the Customs Tariff Act is that the importer should not be put to a disadvantageous position than the domestic manufacturer. But what the petitioners want is to place the importer in an advantageous position. This is not permissible.**

83. As we have indicated earlier, a challenge to a condition prescribed in an exemption notification can be tested only on very limited parameters. None of the parameters is satisfied in this case. The exemption notifications dated 17-7-2015 and 21-7-2015 are issued in exercise of the power conferred by Section 5A. Section 5A(1) itself empowers the Central Government to grant exemption either absolutely or subject to such conditions as they may stipulate. If the Central Government has the power to grant exemption subject to certain conditions, they have the power even to modify the conditions. This is why neither the source of power nor the method of exercise of such power is questioned by the writ petitioners. The impugned amendments are not in excess of the delegated power conferred under Section 5A(1). Therefore, at the outset, the amendments are not ultra vires Section 5A(1).

84. The amendments are not ultra vires Section 3 since the importers are not placed in a more disadvantageous position than that of the domestic manufacturers. By prescribing certain conditions for availing the benefit of exemption, the impugned amendments treat even the domestic manufacturers differently. Placing the importers

on par with those domestic manufacturers who do not get the benefit of the exemption notification, does not strike at the root of Section 3. Therefore, the notifications do not offend Section 3.

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89. *It may be of interest to note that in the case of silk itself, the process of manufacturing of silk fabric from raw silk, involves the following steps : (i) sorting and softening the cocoons, (ii) reeling the filament, (iii) packaging the skeins into bundles, (iv) forming silk yarn by twisting the reeled silk, (v) degumming the thrown yarn (to achieve softness and shine), (vi) dyeing wherever necessary. In these processes, a solution known as degumming solution is used. Sometimes, reeling the filament could happen mechanically, for which capital goods in the form of machinery may be used. Therefore, some of the items that are used in these processes, which naturally attract duty of excise, are treated as inputs. Once they are treated as inputs within the meaning of Rule 2(k) of the Cenvat Credit Rules, a credit can be claimed on the duty of excise duty on those inputs. Therefore, the fact that the raw materials do not attract a duty of excise is hardly a matter of concern. It would be a different matter if all the inputs which come within the definition of the expression "input" under Rule 2(k) of the CENVAT Credit Rules attract only zero rate of duty. Hence, the last argument is also rejected.*

90. *As we have pointed out earlier, we are supposed to take an importer to be a domestic manufacturer of a like product by a deeming fiction. To this extent, the law is very clear and all the learned counsel for the petitioners are correct. **Thereafter, the next question that we should ask is as to whether all domestic manufacturers would automatically be entitled to the benefit of the exemption notification. In respect of the exemption notifications that are absolute and unconditional, all domestic manufacturers will be entitled to the benefit of the exemption notification. Therefore, the importers will also be entitled. But, insofar as exemption notifications that are conditional in nature, the respondents will have to see whether all domestic manufacturers will automatically get exemption or some of them may not get exemption due to non-fulfilment of the conditions prescribed in the notification. If some of them are not entitled, due to non-fulfilment of the conditions, the importers, for whom it is impossible***

of complying with those conditions, are also not entitled to the benefit. It is this position that is sought to be clarified by the impugned amendment notifications dated 17-7-2015 and 21-7-2015. Hence, there are no merits in the writ petitions."

(Emphasis supplied)

8. We also note that in the case of *Commissioner of Cus. (Exports), Chennai v. Prashray Overseas Pvt. Ltd. [2016 (338) E.L.T. 44 (Mad.)]*, the very Hon'ble jurisdictional High Court had gone into the very same issue and held as under: -

"60. Hence, in fine, the propositions of law that would emerge out of the above discussion, can be summed up as follows :

(i) In cases where the exemption Notifications are absolute and they do not make the benefit available only upon the fulfillment of any condition, even the importer would be entitled to the benefit of exemption.

(ii) In cases where the Notifications for exemption stipulate only one condition namely that the inputs used in the manufacture of the exempted goods should have suffered a duty, then the benefit of the Notification will not be available to any of the importers, since he could have never paid any duty of excise on the inputs used in their manufacture by the foreign manufacturer. This proposition is based upon the premise that the object of such Notifications is only to grant exemption to those final products, on which, some duty has been paid (in India) at the stage of inputs. In other words, Notifications of this nature, are not merely conditional, but also restrictive in nature, as they confer benefit not upon all manufacturers of exempted goods, even if they are domestic manufacturers, but only upon those, who use inputs that had suffered duty.

(iii) In cases where the exemption Notification stipulates only one condition namely that no Cenvat credit ought to have been availed on the inputs, the benefit of the Notification will be available only to those, who satisfy two conditions namely that the inputs used by them suffered a duty and that they did not seek Cenvat credit. Since an importer can never satisfy the first condition, the second condition becomes inapplicable to him and he

cannot be heard to contend that the inapplicability of the condition by itself would make him eligible for the grant of the benefit.

(iv) In cases where the exemption Notification stipulates two conditions, namely that the inputs should have suffered duty and that no Cenvat credit should have been availed, then the benefit of the Notification will be available only if both conditions are satisfied. An importer will never be able to satisfy both these conditions and hence, he cannot claim the benefit.

61. Therefore, we answer both questions of law against the assessee. As a consequence, the appeals of the Revenue are allowed. No costs."

9. We take note of the arguments of the Ld. Advocate in his rejoinder, that even against the said judgement in the case of *Prashray Overseas Pvt. Ltd. (supra)*, Special Leave Petition has been filed before the Hon'ble Supreme Court, which has been admitted as reported in *2017 (355) E.L.T. A151 (S.C.)*.

10. The Ld. first appellate authority has only followed the binding decision of the Hon'ble High Court (*supra*) and therefore, we do not find any fault with the impugned orders. In view of the above, we do not find any merit in the contentions of the appellants.

11. We will now consider the doctrine of merger in the light of the admission / granting of leave to appeal, against the order of the Hon'ble High Court (*supra*).

12.1 In the case of *Kunhayammed (supra)*, the Hon'ble Apex Court has, at paragraph 14, expressed its opinion as

to the legal position emerging upon discussion and the relevant portion reads as under: -

"14. ...

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(3) If leave to appeal is granted the appellate jurisdiction of the Court stands invoked; the gate for entry in appellate arena is opened. The petitioner is in and the respondent may also be called upon to face him though in an appropriate case, in spite of having granted leave to appeal, the court may dismiss the appeal without noticing the respondent.

(4) In spite of a petition for special leave to appeal having been filed, the judgment, decree or order against which leave to appeal has been sought for, continues to be final, effective and binding as between the parties. Once leave to appeal has been granted, the finality of the judgment, decree or order appealed against is put in jeopardy though it continues to be binding and effective between the parties unless it is a nullity or unless the Court may pass a specific order staying or suspending the operation or execution of the judgment, decree or order under challenge."

12.2 From Sl. No. (4) (*supra*), it is clear that upon granting of leave to appeal, though the finality of the judgement, decree or order appealed against is put in jeopardy, it continues to be binding and effective between the parties unless it is a nullity or unless the court may pass a specific order staying or suspending the operation or execution of the judgement, decree or order under challenge.

12.3 Further, it is held at paragraph 39 as under: -

"39. We have catalogued and dealt with all the available decisions of this Court brought to our notice on the point

at issue. It is clear that as amongst the several two-Judges Bench decisions there is a conflict of opinion and needs to be set at rest. The source of power conferring binding efficacy on decisions of this Court is not uniform in all such decisions. Reference is found having been made to (i) Article 141 of the constitution, (ii) doctrine of merger, (iii) res judicata, and (iv) Rule of discipline flowing from this Court being the highest court of the land."

13. The doctrine of merger was once again considered in the case of *West Coast Paper Mills Ltd. (supra)* and the relevant observations of the Hon'ble Apex Court are as under: -

"14. Article 136 of the Constitution of India confers a special power upon this Court in terms whereof an appeal shall lie against any order passed by a Court or Tribunal. Once a Special Leave is granted and the appeal is admitted the correctness or otherwise of the judgment of the Tribunal becomes wide open. In such an appeal, the court is entitled to go into both questions of fact as well as law. In such an event the correctness of the judgment is in jeopardy.

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38. In the aforementioned cases, this Court failed to take into consideration that once an appeal is filed before this Court and the same is entertained, the judgment of the High Court or the Tribunal is in jeopardy. The subject matter of the lis unless determined by the last Court, cannot be said to have attained finality. Grant of stay of operation of the judgment may not be of much relevance once this Court grants special leave and decides to hear the matter on merit."

14. There is no dispute that the Tribunal, as a lower judiciary, is bound by the decision of the Hon'ble jurisdictional High Court and the law laid down by the Hon'ble Apex Court being the law of the land, is always binding on all the lower courts.

15. After going through the observations of the Hon'ble Apex Court in the cases of *Kunhayammed* and *West Coast Paper Mills Ltd. (supra)*, it is clear to us and there is also no dispute that once leave is granted to appeal, the impugned order therein does not become final. We therefore venture into the merits of the cases since, as contended by the Ld. Advocate, that issue in the present cases is open for consideration.

16.1 In the case on hand, going by the contentions, both verbal and written, the assessee-importers sought the benefit of Notification No. 30/2004-C.E. which was not available in the Revenue's EDI system. Quite clearly, as on the date of filing the impugned bills-of-entry, there was a change in the law brought about by the amended Notification Nos. 34/2015 and 37/2015 *ibid.* and hence, the superseded Notification can never be available in the EDI system. What would be available is as per the amended law, that is, the new Notifications would replace the earlier Notification in the system as well. Hence, when a new law comes into effect, an importer can avail the benefit of such law only and if such law prescribes certain conditions, then it is incumbent upon such claimant to satisfy the conditions

prescribed thereunder. He cannot be still heard to stake a claim for the benefit under an effaced Notification which is clearly not in vogue as on the date of import / filing of bills-of-entry. To us, therefore, the change in law as brought about in the amended Notifications, has clearly been appreciated by the Hon'ble High Court in its judgement in the assessees' own cases (*supra*), which has rightly been followed by the Ld. first appellate authority.

16.2 The prayer of the appellants even in the grounds-of-appeal reveal clearly that they are seeking the benefit of an erstwhile Notification which stood duly effaced, but however, there is no claim made as to satisfying the conditions prescribed under the amended Notification Nos. 34/2015 and 37/2015 *ibid.* which were applicable. By the amending Notification No. 34/2015-C.E. dated 17.07.2015, the condition that was prescribed was as to the non-availment of CENVAT Credit on the inputs used in the manufacture of goods. The admitted position is that the importers i.e., the assessees before us, were not the manufacturers since the impugned goods were manufactured outside India and hence, it is quite obvious that no CENVAT Credit would be available to be availed on the impugned goods. Perhaps to this extent, it appears that the only condition in Notification No. 34/2015 stands satisfied with respect to the impugned goods, insofar as the appellants herein are concerned.

16.3 Per Notification No. 37/2015-C.E. dated 21.07.2015, yet another condition came to be inserted, which had the effect that Central Excise duty should have been paid on the inputs. This was perhaps impossible for the appellants before us, to have paid the Central Excise duty on the inputs used in the manufacture of imported / impugned goods since, admittedly, the impugned goods were manufactured outside the territory of India. Hence, we do not find any difficulty in assuming that the second condition could not be satisfied by the assessee-importers before us. The assessee also did not claim to have paid the Central Excise duty on the inputs used, but however, it is their only claim that it was an impossible task to fulfil the second condition and therefore the said condition should be ignored.

16.4 Exemption Notifications are issued with a purpose and as we have observed elsewhere, some Notifications are absolute and some are conditional and when it is a conditional one, it is imperative that the condition/s therein ought to be satisfied in order to avail any benefit flowing therefrom. Hence, it is also imperative on us to adopt purposive interpretation in such cases. If the claim of the appellants is to be entertained, then, the local manufacturers would be definitely put in a disadvantageous position as there may be increase in imports due to exemption. Thus, the purpose appears to us to be to encourage local manufacturers and therefore,

the said conditions are put to restrict imports. Hence, we tend not to entertain such claims of the appellants who are only the importers. In this context, we refer to the decision of the Hon'ble Apex Court in the case of *Rohitash Kumar & ors. v. Om Prakash Sharma & ors.* [(2013) 11 S.C.C. 451] wherein the Hon'ble Court has clearly held that inconvenience of the taxpayer cannot be looked into: -

"19. In Bengal Immunity Co. Ltd. v. State of Bihar & Ors., AIR 1955 SC 661 it was observed by a Constitution Bench of this Court that, if there is any hardship, it is for the legislature to amend the law, and that the Court cannot be called upon, to discard the cardinal rule of interpretation for the purpose of mitigating such hardship. If the language of an Act is sufficiently clear, the Court has to give effect to it, however, inequitable or unjust the result may be. The words, 'dura lex sed lex' which mean 'the law is hard but it is the law.' may be used to sum up the situation. Therefore, even if a statutory provision causes hardship to some people, it is not for the Court to amend the law. A legal enactment must be interpreted in its plain and literal sense, as that is the first principle of interpretation.

20. In Mysore State Electricity Board v. Bangalore Woolen, Cotton & Silk Mills Ltd. & Ors., AIR 1963 SC 1128 a Constitution Bench of this Court held that, "inconvenience is not" a decisive factor to be considered while interpreting a statute.

21. In Martin Burn Ltd. v. The Corporation of Calcutta, AIR 1966 SC 529, this Court, while dealing with the same issue observed as under:- "A result flowing from a statutory provision is never an evil. A Court has no power to ignore that provision to relieve what it considers a distress resulting from its operation. A statute must of course be given effect to whether a Court likes the result or not." (See also: The Commissioner of Income Tax, West Bengal I, Calcutta v. M/s Vegetables Products Ltd., AIR 1973 SC 927; and Tata Power Company Ltd. v. Reliance Energy Limited & Ors., (2009) 16 SCC 659).

Therefore, it is evident that the hardship caused to an individual, cannot be a ground for not giving effective and grammatical meaning to every word of the provision, if the language used therein, is unequivocal."

17.1 Admittedly, what the appellants claimed is the benefit of exemption. Hence, when an exemption is claimed, the claimant should necessarily satisfy the conditions prescribed under the Notification under which such exemption is claimed. Conveniently, the appellants have chosen to make the exemption claim under a Notification which was not in existence at the time of imports. Hence, the authorities below have rightly proceeded to examine the claim of exemption under the available / prevalent Notifications i.e., Notification Nos. 34/2015-C.E. and 37/2015-C.E. *ibid.*, and admittedly, the appellants have nowhere whispered about fulfilling all the conditions of the said Notifications which replaced Notification No. 30/2004-C.E. The Hon'ble Supreme Court in the case of *Commissioner of Customs (Import), Mumbai v. Dilip Kumar & Company* [2018 (361) E.L.T. 577 (S.C.)] has clearly laid down that when the benefit of an exemption Notification is claimed, the claimant has to necessarily fulfil all the conditions prescribed under the said beneficial Notification.

17.2 We are therefore of the view that the claim of the appellants for the benefit of Notification No. 30/2004-C.E., as amended vide Notification No. 34/2015-C.E. and Notification No. 37/2015-C.E., is not entertainable and has therefore been correctly rejected by the Ld. first appellate authority. Hence, we do not find any case being made out

for interfering with the impugned Orders-in-Appeal. The issue, therefore, is decided against the appellants.

18. Resultantly, the appeals stand dismissed.

Customs Appeal No. 40032 of 2021:

19.1 In respect of the Department Appeal in Appeal No. C/40032/2021, it appears that the assessee-respondent had filed two appeals against two communications dated 07.01.2020 and 30.04.2020 whereby the refund claims of the assessee in respect of 9 bills-of-entry and 3 bills-of-entry respectively were rejected by the Assistant Commissioner (Refunds).

19.2 The reasons given for rejection of these refund claims made by the respondent herein by the original authority appears to be that the documents called for were not submitted and the respondent also did not appear during the personal hearing. In respect of the second claim, the same was rejected as being time-barred in addition to non-submission of duplicate copy of bill-of-entry, re-assessed bill-of-entry and TR-6 challans. Consequently, the adjudicating authority rejected the claim after referring to Public Notice No. 88/2019 dated 18.10.2019 on the ground that the order of assessment, including the self-assessment, should have been duly modified.

19.3 Against the said rejection, it appears that the respondent preferred two appeals contending that they had submitted all the documents and the deficiency memos were only sent to their branch office. In respect of the second appeal, the respondent had contended that they had submitted to group for re-assessment, but the same was never assessed; the original bill-of-entry and TR-6 challans were misplaced, for which reason an indemnity bond was executed and since the duty was paid under protest, time-limitation would not apply.

19.4 During appellate proceedings, the first appellate authority has recorded the grievance of the assessee, which *inter alia* read as under: -

"5. The appellant has made the following submissions.

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III. The Appellant filed Bill of Entries and claimed exemption under Notification No. 30/2004 dated 09.07.2004. The Department has not granted exemption to the said goods which forced the Appellant to pay excess duty to avoid demurrage charges and furthermore the Appellant paid duty under protest and the same was communicated to the Department. The Appellant filed a communication on 19.01.2019 requesting the Department to issue a speaking order and re-assess the Bill of Entries by granting exemption under Notification No. 30/2004 dated 09.07.2004.

IV. Till date the Department has neither vacated the protest lodged by the Appellant nor issued a speaking order as envisaged under Section 17(5) of the Customs Act, 1962.

It is in this backdrop that the Appellant filed a refund claim application on 13.04.2016 and the same was pending. As the appellant had applied for reassessment of the bill of entry and the same was pending they could not reply to the various communication asking for reassessed bills of entries and the appellant received the final rejection order dt 07.01.2020 on 11.01.2020 though they have submitted all the documents on 08.01.2020 except for reassessed bill of entry. ...”

(Emphasis supplied)

19.5 From the impugned Order-in-Appeal Seaport C.Cus. No. II/994-995/2020 dated 29.10.2020, we find that the first appellate authority has held at paragraph 10 as under:-

"10. In view of the discussions in the above paras, I hold the impugned goods are eligible for exemption of CVD under Notification No. 30/2004-C.Ex. and therefore I reassess the bills of entry, modifying the order of self assessment in respect of impugned bills of entry exempting the impugned goods from CVD under Notification No. 30/2004-C.Ex., and order the refund authorities to sanction refund. The 2 appeals cited in Table:1&2 above are therefore allowed with consequential relief.

Ordered accordingly”

Appeal No(s).: C/40578-40587/2016-DB
C/40096 & 41828/2017-DB
& C/40032 & 40034/2021-DB

20.1 What emerges from the above is that there was a request for re-assessment, but however, there was no attempt at all by the Department to consider the above request for re-assessment. To this extent, therefore, the impugned order appears to be correct. Further, the tables which are reproduced at page 3 of 11 / paragraph 1 of the impugned order dated 29.10.2020 are reproduced below:-

Table:1

Appeal No. C3/II/127/R/2020 Against Communication vide F.No. SR No. 1530/2020/Refunds-II in respect of following bills of entries					
S. No.	BE No.	BE Date	S. No.	BE No.	BE Date
1	10174	29.05.2015	6	2047340	28.07.2015
2	9026522	24.04.2015	7	2057600	28.07.2015
3	2009921	24.07.2015	8	2321478	21.08.2015
4	2010254	24.07.2015	9	2032240	27.07.2015
5	2017340	28.07.2015			

Table:2

Appeal No. C3/II/473/R/2020 Against Communication vide F.No. SR No. 11/2020/Refunds-II in respect of following bills of entries		
S. No.	BE No.	BE Date
1	5165137	10.04.2014
2	7675184	12.12.2014
3	7987733	14.01.2015

20.2 From the above Table:1 in respect of 9 bills-of-entry, we find that the bills-of-entry at Sl. Nos. 1 and 2 therein are clearly before the first amending Notification No. 34/2015-C.E., which came into effect from 17.07.2015. The three other bills-of-entry at Table:2 above are also clearly prior to the amending Notification No. 34/2015-C.E. and hence, insofar as these bills-of-entry are concerned, we have no hesitation in approving the finding of the first appellate authority and to this extent, therefore, the order of the first appellate authority is upheld.

20.3 Insofar as the bills-of-entry at Sl. Nos. 3 to 9 at Table:1 are concerned, we find that the same are after the amending Notification No. 37/2015-C.E. dated 21.07.2015 and hence, the same have to be looked into from the point of eligibility in terms of the conditions prescribed under the amending Notification No. 37/2015 *ibid*. We have analysed the same in respect of the other appeals and following the same reasons, we do not approve the impugned order of the first appellate authority. To this extent, therefore, the impugned order is set aside.

21. The appeal of the Revenue is therefore partly allowed, as discussed above.

Customs Appeal No. 40034 of 2021:

22.1 In respect of the Department Appeal in Appeal No. C/40034/2021, we find from the tables reproduced at paragraph 1 of the impugned Order-in-Appeal Seaport C.Cus. No. II/996-999/2020 dated 29.10.2020 that all the bills-of-entry appear to have been filed during the subsistence of Notification No. 30/2004-C.E. and hence, we do not find any difficulty in extending the benefit of the decision of the Hon'ble Supreme Court in the cases of *M/s. SRF Ltd. (supra)* and also *M/s. Aidek Tourism Services Pvt. Ltd. (supra)*, which has rightly been allowed by the first appellate authority.

22.2 Hence, we do not find any merit in the Department's appeal, for which reason the same is dismissed.

Appeal No(s): C/40578-40587/2016-DB
C/40096 & 41828/2017-DB
& C/40032 & 40034/2021-DB

23. Consequently, the appeals are disposed of, as indicated above.

(Order pronounced in the open court on **12.10.2023**)

Sd/-
(M. AJIT KUMAR)
MEMBER (TECHNICAL)

Sd/-
(P. DINESHA)
MEMBER (JUDICIAL)

Sdd