CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI
WEST ZONAL BENCH

Excise Appeal No. 85677 of 2015

(Arising out of Order-in-Original No. 46/AC/COMMR/TH-II/2014 dated 22/12/2014 passed by the Commissioner of Central Excise, Thane II)

M/s. Axiom Cordages Ltd. **.....Appellant**
Betgaon village Mahagaon Road,
Near Gaushala Boisar (E)
Palghar Thane

Vs.

Commissioner of Central Excise, Thane II **.....Respondent**
3rd Floor, Navprabhat Chamber,
Ranade Road, Dadar (W)
Mumbai

With

Excise Appeal No. 86393 of 2016

(Arising out of Order-in-Original No. 13-14/SJB/COMMR/TH-II/2016 dated 16.03.2016 passed by the Commissioner of Central Excise, Thane II)

M/s. Axiom Cordages Ltd. **.....Appellant**
Betgaon village Mahagaon Road,
Near Gaushala Boisar (E)
Palghar Thane

Vs.

Commissioner of Central Excise, Thane II **.....Respondent**
3rd Floor, Navprabhat Chamber,
Ranade Road, Dadar (W)
Mumbai

And

Excise Appeal No. 86033 of 2019

(Arising out of Order-in- Appeal No. OIA-NA/GST/A-III/MUM/283/18-19 dated 10.12.2013 passed by the Commissioner of Central Excise, Thane II)

M/s. Axiom Cordages Ltd. **.....Appellant**
Betgaon village Mahagaon Road,
Near Gaushala Boisar (E)
Palghar Thane

Vs.

Commissioner of Central Excise, Thane II **.....Respondent**
3rd Floor, Navprabhat Chamber,
Ranade Road, Dadar (W)
Mumbai

APPEARANCE:

Ms. Nisha Bineesh, Advocate for the appellant
Shri Nitin Ranjan, (AR) for the respondent

CORAM:
Hon'ble Mr. S.K. Mohanty, Member (Judicial)
Hon'ble Mr. P. Anjani Kumar, Member (Technical)

FINAL ORDER No: A/86338-86340/2021

DATE OF HEARING: 03.03.2021
DATE OF DECISION: 19.05.2021

PER: P. ANJANI KUMAR

All the three appeals Nos. E/85677/2015, E/86383/2016 and E/86033/ 2019 are filed by M/s Axiom Cordages Limited against different OIO/ OIA orders passed by the Commissioner/ Commissioner (A) as follows. The issue involved in the cases being identical have been taken for hearing and consideration in one go.

Appeal No	**Period Covered**	**OIO/OIA No**	**Duty involved**
E/85677/2015	4/2009 to 12/2013	46/AC/COMMR/Th-II/2014 dated 22.12.2014.	₹13.40Cr
E/86383/2016	01/2014 to 07/2015	13-14/SJB/COMMR/Th-II-2016 dt.16.03.2016	₹3.06 Cr
E/86033/2019	08/2015	NA/GST/A-III/MUM/283/18-19 dated 6.12.2018.	₹0.02 Cr

2. Brief facts of the case are that the appellants are EOU are manufacturers and exporters HDPE/LDPE/PP Ropes and Yarn. The appellants have achieved positive NFE and there is no dispute on this count. The appellants have also cleared Yarn and Ropes in DTA. On the basis of CAG audit conducted on the records of the appellants, department opined that in terms of Para 6.8[a] of the Foreign Trade Policy, built into condition 2 of the notification number 23/2003-CE dated 31-03-2003, EOUs are allowed to clear their finished goods into DTA ,involving value up to 50% of the FOB value of exports subject to fulfilment of positive NFE on payment of concessional duties of excise; within this entitlement of DTA sale , the EOU may sell goods which are exported or to be exported by them; EOUs which are manufacturing and exporting more than one product may sell any of these products into DTA up to 90% of the FOB value of exports of the specific products, subject to the condition that total DTA sale does not exceed the overall entitlement of 50% of the FOB value of exports. It was alleged that the appellants have availed concessional duties of Central excise, on goods cleared in DTA, in excess of the permitted 90% of the FOB value of the exports, in contravention of Para 6.8[a] of the Foreign Trade Policy and condition [2] of the notification number 23/2003-CE dated 31-03-2003; the appellants, during the relevant periods, exported the yarn valued at ₹68,68,303/- and cleared the same yarn valued at ₹4,70,37,94,080/- into DTA; this was much in excess of the prescribed limits of 90% of the FOB value of exported yarn and thus in clear contravention of the Para 6.8[a] of the Foreign Trade Policy and condition 2 of the Notification. Accordingly, Show cause Notices were issued and duty was confirmed vide orders cited above.

3. Learned Counsel for the appellants submits that Twisted Yarn and Rope are similar goods; Rope is nothing but bunch of twisted yarns; yarns are thus intermediate goods; FOB value of Ropes Exported should be counted for the DTA entitlement of Ropes or Yarns; the products manufactured by the Appellant (Twisted Yarn and Ropes) are similar products; they are similar in the quality, character and appearance; rope is nothing but intertwined twisted yarn; strength is based on the number of twisted yarn intertwined; otherwise quality is the same; characteristics like melting point (180°C); floating in water; elasticity; water resistance; corrosive ness; exposure to UV Rays, Acid, chemical etc. are same; there could be difference in thickness, colour based on dye used and strength. She submits that lower authorities relied upon the CBEC Circular 7/2006 dated 13.1.2006; Hon'ble Apex Court in the case of Woodcraft Products Ltd 1995(77) ELT 23 (SC) held that the word similar is expansive and not restrictive like same and that the definition available in the Customs Act cannot be used in respect of Notification issued under other enactment. Interpretation of the word similar goods was done by the Tribunal in the following cases

(i). Madras Aluminium 2000(126)ELT 1064
(ii). Hindustan Lever 2011(268) ELT 252 (T)
(iii). Hindustan Motors 1996(87)ELT 216(T)
(iv). TELCO 1998(97) ELT 439 (T)
(v). Ranbaxy Laboratories 1997(92) ELT 400(T)
(vi). Katyayani Exports 2003(156) ELT 497(T)
(vii) Muthoot Apt Ceramics 2004(168) ELT 186
(viii) Falma Laboratory 1999(105) ELT 658(T).

3.1. She also submits that the appellants have indirectly exported twisted yarns as they have exported Ropes made of the same. The issue was considered in (i) Azad Coach Builders 2010(36) VST 1 (SC) (ii) Mahindra & Mahindra Ltd 2013(296) ELT 62 (T) and (iii) Indian Aluminium 1995(79) ELT 111(T)

3.2. She further submits that the appellants submitted all the details to the Development commissioner and all no objection has been raised. Development commissioner is the competent authority to decide whether goods are eligible for clearance in DTA. Learned Counsel for the appellants submits that they have not violated any provisions of FTP or the Notification; They have obtained letter of permission from Development Commissioner for the clearance of goods; Development Commissioner has not raised any objection at any point of time; clearances were against CT-3 which were not cancelled; they have regularly submitted ER-2 returns; as there is no suppression of any kind, extended period cannot be invoked and demand for the period April 2009 to April 2013 is barred by limitation. No penalty is imposable and no interest is payable.

4. Vide written submissions dated 9th February 2021, she submits that as per Para 6.8 of FTP, units which are manufacturing and exporting more than one product can sell any of these products into DTA, up to 90% of FOB value of the specific products, subject to the condition that total DTA sale does not exceed overall entitlement; Revenue has wrongly interpreted the provision saying that since the product cleared into DTA by the Appellants was not similar to the goods exported and hence the unit was not entitled to pay concessional rate of duty for clearance of HDPE/LDPE/PD yarn (Twisted) and the unit is required to pay duty at full rate for supplies made is excess of 90% percent of value of exports; lower Authorities held that HDPE/LDPE/PP Twisted yarn and HDPE/ LDPE/PP Ropes falls in different Custom Tariff Heading; they have different commercial use; Basic Custom Duty is different and that HDPE/LDPE/PP Ropes were manufactured out of imported raw materials, while twisted yarn was manufactured mainly out of yarn received from the DTA unit against CT-3 Certificate.

4.1. She submits that the contention of Revenue that a literal interpretation of the second clause, when read in its entirety, requires that for different specific products, the DTA sales of EOUs should be compared to the export of that particular product when calculating the 90% limit, subject to an overall 50% limit for the combined sales of all the products and that the requirement of similarity of products from the first proviso cannot be imported to the second one, where it is not present, is baseless and uncalled for; accepting the contention that "for different specific products, the DTA sales of EOUs should be compared to the export of that specific/particular product when calculating the 90% Limit" will be a total deviation from Paragraph 6.8 (a) of FTP, which clearly stipulates that "units which are manufacturing and exporting more than one product can sell any of these products into DTA up to 90% of FOB value of export of the specific products, subject to the condition that total DTA sale does not exceed the overall entitlement of 50% of FOB value of exports; revenue's contention/interpretation of paragraph 6.8(a) is absolutely incorrect; it is the misconception of law by the department that (i) for different specific products, the DTA sales of EDUs should be compared to the export of that specific/[particular product when calculating the 90% limit; (ii) the value of the DTA sales for each particular product manufactured must not exceed 90 % of the value of the Exported Goods. The Audit statement that the DTA Clearance of Twisted Yarn was more than 90% of the export of the same was only amplified by the department; she submits that misconceived provisions of Law would defeat the very purpose and intent of legislation.

4.2. The Appellants are manufacturing HDPE/LDPE/PP ROPES & Twisted Yarns; Export of Ropes was larger than the Twisted Yarns; Appellant cleared Twisted Yarns to DTA within 90% of the FOB value of the exports of goods as per Para 6.8 (a) of FTP; Appellant has cleared twisted Yarn which is well within the prescribed limit of 90% of 50% of the total entitlement; this submission was put forward by the Appellant from the very first stage of reply to the department's audit objection itself. Submitting on the illustration given by the department, she submits that If 100 is the FOB value of exports, then 50% of the same can be cleared to DTA; if the FOB value of export of two products is 100, then they can clear any of the products up to 90% of the FOB value of Export of specific products; here the Department failed to calculate the total value of the exports of specific goods; instead they calculated value of export of yarn alone and alleged that Appellant has cleared to DTA is in excess of the value of export of Twisted yarn which is not correct; Revenue ought to have calculated value of export (value of Twisted yarn and Ropes). She submits that Tribunal in the case of Abi Show tech India 2013(294) ELT 313(Tri-Chennai) and final order 2019 (366) ELT 1048 (Tri-Chennai), wherein the appellant exported some quantity of bearing housing and large quantity of precision automotive components; the value of DTA clearance of Bearing housing machine was more than that of precision automotive components; Tribunal held that it was no violation of policy; similar were findings in the case of Consolidated Coin (*2013 (2) TMI 416*); ironically revenue relies upon the case saying that the Appellant therein cleared in DTA Bearing Housing only; this is not correct argument; the Orders in Original were passed relying upon the Stay Order passed in favour of revenue in the case of *Abi (supra)*, but the case was finally decided in favour of the Assesse by the Hon'ble Tribunal.

5. Learned Authorised Representative (AR), for the department submits that Para 6.8 of the FTP imposes two distinct conditions on the DTA sales by an EOU; First Condition is that the value of the DTA sales must not exceed 50% of the value of the Exported Goods and also that the DTA goods and the exported goods must be similar; Second Condition is that the value of the DTA sales for each particular product manufactured must not exceed 90% of the value of the Exported Goods; appellant has contravened the second condition as can be clearly seen from the CAG Audit Memo dated 21.05.2013. It has been held in the case of Hindustan Granites Vs UOI [2007 (211) E.L.T. 3 (S.C.) that DTA clearances are not an integral part of the EOUs and are exemptions to the obligation of exports; Central Government is within its powers to strictly define the terms of such exemptions such as DTA. He submits that Apex Court in the case of M/s Dilip Kumar And Co 2018-TIOL-302-SC-CUS-CB held that exemption notification needs to be strictly interpreted; a Literal interpretation of the second clause makes it clear that for different specific products, the DTA sales of EOUs should be compared to the exports of that particular product when calculating the 90% Limit, subject to an overall 50% Limit; Second Proviso tries to negate an attempt to reach this limit by large amount of export of any one product; if the argument that DTA sales of each of the products can be up to 90 % of entitlement, it would give rise to absurdity of entitlement being more than 100 % of FOB of exports.

5.1. Learned Authorised Representative (AR), further submits that the Appellant have taken the argument that Twisted yarn are similar to Rope for the first time before CESTAT and not before the Lower authorities. Order-in-original clearly states that the Twisted Yarn has been made mostly from inputs purchased from Domestic Tariff Areas (DTA) locally under the CT-3 while the Ropes are produced from duty-free imported yarn. Hence, Prima facie that the factual premise of the appellant argument cannot be substantiated; the products are entirely different; While Twisted Yarn is classified under the heading of 54041200, Nylon Rope is classified under the heading of 56074900; they are subject to different Basic Customs Duty of 10% and 5% respectively; the appellant has accepted this classification and has not challenged it; hence the argument made by the Appellate should held to be Non Est.

5.2. Referring to the cases relied upon by the appellant, Learned Authorised Representative (AR) submits that the same are not relevant as the issue discussed was different therein; it was the grant refund of MODVAT credit on 'similar 'products used in the manufacture of the final output in the case of Madras Aluminium Co. Ltd2000(126)ELT 1064); similar' goods under Rule 57F (4) of Central Excise Rules was under consideration in Telco Ltd 1998(97) ELT 439 (T)and Falma Laboratory1999(105) ELT 658(T); provisions of Section 6 (1) (b) of the Central Excise Act and Central Excise Valuation Rules 1975 were discussed in in Ranbaxy Laboratories Ltd1997(92) ELT 400(T)); reference is to Central Excise Notification No. 2/95C.E and export of similar goods was discussed in Kathyayani Exports 2003(156) ELT 497(T), Hindustan Motors 1996(87)ELT 216(T)and Muthoot Apt Ceramics 2004(168) ELT 186.

5.3. He submits that the issue in Wood Craft Products Ltd 1995 (77) ELT 23 (SC) was classification of Plywood-Black Board; in Pasupati Spinning and Weaving Mills Ltd 2004(178) ELT, the issue was demand of Additional Duty of Excise on goods cleared from an EOU; in Meghmani Industries Ltd. 2010 (261) ELT 411 (Tri-Ahmd) and Abi Turnamatics vs CGST, Chennai, 2019(366)ELT 1048 (Tri-Chennal), the issue was about the similarity of the Export Product with the one cleared in DTA . This is the first requirement of the Para 6.8 (a) of the FTP which is not the contention in this appeal.

5.4. Adverting to the appellants reliance on cases with reference to Both First and Second Condition given in Para 6.8(a) of FTP, Learned AR submits that in the case of M/s Abi Showatech India ltd vs CGST, Chennai [2019-Tiol-1246-CESTAT-Mad], the discussion was about Bearing Housing and Turbo Charges and it was held that (in Para 6.2) that the clearances of Bearing Housing in DTA was actually 90% of the FOB value of the exports; the case affirms and does not negate the requirement of EOUs having more than one product exported, to have a limit of 90% of the Exports for DTA sales for each of the specific products with respect to the

Exports of that specific product; In the case of Consolidated Coin Pvt. Ltd [2013 (2) TMI 416], Tribunal *was* concerned as to whether Copper Alloy Coins and Copper Zinc Nickel Strips were similar products for the purposes of similarity of DTA clearances and Exports; it was held in Para 3 that the DTA clearances of coin blanks can be up to 90% of the FOB value of the clearances of the coin blanks as the total value of the DTA clearances is within the DTA entitlement of 50% of total FOB; department's view that the DTA clearances of coin blanks must be in the same proportion in which the coin blanks are exported is not correct.

5.5. Replying to the submissions on invocation of extended period, Learned AR submits that as a Star Export House, the appellants do not need prior permission for DTA sales as per the circular No 12/2005-Cus dated 04.03.2005; moreover, they were under Self- Sealing procedure; Jurisdictional Authorities became aware of the contravention of the policy when the records of the Appellant were subject to CAG Audit. He submits that the declaration given to the Development Commissioner, only stated that the Appellants were going to make DTA sales subject to the overall limit of 50% of Exports; it does not state the breakup of particular products; it was implicit that the Appellants adheres to the requirement of DTA sale of each particular product; monthly returns filled do not give the proper picture to the authorities. He submits that they are bound by the B-17 Bond, for ₹70 Cr, executed by them; it was held in M/s Bell Match Company *[2019-TIOL-1117-HC-MAD-CUS]* that when the assessee had not followed the requirements given in the Letter of Permission(LoP), extended period would be applicable; it was held in M/s Samsaa Rubber And Polymers Pvt Ltd [2019-TIOL-2617- CESTAT-HYD], that a wrong classification of product by the assessee denotes suppression; in M/s K. I. International [2012 (2) ECS (126) (Tri-Chen)], it was held that fraud does not go with justice.

5.6. Lastly, learned AR submits that exports are the main area of focus for EOUs and sales to DTA are a concession provided and the upper limit of DTA Sales of 90% of Exports for Particular products have to be strictly followed; it was held in *M/s ABI Showatech India Ltd (supra)* that the Provisions of Para 6.8(a) of the Foreign Trade Policy have to be strictly followed; in the case of *M/s Dilip Kumar And Company And Ors (supra),* the Apex Court has held that Exemption Provisions have to be interpreted strictly as per their plain language; in the case of M/s *Consolidated Coin Pvt. Ltd (supra) it was* held that the entitlement of 90% would be applicable even when the products were classified under same Heading of 7409 but as they were commercially different, their DTA sales limit of 90% would apply to each product separately; it was held in the case *Hindustan Granites (supra)* that DTA clearances are not an integral part of the EOUs and hence the Central Government is within its powers to strictly define the terms of such exemptions such as DTA.

6. Heard both sides and perused the records of the case. Brief issues that require consideration, in the case, are as to whether the appellant has violated the provisions of foreign trade policy 2009-14 as contained in paragraph 6.8 ibid thus making them ineligible for the concessional rate of duty as contained in notification No. 23/2003 CE dated 31.03.2003 and as to whether the department is justified in invoking extended period for the duty demand. We find that the appellants have based their submissions mainly contending that the items manufactured, exported and cleared in DTA by them are similar; the department has misread the provisions of Policy in finding that DTA sales limit of 90% would apply to each product separately, whereas the word used is products.

7. We find that a plain reading of the Paragraph 6.8 (a) of FTP (2019-14) would be beneficial. The paragraph reads as

> *"Units other than gems and jewellery units may sell goods up to 50% of FOB value of exports, subject to the fulfilment of positive NFE on payment of concessional duties. Within entitlement of DTA sale, units may sell in DTA, its products similar to goods which are exported or expected to be*

> *exported from units. However, units which are manufacturing and exporting more than one product can sell any of these products into DTA, up to 90% of FOB of export of the specific products, subject to the condition that total DTA Sale does not exceed the overall entitlement 50% of FOB value of exports for the unit, as stipulated above."*

8. Learned Counsel for the appellant submits that the purpose of FTP and the notifications issued is to promote export and to grant benefits in the form of concessional rate of duties. The interpretation, as attempted by the department, in this case defeats the very purpose of the FTP and Notification. She also submits that as per paragraph 6.8 of FTP, products similar to goods which are exported or expected to be exported can be cleared in the DTA; even the standard input output norms (SION) for each goods exported is specified under a product group specified therein; ropes and twisted yarns fall under the product group 'textile product'; they are made from common raw materials. Therefore, these goods are similar for the purposes of paragraph 6.8. The concept of similar or dissimilar goods cannot be applied to the instant case; twisted yarns are further processed to obtain ropes since ropes are nothing but bunch of twisted yarns inter-twined into each other, the concept of similar goods cannot be applied; the policy nowhere specifies that two specific goods can be similar only when such goods are commercially interchangeable; as a matter of fact, the impugned goods are commercially interchangeable as both are similar to each other in composition, and character and use and the only difference is of the strength.

9. Department relies heavily on the definition of similar goods given in Para 3 circular 7/2006-Cus dated 13.01.2006 F. No. 305/69/2005- FTT (Part IV). The said circular says.

> *"3. The paragraph 6.8 (a) of the FTP provides that EOU/EHTP/STP may sell goods up to 50% of FOB value of exports in DTA on payment of concessional duty subject to fulfilment of positive NFE. It also provides that within the entitlement of DTA sale, the unit has to sell in DTA its products similar to the goods, which are exported or expected to be exported. There has been doubt as to what constitutes „similar goods". Further, when the units are not required to take any permission for DTA sale under paragraph 6.39.9, it is felt necessary to provide definition of "similar goods" to bring clarity and uniformity. Therefore, it has been decided that the definition of „similar goods" would be based on the definition of similar goods as provided in the Customs Valuation (Determination of Price of Imported Goods) Rules, 1988. The term „similar goods" means "goods which is although not alike in all respects, have like characteristics and like component materials which enable them to perform the same functions and to be commercially interchangeable with the goods which have been exported or expected to be exported having regard to the quality, reputation and the existence of trade mark and produced in the same unit by the same person who produced the export goods". The Board's Circular No. 85/95 dated 26-7-95 issued in this regard stands rescinded."*

10. We find that the issue of similar goods came for discussion before various courts and tribunals. Coming to the question of similarity of goods, exported by the appellant, the appellants claim that as per the ratio of the decision of Tribunal in the case *Meghmani Industries (supra)* which was followed by the Tribunal in *Consolidated Coins Co (supra),* similarity does not mean being identical. We find that Tribunal in the case of *Madras*

Aluminium Co. Ltd. (supra) held that the words similar cannot be restricted to mean "same" or "identical"; instead when wider meaning is given to the words "similar" it will encompass the goods broadly falling within the same class or category. We also find that in the case of Hindustan Motors (supra), Tribunal held that the word "similar" needs to be given a wider meaning beyond the concept of headings /sub-headings of the Tariff. By applying this logic, the Tribunal concluded that motor vehicle chassis are similar to motor vehicles. In the case of TELCO(supra) Tribunal has held that cars falling under heading 8703 and light commercial vehicles/ heavy commercial vehicles falling under 8704 are similar goods. In the instant case, as submitted by the appellant, both products manufactured and exported by them are manufactured out of HDPE/LDPE/PPE granules; have same characteristics and are placed under same product group "textile products", as per standard input output norms (SION).. Therefore, following the ratio of the judgment cited above, we find that twisted yarn and rope fall under same category of goods. It is also pertinent to note that the permission/ Green Card given by the Development Commissioner vide SEEPZ/EOU/Broad banding/12/2002-03 /2037mentions both the products HDPE/PP/NYLON ROPE/YARN, Twisted yarn of HDPE/PP/NYLON. It can be seen that the products exported by the appellant are separated with the symbol '/ (or)'. The learned counsel for the appellants submit that Twisted Yarn and Rope are similar goods; Rope is nothing but bunch of twisted yarns; yarns are thus intermediate goods; FOB value of Ropes Exported should be counted for the DTA entitlement of Ropes or Yarns; the products manufactured by the Appellant (Twisted Yarn and Ropes) are similar products; they are similar in the quality, character and appearance; rope is nothing but intertwined twisted yarn; strength is based on the number of twisted yarn intertwined; otherwise quality is the same; characteristics like melting point (180Deg C); floating in water; elasticity; water resistance; corrosive ness; exposure to UV Rays, Acid, chemical etc are same; there could be difference in thickness, colour based on dye used and strength; it is common knowledge that rope is a thick yarn and yarn is a thin rope; depending on the use they are interchangeable. We find that Hon'ble Apex Court in the case of Woodcraft Products Ltd 1995(77) ELT 23 (SC) held that the word similar is expansive and not restrictive like same and that the definition available in the Customs Act cannot be used in respect of Notification issued under other enactment.

11. We find that tribunal in the case of Meghamani Industries 2010 (261) E.L.T. 411 (Tri. – Ahmd), held as follows.

> ***4.*** *We have considered the submissions made by both the sides. Applicability of extended period in our opinion is not sustainable in this case when the appellant has submitted returns which would show exemption notification availed by them, it cannot be said that there was any suppression or mis-declaration once the details of exemption Notification is given. Central Excise officer who is receiving the returns would be able to check up whether the clearances by the appellants were in terms of the*

notification or not. Since the condition of the Notification are known to the officer as well as the appellants. When all available information is submitted, if the departmental officers choose not to take any action under the Notification, unless the department is able to show that in the return or in the declaration made by the appellants there were any omissions or commissions which would have prevented, the officer to find out the correct case, extended period cannot be invoked. In this case no evidence has been brought out to show that return/documents declarations were incomplete or facts were suppressed or misdeclared in the order. Further, it was also submitted that invoices need not have been given by the appellant and if given the departmental officer need not have to verify. In any case, we find that mention of the notification number in the return and giving quantum of the clearances would be sufficient for the purpose of department. Therefore, the extended period cannot be invoked and demand if upheld would be limited to one year from the date of show cause notice. Therefore, we consider it a fit case for waiver of pre-deposit. Further, we also find that two Supreme Court decisions and a Tribunal decision have been cited before Commissioner but there is no finding in respect of these decisions. Commissioner simply observed that the facts of each case are different from this case and therefore, the case law is not relevant. In this case what was required to be considered was whether the definition of "similar goods" available in Customs Valuation Rules can be applied to the facts of the case. Basically the issue involved appears to be covered by the decisions cited by the learned advocate. The facts were not relevant but ratio of the decision as regards words 'similar' *was to be considered. Therefore these decisions are applicable. Ratio of these decisions is that definition available in the Customs Act cannot be used in respect of Notification issued under another enactment. In such cases common parlance or dictionary meaning has to be applied. Therefore, we find this issue has not been dealt with properly by the Commissioner. We could have considered this issue here in the Tribunal but for the fact that there is no examination of the goods in question which have been cleared in the DTA in terms of definition of similarity. In our opinion, in such cases, there has to be examination in respect of each product to show that this product is not similar to the one exported and why benefit of notification is not available to this particular product. In the absence of clear finding in respect of each product, we consider the order would be incomplete. As already observed by us in respect of dyes, there seems to be clarity in view of the fact that demand shown under the heading VAT dyes would give an impression that department has accepted that VAT dyes, OBA and solvent dyes form distinct categories. There is no finding as regards agro-chemicals which are similar and if they are not similar why they are not similar. Commissioner has to consider all these facts and give finding on the issues. Therefore, we remand the matter to the Original Adjudicating Authority, who shall consider in respect of each item the eligibility in DTA and also which meaning of "similar goods" to be adopted. We have already held that extended period cannot be applied. Appellants are to be given proper opportunity to present their case before the final decision is taken.*

12. Though in the above case, the above case is in respect of stay, the view of the tribunal has been made categorically clear on the issue of similarity of goods and admissibility of extended period of limitation. Tribunal in the case of *Hindustan Lever Ltd.* 2011 (268) ELT 252 (Tri-Chennai) has opined that fresh mushrooms and processed mushrooms even though classifiable under separate chapter headings belong to the same class of goods and both are similar. In view of the above discussion, the permission letter given by the development commissioner, grouping of both the items under one category under SION and the case law cited, we find that the appellant's contention on the similarity of goods exported/ sold in DTA merits acceptance and we uphold the same. Consequentially, the demands raised by the revenue are not sustainable and are liable to be set aside.

13. We find that the Revenue has relied upon the illustration given in the Circular no. 12/2008-Cus dated 24.07.2008 – F.N. DGEP/FTP/13/2008-EOU & G&J – PARA 8 for calculating the eligibility of DTA sale where more than one products are manufactured, exported and cleared in DTA by EOUs. Relevant para of the circular is reproduced as below.

> *"8. Flexibility for DTA sale for the units manufacturing and exporting multiple products Under the EOU scheme, a unit is permitted to sell up to 50% the goods which are 'similar' to the goods exported or expected to be exported at concessional rate of duty. 'Similar' goods have been defined in Board's circular No. 07/2006-Cus dated 13.01.2006 as goods which although not alike in all respects, have like characteristics and like*

component materials which enable them to perform the same functions and to be commercially interchangeable. The quality of the goods, reputation and the existence of a trade mark are among the factors to be considered in determining whether goods are similar. The above restriction posed difficulty to units which are manufacturing multiple products as they can only sell the specific goods in DTA up to 50% of value of export of that specific product. In order to obviate this difficulty, flexibility is provided by allowing DTA sale of a specific product up to 75% of the FOB value of export of the specific product within the overall total entitlement of 50% of total FOB value of exports which can be cleared at concessional rate of duties. Accordingly, para 6.8 (a) of FTP has been amended suitably. To exemplify, if a unit manufactures products 'A' and 'B' and exports product 'A' worth Rs 10 lakh and product 'B' worth Rs 15 lakhs, the unit was earlier allowed to sell goods worth of Rs 12.5 lakh (i.e 50% of the FOB value of exports of Rs 25 lakhs) into the DTA. Within this entitlement, the unit could sell into DTA products in proportion to the value of export of individual products i.e. for product 'A' worth Rs 5 lakhs and for product 'B' worth Rs 7.5 lakhs. In terms of amendment now carried out in para 6.8 (a) of FTP, the unit would be able to sell into DTA, the product 'A' up to a value of Rs 7.5 lakhs or product 'B' upto a value of Rs 11.25 lakhs provided the total value of sale by the unit (of A&B together) into DTA under concessional duty rate does not exceed Rs 12.5 lakhs."

14. The appellant submits that the learned Commissioner has reproduced the paragraph of the policy in a wrongful manner; the impugned order conveniently uses the word 'specific product' instead of' specific products'; correct word used in the policy is 'products'; change of word from 'products' to 'product' resulted in wrongful interpretation of the entire provisions; simple and plain reading of the provision reveals that those EOU units which are engaged in manufacturing and exporting more than one product, can sell any of these products into DTA up to 90% of the total FOB value of all the goods exported by the appellants; in other words, if an EOU is engaged in manufacturing more than one product, the DTA entitlement limit for each of the product will be 90% of the total Export made subject to overall limit of 50%. The appellants argue that Notification 23/3003–CE dated 31.03.2003 provides that exemption shall be availed if the goods are cleared to the domestic tariff area in accordance with sub paragraphs (a), (b), (d) and (h) of paragraph 6.8 of export and import policy; the notification requires that Deputy/Assistant Commissioner of Customs/Central Excise should be satisfied with the eligibility of the clearance of the said goods; Development commissioner is competent authority to decide on as to whether the goods are eligible for clearance in DTA and as to the DTA entitlement; the appellant have been regularly submitting copies of intimations given to the Development Commissioner; no objections have been ever raised by either the Development Commissioner or the Deputy Commissioner of Central Excise in this regard; At no point of time, it has been disputed by the competent authority that ropes and twisted yarn manufactured and exported or cleared in DTA are not similar goods and that ropes cannot be sold in DTA in excess of the proportion of their exports. it is well settled law that once the competent authority i.e. Deputy Commissioner grants permission for DTA clearance, CE authorities are precluded from questioning its validity; Condition no. 2(ii) (a) provides that goods to be cleared into DTA are similar to the products exported or expected to be exported; all the goods manufactured by the EOU, as mentioned in the LOP are meant to be exported; there is not stipulation that only those products which are similar to the products exported alone should be cleared within the DTA; if it were so, the expression 'expected to be exported' would be redundant.

15. We find that coordinate benches of the Tribunal in a series of decisions held that the appellants contention is correct and that in terms of the Para 6.8 of FTP, in respect of the units which are manufacturing more than one item, goods whose exports are less can be cleared more in the DTA subject to the overall limitation of 50 % of the FOB of export performance. Chennai Bench of the Tribunal in the case of M/s ABI Showatech India Ltd 2019-TIOL-1246-CESTAT-Mad held that

> *6.2. "Thus it can be seen that within entitlement of DTA sale, units may sell in DTA, its products similar to goods which are exported or expected to be exported from units. The description of goods in the green card does not differentiate or specify goods on the basis of customs tariff. It merely treats them belonging to a class. Bearing machines are considered by department as part of turbo charger which are parts of automobile, then precision automotive components also being part of automobiles should fall in the same class, since they are engaged in manufacture and*

export of various part of automobile as stated in the green card. Further, as per the table given in paragraph 2 above, the appellant has cleared in DTA bearing housing only. Precision automotive competent was not cleared in DTA. In paragraph 6.8 what is stated is that when more than one product is exported such unit can clear in DTA up to 90% of value of such specified goods provided the total DTA sale does not exceed 50% FOB value of exports of the unit. The appellant have sold 90% FOB of value of export of bearing housing in DTA and has not exceeded 50% of FOB value of the unit since there is no DTA sale of precision automotive component. The condition is therefore fully satisfied. The denial of concessional rate of duty as per the notification is unjustified. The demand raised cannot sustain and requires to be set aside, which we hereby do. The impugned order is set aside and the appeal is allowed with consequential relief if any.

16. In the case of ABI Turnamatics 2019 (366) ELT 1048 (Tri-Chennai) it was held that

5.5 In the first place, we find that the Tribunal in the case of Meghmani Industries Ltd has addressed the very controversy in respect of the definition of similar goods for exemption under notification no. 23/2003-CE. The tribunal in the decision after referring to the judgement of the Hon'ble Supreme Court in the case of Woodcraft Products Ltd. 1995 (77) ELT 23 (SC) and the Tribunal in Telco 2000 (126) ELT 1102 (Tri) noted that the definition available in the Customs Act cannot be used in respect of notifications issued under another enactment; then in such cases common parlance or dictionary meaning is to be applied. Secondly, we find from the green card dated

31.03.2006 issued by the Development Commissioner MEPZ and subsequently also further revised by the MEPZ/SEZ that the main products that was manufactured /exported to be turbo charger components. There is no doubt that the appellant had exported bearing housing whereas the goods to be cleared into DTA seeking benefit of notification no. 23/2003 was turbo wheel assembly. While the adjudicating authority has been at pains to cite the difference in characteristic and function of these two items, the fact remains that both of them are components of turbo charger and hence would surely fall under the broad banded term "turbo charger components' which is the export product as per the EOU / green card issued to be appellant by the Development Commissioner. Hence, when the permission granted to the appellant has not listed any specific components of a turbo charger but instead has only indicated as export product of 12,50,000 nos. of turbo charger component which was even subsequently enhanced to 32,00,000 nos. of turbo charger components, the appellant cannot then be said to have caused the breach of the conditions. Both bearing housing and turbine wheel are surely component parts of turbo charger, the fact which has been admitted by the adjudicating authority in para 12 of the impugned order. If, on the other hand, the permission granted by the Development Commissioner to the EOU was only for bearing housing, in that event, the clearance of turbine wheel which is part distinct from bearing housing would have come under the scanner. But when the permission is generic and only states "turbo charger components" the condition of the impugned notification gets satisfied so long as the parts that they exported and the parts cleared into DTA are both like components of turbine charger.

17. In the case of *Consolidated Coin Company Pvt. Ltd*. 2013 – TIOL-139-CESTAT-DELHI Tribunal held that as regards the third point of dispute since hte items exported by the appellant the "copper alloys coins blanks and copper zinc nickel strip" are the similar products, both falling under heading 7409 and since the DTA Clearances are within the overall entitlement of 50% of the FOB value of the exports, in accordance with the provisions of para 6.8(a) of the FTP the DTA clearances of any one of these products can be made up to 90% of the FOB value of the export. The DTA Sales of coper alloy coin blanks are well within 90% of their clearances. In view of this, the third objection of the department also does not appear to be valid and as such the duty demand of ₹83, 23,000/- does not appear to be sustainable.

18. In terms of paragraph 6.8(a) of the FTP units which are manufacturing and exporting more than one product can sell any of these products into DTA up to 90% of FOB value of export of the specific products, subject to the condition that total DTA sale does not exceed the overall entitlement of 50% of FOB value of exports for the unit as stipulated. A plain reading of the provisions of policy gives understanding that within entitlement of DTA sale, the units may sell in DTA, its products similar to goods which are exported or expected to be exported from units and in case they are manufacturing and exporting more than one product, they can sell in DTA any of this products subject to limitation of 90% of FOB value of export of the specific products.

However, this is subject to overall entitlement of 50% of FOB value of exports. The policy is clear in saying that the units may sell "any" of these products into DTA and subject to 90% of export value of export of the specific "products." In our understanding, a plain meaning of words is that any of the products manufactured or exported can be sold in DTA. The only restriction that appears to be that the value of DTA clearances of any of the products should not exceed 90% of FOB value of export of the specific products. The catch here seems to be on the word "products" whereas the policy mentions the same to be specified products. The department wants to read the same down as "product." As seen above, Tribunal has taken a categorical stand on the interpretation of this provision in the case of measure ABI Showatech India, ABI Turnamatics and M/s Consolidated Coin (all supra), in favour of the appellants. IN the case of ABI Showatech the export value of bearing housing machines was only about 25 thousands, whereas value of DTA clearances was about 7crores. The same was held to be valid.

19. We find that EOUs are given a facility to clear the goods in DTA, as a reward for the exports made by them subject to the fulfilment of positive NFE. It may so happen that EOU unit manufacturing more than one product may not be able to export all the products in the same proportion; the overseas market may not have demand for all the products manufactured by them. Understandably, EOU cannot be expected to throw away or destroy the product or sell in DTA at a higher rate of duty resulting in financial loss. We find that, under these circumstances, a provision has been built in to the FTP, provision has been made to enable the manufacturer to sell such goods in DTA. The Limitation of 90% of FOB of the products appears to have put to ensure that there is export of all the products manufactured and to ensure that a product which is not at all exported is not cleared in DTA. We find that, as the EOU scheme is based on value of clearances, once export obligation is fulfilled, the manufacturer cannot be constrained to clear particular products in DTA in proportion to the export of the specific product. This appears to be the understanding of the tribunal in the series of judgments cited above. Moreover, the facts and circumstances of the instant case being similar to that of the cases cited above, we find that the goods cleared in DTA are to be held to be similar to those exported and that the 90% entitlement should be seen from the value of exported specific products and not a single product. By following the ratio of the cases, we find that the DTA clearances of the appellants are in order.

20. Coming to the third submission of the appellants that the substantial portion of the demand is time barred, we find that Development Commissioner has given permission or has been regularly intimated about the DTA clearances; similar intimations and returns have also been submitted to the jurisdiction Custom/CE authorities. The clearances in DTA were going on from 2009 onwards. CERA audit of the unit has taken place and note was issued on 21.05.2013. The authorities' i.e either the development Commissioner or the Deputy/Assistant commissioner of Customs/Central Excise has never raised any red flag about the entitlement of DTA Clearances by the appellants. The revenue authorities also have accepted the clearances before the conduct of audit. It gives an understanding that the department was in agreement with the procedures followed by the appellant. As the appellants were regularly submitting intimations to the Development Commissioner and Jurisdictional Central Excise authorities, it is not open to the department to invoke the extended period of limitation. Revenue sought to enforce the conditions of B-17 Bond. However, the Bond is given in respect of imports or duty free DTA procurements by the appellants. It would no way cover the duty liability if any on the DTA clearances. It is not the case of the department that the demand is of duty of Customs or duty of excise foregone on the raw material imported/procured by the appellants.

21. Moreover, the Revenue has alleged violation of the condition of the notification 23/2003 dated 31.03.2003. The notification refers to the provision of the FTP policy. Development Commissioner who is the implementing authority of the policy has not objected to the clearances made by the appellants in DTA. Under the circumstances, it is to be held that revenue has gone beyond their authority in interpreting the provisions of FTP, following the decision of Delhi High Court in

Great ship (India) Ltd. 2016 (338) ELT 545 (Del), where in it was held that

> ***33.*** *There is merit in the contention of the petitioner that in the event of conflict of views between two ministries of the Central Government, the view taken by the ministry that is primarily responsible for the policy in question, which in this case is the FTP, should prevail. The SFIS was introduced by the Ministry of Commerce and its instrumentality, i.e., the DGFT has been statutorily entrusted with the final word on the interpretation of the FTP. The letter dated 6th September, 2013 from the Commerce Secretary to the Revenue Secretary is instructive. It refers to Circular No. 837/14/2006, dated 3rd November, 2006 issued by the C.B.E. & C. under the Ministry of Finance which acknowledged that payment of customs duty could be made by using the duty credit scrips. In particular it was pointed out that the expression "duty free credit scrip" had been used incorrectly and that the correct phrase should have been "duty credit scrips". It was suggested that the "insistence by C.B.E. & C. that goods imported by use of SFIS scrip may not be alienated unconditionally, even after three years of import, can be attributable to this inadvertent choice of words." Importantly it was pointed out that "the scrip itself is a benefit that has been 'earned'". This also answers the misconception of the DoR that customs duty can only be paid in cash, and that use of duty credit scrips is only 'revenue foregone'. The position has been explained by the Madras High Court in Tanfac Industries Ltd. (supra), where it was held that the goods cleared by using DEPB scrips for payment of duty should be treated as duty payable goods and not as duty exempted goods.*

22. In view of the above discussion and following the ratio of cases of Meghmani Dyes & Intermediates Ltd 2013 (288) ELT 514 (Guj); Emcure Pharmaceuticals Ltd2014 (307) ELT 180 (Tri-Mum) and Surya Life Science Limited 2019 (368) ELT 148 (Tri-Ahmd), extended period cannot be invoked under the circumstances. On this count substantial portion of the demand should go away. However, as we already held that the DTA clearances of the appellants are in order, the appeals succeed on merits, the issue of limitation will not have any bearing on the outcome.

23. Interestingly, the counsel for the appellants as well as the ld. AR have relied upon the same cases i.e. *Measures ABI Showatech India Ltd.* (supra) while the appellant rely on the same stating that clearance in DTA was mostly of bearing housing only whereas exports were mainly of precision automotive component. The department relies on the same saying that the appellant in that case have fulfilled the conditions of Para 6.8 of FTP and the DTA clearances were less than sold 90% of FOB value of specific product within the overall limit 50% of FOB value. However, ongoing through the case law it appears that the department's contention is incorrect. Tribunal has held categorically that even though the value product (bearing Housing) cleared in DTA was more than 90 percent of the value of FOB value of export of the same, the DTA clearances were in order. The figures of export and DTA clearances in that case are as follows.

Bearing Housing Machined (parts of Turbo Charger)			**Precision automotive components**		
FOB Value Of exports (₹)	Value of DTA clearances	DTA clearances as a% of FOB value of exports	FOB value of exports	Value of DTA clearances	DTA clearances as % of FOB value of exports
25135	7,03,86,720	280035%	209052935	Nil	---

It can be seen that in the instant case, DTA clearances of Bearing Housing Machined were 280035% of the FOB value. Even then Tribunal held that the clearances are in order in view of the provisions of FTP. In the instant case during the period 2009-10 to 2013-14(up to December 2013), exports of twisted yarn were ₹66, 68,303/- and DTA clearances were of value ₹470, 37, 94,080/- thus DTA clearances were 70,205% of the same. It can be seen that facts of the case are identical. Tribunal also held that Bearing Housing and Precision components were similar goods. In the instant case as per above discussion we held that Twisted yarn and Ropes are under the same category of goods under SION and can be held to be similar goods in the broader sense of the word. Therefore, we find that the case is in no way in favour of the Revenue. Learned Authorised Representative for the Revenue, countering the cases cited by the appellants to explain the similarity of nature of goods, submitted that the issues discussed therein are different. While we agree with this contention we hold that the cases can be relied as far as the understanding of similar goods is concerned. Therefore, we find that the contentions of Revenue are not acceptable and the ratio of the cases cited is valid to arrive at the conclusion that the impugned goods are similar in nature. Learned Authorised Representative for the Revenue further sought to rely on the case of Shri Dilip Kumar and others. We are of the considered opinion that the issue doesn’t pertain to interpretation of a Notification but interpretation of Provisions of the Policy. As discussed above, the implementing authority, the Development Commissioner has not raised any objection on the DTA sales made by the Appellant. Therefore, we hold that the ratio of cases is to be applied if the facts of the case are comparable and that a strenuous stretching of facts is not permissible. Moreover, in the instant case there is no allegation that export obligation has not been fulfilled and positive NFE was not achieved. A close look at the scheme of the EOU, gives an understanding that the scheme places on reliance of the value of exports and not the quantities. Therefore, we find that positive NFE being achieved, the appellants are within their rights to avail the facility of DTA clearance in terms of Para 6.8 of FTP.

24. In view of the above, the appeals are allowed with consequential relief, if any, as per Law.

(Pronounced in Court on 19.05.2021)

(S.K. Mohanty)
Member (Judicial)

(P. Anjani Kumar)
Member (Technical)

//SR