

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, MUMBAI
REGIONAL BENCH**

Excise Appeal No. 1307 of 2012

(Arising out of Order-in-Appeal No. YDB(32)MV/2012 dated 29.05.2012 passed by the Commissioner of Central Excise (Appeals), Mumbai-I)

**M/s. Mother Dairy Fruit and Vegetable
Pvt. Ltd.**

Appellant

NDDB Compound, Western Express Highway,
Goregaon (E), Mumbai 400 065.

Vs.

Commissioner of Central Excise, Mumbai-V

Respondent

5th floor, Utpad Shulk Bhavan, Plot No. C-24,
Block 'E', Bandra-Kurla Complex,
Bandra (E), Mumbai 400 051.

Appearance:

Shri P.K. Shetty with Shri Virat Chanda, Advocates, for the Appellant
Shri Deepak Bhilegaonkar, Additional Commissioner, Authorised
Representative for the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)
HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

Date of Hearing: 22.09.2022

Date of Decision: 22.09.2022

FINAL ORDER NO. A/85912/2022

PER: SANJIV SRIVASTAVA

This appeal is directed against order in appeal No. YDB(32)MV/2012 dated 29.05.2012 passed by the Commissioner of Central Excise (Appeals), Mumbai-I, upholding order in original No. 442/07/1/2011/ADDL/AGS dated 13.12.2011 of the Additional Commissioner of Central Excise. By the order in original, the Additional Commissioner has held as follows:

"ORDER

In the facts and circumstances of this case, as discussed, analyzed and found above -

1. I determine and confirm the amounts of unpaid differential duties of excise of 28,16,877/- [Rupees twenty eight lakh sixteen thousand eight hundred seventy seven only) under

Section 11A(2) [now Section 11A(10)] of the Central Excise Act, 1944 for being recovered from M/s Mother Dairy Fruit & Vegetable Private Limited, NDDDB Campus, Near Mahananda Dairy, Western Express Highway, Goregaon (East), Mumbai -400 065 along with accrued interest thereon under Section 11AB [now Section 11AA] of the Central Excise Act, 1944; and

2. 1 Impose a penalty of 28,16,8771- [Rupees twenty eight lakh sixteen thousand eight hundred seventy seven only] upon M/s Mother Dairy Fruit & Vegetable Private Limited, NDDDB Campus, Near Mahananda Dairy, Western Express Highway, Goregaon (East), Mumbai-400 065 under Section 11AC [now Section 11AC(1)(a)] of the Central Excise Act, 1944."

2.1 Appellant is an 100% Export Oriented Unit. They had cleared the "fruit pulp" were not liable to excise duty as such to the job worker of their sister DTA unit for further processing as per the agreement and direction of their sister concern. The Appellant reversed the duty forgone in terms of the paragraph 6.8(j) of the FTP 2004-09 read with the proviso to the clause 6 of the Notification No.22/2003-CE dated 31.03.2003 read with the proviso to the clause 3 of the Notification No.52/2003 Cus dated 31.03.2003. For determining the duty forgone they took the value at which they had cleared the "fruit pulp".

2.3 Revenue was of the view that the value adopted for determining the duty forgone, should be of the "fruit juice" cleared by the job worker/ processor.

2.4 Accordingly a show cause notice was issued to the appellant asking them to show cause as to why the amount of duty foregone should not be determined on the basis of value of "fruit juice" at which the job worker – processor of their sister concern was clearing the goods after processing, and the differential amount of the duty foregone should not be recovered from them. Show Cause notice was issued invoking extended period of limitation and also proposed for recovery of interest and imposition of penalty.

2.5 This show cause notice was adjudicated by the additional commissioner as per the order in original referred in para 1,

above. Appeal filed by the appellant, was dismissed by Commissioner (Appeal) as per the impugned order.

2.6 Aggrieved appellant have filed this appeal.

3.1 We have heard Shri P K Shetty and Virat Chanda, Advocates for the appellant and Shri Deepak Bhilegaonkar, Additional Commissioner, Authorized representative for the revenue.

3.2 Arguing for the appellants learned counsels submit that

- in the paragraph 41 of the Order-in-Original dated 12.12.2011 it is held that the goods cleared by the Appellant (EOU) were not liable to excise duty and as such, the Appellant (EOU) had reversed the duty forgone in terms of the paragraph 6.8 (j) of the FTP 2004-09 read with the proviso to the clause 6 of the Notification No.22/2003-CE dated 31.03.2003 read with the proviso to the clause 3 of the Notification No.52/2003 Cus dated 31.03.2003.
- the aforesaid manner of assessment was done only after taking specific permission from the jurisdictional customs authority by virtue of its letter F. No. S/16-EOU-01/96-992 VI dated 19.09.2008 confirming the quantum of duty payable in respect of the goods cleared by the Appellant (EOU) to the DTA.
- Larger Bench of this Hon'ble Tribunal in case of Green Brilliance Energy (P) Ltd. V. CCE&ST, Vadodara-I' has held that when the goods cleared from the EOU to the DTA are non-excisable or even if they are liable to NIL rate of duty, the same are liable to be assessed after reversing the duty forgone in terms of the paragraph 6.8(j) of the FTP read with the proviso to the clause 6 of the Notification No.22/2003 -CE dated 31.03.2003 read with the proviso to the clause 3 of the Notification No.52/2003-Cus dated 31.03.2003.
- Memorandum of Understanding dated 01.04.2007 between the Appellant (EOU) and the distinct DTA unit clearly demonstrates that the Export Oriented Unit and the Domestic Tariff Area Unit were distinct entities from the point of view of assessment to central excise and customs

duties. It further demonstrates that Godrej Hershey Ltd was a sub-contractor of the DTA unit and not of the EOU (Appellant) and as such, if at all any notice was to be issued for assessment of duty in relation to fruit juices processed by Godrej Hershey Ltd., the same at the highest could have been issued to the DTA unit and not to the Appellant (EOU).

- Besides this, the show cause notice is stale and time barred inasmuch as an earlier show cause notice based on the same set of facts was issued way back on 20.1.2010 as recorded in the paragraph 7 of the show cause notice and the present show cause notice was issued on 1.3.2011 even beyond the period of one year from the date of earlier show cause notice for the same DTA clearances. Appellant relies on the judgment of the Hon'ble Supreme Court in cases of Nizam Sugar Factory [2006 (197)ELT 465] and ECE Industries [2004 (13) SCC 719] categorically holding that a second show cause notice invoking larger period of limitation cannot be issued on a particular set of facts which were basis for an earlier show cause notice.
- Even in case it is assumed without conceding that the valuation of the goods in question was governed by the provisions of Rule 7(3) of the Customs Valuation Rules, the sub clause (b) of the said Rule 7(3) categorically provides for exclusion of the value added by processing or "processing costs' besides excluding selling & distribution expenses, freight, etc incurred in India and the normal profit margin. The aforesaid position in law is clear from the interpretative note to Rule 7 as well as the decision of this Hon'ble Tribunal in case of DCM Hyundai 2017(358) ELT 785
- Appellant humbly submits that a plain reading of the above provisions shall imply that the impugned order ought to have excluded the cost of processing incurred by the DTA unit besides also excluding selling & distribution expenses, freight, etc and the normal profit margin from the valuation of the fruit pulp cleared by the 100% EOU. Appellant submits that in case the impugned order had strictly applied the provisions contained in aforesaid Rule

7(3), it would have appreciated that the manner of assessment adopted by the Appellant is completely in line with the statutory provisions contained in the Proviso to Section 3(1) of the Central Excise Act, 1944 read with above Rule 7(3) and hence, the whole case against the Appellant deserved to be dropped.

- Neither the impugned order nor the show cause notice lead any evidence to show as to how the assessable value of Rs.1,97,20,400/- was arrived at by the Revenue nor to demonstrate as to how Rule 7 of the Customs Valuation Rules was applied without discussing application of earlier rules. Appellant submits that it is a settled law laid down by the Hon'ble Supreme Court in case of Varsha Plastics (P) Ltd. V. Union that the burden to prove the valuation lies heavily on the Revenue which in present case it has failed to discharge.
- The final de-bonding order under F.No.SEEPZ:28:EOU/99 2000/Vol 11/4306 dated 23.4.2010 was issued by the office of Development Commissioner, SEEPZ SEZ pursuant to the 'no dues' certificate issued by the concerned revenue authorities and hence, no suppression could be alleged against the Appellant for invoking larger period of limitation in view of the recent ruling of this Hon'ble Tribunal in case of CCE, Aurangabad V. Crompton Greaves Ltd.

3.3 Learned authorized representative reiterates the findings recorded in the impugned order.

4.1 We have considered the impugned order along with the submissions made in appeal and during the course of arguments.

4.2 Commissioner (Appeals) has in the impugned order recorded following findings for upholding the order in original of the Additional Commissioner-

"4. I have carefully gone through the entire records of the case and have also considered the averments made in the appeal memorandum as well as the oral and written submissions made before me during the course of personal hearing. The issue involved in the instant case is under the facts and circumstances of the case, whether it can be held that the appellants have

correctly discharged their duty liability without resorting to suppression or misstatement in respect of the quantity and valuation of the fruit pulp and fruit juice at the respective stages of clearances from their units at Mumbai and Delhi and whether the Central Excise duty is correctly discharged by them or otherwise. In this case, in the first place, it is observed that while clearing the fruit pulp from their 100% EOU to the factory of M/s Godrej Hershey Ltd., the appellants had started clearing the consignments of fruit pulp on payment duty worked out by them in the manner prescribed in Sr. No. 2 of the Notification No. 23/2003-CE dated 31.03.2003, but with effect from mid October 2008 onwards, the appellants started clearing their subsequent consignments on payment of the duty forgone' on the raw materials and the packing materials utilized in the manufacture of final products, instead of sticking to the earlier manner of assessment, they switched over to the assessment in the manner mentioned above.

5. Further, it is also observed that as claimed by the appellants, the DTA unit of the appellants had entered into two different agreements on different dates, one with the 100% EOU on 01.04.2007 and another one with M/s Godrej Hershey Ltd. on 01.04.2008. Even though, there appear to be two different units namely 100% EOU and DTA unit, they are in fact two divisions and not independent legal entities. So far as their inter se relationship is concerned, prior to their amalgamation, both the units were part of M/s Mother Dairy Foods Processing Ltd. It is a forgone conclusion that M/s Mother Dairy Foods Processing Limited had merged with the appellants company namely M/s Mother Dairy Fruit & Vegetable Pvt. Ltd. after the order of Hon'ble Delhi High Court passed on 07.08.2007. The period involved in the impugned order is subsequent to the amalgamation and hence the MOU between the DTA and 100% EOU will become meaningless and redundant, once the amalgamation is effected It is also observed that the EOU arm of the appellants was a division of M/s Mother Dairy Foods Processing Limited, when the MOU dated 01.04.2007 was entered into between the EOU and DTA divisions of M/s Mother Dairy Foods Processing Limited. Therefore, after the

amalgamation order was passed by the Delhi High Court. Therefore the status of the terms and conditions of the said MOU dated 01.04.2007 will largely depend upon the said amalgamation order and will lose its independent existence for the purpose of its application. Therefore under such circumstances, the action of making payment of duty only on the cost of pulp and to the extent of duty forgone has resulted in short payment of duty.

6. Further, it is also observed that the lower adjudicating authority has rightly observed that the clearance of the fruit pulp from the 100% EOU to M/s Godrej Hershey Pvt. Ltd. on account of the DTA unit without charging the processing charges and without including the same in the costing of the fruit pulp for the purpose of valuation and without subjecting it to duty at normal rate cannot be viewed as a transaction at arm's length. Actually the sale of processed fruit pulp has taken place from the Delhi arm of the appellants and the legal status of the unit has remained the same. Further, in this case, the lower adjudicating authority, in his findings has rightly observed that DTA sale of the processed fruit pulp from the Delhi arm of the appellants had occurred during the period of dispute and actually there was no DTA sale of the fruit pulp as such. Hence, the question of taking the prices of contemporaneous imports into consideration did not arise. Further, the lower adjudicating authority has also observed that the MOU dated 01.04.2007 had only limited significance in a limited context in as much as it spoke only of the inter se arrangements for conversion of fruit pulp to juice and consequent receipt of the processed juices by the Delhi unit of the DTA unit for the purpose of sale across India. Therefore, this arrangement cannot be used as a mechanism to circumvent the duty liability and by pass the same. Further, it is also observed that the lower adjudicating authority has fully addressed to all the pleas and arguments made and objections raised by the appellants at the time of hearing at his end. Now, I observe that the appellants have neither advanced any new arguments in their favour nor have pointed out any lacunae in the impugned Order-in-Original or have ever been able to complain that their particular objections or arguments were not

considered by the lower adjudicating authority while passing the impugned Order. As to the imposition of penalty under Section 11AC of the Act, it is observed that the lower adjudicating authority has given due justification for his action of imposition of penalty and the appellants have failed to put forth any convincing arguments from their side to point out that the said penalty was unreasonable under the given circumstances and in view of the facts of the case. Also none of the case laws relied upon by the appellants are found to be applicable in the instant case.

7. In view of the foregoing, I observe that the lower authority has fully discussed all the relevant grounds and has also considered the various aspects of the issue involved in this case, in a just and fair manner, before correctly and aptly recording his views and findings and arriving at the final decision as per the impugned Order. I also observe that the appellants have failed to put forth any solid arguments against the allegations made against them in the instant case, as their arguments are found to be devoid of any material substance and hence are found to be incapable of establishing a case in their favour. Therefore, I do not find any reason to interfere with the impugned Order-in-Original."

4.3 The only issue that is to be decided in this appeal is whether the goods as cleared by the appellant an 100 % EOU to the job worker of their own sister concern in DTA, need to be valued on the basis of the value determined on the basis of the form and manner in which the goods were cleared or they have to be valued on the basis of the value determined on the basis of price at which the job worker/ processor clears the goods.

4.4 Undisputed facts of the case are that appellant is an 100% Export Oriented Unit. They are having units in the DTA also. Appellant entered into an MOU dated 01.04.2007 with their DTA unit. Salient features of the MOU are reproduced below:

"1 EOU unit of Mother Dairy Fruit & Vegetable Pvt Ltd. (MDFPL) is manufacturing fruit Pulp/puree which are exported or sold in DTA.

2 DTA division of (MDFPL) is engaged in Juice Marketing and procures Pulp from EOU Unit on payment of applicable Duty.

3 DTA division (MDFPL) will get pulp from EOU (MDFPL) and the duty as applicable will be paid by EOU.

4 EOU (MDFPL) will obey all the instructions made by DTA (MDFPL) for delivery of Duty paid pulp to the Job workers premises, directly from EOU (MDFPL) premises.

5. The pulp billed by the EOU (MDFPL) to DTA (MDFPL) will include the cost of pulp and the duty.

6 EOU (MDFPL) Sales Price will be as above and all the statutory permission to sale the goods to DTA (MDFPL) will be taken by EOU (MDFPL).

7 DTA division (MDFPL) will be solely dealing with the job worker (M/s Godrej Hershey) for manufacturing juices out of the pulp being supplied by the EOU and instructing the job worker to dispatch the final product (juices) as per the requirements in various parts of the country. EOU will no where in the picture for any transaction related to either processing or selling or distributing the juices. The payment of job processing charges will be the done by the DTA Juice division of MDFPL.

8 It is understood & agreed between the parties that the DTA division (MDFPL) shall be solely responsible for all liabilities or any losses due to delivery and logistics, handling and in no circumstances EOU (MDFPL) will take back any such material since duty on such material may already been paid."

As per this MOU, appellant was required to clear fruit pulp manufactured of fresh fruits procured from the farmers, and the DTA unit was required to process the fruit pulp to fruit juice.

4.5 The DTA unit entered into another MOU dated 01.04.2008 with Godrej Hershey Ltd, for processing of the fruit pulp received from the appellant into fruit juice. As per these two MOU's cleared the fruit pulp directly to Godrej Hershey Ltd. It is not in dispute that the appellant had cleared the fruit pulp only and not the fruit juice.

4.5 Fruit pulp is non excisable in nature, in as much as the Custom tariff itself did not prescribe any duty for the same, the

tariff rate for the relevant Chapter Sub Heading No. 0804.5040 being nil and hence the DTA clearances were made by the 100% EOU by reversing the 'duty forgone' in respect of the duty free inputs procured by it, in terms of proviso to clause 6 of the Notification No. 22/2003-CE dated 31.03.2003, read with clarification issued by CBEC by virtue of its Circular No. 54/2004-Cus dated 13.10.2004. Therefore appellant had in terms of para 6.8 (j) of the FTP 2004-09 read with the proviso to the clause 6 of the Notification No.22/2003-CE dated 31.03.2003 read with the proviso to the clause 3 of the Notification No.52/2003-Cus dated 31.03.2003 had reversed the duty forgone. This manner of clearance of the exempted/ chargeable at nil rate, goods to DTA has been done as has been held by the Larger Bench of the Tribunal In the case of Green Brilliance Energy P Ltd. [2015 (325) E.L.T. 351 (Tri. – LB)].

4.6 For determination of the amount of duty foregone, appellant had vide his letter dated 18th July 2008, addressed to Assistant Collector of Customs, New Custom House Ballard Estate Mumbai, has submitted the as follows:

"We have received an order for DTA sale for about 675 mt (3125 drums) of Mango Pulp. We would like to repay back the duty amount being saved by us for processing these quantities and clear the same under DTA sale. We had procured packaging material such as drums, polyliners, Aseptic bags. and thermocol sheets for packing this product.

The work sheet showing the amount of duty saved is enclosed herewith in Annexure I along with the relevant documents such as CT 3, Bill of entry, procurement certificate, copy of Bond register and copy of CT 3 register.

Please also find enclosed herewith a copy of permission for DTA sale being issued by the Development Commissioners Office, Seepz under para 6.8 (a) of the Foreign Trade Policy 2004-09.

Hence, as per the work sheet, amount of duty payable is Rs. 5,74,897.27 (Rupees five lac seventy four thousand eight hundred ninety seven and paise twenty seven only), which works out to Rs. 183.96 (Rupees one hundred eighty three and paise ninety six only) per drum.

Please approve the same to enable us make necessary payments at the time of clearing the material.

Sr. No	Description of Goods	CT 3 No.	PC No. Bill of Entry No.	Total Qty.	Total Value	Qty. to be debonded	Value in Rs.	Rate of Duty %	Duty Payable
1	EPS Thermocol Disc	04 dtd 14/5/08	NA	5000 nos	70000	3125	43750	14.42%	6308.75
2	LDPE Polybag	02 dtd 29/4/08	NA	1500 kgs	135765	625	56569	14.42%	8157.25
3	220 ltr capacity M.S. Barrels	03 dtd 06/5/08	NA	5000 nos	1050000	3125	2531250	14.42%	365006.25
4	Aseptic bags 220 ltrs capacity	NA	01 dtd 29/4/08 812895 dtd 5/5/08	14364 nos	2833349.45	3125	616417.22	31.70337	195425.02
						Total duty amount in Rupees			574837.27

4.7 In response to this letter, by letter dated 19.09.2008, permission as sought for was accorded stating as follows:

"I am directed to inform you that the AC/ EOU has permitted you to clear 675 MT (3125 Drums) of Mango Pulp on payment of duty of Rs 574897/- that is Rs 183.96 per drum at the time of clearing the material from the Unit."

In accordance with the above permission accorded by the Customs authorities vide the letter dated 19.09.2008 appellants cleared the goods in DTA. Since appellants have cleared the goods, on the reversal of the duty foregone as approved by the Custom Authority, this itself is sufficient to set aside the proceedings initiated subsequently.

4.8 Subsequently the Central Excise Authorities objected to the manner of determination of duty fore gone and during the course of audit observed as follows:

"5. The officers of the Commissionerate of Central Excise, Mumbai-V conducted the audit of records of said M/s. MDFVPL (while it was 100% EOU) from 17.02.2009 to 20.02.2009 and on 05.03.2009, 06.03.2009 for the Audit period from August 2006 to January, 2009. The Auditors observed certain discrepancies in the payment of duty for the DTA clearances effected by the said M/s. Mother Dairy Fruit & Vegetables Pvt. Ltd., which were covered in Para 6 of the Audit Report No. 219/08. It was reported that

"M/s. MDFVPL had cleared the product Mango pulp/ puree and Banana Puree' to M/s. Godrej Hershey Ltd situated at Mandideep, Madhya Pradesh under their invoices as DTA clearances by paying the duty on a cost of production method. The Auditors observed that these clearances were not SALE but were cleared to M/s. Godrej Hershey for processing, for making juices for which they were paid processing charges by MDFVPL. These processing charges were not considered by MDFVPL while computing the AV of the goods. Besides, the Auditors observed that, the processed juices' did not come back to the M/s. MDFVPL, 100% EOU at Goregaon unit, but were cleared from the premises of M/s. Godrej Hershey Ltd to the M/s. MDFVPL's Delhi unit for sale in the market. It was observed by the Audit that since there is no sale involved as the goods were sent only for processing, the valuation of such clearances would be governed by the Rule 7(3)(a) and (b) of the Customs Valuation Rules 2007 r/w section 14 of Customs Act, 1962 and not by then Cost of Production method as adopted by the assessee for such clearances.."

5.1 The Auditors also observed that the said M/s. MDFVPL have paid short duty even on account of mis- interpretation of provisions of Notification governing effective rate of duty for DTA clearances. It was observed that the assessee had made short payment of duties on all the DTA clearances during the period 01.03.2008 to 31.03.2009 for the following reasons:-

In terms of Section 3(1) of CEA, 1944, an amount equal to the aggregate of duties of Customs leviable on like goods is to be paid by a 100% EOU on DTA clearances as the duty of Excise. However, the effective rate of duty is governed by Notfn. No.

23/2003-CE dated 31.03.2003 as amended, which provides for concessional rates of duties, depending on whether the goods are manufactured from wholly indigenous raw materials or out of imported raw materials or a mix of both indigenous and imported raw materials. In the instant case, the assessee has been making payment of duty as per Sr. No. 2 of the said Notification (applicable to goods wherein both imported and indigenous raw materials are used) which provides for exemption to the extent of 75% of the Basic Customs duty specified in the First Schedule Accordingly, under the said Notification, they were paying duties taking into account 25% of the basic Customs duty (i.e. 7.25%, as the normal effective Customs duty was 30%).

During the audit it was noticed that, even though the said Notfn. No. 23/2003 CE has been amended vide Notfn. No. 10/2008 CE dated 01.03.2008, whereby the exemption available of basic Customs duty for DTA clearances was reduced from 75% to 50% w.e.f. 01.03.2008, (which meant that they had to pay duties, taking into account 50% of the basic Customs duty), the assessee had, even after 01.03, 2008, continued to avail exemption to the extent of 75% of basic Customs duty, thus resulting into short payment of duty on DTA clearances. Thus, wef 01.03.2008, the exemption available was only 50% of basic Customs duty and not 75% which was wrongly availed by them.

It was also observed that w.e.f. October 2008, they had switched over to paying duty on the DTA sales@ Rs. 183.96 per drum of goods cleared in DTA) based on a calculation made by them of duty foregone in respect of the imported and indigenous dutiable raw material obtained by them free of duty as a 100% EOU. In the instant case, since the goods in question, i.e. fruit pulp/puree are excisable, and the raw materials thereof included both imported and indigenous, the DTA clearances under reference are rightly covered by Sr. No.2 of Notfn. No. 23/2003 as amended by 10/2008-CE dated 01.03.08, and therefore they were liable to pay duties considering 50% of the basic Customs duty.

5.2 To sum up, the said M/s. MDFVPL were required to pay duty on DTA clearances in accordance with the terms of Sr. No.2 of Notfn. No. 23/2003-CE dated 31.03.2003 as amended by

10/2008 CE dated 01.03.2008, which in the instant case required payment of 50% of basic Customs duty (15%), Additional Customs duties under sub-Section (3) and (5) of Section 3 of Customs & Tariff Act (wherever applicable) and Edu. Cess (2%) and Secondary Higher Edu. Cess (1%). The above amount calculated being the duty of Excise, Edu. Cess (2%) and Secondary Higher Edu. Cess (1%) are again leviable on them in terms of Section 93 and Section 138 of the Finance Act, 2004 and Finance Act, 2007, respectively. Further, the Value for computation of duty in respect of clearances made to M/s. Godrej Hershey Ltd for job-work, the same are governed by Rule 7 (3)(a) and (b) of the Customs Valuation Rules. Thus, it appears that M/s MDFVPL have made short payment of duties on such DTA clearances made to M/s. Godrej Hershey Ltd; MP, made during period 01.03.2008 onwards."

4.9 After completion of investigations revenue alleged that –

"12. Further, the clearance of Juices from the M/s Godrej Hershey Ltd. to M/s MDFVPL Delhi, was to the same unit or arm of the 100% EOU. As such the clearance Value of Fruit Pulp declared by MDFVPL for making clearances under the guise of DTA clearances was not the true value of the goods cleared for "DTA sale", The actual DTA sale was of juices and not fruit pulp. The finished goods were sold after the processing in unit sale price by M/s. MDFVPL in the market. As such the value of the finished goods has to be ascertained under Rule 7(3)(a) of the Customs Valuation Rules read with Rule 10A of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000. In view of the above the value for the purpose of assessment of the duty for said clearances should be the value at which M/s. MDFVPL sold the goods.

13. It is seen from the data submitted by Shri Jignesh Joshi, Head-Commercial, M/s Mother Dairy Fruit & Vegetable Pvt. Ltd, under his statement dated 10.02.2011 that the sale price charged by M/s. MDFVPL for the relevant DTA sales after processing of pulp and converting the same to juices during the material period mentioned above, was Rs.1,97,20,400/-. Therefore, the working of Central Excise duty on DTA sales on

differential assessable value and the duty to be recovered as per the Notification is as follows:

a. Total assessable value (as above)	Rs. 1,97,20,400/-
b. Total Custom duty	
+ (50% + of BCD i.e. of 30%) = 15%	Rs. 29,58,060/-
c. + 2% Education Cess	Rs. 59,161/-
d. + 1% Secondary Higher Edu. Cess	Rs. 29,580/-
e. Total Custom duty (b+c+d)	Rs. 30,46,801/-
f. This will be aggregated duty of Excise	Rs. 30,46,801/-
g. 2% Edu. Cess	Rs. 60,936/-
h. 1% Secondary Higher Edu. Cess	Rs. 30,468/-
i. Total Excise duty (f+g+h)	Rs. 31,38,205/-
j. Less total duty paid (as per Anx A)	Rs. 3,21,328/-
Balance duty recoverable	Rs. 28,16,877/-

14. Thus, it is observed that M/s. MDFVPL have not paid the duty on the sale value of juices converted from the fruit pulp for the DTA sales made by them during the period from 01.03.2008 to 31.03.2009. Thus, MDFVPL under valued the said goods with an intent to evade duty of Rs 28,16,877/- as per details given above. The same is payable and to be recovered from unit M/s MDFVPL along with applicable interest under provisions of Section 11AB of the Central Excise Act 1944 read with Section 28 of the Customs Act, 1962."

4.10 Interestingly it is noticed that though excise authorities admit that the appellants had cleared the "Fruit Pulp" they demand duty on fruit juices or by adopting the value of Fruit Juices. Para 17 of the show cause notice reads as follows:

17. It appears that the Central Excise duty of Rs.28,16,877/- (Rupees Twenty eight lakhs sixteen thousand eight hundred and seventy seven only) as detailed above, short paid is recoverable from M/s. Mother Dairy Fruit & Vegetable Pvt. Ltd. under provision to Section 11A(1) of the Central Excise Act, 1944; that they have cleared fruit pulp to M/s. Godrej Hershey Ltd, Mandideep for converting into juices and also that the finished goods (juices) were then cleared from the premises of M/s. Godrej Hershey Ltd, Mandideep to M/s. Mother Dairy Fruit & Beverages Pvt. Ltd., New Delhi Unit for sale in market. Thus, the clearances to M/s. Godrej Hershey Ltd., Mandideep, M.P. were not sale as the goods were sent only for processing. They have

thus contravened the provisions of Rule 7(3) (a) & (b) of Customs Valuation Rules, 2007 read with Section 14/ of Customs Act, 1962 and Rule 10A of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000. Further, since the assessee have suppressed the facts and deliberately contravened the provision of Rule 4, Rule 6, Rule 17(1) and Rule 17(3) of the Central Excise Rules, 2002 and the conditions of notification as discussed above, with an intent to evade payment of duty, they have rendered themselves liable for penal action under Rule 25 of the Central Excise Rules, 2002 and Section 11AC of the Central Excise Act, 1944."

4.11 It is settled principle that the goods are to be assessed in the form they are produced for assessment. The goods cleared in the present case are 'fruit pulp' and not the 'fruit juice' hence the entire proceeding which seek to demand the duty on the basis of the sale price of 'fruit juice' cannot be sustained. Further in this case fruit juice produced from the fruit pulp supplied by the Appellant, to the M/s Godrej Hershey was processed on job work basis under the instructions of the sister unit of the appellant. It is nobodies case that M/s Godrej Hershey was related person of the appellant. The MOU dated 01.04.2007 clearly provides that the Appellant would only be clearing the "Fruit Pulp".

4.12 The proviso to Section 3(1) of the Central Excise Act, 1944 reads as follows:

"Provided *that the duties of excise which shall be levied and collected on any excisable goods which are produced or manufactured,-*

(i) Omitted

(ii) by a hundred per cent export-oriented undertaking and brought to any other place in India, shall be an amount equal to the aggregate of the duties of customs which would be leviable under the Customs Act, 1962 (52 of 1962) or any other law for the time being in force, on like goods produced or manufactured outside India if imported into India, and where the said duties of customs are chargeable by reference to their value; the value of such excisable goods shall, notwithstanding anything contained in any other provision of this Act, be determined in accordance

with the provisions of the Customs Act, 1962 (52 of 1962) and the Customs Tariff Act, 1975 (51 of 1975)“.

This proviso clearly and unambiguously states that value of the goods will have to be determined as per the provisions of the Customs Act, 1962. This section do not provide for determination of the duty on the basis of the value of the processed goods, processed after the clearance from EOU. In the case of *Morarjee Brembana Ltd* [2015 (318) ELT 600 (SC)] Hon’ble Supreme Court has held as follows:

“10.*As is clear from the bare reading of the aforesaid proviso, in those cases where excisable goods are produced or manufactured by hundred per cent export oriented undertaking are allowed to be sold in India, the duty of excise has to be the amount equal to the aggregate of the duties of customs which would be leviable under Section 12 of the Customs Act, on like goods produced or manufactured outside India if imported into India and where the said duties of custom are chargeable by reference to their value, the value of such excisable goods shall be determined, in accordance with the provisions of the Customs Act and Customs Tariff Act, 1975.*

11.*Keeping in view the aforesaid proviso to Section 3 of the Central Excise Act, in our opinion the Tribunal has rightly held that the sale price charged to customer in India of the goods under assessment cannot be considered as a price in the course of International trade. To this extent we do not find fault with the view taken by the Tribunal.*

12.*As pointed out above, if Rule 4 is not applicable, the valuation of the goods has to be arrived at by applying Rules 5 and 8 in sequential order. It is here, as noted above, the Tribunal fell in error as applicability of Rules 5 and 6 depended on certain factual aspects which had to be gone into. The Tribunal has made certain observations on facts but without any material before it.”*

4.13 Thus in view of the observations made by the Hon’ble Apex Court the sale value adopted by the revenue of fruit juice in DTA, cannot be adopted for determination of value of the goods cleared by EOU. As per the Customs Valuation Rules, it would

imply that value needs to be determined on the basis of the like goods namely fruit pulp / puree, imported into India being the contemporaneous imports at or about the time the imported goods were cleared from the 100% EOU into DTA. The selling prices of the juices cleared by independent DTA unit to the third parties can be adopted for valuing clearances of the 100% EOU. Further the rules 5 to 8 of the Customs Valuation Rules, need to be applied in the sequential order. Neither the show cause notice nor the order in original or impugned order records any reason for not coming to Rule 7 for determination of the value of the impugned goods without ruling out the applicability of preceding rules.

4.14 Even if the contention of the revenue that the value of the impugned goods cleared by the appellants was to be determined in terms of the Rule 7 of the Customs valuation Rules, then also the processing charges that are incurred post clearance of the goods need to be excluded in terms of the Sub Rule 3 (b) to Rule Rule 7, which provides as follows:

"7. : Deductive Value: (1)....

(3)(a) If neither the imported goods nor identical nor similar imported goods are sold in India in the condition as imported, then, the value shall be based on the unit price at which the imported goods after processing, are sold in the greatest aggregate quantity to persons who are not related to the seller in India,

(b) In such determination, due allowance shall be made for the value added by processing and the deductions provided for in items (i) to (iii) of sub-rule (1)."

Thus for determination of the value of the impugned goods, the cost of processing incurred after the clearance of the goods is to be excluded from the price of fruit juices.

4.15 The findings in the impugned order in respect of the amalgamation of the Appellant with their sister concern/ DTA unit do not serve any purpose as these two units continue to be separately registered units for the purpose of Central Excise. Once these two units are registered with the Central Excise Authorities, then they continue to be separate entity. Further the

appellants at the time of clearance of the fruit pulp, did not determined the value which was effected by their relationship, the issue of such amalgamation is irrelevant. Revenue in the present case is proceeding against the appellant for undervaluation, of the non dutiable goods which have been cleared by the appellants on payment of the amount of the duty foregone.

4.16 Since the appellants have cleared the impugned goods after obtaining the permission from the Customs authority and in accordance with the permission given as stated earlier in para 4.7 there can be no reason for invoking the extended period of limitation to demand this duty.

4.17 In view of above we do not find any merits in the impugned order.

5.1 Appeal is allowed.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)