(In the Customs, Excise & Service Tax Appellate Tribunal
West Block No.2, R.K. Puram, New Delhi-110066

Appeal No.C/50251-50252/2017(DB)
(Arising out of Order-in-Appeal No.CC(A)CUS/ICD/PPG & ICD/TKD/729-730/2016 dated 19.10.2016 passed by Commissioner of Customs (Appeals), New Customs House, New Delhi)

CC Patparganj …Appellant

Vs

Krishna Impex International …Respondent

Appearance:
Present for the Appellant : Shri Govind Dixit, DR
Present for the Respondent : S/Sh DK Nayyar, Alok Agarwal, Shubham Tyagi, Advocates

Coram:
HON'BLE MR S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR B.RAVICHANDRAN, MEMBER (TECHNICAL)

Date of hearing: 29.08.2017
Date of decision:27.09.2017

Final Order No.56797-56798/2017

Per B. Ravichandran,

The Revenue filed these appeals against the order dated 19.10.2016 of Commissioner (Appeals), New Customs House, New Delhi. The respondents filed bill of entry for the clearance of imported "Plain Silk Fabrics Undyed and Unprinted". They have claimed exemption of additional duty of customs in terms of Sr.No.1 of Notification No.30/2004 dated 09.07.2004 as amended. The said exemption is conditional to the effect that the said excisable goods are manufactured from inputs or by utilizing input services on which appropriate duty of excise or additional duty of Customs and Service Tax has been paid and no credit of such excise duty or additional duty of customs on inputs or Service Tax on input services has been taken by the manufacturer of such goods (and not the buyer of such goods), under the provisions of Cenvat Credit Rules, 2004. The exemption was denied to the respondent on the ground the importer does not fulfill this condition. The impugned order, which was passed on the appeals filed by the respondent, set-aside the impugned original orders disallowing the exemption and allowed the benefit to the respondent. Reliance was placed on the decision of Hon'ble Supreme Court in SRF Ltd-2015 (318) ELT 607 SC and affirmed that in the review by the Hon'ble Supreme Court by dismissal of the review petition of the Revenue vide order dated 15.07.2016-2016 (340) ELT A202 SC.

(2) In the present appeal, Revenue contested the above findings. It is submitted that notification No.34/15 CE dated 17.07.2015 has amended proviso in the Notification No. 30/2004 CE dated 09.07.2004 which provides for the condition. It is submitted that the Commissioner had not taken the legal position after the amendment of the condition and passed the order erroneously. The amendment as clarified by circular dated 21.07.2015 makes it clear that as the importer is not a manufacturer, the exemption from additional duty is not available to them. Reliance was placed by the Revenue on the decision of Hon'ble Madras High Court in Prashray Overseas Pvt Ltd, 2016 (338) ELT 44 (Mad.). It is contended that the said decision of the High Court is applicable to the facts of the present case and the impugned orders are to be set aside. The ld AR reiterated these grounds during his submission.

(3) The ld Counsel for the respondent submitted that the Hon'ble Madras High Court in M/s Prashray Overseas Ltd (supra) was examining the issue keeping in view the pendency of review petition before the Hon'ble Supreme Court against the decision in SRF case (supra). The Apex Court dismissed the review petition filed by the Revenue on 15.07.2016. Covering the legal provisions of this notification, the matter was again decided by the Hon'ble Supreme Court in Enterprises International Ltd, 2017 (346) ELT A130(SC). The Hon'ble Supreme Court dismissed the appeal of Revenue against the decision of the Tribunal in 2017 (346) ELT 423 (Tri.-Chennai). The civil appeals are dismissed. The ld Counsels submitted that the decision of Hon'ble Madras High Court is not in line with the clear law laid down by the Hon'ble Supreme Court, in more than one cases. As a reference to above two decisions of the Hon'ble Supreme Court along with decision of the Tribunal in M/s Prashray Overseas Pvt Ltd, which stands confirmed by the Hon'ble Supreme Court, the ld Counsel submitted that there is no merit in the appeals by the Revenue.

(4) We have heard both the sides and perused the appeal records. We note that similar issue of eligibility of importer for exemption under Notification No.30/2004 CE came up before the Tribunal recently in M/s Artex Textiles Pvt Ltd vide Final Order Nos.56138-56207/2017 dated 18.08.2017. The Tribunal observed as below:

> '5. The fact is not under dispute that in the appellant's own case, the Tribunal vide Order dated 17.11.2016 has extended the benefit of notification dated 9.7.2004 by relying on the judgement of the Hon'ble Supreme Court in the case of **SRF Ltd. – 2015 (318) ELT 607 (SC).**

However, the Revenue has objected to the availment of the benefits contained in the notification dated 9.7.2004 in view of the judgement of the Hon'ble Madras High Court in the case of **Prashray Overseas Pvt. Ltd. (supra)**.

6. Ld. DR specifically drew our attention to the paragraphs recorded in the jugement of the Hon'ble Madras High Court in the case of **Prashray Overseas Pvt. Ltd (supra),** which are as follows**:-**

"45. *Wherever the Notifications prescribed conditions, which were merely procedural in nature, but did not involve the payment of any duty of excise on the inputs, the Court interpreted the Notifications in favour of the assessee, in view of the fact that an importer could not comply with those procedural formalities. But, wherever the Notifications imposed either (i) a condition that the input used for the manufacture of the exempted goods, should have suffered a duty or (ii) a condition that duty ought to have been paid and Cenvat credit not claimed, the Court interpreted such Notifications in favour of the Revenue (except perhaps in the case of Aidek and SRF).*

46. *It must be pointed out at this stage that one cannot make a distinction between (i) a Notification, which merely stipulates a condition that the manufacturer ought not to have claimed Cenvat credit in respect of the duties paid on the inputs and (ii) a Notification that imposes a condition that a duty of excise should have been paid on the inputs and no Cenvat credit should have been claimed in relation to the same. This is for the reason that the very entitlement to claim Cenvat credit would arise only in cases where a duty of excise had been paid on the inputs. For a person, who never paid a duty of excise, on the inputs used for the manufacture of exempted goods, the question of claiming Cenvat credit would never arise.*

47. *A Notification such as the one Bearing No. 30/2004, dated 9-7-2004, which merely stipulates a condition that no Cenvat credit ought to have been availed in respect of the duties paid on the inputs, is in no way different from a Notification, which stipulates a condition that the inputs ought to have suffered a duty and no Cenvat credit should have been claimed on the same.*

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59. *Therefore, in the absence of any material to show that the processes indicated above would involve inputs, none of which would attract duty of excise, it is not possible to conclude that the first respondent would satisfy both conditions namely (a) payment of duty on the inputs and (b) the non availing of Cenvat credit on the same. Though the Notification Bearing No. 30/2004, dated 9-7-2004 does not stipulate the first condition, we have held that the first condition is inbuilt into the second condition. Therefore, the first respondent cannot be taken to have fulfilled the condition stipulated in the proviso to the Notification No. 30/2004, dated 9-7-2004, unless he had shown that in the entire process of manufacture of woven silk fabrics falling* *under Tariff Item No. 5007, there are no inputs (used directly or indirectly and whether found in the final product or not), which attract any levy of duty under tariff items relevant to those inputs.*

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."

7. On careful consideration of the judgement of the Hon'ble Madras High Court in the case of **CC(Exports), Chennai Vs. Prashray Overseas Pvt. Ltd.,** as above, we find that the Honb'ble Court proceeded to decide the subject issue with the following observation:-

> *"15. Contending that the amendment to the Notification is unconstitutional, inasmuch as it seeks to annual the effect of the decision of the Supreme Court in SRF Ltd. , a batch of writ petitions have been filed before this Court. But simultaneously, the Central Government also moved a petition before the Supreme Court for a Review of the judgement in SRF Limited. On 9.9.2015, the Supreme Court condoned the delay and ordered notice in the*

Review Petition . Therefore, we will have to examine the rival contentions, keeping in mind these two developments namely (i) the two amendments to the Exemption Notification and (ii) the notice ordered by the Supreme Court in the petition for Review of the decision in SRF Limited."

8. On perusal of the above quoted paragraph, we find that the order dated 26.03.2015 of Hon'ble Supreme Court in the case of **SRF Ltd (*supra*)** was recorded as pending for review and notice was issued on such review petition filed by the Revenue. Both sides now agree that the review petition filed against the judgement dated 26.03.2015 was dismissed by the Hon'ble Suprepme Court with the following observations:-

"*Heard learned Counsel for the parties.*

We find no error, much less apparent error, in the order impugned. The review petitions are, accordingly, dismissed."'

(5) The Revenue emphasized on the legal position brought in by the amendment in the said proviso of Notification No.30/2004. We note that the implication of the amendment has been brought-out in the circular dated 21.07.2015 for better appreciation. The circular is re-produced below:

"It may recalled that the Hon'ble Supreme Court, in the case of *M/s. SRF Ltd.* versus *Commissioner of Customs, Chennai* and *M/s. ITC Ltd.* v/s. *Commissioner of Customs (I&G), New Delhi* [2015 (318) E.L.T. 607 (S.C.)] relating to CVD exemption, has held that the benefit of excise duty exemption [available to final products manufactured by the domestic manufacturer, subject to the condition of non-availment of CENVAT credit of duty on inputs or capital goods used by such manufacturer for manufacture of such final products] will also be available to the importers of such final products for the purposes of CVD on the ground that the importer was not availing the credit of duty on inputs or capital goods.

2. The implication of the Hon'ble Supreme Court judgment was that all such final products when imported by manufacturer importer would have attracted concessional excise duty as CVD, while the domestic manufacturer of such final products had to forgo input tax credit to be eligible for such concessional rate. This would put the domestic

manufacturers at a disadvantage vis-a-vis imports and would adversely impact the Make in India Policy of the Government.

3. The judgment of the Hon'ble Supreme Court was examined in CBEC and it was found that there were certain errors apparent on record/interpretational issues and. with the concurrence of the Ld. Attorney General, a Review Petition/Revision Application has been filed against the same.

4. However, keeping in view the adverse implications of the aforesaid judgment on the domestic industry, legal opinion was sought from the Ministry of Law & Justice as to whether pending the aforesaid Review Petition/Revision Application, such conditions in the relevant notifications be suitably amended so as to make the intention abundantly clear *(that these conditions are to be satisfied by the manufacturers of such goods and not the buyer/importer of such goods)*.

5. In this context, opinion of the Ministry of Law & Justice was also sought. With the concurrence of the Ld. Attorney General, notifications No. 34/2015-C.E., No. 35/2015-C.E. and No. 36/2015-C.E. all dated 17-7-2015 were issued amending the conditions in notifications No. 30/2004-C.E., dated 9-7-2004, No. 1/2011-C.E., dated 1-3-2011 and No. 12/2012-C.E. dated 17-3-2012, respectively.

6. In the above context, apprehensions have been raised about the use of the phrase of "appropriate duty". In this regard. Explanations have been inserted in the notifications No. 30/2004-C.E., dated 9-7-2004, No. 1/2011-C.E., dated 1-3-2011 and No. 12/2012-C.E., dated 17-3-2012 so as to clarify that the appropriate duty or appropriate additional duty or appropriate service tax for the purposes of the said notifications/entries includes nil duty or tax or concessional duty or tax, whether or not read with any relevant exemption notification for the time being in force.

7. It may, therefore, be noted that the domestically manufactured goods covered under these notifications/entries continue to be exempt from excise duty or subject to concessional rate of excise duty, as the case may be, as they were prior to 17th July, 2015."

(6) The above circular makes it clear that the amendment carried-out basically to make it clear that equal treatment should be given to the domestic manufacturers vis-à-vis importers. In other words, the amendment is to make the intention clear that the said conditions are to be satisfied by the manufacturers of such goods and not the buyer/importer of such goods. From the contents of the circular and also amended entry of the proviso in Notification No.30/2004, we note that the legal position laid down by the Hon'ble Supreme Court on more than one occasions is continued to be relevant and applicable to the present case also. Admittedly, there is no Cenvat credit availed by the manufacturer of the imported goods, neither the buyer/importer availed any such credit. As such, we find the amendment will not act as a bar for extending benefit to the present impugned goods from payment of CV duty.

(7) The legal position with reference to levy of additional duty of customs was examined at length by the Hon'ble Supreme Court in M/s Aidek Tourism Services Pvt Ltd, 2015 (318) ELT 3 (SC). The observation of the Apex Court is as below:

> "**15.** The ratio of the aforesaid judgment in *Thermax Private Limited* (supra) was relied upon by this Court in *Hyderabad Industries Ltd.* (supra) while interpreting Section 3(1) of the Tariff Act itself; *al beit* in somewhat different context. However, the manner in which the issue was dealt with lends support to the case of the assessee herein. In that case the Court noted that Section 3(1) of the Tariff Act provides for levy of an additional duty. The duty is, in other words, in addition to the Customs duty leviable under Section 12 of the Customs Act read with Section 2 of the Tariff Act. The explanation to Section 3 has two limbs. The first

limb clarifies that the duty chargeable under Section 3(1) would be the Excise duty for the time being leviable on a like article if produced or manufactured in India. The condition precedent for levy of additional duty thus contemplated by the explanation is that the article is produced or manufactured in India. The second limb to the explanation deals with the situation where *'a like article is not so produced or manufactured'*. The use of the word *'so'* implies that the production or manufacture referred to in the second limb is relatable to the use of that expression in the first limb which is of a like article being produced or manufactured in India. The words *'if produced or manufactured in India'* do not mean that the like article should be actually produced or manufactured in India. As per the explanation if an imported article is one which *has been manufactured or produced*, then it must be presumed, for the purpose of Section 3(1), that such an article can likewise be manufactured or produced in India. For the purpose of attracting additional duty under Section 3 on the import of a manufactured or produced article the actual manufacture or production of a like article in India is not necessary. For quantification of additional duty in such a case, it has to be imagined that the article imported had been manufactured or produced in India and then to see what amount of Excise duty was leviable thereon.

It is thus clear from the reading of this judgment that the Court held that the levy under Section 3 of the Tariff Act is in the nature of a countervailing duty and is with a view to levy additional duty on an import to counter balance the Excise duty payable on a like article indigenously manufactured. The Court also adverted to the scope/effect of Section 3 of the Tariff Act, particularly the expression, "Excise Duty for the time being leviable on a like article in produced in India" and the explanation thereto. In this regard it observed as follows : (At Para 11 of the Report)

"The words 'if produced or manufactured in India' do not mean that the like article should be actually produced or manufactured in India. As per the explanation if an imported article is one which has been manufactured or produced then it must be presumed, for the purpose of Section 3(1), that such an article can likewise be manufactured or produced in India. For the purpose of attracting additional duty under Section 3 on the import of a manufactured or produced article the actual manufacture or production of a like article in India is not necessary."

The Court further referred with approval to the rationale of the provision as laid down in *Thermax* case (supra) in the following terms :

"... As observed by this Court in *Thermax (P) Ltd.* v. *Collector of Customs* (at SCC pp. 452-53, para 11) that Section 3(1) of the Customs Tariff Act :

"specifically mandates that the CVD will be equal to the excise duty for the time being leviable on a like article if produced or manufactured in India. In other words, we have to forget that the goods are imported, imagine that the importer had manufactured the goods in India and determine the amount of excise duty that he would have been called upon to pay in that event".

To our mind the genesis of Section 3(1) of the Customs Tariff Act has been brought out in the aforesaid observations of this Court, namely, that for the purpose of saying what amount, if any, of additional duty is leviable under Section 3(1) of the Customs Tariff Act, it has to be imagined that the articles imported had been manufactured or produced in India and then to see what amount of excise duty was leviable thereon."

This position has been reiterated in *Motiram Tolaram* v. *Union of India* - (1999) 6 SCC 375 = 1999 (112) E.L.T. 749 (S.C.), *CCE* v. *J.K. Synthetics* (2000) 10 SCC 393 = 2000 (120) E.L.T. 54 (S.C.), *Lohia Sheet Products* v. *Commr. of Customs* - (2008) 11 SCC 510 = 2008 (224) E.L.T. 349 (S.C.) and *Collector of Customs (Preventive)* v. *Malwa Industries Ltd.* - (2009) 12 SCC 735 = 2009 (235) E.L.T. 214 (S.C.) In fact, in *Lohia Sheets* and *Malwa Industries* cases (supra), this Court was considering exemption notifications envisaging use of certain material within a "factory" and still held that an importer would be entitled to the benefit of the exemption notifications in view of Section 3 of the Tariff Act and the decisions in *Hyderabad Industries* and *Thermal* cases. As such, it is now settled that the rate of duty would be only that which an Indian manufacturer would pay under the Excise Act on a like Article. Therefore, the importer would be entitled to payment of concessional/reduced or nil rate of countervailing duty if any notification is issued providing exemption/remission of Excise duty for a like article if produced/manufactured in India.

16. We may mention that in the case of *Commissioner of Central Excise, New Delhi* v. *Hari Chand Shri Gopal & Ors.* - (2011) 1 SCC 236 = 2010 (260) E.L.T. 3 (S.C.), a three Judge Bench of this Court had raised certain doubts on the correctness of the principle contained in *Thermax Private Limited* (supra) as well as in *J.K. Synthetics* (supra) and referred the matter to a larger Bench. Reference order is reported as (2005) 8 SCC 164 = 2005 (188) E.L.T. 353 (S.C.). The Constitution Bench decided the said case, which is reported as (2011) 1 SCC 236. From the reading of para 39 to 41 of the said judgment it becomes clear that though these cases were held not applicable to the fact situation and were distinguished, the Court did not say that the aforesaid judgments were incorrectly decided. In fact, by distinguishing the ratio of the said cases, the Constitution Bench impliedly gave its imprimatur to the principle laid down in the aforesaid judgments.

17. We are of the opinion that since we are dealing with exemption notification issued under Rule 8 of the Rules, which was the position in *Thermax Private Limited* (supra) as well, for the purpose of extending benefit of concession contained in Notification No. 64/93-CE, the principle in *Thermax Private Limited* (supra) would clearly become applicable. We may point out that a specific query was put to the learned counsel for the Revenue to the effect that if the importer is not deemed as manufacturer for the purpose of applicability of the said notification, then there cannot be a situation where such benefit of this Notification would be extended to any person, inasmuch as, it was almost impossible to visualise a situation where a foreign manufacturer would import the saloon cars in this country and would utilise those cars for tourist taxis.

Learned counsel for the Revenue had no answer or reply to our query. It is obvious that the purpose of exemption Notification No. 64/93-CE was to extend benefits to the importers of saloon cars to use the said cars for tourist taxis. Going by the spirit and the objective behind this Notification, the irresistible conclusion would be to apply the principle of *Thermax Private Limited* (supra) in the present case as well."

(8) In Enterprises International Limited (supra), the Tribunal examined at length the availability of exemption under Notification No.30/2004-CE dealing with almost identical sets of facts. The Tribunal recorded as below:

"13. On the question of admissibility of CVD exemption, we find the Notification No. 30/2004-C.E., dated 9-7-2004 at Sl. No. 5 of table exempts excise duty on silk yarn and silk fabrics falling under Chapters 54.01 to 54.07. The proviso to the notification stipulates a condition that *"nothing contained in this notification shall apply to the goods in respect of which credit of duty on inputs or capital goods has been taken under the provisions of the CCR, 2002."* This very issue was discussed in the case of *Prashray Overseas Pvt. Ltd.* [2009 (235) E.L.T. 300 (Tri.-Chennai). The relevant Paragraph 3 of the order is reproduced as under :-

"3. We find that no Central Excise duty is payable on raw silk produced in India. Yarn manufactured from such silk is also exempt under Notification No. 30/2004 as no credit availed input is used to manufacture silk yarn. Therefore indigenous silk fabrics manufactured from indigenous silk yarn are exempt from Central Excise duty. Another stream in which silk fabrics get manufactured in India is using imported silk yarn. Neither party disputes that imported silk yarn was exempt from CVD during the material period in terms of Notification No. 20/2006-Cus., dated 1-3-2006. We find that the levy of CVD on imports is regulated by the following provisions of the Customs Tariff Act, 1975.

"3. Levy of additional duty equal to excise duty. - Any article which is imported into India shall, in addition, be liable to a (1) duty (hereafter to this section referred to as the additional duty) equal to the excise duty for the time being leviable on a like article if produced or manufactured in India and if such excise duty on a like article is leviable at any percentage of its value, the additional duty to which the imported article shall be so liable shall be calculated at that percentage of the value of the imported article."

CVD is therefore payable on imported silk fabrics at the rate central excise duty is leviable for the time being on such silk fabrics produced or manufactured in India. Additional duty is imposed on imported goods to counter balance the central excise duty leviable on like articles made indigenously, this being a measure intended to safeguard the interests of the manufacturers in India. As no duty was payable on silk yarn either indigenous or imported, indigenous silk fabrics were not subject to central excise duty during the material period in terms of Notification No. 30/04-C.E. (supra). Therefore imported silk fabrics imported during the material period need not beat any CVD. The impugned imports are eligible for the exemption contained in Notification No. 30/2004. This was also the ratio of our final order Nos. 941, 942/2008, dated 28-8-2008 [2008 (232) E.L.T. 63 (Tribunal)] in respect of the same appellants for 44 consignments imported earlier. The appeal is allowed."

14. We find that Revenue relied on the Supreme Court's decision in the case of *Motiram Tolaram* v. *UOI* (supra) and the Tribunal's Larger Bench decision in *Priyesh Chemicals & Metals* (supra). In this regard the Hon'ble Supreme Court in their recent order in the case of *SRF Ltd.* v. *CC, Chennai* (supra) held that the appellants are entitled to exemption from payment of CVD under Notification No. 6/2002 and allowed the civil appeal. The relevant Paras 3 to 8 of the said Supreme Court's order is reproduced as under :-

"3. Entry/Serial No. 122 in the Notification No. 6/2002 reads as under:

S. No.	Chapter or heading No. or sub-heading No.	Description of goods	Rate under the First Schedule	Rate under the Second Schedule	Condition No.
122	5402.10 5402.41 5402.49 5402.51 5402.59 5402.61 or 5402.69	Nylon filament Yarn or Polypropylene multifilament yarn of 210 deniers with tolerance of 6 per cent.	Nil	-	20

4. As per the aforesaid entry, the rate of duty is nil. Condition No. 20 of this Notification, which was relied upon by the authorities below in denying the exemption from payment of CVD, is to the following effect:

"20. If no credit under rule 3 or rule 11 of the Cenvat Credit Rules, 2002, has been taken in respect of the inputs or capital goods used in the manufacture of these goods."

5. The aforesaid condition is to the effect that the importer should not have availed credit under rule 3 or rule 11 of the Cenvat Credit Rules, 2002, in respect of the capital goods used for the manufacture of these goods.

6. In the present case, admitted position is that no such Cenvat credit is availed by the appellant. However, the reason for denying the benefit of the aforesaid Notification is that in the case of the appellant, no such credit is admissible under the Cenvat Rules. On this basis, the CEGAT has come to the conclusion that when the credit under the Cenvat Rules is not admissible to the appellant, question of fulfilling the aforesaid condition does not arise. In holding so, it followed the judgment of the Bombay High Court in the case of *Ashok Traders* v. *Union of India* [1987 (32) E.L.T. 262], wherein the Bombay High Court had held that "it is impossible to imagine a case where in respect of raw naphtha used in HDPE in the foreign country, Central Excise duty leviable under the Indian Law can be levied or paid." Thus, the CEGAT found that only those conditions could be satisfied which were possible of satisfaction and the condition which was not possible of satisfaction had to be treated as not satisfied.

7. We are of the opinion that the aforesaid reasoning is no longer good law after the judgment of this court in *Thermax Private Limited* v. *Collector of Customs (Bombay), New Customs House* [1992 (4) SCC 440] = 2002-TIOL-683-SC-CUS-LB which was affirmed by the Constitution Bench in the case of *Hyderabad Industries Limited* v. *Union of India* [1999 (5) SCC 15] = 2002-TIOL-369-SC-CUS-CB. In a recent judgment pronounced by this very Bench in the case of *AIDEK Tourism Services Private Limited* v. *Commissioner of Customs, New Delhi* (Civil Appeal No. 2616 of 2001) = 2015-TIOL-23-SC-CUS, the principle which was laid down in *Thermax Private Limited* and *Hyderabad Industries Limited* was summarised in the following manner:-

"15. The ratio of the aforesaid judgment in *Thermax Private Limited* (supra) was relied upon by this Court in *Hyderabad Industries Ltd.* (supra) while interpreting Section 3(1) of the Tariff Act itself; albeit in somewhat different context. However, the manner in which the issue was dealt with lends support to the case of the assessee herein. In that case, the court noted that Section 3(1) of the Tariff Act provides for levy of an additional duty. The duty is, in other words, in addition to the customs duty leviable under Section 12 of the Customs Act read with Section 2 of the Tariff Act. The explanation to Section 3 has two limbs. The first limb clarifies that the duty chargeable under Section 3(1) would be the excise duty for the time being leviable on a like article if produced or manufactured in India. The condition precedent for levy of additional duty thus contemplated by the explanation deals with the situation where 'a like article is not so produced or manufactured'. The use of the word 'so' implies that the production or manufacture referred to in the second limb is relatable to the use of that expression in the first limb which is of a like article being produced or manufactured in India. The words 'if produced or manufactured in India' do not mean that the like article should be actually produced or manufactured in India. As per the explanation if an imported article is one which has been manufactured or produced, then it must be presumed, for the purpose of Section 3(1), that such an article can likewise be manufactured or produced in India. *For the purpose of attracting additional duty under Section 3 on the import of a manufactured or produced article the actual manufacture or production of a like article in India is not necessary. For quantification of additional duty in such a case, it has to be imagined that the article imported had been manufactured or produced in India and then to see what amount of excise duty was leviable thereon."*

(Emphasis supplied)

8. We are of the opinion that on the facts of these cases, these appeals are squarely covered by the aforesaid judgments. We accordingly hold that appellants were entitled to exemption from payment of CVD in terms of Notification No. 6/2002. The appeals are allowed and the demand of CVD raised by the respondents-authorities is set aside."

The ratio of the Apex Court's decision is squarely applicable to the present case where CVD exemption was denied under Notfn. No. 30/2004 where the proviso to the notification stipulated the condition that the exemption is not applicable if credit of duty on inputs or capital goods has been taken under CCR.

15. Further, we find the Hon'ble Apex Court in the case of *AIDEX Tourism Services Pvt. Ltd.* v. *CC* (supra) has not only considered the cases of *Thermax Private Ltd.* and *Hyderabad Industries Ltd.* but also discussed the Apex Court's decision in the case of *Motiram Tolaram* v. *UOI* (supra). The relevant para is extracted hereinunder :-

" ....

This position has been reiterated in *Motiram Tolaram* v. *Union of India* - (1999) 6 SCC 375 = 1999 (112) E.L.T. 749 (S.C.), *CCE* v. *J.K. Synthetics* - (2000) 10 SCC 393 = 2000 (120) E.L.T. 54 (S.C.), *Lohia Sheet Products* v. *Commr. of Customs* - (2008) 11 SCC 510 = 2008 (224) E.L.T. 349 (S.C.) and *Collector of Customs (Preventive)* v. *Malwa Industries Ltd.* - (2009) 12 SCC 735 = 2009 (235) E.L.T. 214 (S.C.). In fact, in *Lohia Sheets* and *Malwa Industries* cases (supra), this Court was considering exemption notifications envisaging use of certain material within a "factory" and still held that an importer would be entitled to the benefit of the exemption notifications in view of Section 3 of the Tariff Act and the decisions in *Hyderabad Industries and Thermal* cases. As such, it is now settled that the rate of duty would be only that which an Indian manufacturer would pay under the Excise Act on a like Article. Therefore, the importer would be entitled to payment of concessional/reduced or nil rate of countervailing duty if any notification is issued providing exemption/remission of Excise duty for a like article if produced/manufactured in India.

16. We may mention that in the case of *Commissioner of Central Excise, New Delhi* v. *Hari Chand Shri Gopal & Ors.* - (2011) 1 SCC 236 = 2010 (260) E.L.T. 3 (S.C.), a three Judge Bench of this Court had raised certain doubts on the correctness of the principle contained in *Thermax Private Limited* (supra) as well as in *J.K. Synthetics* (supra) and referred the matter to a larger Bench. Reference order is reported as (2005) 8 SCC 164 = 2005 (188) E.L.T. 353 (S.C.). The Constitution Bench decided the said case, which is reported as (2011) 1 SCC 236. From the reading of paras 39 to 41 of the said judgment it becomes clear that though these cases were held not applicable to the fact situation and were distinguished, the Court did not say that the aforesaid judgments were incorrectly decided. In fact, by distinguishing the ratio of the said cases, the Constitution Bench impliedly gave its imprimatur to the principle laid down in the aforesaid judgments."

16. In view of the above ruling by Apex Court, we are unable to accept the Revenue's plea that the Apex Court decision of *SRF Ltd.* and *M/s. Motiram Tolaram* are in direct conflict. Hon'ble Supreme Court has clearly considered all the previous decisions of Apex Court including the decision in the case of *Motiram Tolaram* v. *UOI* (supra). Therefore, the Revenue relying on the above case law and also the LB decision in the case of *M/s. Priyesh Chemicals & Metals* (supra) are not relevant. In view of the latest decision of Apex Court in *SRF* case & *AIDEK Tourism Services Pvt. Ltd.*, the issue of CVD exemption under Notfn. No. 30/2004 on imported goods has attained finality. This Tribunal Bench decisions in the case of *M/s. Prashray Overseas Pvt. Ltd.* v. *CC, Chennai* stands confirmed by the Hon'ble Supreme Court in the above decision.

(9) In view of the settled legal position as above, we note that the ratio and the law laid-down by the Hon'ble Supreme Court, as elaborately discussed above, are squarely applicable to the fact of the case. Accordingly, we are of the considered view that the exemption of additional duty of customs extended to the respondent by the impugned order is legal and proper. Accordingly, we dismiss the appeals by the Revenue.

(Pronounced in the court on 27.09.2017)

(S.K. Mohanty) Member (Judicial)	(B.Ravichandran) Member (Technical)

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