

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
MUMBAI**

WEST ZONAL BENCH

EXCISE APPEAL NO: 85657 OF 2020

[Arising out of Order-in-Original No. PLG-GST-COM-01/2020-21 dated 10th June 2020 passed by Commissioner of Central Excise & CGST, Palghar.]

Responsive Industries Ltd

Mahagaon Road, Betegaon Village, Boisar (E),
Palghar, Dist: Thane 401 501, Maharashtra.

... *Appellant*

versus

**Commissioner of CGST & Central Excise
Palghar**

Central GST Bhawan, Plot No. C-24, Sector -E
Bandra-Kurla Complex, Bandra (E), Mumbai 400 051

...*Respondent*

APPEARANCE:

Shri Prakash Shah and Shri Mihir Mehta, Advocates for the appellant

Shri S K Mathur, Special Counsel with Shri Bhilegaonkar Deepak, Commissioner (AR) for the respondent

WITH

EXCISE APPEAL NO: 85776 OF 2020

[Arising out of Order-in-Original No. PLG-GST-COM-1/2020-21 dated 10th June 2020 passed by Commissioner of Central Excise & CGST, Palghar.]

**Commissioner of CGST & Central Excise
Palghar**

Central GST Bhawan, Plot No. C-24, Sector -E
Bandra-Kurla Complex, Bandra (E), Mumbai 400 051

... *Appellant*

versus

Responsive Industries Ltd

Mahagaon Road, Betegaon Village, Boisar (E),
Palghar 401 501, Maharashtra.

...*Respondent*

APPEARANCE:

Shri S K Mathur, Special Counsel with Shri Bhilegaonkar Deepak, Commissioner (AR) for the appellant

Shri Prakash Shah and Shri Mihir Mehta, Advocates for the respondent

WITH

EXCISE APPEAL NO: 86019 OF 2020

[Arising out of Order-in-Original No. PLG-GST-COM-1/2020-21 dated 10th June 2020 passed by Commissioner of Central Excise & CGST, Palghar.]

Commissioner of CGST & Central Excise

Palghar

Central GST Bhawan, Plot No. C-24, Sector -E
Bandra-Kurla Complex, Bandra (E), Mumbai 400 051

... *Appellant*

versus

Atit Agarwal

Responsive Industries Ltd
Mahagaon Road, Near Gaushala Betegaon, Boisar (E),
Palghar 401 501, Maharashtra.

...*Respondent*

APPEARANCE:

Shri S K Mathur, Special Counsel with Shri Bhilegaonkar Deepak, Commissioner (AR) for the appellant

Shri Prakash Shah and Shri Mihir Mehta, Advocates for the respondent

WITH

EXCISE APPEAL NO: 86020 OF 2020

[Arising out of Order-in-Original No. PLG-GST-COM-1/2020-21 dated 10th June 2020 passed by Commissioner of Central Excise & CGST, Palghar.]

Commissioner of CGST & Central Excise

Palghar

Central GST Bhawan, Plot No. C-24, Sector -E
Bandra-Kurla Complex, Bandra (E), Mumbai 400 051

... *Appellant*

versus

Om Prakash Agarwal

Responsive Industries Ltd
Mahagaon Road, Near Gaushala Betegaon, Boisar (E),
Palghar 401 501, Maharashtra.

...*Respondent*

APPEARANCE:

Shri S K Mathur, Special Counsel with Shri Bhilegaonkar Deepak, Commissioner (AR) for the appellant

Shri Prakash Shah and Shri Mihir Mehta, Advocates for the respondent

WITH

EXCISE APPEAL NO: 86021 OF 2020

[Arising out of Order-in-Original No. PLG-GST-COM-1/2020-21 dated 10th June 2020 passed by Commissioner of Central Excise & CGST, Palghar.]

Commissioner of CGST & Central Excise

Palghar

Central GST Bhawan, Plot No. C-24, Sector -E
Bandra-Kurla Complex, Bandra (E), Mumbai 400 051

... *Appellant*

versus

R K Parsania

Responsive Industries Ltd
Mahagaon Road, Near Gaushala Betegaon, Boisar (E),
Palghar 401 501, Maharashtra.

...*Respondent*

APPEARANCE:

Shri S K Mathur, Special Counsel with Shri Bhilegaonkar Deepak, Commissioner (AR) for the appellant

Shri Prakash Shah and Shri Mihir Mehta, Advocates for the respondent

WITH

EXCISE APPEAL NO: 86022 OF 2020

[Arising out of Order-in-Original No. PLG-GST-COM-1/2020-21 dated 10th June 2020 passed by Commissioner of Central Excise & CGST, Palghar.]

Commissioner of CGST & Central Excise

Palghar

Central GST Bhawan, Plot No. C-24, Sector -E
Bandra-Kurla Complex, Bandra (E), Mumbai 400 051

... *Appellant*

versus

Rajesh Pandey

Responsive Industries Ltd
Mahagaon Road, Near Gaushala Betegaon, Boisar (E),
Palghar 401 501, Maharashtra.

...*Respondent*

APPEARANCE:

Shri S K Mathur, Special Counsel with Shri Bhilegaonkar Deepak, Commissioner (AR) for the appellant

Shri Prakash Shah and Shri Mihir Mehta, Advocates for the respondent

WITH

EXCISE APPEAL NO: 86023 OF 2020

[Arising out of Order-in-Original No. PLG-GST-COM-1/2020-21 dated 10th June 2020 passed by Commissioner of Central Excise & CGST, Palghar.]

Commissioner of CGST & Central Excise

Palghar

Central GST Bhawan, Plot No. C-24, Sector -E
Bandra-Kurla Complex, Bandra (E), Mumbai 400 051

... *Appellant*

versus

Ramesh J Mistry

Responsive Industries Ltd

Mahagaon Road, Near Gaushala Betegaon, Boisar (E),
Palghar 401 501, Maharashtra.

...*Respondent*

APPEARANCE:

Shri S K Mathur, Special Counsel with Shri Bhilegaonkar Deepak, Commissioner (AR) for the appellant

Shri Prakash Shah and Shri Mihir Mehta, Advocates for the respondent

WITH

EXCISE APPEAL NO: 86024 OF 2020

[Arising out of Order-in-Original No. PLG-GST-COM-1/2020-21 dated 10th June 2020 passed by Commissioner of Central Excise & CGST, Palghar.]

Commissioner of CGST & Central Excise

Palghar

Central GST Bhawan, Plot No. C-24, Sector -E
Bandra-Kurla Complex, Bandra (E), Mumbai 400 051

... *Appellant*

versus

Mehul Wala

Responsive Industries Ltd

Mahagaon Road, Near Gaushala Betegaon, Boisar (E),
Palghar 401 501, Maharashtra.

...*Respondent*

APPEARANCE:

Shri S K Mathur, Special Counsel with Shri Bhilegaonkar Deepak, Commissioner (AR) for the appellant

Shri Prakash Shah and Shri Mihir Mehta, Advocates for the respondent

WITH

EXCISE APPEAL NO: 86025 OF 2020

[Arising out of Order-in-Original No. PLG-GST-COM-1/2020-21 dated 10th June 2020 passed by Commissioner of Central Excise & CGST, Palghar.]

Commissioner of CGST & Central Excise

Palghar

Central GST Bhawan, Plot No. C-24, Sector -E
Bandra-Kurla Complex, Bandra (E), Mumbai 400 051

... *Appellant*

versus

Rajesh Pandey

Responsive Industries Ltd
Mahagaon Road, Near Gaushala Betegaon, Boisar (E),
Palghar 401 501, Maharashtra.

...Respondent

APPEARANCE:

Shri S K Mathur, Special Counsel with Shri Bhilegaonkar Deepak, Commissioner (AR) for the appellant

None for the respondent

WITH

EXCISE APPEAL NO: 86026 OF 2020

[Arising out of Order-in-Original No. PLG-GST-COM-1/2020-21 dated 10th June 2020 passed by Commissioner of Central Excise & CGST, Palghar.]

Commissioner of CGST & Central Excise

Palghar

Central GST Bhawan, Plot No. C-24, Sector -E
Bandra-Kurla Complex, Bandra (E), Mumbai 400 051

... Appellant

versus

Rangnath Shinde

Responsive Industries Ltd
Mahagaon Road, Near Gaushala Betegaon, Boisar (E),
Palghar 401 501, Maharashtra.

...Respondent

APPEARANCE:

Shri S K Mathur, Special Counsel with Shri Bhilegaonkar Deepak, Commissioner (AR) for the appellant

Shri Prakash Shah and Shri Mihir Mehta, Advocates for the respondent

WITH

EXCISE APPEAL NO: 86027 OF 2020

[Arising out of Order-in-Original No. PLG-GST-COM-1/2020-21 dated 10th June 2020 passed by Commissioner of Central Excise & CGST, Palghar.]

Commissioner of CGST & Central Excise

Palghar

Central GST Bhawan, Plot No. C-24, Sector -E
Bandra-Kurla Complex, Bandra (E), Mumbai 400 051

... Appellant

versus

Shree Mateshwari Transport

615/616 Monarch Plaza, 6th Floor, Sector-11
Belapur, Navi Mumbai - 4400614

...Respondent

APPEARANCE:

Shri S K Mathur, Special Counsel with Shri Bhilegaonkar Deepak, Commissioner (AR) for the appellant

None for the respondent

WITH

EXCISE APPEAL NO: 86028 OF 2020

[Arising out of Order-in-Original No. PLG-GST-COM-1/2020-21 dated 10th June 2020 passed by Commissioner of Central Excise & CGST, Palghar.]

Commissioner of CGST & Central Excise

Palghar

Central GST Bhawan, Plot No. C-24, Sector -E
Bandra-Kurla Complex, Bandra (E), Mumbai 400 051

... Appellant

versus

Jagtap Transport

201, 3rd Floor, Sadwal Apartment,
Nr Asharam Bapu Ashram, Mahadeve Nagar
Boisar (E), Palghar - 401501

...Respondent

APPEARANCE:

Shri S K Mathur, Special Counsel with Shri Bhilegaonkar Deepak, Commissioner (AR) for the appellant

Shri Prakash Shah and Shri Mihir Mehta, Advocates for the respondent

WITH

EXCISE APPEAL NO: 86029 OF 2020

[Arising out of Order-in-Original No. PLG-GST-COM-1/2020-21 dated 10th June 2020 passed by Commissioner of Central Excise & CGST, Palghar.]

Commissioner of CGST & Central Excise

Palghar

Central GST Bhawan, Plot No. C-24, Sector -E
Bandra-Kurla Complex, Bandra (E), Mumbai 400 051

... Appellant

versus

Vaibhav Transport

201, 3rd Floor, Sadwal Apartment,
Nr Asharam Bapu Ashram, Mahadeve Nagar
Boisar (E), Palghar - 401501

...Respondent

APPEARANCE:

Shri S K Mathur, Special Counsel with Shri Bhilegaonkar Deepak, Commissioner (AR) for the appellant

Shri Prakash Shah and Shri Mihir Mehta, Advocates for the respondent

WITH

EXCISE APPEAL NO: 86030 OF 2020

[Arising out of Order-in-Original No. PLG-GST-COM-1/2020-21 dated 10th June 2020 passed by Commissioner of Central Excise & CGST, Palghar.]

Commissioner of CGST & Central Excise

Palghar

Central GST Bhawan, Plot No. C-24, Sector -E
Bandra-Kurla Complex, Bandra (E), Mumbai 400 051

... *Appellant*

versus

Rishi Monga

GA-15 Ground Floor, Lake City Mall, Kapurbawdi
Thane (W) - 400601

... *Respondent*

APPEARANCE:

Shri S K Mathur, Special Counsel with Shri Bhilegaonkar Deepak, Commissioner (AR) for the appellant

Shri Prakash Shah and Shri Mihir Mehta, Advocates for the respondent

AND

EXCISE APPEAL NO: 86031 OF 2020

[Arising out of Order-in-Original No. PLG-GST-COM-1/2020-21 dated 10th June 2020 passed by Commissioner of Central Excise & CGST, Palghar.]

Commissioner of CGST & Central Excise

Palghar

Central GST Bhawan, Plot No. C-24, Sector -E
Bandra-Kurla Complex, Bandra (E), Mumbai 400 051

... *Appellant*

versus

Ambalal Shah

Shreeji Industries, Chhota Udepur, Gujarat

... *Respondent*

APPEARANCE:

Shri S K Mathur, Special Counsel with Shri Bhilegaonkar Deepak, Commissioner (AR) for the appellant

None for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: 87256-87270/2023

DATE OF HEARING: 26/09/2023
DATE OF DECISION: 22/12/2023

PER: C J MATHEW

*'If a tree falls in a forest and there is no one to hear it, did it make
a sound when falling?'*

is an ostensibly unattributed poser that has had many responses – both philosophical and physiological – but rarely, if at all, in a tax dispute; in the disposal of these appeals before us – both in relation to events that prompted the investigation culminating in notice impugned here as well as the foundational logic of the charges urged for our approval of the demand proposed in the notice impugned here – the mundane world of tax levy may no longer remain out of that. On behalf of the appellant-assessee, M/s Responsive Industries Ltd, it has been submitted that the case of diversion of 'polyvinyl chloride (PVC) resin', procured by them – from abroad and sourced indigenously – without payment of duty in terms of notification no. 52/2003-Cus dated 31st March 2003 and notification no. 22/2003-CE dated 31st March 2003, rests on peripheral factors sparked by presumption of falsified records without any reasons to even suspect so. Attention was drawn to

'1i. After completing the investigations, the Department was of the view that RIL-EOU had imported and also procured duty-free indigenous raw materials in excess of what was required for export production and the allegation is that such excess procured duty-free raw materials has been clandestinely sold / diverted in the domestic market, before and after bringing them to the factory. The demand of duty covering April 2010 to March 2016, are on the following:

- (i) Demand of customs duty of Rs.678,85,68,924 /- in respect of duty-free imported raw materials imported in excess of the actual requirement for production of export goods as per SION Norms.*
- (ii) Demand of customs duty of Rs.12,58,94,577/- in respect of duty-free imported raw materials which are not specified in the SION Norms.*
- (iii) Demand of central excise duty of Rs. 55,75,39,599/- in respect of indigenously procured duty-free raw materials which were in excess of actual requirement for export production as per SION Norms.*
- (iv) Demand of central excise duty of Rs.4,08,13,609/- in respect of indigenously procured duty-free raw materials which are not specified in the SION Norms.'*

in order¹ of Commissioner of Central Excise & CGST, Palghar which is under challenge by them for having confirmed recovery of ₹ 27,90,00,071 under section 11A of Central Excise Act, 1944, along with applicable interest under section 11AA of Central Excise Act, 1944, besides imposing penalty of like amount under section 11AC of Central Excise Act, 1944 while also confirming recovery of ₹ 28,247 under section 28 of Customs Act, 1962, along with applicable interest under section 28A of Customs

¹ [order-in-original no. PLG-GST-COM-01/2020-21 dated 10th June 2020]

Act, 1962, besides imposing penalty of like amount under section 114A of Customs Act, 1962 with the jurisdictional Commissioner of Central Excise as respondent; as the original proposal for recovery of ₹ 55,75,39,599 and ₹ 4,08,13,609 under section 11A of Central Excise Act, 1944 and recovery of ₹ 678,85,68,924 and ₹ 12,58,94,577 under section 28 of Customs Act, 1962 had not been entirely confirmed in the impugned order, the jurisdictional Commissioner of Central Excise, too, is in appeal with the assessee as respondent as are others alleged to have been involved either in transportation or in arranging the diversion of the impugned goods.

2. We are unable to fathom the stimulus for such meandering investigations, elaborate notice and discursive findings in a dispute which, in effect, stands on allegation of non-conformity with 'norms' that, indisputably, are to be adhered to. Owing to the incremental lightening of oversight on 'export oriented unit (EOU)' under the eponymous scheme in the Foreign Trade Policy (FTP), statutorily acknowledged by the Central Excise Act, 1944 for levy of duties on manufactured goods should that contingency arise, the obligation for restitution of privileges availed by such units, through exemptions accorded under section 5A of Central Excise Act, 1944 and Customs Act, 1962 now rests upon presumption and not on subjective satisfaction as it did earlier. Such units undertake manufacture of goods and, though considered to be factory with dutiability arising on manufacture under section 3 of Central Excise Act, 1944, are under joint regulatory control of inter-departmental Approval Committee envisaged in

the Foreign Trade Policy (FTP) thus bringing production, export and clearance within a reporting structure far more regimented than the usual factories registered under Central Excise Act, 1944. Just as the export promotion schemes, envisaged in chapter 4 of Foreign Trade Policy (FTP) for incentivizing foreign exchange accretion in return for privilege of procurement of 'inputs' from abroad and corresponding credit for import substitution, placed premium on efficient use of such materials to rectify leakage under cover of inefficiency, units such as that of the assessee, covered by chapter 6 of the Foreign Trade Policy (FTP) had also had their privileges restricted to such theoretical estimates further down in time. Bonding of these goods in the factory, which was also licenced as 'private bonded warehouse' under section 58 of Customs Act, 1962, for utilization thereof according to section 65 of Customs Act, 1962, enabled administrative mechanism for recovery of duty foregone even for prodigality by provisioning for subjective satisfaction of deployment thus obviating temptation to indulge in deliberate diversion. The alteration of the conditions was, thus, more about substitution of subjective satisfaction with objective determination for compliance oversight than about intending deterrent against such temptation. The issue in despite has assumed overtones extending beyond adherence to the 'norms' from the circuitous manner in which detriment beyond duty liability was brought to bear in the proceedings. The setting out by the adjudicating authority of the issues to be decided upon is no less gargantuan. A plain and simple outcome in this proceedings has, thus, been foreclosed as fair disposal of the submissions

on behalf of jurisdictional Commissioner of Central Excise requires us to enter the maze that the notice turned out to be and which the adjudicating authority too followed suit.

3. As pointed out on behalf the assessee, it is necessary to bear in mind that the case against the appellant-assessee is not about finished goods that were not exported but about diversion of material, procured without payment of either of the duties under the aegis of the respective notifications *supra*, into the domestic market as such and which is of sufficient relevance for us to dwell on presently. The *mantra* for monetization of procurement in excess of quantity warranted for optimal deployment of inputs for manufacture is the ‘standard input output norms (SION)’ appended to chapter 4 of Foreign Trade Policy (FTP) within which the products of the appellant are placed, and unquestionably so as is evident from recourse to such in fastening duty liability, enjoining us, at the outset, to visit the propriety of appropriation of the norms to such end in the notice in the light of recourse to presumption adverted *supra*; for there appears to be an irreconcilability in setting out facts and inferences intended to portray ‘clandestine removal’ while yet unavoidably yoked to pre-determined formulation of ‘norms’ for quantification of consequential liability. The fatal flaw, in such dovetailing, lies in the inherent design of the ‘norms’ to serve both the justification for, and computation of, recovery. That the said absence of distinguishment in the ‘norms’ between inefficiency and diversion suffices to characterize the formulation for all applications except

where it is specifically provides otherwise as an inevitable corollary.

4. With this backdrop of policy framework before us and considering the scale of alleged diversion that was proposed for recovery in the notice, it would be of use to set out the facts taken note of in the impugned proceedings. The appellant-assessee undertakes production of several articles made of 'polyvinyl chloride (PVC)' such as 'vinyl flooring' and 'textile fabrics' which are either exported or, when destined for domestic tariff area (DTA), are transferred to another undertaking of theirs that, unlike the appellant-assessee, which is an 'export oriented unit (EOU)' issued with 'letter of permission (LoP)' under the 'Foreign Trade Policy (FTP)', is a manufacturing facility registered as such under Central Excise Act, 1944. As privilege of operating under the scheme in 'Foreign Trade Policy (FTP)', the appellant is entitled to procure 'capital goods', 'raw materials' and 'consumables' – domestically or from abroad – without payment of duty owing to exemptions availed under Central Excise Act, 1944 and Customs Act, 1962 respectively.

5. It would appear that detailed investigation of past imports effected by the appellant from April 2010 to March 2016 was prompted by the culmination of notice for recovery of duty on, and other detriments, consequent upon interception of several consignments of 'polyvinyl chloride (PVC) resin', including that of the assessee - imported by recourse to the exemption *supra* - at a godown in Bhiwandi on 21st August 2014, for contravention of the condition of bonding, in proceedings before the

Settlement Commission. The voluminous notice, detailing the evidence of several searches and statements of as many as 63 persons, for recovery of 'duty foregone' was premised on the conclusion that 'raw materials' in excess of that required for export had been sourced solely for clandestine removal thereafter. Accordingly, demand of ₹ 55,75,39,599 towards central excise duty foregone on indigenously procured goods in excess of prescribed 'norms', ₹ 4,08,13,609 towards duty foregone on goods indigenously procured that were not specified in the prescribed norms and ₹ 678,85,68,924 and ₹ 12,58,94,577 towards duties of customs foregone on like procurements from abroad came to be proposed in notice covering the period from April 2010 to March 2016. Besides charging of interest thereon, the notice also proposed confiscation of the impugned goods as well as 50 nos. trucks and trailers alleged to have been used for transportation.

6. It is surprising to note that, unlike the standard procedure of personal hearing in which only noticees are afforded opportunity of response, a special counsel was authorized to present the case of the 'show cause notice issuing authority' and, notwithstanding which, the investigating agency insinuated itself into the adjudicatory proceedings to oppose cross examination of witnesses sought for by the assessee; that denial thereon was challenged before the Tribunal and, upon disclaiming of jurisdiction, was carried to Hon'ble High Court of Bombay before being permitted to be withdrawn *vide* order dated 3rd June 2019.

7. The foundation of the demand *supra* has been elaborately set out in the adjudication order informing the issues for disposal that, according to the adjudicating authority, erected on the premise that ‘export-oriented unit (EOU)’ are obliged to undertake manufacture of goods solely by using exempted material and stood on assumption of diversion inhering in every procurement of ‘raw materials’ in excess – in quality or description – of enumeration in ‘norms’ for the relevant product group prescribed in Handbook of Procedures Vol II of Foreign Trade Policy (FTP) which, for the period in dispute, is that of AM 2010-2015. It was also noted that re-classification of each of the manufactured articles, within the product groups therein, has had the effect of lower ceiling for duty free procurement of ‘raw materials’ rendering excess procurement of enumerated ‘raw materials’ and those not enumerated as corresponding to the product group to be ineligible. Furthermore, it has been noted that alleging diversion/sale was sought to be established from private records of appellant-assessee and other parties as well as statements of employees and third parties.

8. The adjudicating authority also took note of the response of the assessee that the re-classification was inapt owing to defect in test reports that had been relied upon for this emendation, that the computation of usage of ‘raw materials’ was contested for not having taken into account deployment in manufacture of goods transferred to the other entity and that reliance placed on content of ‘pen drives’ and ‘hard disk drives’ was under challenge for having been retrieved without forensic certification.

9. The impugned order has examined foundational issues and substantive issues emanating from the show cause notice; the findings on these may, broadly, be grouped as those in which appellant-Commissioner has cavil about conclusions and those that are of grievance to the assessee – between the two, the gamut of the adjudication is covered. However, we are of the view that consideration of the foundational aspects is necessary only to the extent that these mitigate or erase any burden devolving on the assessee requiring us, therefore, to first determine the substantive issues in dispute and to return to the foundational only should circumstances warrant.

10. These are denial of privilege of concessional rate of duty on goods cleared into ‘domestic tariff area (DTA)’, and subjecting them to recovery of liability of ₹ 27,09,00,071 towards ‘basic customs duty (BCD)’ and ‘additional duty of customs (CVD)’, for not being goods ‘similar’ to that exported, recovery of duty of ₹ 28,247, foregone at the time of import of 1000 kg of ‘polyvinyl chloride (PVC) resin’, for non-receipt at registered premises and the dropping of demands of ₹ 6,78,85,68,924 and ₹ 12,58,94,557 towards aggregate duties of customs foregone, and ₹55,75,39,599 and ₹ 4,08,13,609 towards ‘duties of central excise’, foregone on procurement of ‘polyvinyl chloride (PVC) resin’ alleged to have been not used and, thereby, presumed to have been diverted into the market in contravention of conditions of exemption availed then, for insufficiency of evidence in the form of statements and documents relied upon and for inconclusiveness of inference from the norms relied upon.

11. Built into the last is the finding of misclassification of export goods, within the groupings of ‘standard input output norms (SION)’ in Handbook of Procedure Vol II appended to Foreign Trade Policy (FTP), based on procurement and consumption of ‘dolomite’ – used as ‘filler’ – that were inferred from records seized from third parties as well as statements of transporters and employees. It is to be noted that, but for the finding on non-leviability of differential duty in the adjudication order, the allegation of misclassification may have had effect on the quantum of recovery ordered and is, therefore, relevant for scrutiny only should relief sought by jurisdictional Commissioner of Central Excise be found to be tenable.

12. Owing to the sequence of commercial activity, it would be appropriate to first take up the challenge of the assessee to the fastening of duty liability on them stemming from disallowance of entitlement to clear the goods in the ‘domestic tariff area (DTA)’ at concessional rate of duty. Moreover, the jurisdictional Commissioner of Central Excise, too, is in appeal on this count with the cavil that the adjudicating authority had misinterpreted the provisions of the Foreign Trade Policy (FTP) to conclude that even goods dissimilar to those exported may be cleared into the ‘domestic tariff area (DTA)’, at the cost of eligibility for concessional rate of duty on finished goods cleared domestically by ignoring the proposition in the show cause notice that even deployment of ‘raw materials’, procured without payment of duty, is contrary to condition in the relevant notifications with recovery of such ‘duty foregone’ to be the

inevitable consequence.

13. It is the contention of Learned Counsel for the appellant that the demand is flawed for having traversed beyond the framework of the show cause notice in which, though inappropriateness of usage in manufacture of ineligible goods is narrated, the consequent demand proposed has not been disaggregated from the recovery of duty of ₹ 55,75,39,599 foregone on procurement of goods enumerated in the norms and ₹ 4,08,13,609 foregone on goods not included in the norms. It was further submitted that, in framing the issues purportedly contained in the notice, the adjudicating authority, of his own volition, insinuated the proposal to disentitle concessional rate of duty incorporated in paragraph 6.8 (a) of the Foreign Trade Policy (FTP) 2009-14 and reflected in notification no. 23/2003-CE dated 31st March 2003. According to him, even while holding that goods permitted for clearance on payment of duty are not excluded from being manufactured out of 'duty free' procurements in the face of proposal in the notice for recovery of 'duty foregone' to that extent, on 'raw materials' so used, the adjudication order has determined duty as arising under section 3 of Central Excise Act, 1944 which is intended for levy of impost on manufactured goods. That no adjudicating authority was authorized to transgress the boundaries of notice was, according to him, clearly enunciated by the Hon'ble Supreme Court in *Commissioner of Central Excise v. Gas Authority of India Ltd* [2008(232) ELT 7 (SC)], in *Commissioner of Central Excise, Nagpur v. Ballarpur Industries Ltd* [2007 (215) ELT 489

(SC)] and in *Commissioner of Central Excise, Bangalore v. Brindavan Beverages (P) Ltd* [2007 (213) ELT 487 (SC)] as well as by the Tribunal in *Hindalco Industries Ltd v. Commissioner of Central Excise, Allahabad* [2009 (248) ELT 391 (Tri-Del)].

14. Though the notice did venture to suggest that the goods cleared to their affiliate in the ‘domestic tariff area (DTA)’ was not similar to that which had been exported, duty liability sought to be fastened was only to the extent of ‘duty foregone’ on ‘raw materials’ deployed for such manufacture and only for not having been put to use in manufacture of export goods. Indeed, the notice went a step further to propose recovery of such ‘duty foregone’ as is attributable to such ‘raw materials’ as were deployed even in manufacture that was not exported. Yet, the adjudicating authority preferred to use that signification to infer only ineligibility for concessional rate of duty on domestic clearance; neither does the impugned order nor did the show cause notice suggest that the assessee was not eligible in terms of the twin conditions, viz., being compliant with obligation to be ‘net foreign exchange (NFE) positive’ and within the quantitative restriction proportionate to value of goods exported, for concessional rate of duty. With denial of that entitlement for clearance at concessional rate of duty not having been contemplated in the notice initiating the present proceedings, culmination in such insinuated detriment to assessee bedevils the acceptability of the impugned order, to that extent, for not being legal and proper.

15. Again, as both sides have made common cause before us on the impropriety of ignoring one proposal and substituting, in its stead, another conclusion – albeit with different pleadings on consequences – we may do worse than just disapprove resort to such by the adjudicating authority. However, the appeal of jurisdictional Commissioner of Central Excise, urges other consequences arising from clearance of ineligible goods to the domestic market which cannot be ignored.

16. The allegation in the show cause notice that the goods released into the domestic stream, at concessional rate of duty that was claimable only for goods ‘similar’ to that exported, were different is based on the embossing and printing on such ‘vinyl flooring’ and ‘polyvinyl chloride (PVC) leather cloth/textile fabric’ in exported goods that were, admittedly, absent in the former. To support this lack of ‘similarity’, the notice drew upon a communication of 9th October 2015 addressed to central excise authorities in which the assessee had referred to such goods as being ‘semi-finished/unfinished’ with no liability to ‘special additional duty (SAD)’ and statement of 27th November 2015 of Shri Parasania, a noticee and now respondent in appeal of jurisdictional Commissioner of Central Excise, purporting to admit that these were not similar. The notice did tacitly acknowledge that the expression ‘similar’, qualifying goods entitled to concessional rate on clearance into ‘domestic tariff area (DTA)’, was not defined by falling back on circular no. 7/2006-Cus dated 13th January 2006 in which the Central Board of Excise & Customs (CBEC), admitting to

such deficiency, declared that, for consistency of approach, the definition of 'similar goods' in rule 2 of Customs Valuation (Determination of Value of Imported Goods) Rules, 1988 is apt for adaptation. It was, thus, that the show cause notice contended that the 'raw materials' deployed therein had not been used for the purpose intended in the exemption notification to empower recovery of 'duty foregone' on such procurement which, itself, was dilution of a preceding contention in the notice that the privilege of exemption could not be extended to 'raw materials' used in any goods that were not exported that the adjudicating authority, rightly, discarded without any controverting thereto in proceedings now before us. Nonetheless, either by way of denial of concessional rate of excise duty for being not 'similar' to export goods or by way of recovery of 'duty foregone' on procurement of 'raw materials' used for manufacture of goods that were not 'similar' to export goods, we are required to resolve the dispute over the goods cleared to 'domestic tariff area (DTA)' entity being 'similar', or otherwise, to exported goods to settle the controversy.

17. Learned Counsel submitted that the conclusion of lack of similarity of domestically cleared goods with exported goods had been inferred without any basis in fact or law solely by relying on purported admission to that effect in statements recorded from key personnel of the appellant-company and on a letter in which the leviability of 'special additional duty (SAD)' was doubted. He pointed out that the statements had been twisted out of context to contrive such conclusion and that the communication on

applicability of ‘special additional duty (SAD)’ was more about absence of sale in inter-unit transfer than about the characteristics of the goods. He further pointed out several inconsistencies in the findings that had led to the outcome of fastening of duty liability on them. He contended that there was no difference, as far as classification or usage is concerned, between ‘vinyl flooring’ and ‘polyvinyl chloride (PVC) leather cloth/ textile fabric’, constituting almost 97% of production in the ‘export oriented unit (EOU)’, that was cleared without printing and embossing to their group undertaking and that cleared after printing and embossing for export. On the manner in which the expression ‘similar’ was to be interpreted, Learned Counsel placed reliance on the decisions of the Tribunal in *ABI Turnmatics v. Commissioner of GST & Central Excise, Chennai* [2019 (366) ELT 1048 (Tri-Chennai)] and in *Commissioner of Central Excise, Salem v. Hindustan Lever Ltd* [2011 (268) ELT 252 (Tri-Chennai)] as well as that of the Hon’ble Supreme Court in *Nat Steel Equipment Private Ltd v. Collector of Central Excise* [1988 (34) ELT 8 (SC)].

18. Learned Authorized Representative submitted that the proposal in the show cause notice on consequence of clearance of goods, that were not similar to exported goods, into the domestic market is recovery of ‘duty foregone’ because any other course of action would give free rein to such privileged units to manufacture goods as they pleased without care for strict adherence to the enabling notification. It was further submitted by him that the lack of similarity had been admitted in the statements of top officials of

appellant -assessee recorded during investigation. It was also urged that, in rendering its finding on dissimilarity of goods on which further processing was to be undertaken by the 'domestic tariff area (DTA)' unit *vis-à-vis* the export goods which was subjected to the additional process by the appellant-assessee themselves, the adjudicating authority, by limiting the consequence, had, in effect, extended benefit unintended by the scheme in the Foreign Trade Policy (FTP). It was urged that the finding of the Tribunal in similar disputes of the past should also inform the outcome of the proceedings now before us.

19. Though the order of the reviewing authority directing the appellant-Commissioner to challenge confirmation of duty liability in the adjudication order signifies divergent opinion, at least as far as outcomes are concerned, within the tax administration, we, nonetheless, perceive convergence on this one facet of the dispute: that the 'vinyl flooring' and 'polyvinyl chloride (PVC) leather cloth/textile fabric' - 'plain' - cleared to 'associate undertaking' of appellant-assessee during the period of dispute were not similar to the 'vinyl flooring' and 'polyvinyl chloride (PVC) leather cloth/textile fabric' - 'embossed'/'printed' – exported by them. That is not in the least surprising for the adjudicating authority has merely adopted the narrative in the show cause notice which is all the analysis, too, that prompted this element of the challenge now mounted in appeal of jurisdictional Commissioner of Central Excise. There has been no evaluation of facts by the adjudicating authority despite it being apparent

that comparison of any two goods for ascertaining similarity should be grounded in facts to the exclusion of all else. And it is the glaring lack thereof in the notice which appears to have persuaded the impugned order to venture into speculation. That too does not surprise as there are no remnants of past clearances available and, yet founded on the admitted lack of embossing and printing on the goods cleared domestically, 'lack of similarity' has been got admitted from key personnel of the appellant-assessee with their admitted 'opinion'- such as it is – to project liability to duty – one way or the other.

20. That is clearly unacceptable as passing muster to be sufficiently conclusive because it is not from such contrived assent but from unquestioned distinguishment of description that such conclusions may acquire the mantle of credibility. In the absence of samples which could be referred to laboratories for testing, we may, reasonably, presume that the descriptions of the respective products under comparison, being accepted by assessee and central excise authorities, are to be juxtaposed and, thus, subjected to the test for similarity or to the contrary. The immediate hurdle confronting us is the lack of any meaning assigned to 'similar' – an expression originating in the Foreign Trade Policy (FTP) and, as befits such instrument of executive intent, can only be viewed as amenable to beneficial interpretation. Learned Authorized Representative would have us apply it as a strict construct owing to that which he considered to be the twin test of deployment in a customs notification and the privilege of duty

concession that flows thereby. We are constrained to reject that proposition, for judicial pronouncement endorsing such approach rests upon presumption of intent of the Central Government in exercise of its authority to map tax policy – here the instrument of exception to, or dilution of, levy is erected on the contours of trade policy and distinguishable, thereby, from the rigidity mandated by the decision of the Hon’ble Supreme Court in *Commissioner of Customs (Import) Mumbai v. Dilip Kumar & Company* [2018 (361) ELT 577 (SC)].

21. Both the adjudicating authority and reviewing authority have drawn sustenance from circular no. 7/2006-Cus dated 13th January 2006 of Central Board of Excise & Customs (CBEC). We find it untenable, and, especially, where duty liability is contingent upon evaluation of facts in assessment process, that the Central Board of Excise & Customs (CBEC) did, without authority of empowerment under Central Excise Act, 1944 or Customs Act, 1962, arrogate to itself enablement of such determination. Being tantamount to directing of assessment, or adjudication, by ‘proper officer’ to a pre-determined conclusion, such exercise of jurisdiction is beyond the scope of the taxing laws. Even otherwise, the deployment of such an expression in the Rules notified under section 14 of Customs Act, 1962 – intended to offer ‘surrogate price’ for ‘value’ as essential to assessment when transacted price, and first alternative of ‘identical’ goods, fails – is of such narrow applicability as to be unusable for any other determination including description of goods in any other context.

22. This conclusion finds resonance in the decision of the Tribunal in *Meghamani Industries Ltd v. Commissioner of Central Excise, Ahmedabad I* [2010 (261) ELT 411 (Tri-Ahmd)] holding that

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 checkup 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 can not be invoked. In this case no evidence has been brought out to show that return/documents/declarations were incomplete or facts were suppressed or mis-declared 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.’

and referred to in the decisions *supra* cited by Learned Counsel, owing to which any finding of goods being ‘dissimilar’ would have to emerge in the facts of each dispute and independent of standards adopted for any other purpose. The Foreign Trade Policy (FTP) permits goods, ‘similar’ to that exported, to be cleared into the domestic market at concessional rate of duty. That flexibility appears to have been necessitated by customer preference being varied in different markets and, therefore, to accommodate commercial choice. The impugned order has not been able to distinguish the impugned goods from exported goods in terms of distinction by descriptions in the schedule to Custom Tariff Act, 1975/schedule to Central Excise Tariff Act, 1985. All that is alleged is that the impugned goods lack embossing or printing but no suggestion has been put forth that the products acquire new character and different usage by undergoing those processes. Indeed, it would appear similar to drawing a distinction between shirts – ‘printed’ and ‘plain’ – merely to obstruct implementation of policy scheme. We find no evidence to convince that the exported goods undergo processing of alteration to such extent that these cease to be similar to those transferred to the associate concern. The goods are not dissimilar and, therefore, the fastening of differential duty in the impugned order is improper. Clearance of such goods effected by the assessee shall have to be considered once again in disposing off the appeal in which assessee is respondent.

23. Incidentally, we are also unable to comprehend the pursuit in the

appeal of jurisdictional Commissioner for recovery of 'duty foregone' over the differential duty. No computation has also been offered, either in the appeal or in the show cause notice, to isolate the duty implications of this alleged breach of provisions of the scheme which rests upon improper use instead of resting upon diversion for which the remainder has been subject to proceedings. From that lack, we are unable to ascertain the extent to which revenue has been purportedly prejudiced, if at all, by the order of the adjudicating authority fastening liability on manufactured goods. It appears to us that, by not having effected such segregation of recovery of duty foregone for each type of alleged misuse in the notice, the reviewing authority had no choice but to seek that liability be fastened on the 'raw materials' irrespective of the detriment occasioned by breach of provisions. This lack of appreciation of cause and effect of the specific breaches also points to lack of application of mind with its consequence to the proposed demand. This is further exacerbated by charging that 'dissimilar goods' are not entitled to absorb 'duty free' 'raw materials' while at the same time restricting the computation of 'duty foregone' only to 'polyvinyl chloride (PVC) resin' and not to other inputs obtained by availing the exemption notification. For those reasons, too, we are compelled to consider the aspect of 'dissimilar goods' in appeal of jurisdictional Commissioner of Central Excise within the urging for recovery of 'duty foregone' on the whole of 'raw materials' that did not get deployed for manufacture of exported goods.

24. While the notice and appeal of jurisdictional Commissioner of Central Excise, as well as the impugned order, are at one in spelling out the ineligibility of domestically traded output of the appellant-assessee for being ineligible *ab initio* on the one hand by not having been exported and on the other for not being similar to exported goods, the quantum of recovery is not in concord, with only the impugned order falling back on section 3 of Central Excise Act, 1944 for restitution and the other two seeking restitution by resort to the recovery contemplated in the two exemption notification for breach of conditions therein. This lack of concord is manifested again in inconsistency of approach to recovery which we may, at this stage, take the liberty of digressing to take note of. The adjudicating authority, while disregarding the proposal in the notice for recourse to the undertaking of the appellant in seeking benefit of exemption notifications, to be initiated upon alleged breach thereof without the trammeling confines of limitation in section 11A of Central Excise Act, has directed recovery of differential duty on finished goods leviable under section 3 of Central Excise Act, 1944 for which bar of limitation would have to be overcome to reach back in time beyond the normal period of limitation but, contrarily, fell back upon, and inappropriately so, the discarded authority of bond conditions. Though this inconsistency inhering in the adjudication order is inconsequential in the light of our finding on leviability of differential duty *supra*, it does, however, demonstrate less than acceptable application of mind which is sought to be perpetuated in the urging on behalf of appellant-Commissioner.

25. In the appeal of Commissioner of CGST & Central Excise, the duty liability determined in the adjudication order, amounting to ₹ 27,09,00,071, is cause of grievance for having been attributed to differential duty of central excise on finished goods instead of being entailed upon the alleged misutilization of 'raw materials' that were used in those very finished goods; this grievance, set forth, purportedly in pursuance of legality that emanates only from recourse to bond conditions of notification, as conformity with the empowerment to review adjudication orders is, as yet, unable to determine the extent of recoverability on this score and it appears to us that unwillingness to take that path to its logical conclusion was prompted by unavailability of wherewithal to distinguish the 'raw materials' used for manufacture from that which was diverted which would remain unanswered sufficiently enough to cast doubts on the proposition in the notice itself.

26. Though the appeal of Commissioner of Central Excise & CGST, Palghar, on this aspect is stultified by our finding *supra* that the goods cleared to their group unit did conform to the requirement of 'similar' for entitlement to concessional rate of duty permitted by notification no. 23/2003-CE dated 31st March 2003, the ground of appeal cannot be left unaddressed for its potential to disrupt operation of the scheme. We are at a loss to comprehend the conclusion in the ground of appeal that the consequence of dissimilar goods cleared on discharge of 'applicable' duty, or even if subjected to post-clearance proceedings for being dissimilar, can

ever be contemplated for restitution of 'duty foregone' at the time of import by operation of 'intended use' having been breached. Both the exemptions, viz., notification no. 52/2003-Cus dated and notification no. 22/2003-CE dated, make no reference to the nature of goods that are cleared domestically. *Per contra*, both are categorical that clearance of final products into the domestic market on payment of duty expunges scope for subsequent revisit of entitlement to exemptions availed of on procurement of 'raw material' used in such manufacture; moreover, the *non obstante* qualification of the facility excludes contemplation of any proceedings other than duty liability arising out of section 3 of Central Excise Act, 1944. It is apparent that, in filing this appeal, the competent authority did not appear to have been guided by the entirety of the impugned notifications and restricted themselves to the conditions attached to availment of exemptions from levy on procurement. The failure of Commissioner of Central Excise on this score is academic, however, considering our disposal of the appeal of the assessee on fastening of duty liability.

27. Turning to the other facet of appeal of jurisdictional Commissioner of Central Excise, viz., the recovery of duty foregone on 'raw materials' alleged to have been sold illicitly in the market or without being put to use in production of permissible goods, the dispute is continued here on the ground that reliable evidence in the notice had been incorrectly discarded in the impugned order. Before we proceed to consider the submissions, we cannot but note that it is not the case of central excise authorities that the

goods procured without payment of duty had been found outside the bonded premises; neither is it their case that the proceeds of alleged sale had been traced back to the assessee. Indeed, it would appear that it was owing to lack of verifiable information of actual diversion and computation of duty realizable in consequence, that the other constituent of demand in the notice, arising from clearance of allegedly 'dissimilar' goods by deploying of inputs from the same pool of 'raw materials' sourced without payment of duty, was also clubbed for omnibus demand of 'duty foregone' derived from mathematical formulation of input and output in the 'standard input and output norms (SION)' of the Foreign Trade Policy (FTP). That this was so contrived only owing to lack of wherewithal for segregation of demands attributable to unverifiable 'diversion' and verifiable 'domestic clearances' should be obvious from forfeiting, undoubtedly, higher recovery realizable from fastening liability on finished goods to preserve the integrity – such as it is - of the demand laid at the door of the assessee.

28. However, with the legality of transfer of finished goods to the domestic undertaking of the group on payment of concessional duty having been affirmed *supra*, the appeal of jurisdictional Commissioner of Central Excise may be allowed cavil only over the amount remaining out of the proposed recovery after exclusion of that attributable to 'raw materials' used in manufacture of 'finished goods' that had been transferred to associate company. The notice proposed recovery of duty foregone on 'raw materials' enumerated in the 'standard input output norms (SION)', though

entitled to be procured under the two notifications for specified purpose, to the extent of being in excess of requirements for manufacture of exported goods and of such 'raw materials' that had availed duty exemption incorrectly owing to non-inclusion in 'standard input output norms (SION)' of the Foreign Trade Policy (FTP).

29. The charge of liability to recovery of 'duty foregone' by subsequent non-utilization for manufacture of eligible finished goods, is founded not by ascertainment of actual disposition of such 'raw material' but on the purported inability of the General Manager, and now respondent in appeal of jurisdictional Commissioner of Central Excise, to satisfy investigators about the unaccounted 21,24,77,752 kg of 'polyvinyl chloride (PVC) resin' entered in the returns filed during the disputed period as well as details of thickness of the goods cleared against invoices, the inordinately high consumption of 'raw materials' as recorded in the 'pen drives' seized from the residence of an employee and the deployment of 'polyvinyl chloride (PVC) resin' to the extent of eight times that of 'plasticizers' while it was to be only less than three times as per 'standard input output norms (SION)' in the Foreign Trade Policy (FTP). It was inferred from the last that the skew in the procurement of these two 'raw materials', and to the extent of excess from the ratio borne to one another in the norms, was attributable to the 'polyvinyl chloride (PVC) resin' diverted illicitly. It was also inferred from procurement of certain grades of 'polyvinyl chloride (PVC) resin' which, by itself, does not lend itself to manufacture of flexible products,

coupled with literature from FORMOSA Plastic Corporation, that these were intended to be, and had been, diverted to the local market.

30. The statements of Shri Om Prakash Agarwal, Chief Executive Officer, and now respondent in appeal of jurisdictional Commissioner of Central Excise, admitting to diversion as testified by employees and expressing willingness to remit some duty towards the misused 'raw materials', and of transporters admitting to adjustment of bills reflecting the actual transportation were also relied upon in the notice.

31. The appeal of jurisdictional Commissioner of Central Excise rests upon the misuse of 'raw materials' procured – both domestic and imported – between April 2010 to March 2016 and, to the extent of not attributable to deployment in goods that were exported, should be denied the exemption, claimed against entitlement under notification no. 52/2003-Cus dated 31st March 2003 and notification no. 22/2003-CE dated 31st March 2003, from duties of customs and duties of central excise respectively and is concurrently the entirety of the contents of the show cause notice. The notice itself, barring a negligible amount relating to short receipt of a small quantity of 'raw materials' at the premises of the assessee that was made good during investigation, rests on the pillars of procurement of 'polyvinyl chloride (PVC) resin' in excess of that permitted by the norms for the quantity exported and procurement of 'raw materials' not covered by the norms as required for manufacture of permitted goods, both inclusive of the misutilization implicit in having been deployed in goods transferred

domestically, and manifest as duties of customs or duties of excise on such quantity that is in excess of 'plasticizers' deployed for manufacture of goods that were exported.

32. For the sake of his convenience in decoding, and categorizing, of the several parallel, and some entangled, threads of evidences presented in support of the proposal in the notice, the adjudicating authority had posed questions and rendered answers to each which, however, does not detract from the simplicity word picture *supra*. That having been placed on record, may now address the principal cavil of the jurisdictional Commissioner of Central Excise about the impugned order. We make it abundantly clear that we are deciding only on the proposition putforth on the applicability of norms to allege diversion of 'raw materials' other than those used in manufacture of goods for export and domestic clearance.

33. From a perusal of

'7.

(g) *The working of the demand in the Show Cause Notice was done in the following manner:-*

(i) *The assessee had procured duty-paid inputs as well as duty-free inputs.*

(ii) *On the basis of export clearance of finished goods the quantum of duty-free inputs allowed as per SION was computed year-wise. This quantity of inputs was considered as permissible consumption of inputs.*

(iii) *Thereafter, this permitted consumption was first adjusted*

against the total quantity of duty-paid inputs; balance, if any, was adjusted against the locally procured duty-free inputs and further balance, if any, was adjusted against imported duty-free inputs.

- (iv) *Barring one or two inputs, permissible consumption of inputs, got adjusted against the first two types of procurement of inputs.*
- (v) *On the balance quantity remaining after above adjustments, proportionate duty - either Customs or Central Excise was demanded.'*

in the grounds of appeal, we may be confronted having to deal with segregation, that the notice and appeal have shied away from, should the remaining issue find approval. The truncated cavil in appeal of jurisdictional Commissioner of Central Excise is that the impugned order, instead of holding the importer liable to discharge onus of conformity of deployment of 'raw materials' for 'intended purpose', had dropped proceedings by placing that responsibility at the door of the tax authorities and, even thereafter, by failing to

'8 ...

- (d) *While dealing with the IVth issue, at paras 7b and 7e of the impugned Order-in-Original, the Adjudicating Authority has observed that if goods, "similar" to the goods exported, are cleared to DTA, then duty at concessional rates in terms of Notification No. 23/2003 - CE would be applicable; and in respect of goods, "other than goods similar" to the goods exported are cleared to DTA, then the benefit of Notification No. 23/2003 - CE will not be applicable and*

full rate of duties will have to be paid by the EOU. The Adjudicating Authority has wrongly interpreted the EOU scheme. As seen above, under the EOU scheme there is no mention about allowing sale of non similar goods to DTA. The scheme very precisely lays down what is permitted. Clearing non similar goods to DTA is therefore, clearly beyond the scope of the said scheme. It follows that if any such clearances of non similar goods to DTA has occurred, conditions of exemption notification have been clearly violated.'

besides ignoring

'8.

(e) The opening paragraph of Notification No. 23/2003 - CE reads as under:

*In exercise of the powers hereby exempts excisable goods produced or manufactured in an export oriented undertaking or (STP) Unit and brought to any other place in India **in accordance with the provisions of Export and Import Policy** (emphasis supplied) and subject to the relevant conditions specified*

Attention is invited to the words - "in accordance with the provisions of Export and Import Policy [i.e. the FTP]". A con-joint reading of the EOU Scheme, the Notification No. 23/2003-CE and the FTP clearly brings to the fore that the said Notification is applicable only to those goods that are allowed to be brought into DTA in accordance with the FTP. This fact has remained unappreciated by the Adjudicating Authority. Para 6.08 (a) of the FTP requires the fulfillment of two conditions before goods can be cleared to DTA, as under –

(i) that the EOU earns Positive Net Foreign Exchange [NFE]; and

(ii) *that the goods cleared to DTA are “similar” to the goods exported;*

but such DTA clearances should not exceed 50% of the FOB value of exports.’

in the grounds of appeal that, and riding on the support of documentary evidence set out in show cause notice, should have sufficed for establishing manipulation of records maintained by assessee to derail suspicion of diversion that were more accurately portrayed by the contents in ‘pen drive’ recovered during search.

34. The essence of ‘norms’ to the onus of ‘use for intended purpose’ has been set out thus

(a) *The Adjudicating Authority has made the following observation at para 9d of the impugned Order-in-Original - If the Noticee has procured lesser quantity of Plasticizers as compared to PVC Resins, it cannot be concluded that PVC Resins has been procured in excess. Therefore, nothing adverse can be concluded against the Noticee.*

(b) *The basic premise of the Show Cause Notice is diversion of duty-free inputs by the assessee. **Diversion can occur only after procurement.** What is sought to be brought out at para 44 of the Show Cause Notice has been completely misunderstood by the Adjudicating Authority. Adjudicating Authority has failed to appreciate that excess inputs which were procured and not used in finished goods were obviously and logically diverted.*

(c) *The SION prescribes the maximum quantum of duty-free*

inputs that can be consumed by an EOU for a given unit of finished product. PVC Resin and Plasticizers are the two ingredients that make up more than 90% of the weight of the finished product manufactured by the assessee.

- (d) Plasticizer is the liquid into which the PVC Resin is mixed to form a paste which then, depending on the type of finished goods, is either calendered or spread out on a fabric. Therefore, **if plasticizer was not available in sufficient quantity** with the assessee, **there was no question of consumption of PVC Resin** to the extent that they had procured.
- (e) "PVC Leather Cloth" was manufactured maximum by the assessee. As per SION, for the manufacture of 1.000 Kg of PVC Leather Cloth, the maximum quantity of duty-free inputs - PVC Resin and Plasticizers, allowed is 0.587 Kg and 0.405 Kg, respectively.
- (f) From para 44c of the Show Cause Notice the quantum of PVC Resin and Plasticizers procured by the assessee is reproduced below -

xxxxxx

For example, if the assessee claims that during the year 2010-11 they had consumed entire quantity of 5922925 Kgs of duty-free Plasticizers for manufacture of "PVC Leather Cloth" for export and DTA, then as per SION, **the maximum quantity of duty-free PVC Resin** allowed to be consumed would be = $[5922925 \text{ Kgs} \times 0.587/0.405]$ (refer SION for PVC Leather Cloth) = 8584585 Kgs only. **The procurement of PVC Resin in excess of the above quantity therefore becomes dutiable.**

- (g) The use of Plasticizer has been confirmed by the following

employees of the assessee - Shri Sharad Chandra vide his Statement dated 25-08-2015 [RUD-B48], Shri R. K. Parsania vide his Statements dated 23-11-2015 [RUD-B77] and 28-12-2015 [RUD-B81] and also by the assessee vide letter dated 31-07-2015. The Plasticizer is the chemical that gives flexibility to the finished product. Lesser the Plasticizer, more rigid the product.

- (h) The argument put forth by the assessee is that SION provides for maximum quantity of inputs that can be used but there was no restriction on lesser quantity being used. There's no harm in this argument **but the moot question is then whether the resultant finished goods would be as intended by the assessee?** Even the basic tenets of chemistry, which states that in a given manufactured substance one chemical cannot be unilaterally altered without proportionately altering the other required chemicals, has been overlooked by the Adjudicating Authority. There has been a failure on the part of the Adjudicating Authority in not correctly considering the allegations made in para 44 of the Show Cause Notice.
- (i) Another observation made by the Adjudicating Authority in the impugned Order-in-Original at para 9d is - The data compiled in the notice at Annexure - O and P itself varies. For example, in the year 2010-11, in Annexure - O, all grades of PVC Resins consumption is as 1,57,38,452 kgs while in Annexure - P the consumption data of PVC Resins is shown as 8,27,60,000 kgs.

In this regard, it is submitted that Annexure-O is "Summary of Input Consumption Data" whereas Annexure-P is a "Summary of the Inputs [duty-paid + duty-free] procured" by the assessee. When a comparison of "consumption" figures with "procurement" figures is made there is bound to be a difference.

It is obvious from the statement that the Adjudicating Authority has not understood even the basic difference in the data presented and has dropped the demand without appreciating the basic facts / data. Therefore, such comparison of divergent parameters cannot form the basis for dropping the demand.'

in grounds of appeal.

35. Thus, the crux of the appeal of jurisdictional Commissioner of Central Excise is that the 'standard input output norms (SION)' suffices, to the extent of non-utilization for exports, for recovery of duty foregone and that the onus thereof has not only remained undischarged by the importer but also, on the contrary, further exacerbated to detriment of the importer by inference from manipulation of consumption records evident from admissions in statements recorded from S/Shri Om Prakash Agarwal, Rangnath Shinde, Keyur Umraniya and of RK Parsania together with that of transporters and documents recovered from Shree Mateswari Transport, Jagtap Transport and Vaibhav Transport besides information obtained from seized 'pen drive' depicting a picture vastly different. With the grounds of appeal of jurisdictional Commissioner of Central Excise also contending that these evidence comprising statements and documents, incorporated in the notice for discrediting the records maintained by the importer and even if corroborative only, had been disdained rather casually by the adjudicating authority, it would be appropriate for us to subject that finding to the test of fact and law.

36. Before doing so, it behoves us to tarry awhile on the recurrent urging of Learned Special Counsel for the appellant-Commissioner and Learned Authorized Representative appearing for respondent-Commissioner to draw into this proceedings an incident of 21st August 2014 concerning the appellant-assessee which eventually was carried to the Customs Central Excise and Service Tax Settlement Commission under section 127B of Customs Act, 1962. Conscious of the finality of order issued by the Commission in terms of section 127J of Customs Act, 1962, we steer clear of any inferences, relating to alleged acts of omission and commissions, that the representatives of the Commissioner of Central Excise desired to impress upon us. We, however, are constrained to bear this in mind while evaluating the acceptability of evidence discarded, and erroneously so according to the grounds of appeal, by the adjudicating authority despite being clear evidence in support of inference of diversion of 'raw materials' procured without payment of duties of customs or duties of central excise, as the case may be.

37. In appeal of Commissioner of CGST & Central Excise, Palghar, it is accepted that the impugned proceedings have emanated from follow-up action by investigators and we are, therefore, burdened with the task of excoriating, as it were, any aspect that relates to disposal of application before the Customs Central Excise and Service Tax Settlement Commission; a dilemma presents itself here as the alleged complicity in alleged diversion of the impugned goods, said to be evidenced by some of

the statements relied upon in the notice, is inseparable from the dispute carried to Customs Central Excise and Service Tax Settlement Commission. The record of that proceeding is not before us to assist in the exercise and, in the absence of even suggestion of impugned goods having reached some recipient, let alone trail of movement of goods, after procurement, the connection, if any, between relied upon inculpatory testimony and the present proceedings, in the statements is but an offshoot of the earlier aborted proceedings. The evidence of transporters, and others alleged to have conspired in the diversion, drawn solely from those statements are clearly not acceptable. Furthermore, statements of co-noticees that were relied upon as evidencing diversion do, by denial in adjudicatory proceedings as well as by filing of appeal, stand jeopardized as deemed to have been retracted by those very individuals, and which, thereby, are not amenable to the test of section 129B of Customs Act, 1962/ section 9D of Central Excise Act, 1944, prompting reluctance on our part to accord credulity to those. It goes against the grain of parliamentary authority for an agency of the state to walk the edge of law merely because an assessee took recourse to mechanism afforded by deliberated legislative enactment. The adjudicating authority was more circumspect, and not surprisingly so from his standpoint as a customs official, in holding the statements to be unacceptable for determining resolution of the dispute. We, on the contrary, feel no need to pull any punches for if the ends were to justify means, law will cease to be the armor of the agents of the Republic only to be distressed by no less brutality than by those alleged to have

broken those very laws. We, therefore, discard the evidentiary weight of the statements relied upon in the notice, that the adjudicating authority held to be unreliable and which is cause of grievance in the appellant-Commissioner, for not being amenable to disentangling from the matter decided by Customs Central Excise and Service Tax Settlement Commission.

38. As far as the ‘pen drives’ are concerned, it has been contended by Learned Counsel for appellant-importer that the pre-requisite of forensic authentication had not preceded the capture of information allegedly contained therein and, thereby, depriving resort thereto of any credibility whatsoever notwithstanding any statement of acceptance on the part of the persons from whom these were recovered and which has been the substance of contention by Learned Special Counsel for appellant-Commissioner. Our perusal of the notice leads to the inevitable conclusion that the information purportedly sourced from the ‘pen drives’ has not been deployed for computation of differential duty liability but is limited to having been set out as evidence of alleged manipulation of records maintained by the assessee. Hence, even if the provenance of the information is held as acceptable, no substantive detriment turns upon it save in circumstances of any such being attributed to the maintained records – either as mandated obligation under prescribed procedure or presumption, thereby, of diversion of material. Therefore, the information purportedly obtained from the ‘pen drives’ is, for the nonce, irrelevant.

39. Having alluded to certain episodes involving the appellant, Learned Special Counsel for appellant-Commissioner took us through details of the 'export oriented unit (EOU)' scheme and the corresponding notifications, exempting duties of customs and duties of central excise, issued under Customs Act, 1962 and Central Excise Act, 1944 to operationalize the intent of the Foreign Trade Policy (FTP) which he contended to have been succinctly encapsulated in circular no. 12/2008-Cus dated 24th July 2008 of Central Board of Excise & Customs (CBEC) and is the bedrock of the case established in the investigation. He argued for a harmonious, and contextual, appreciation of the scheme as emanating from these statutory and administrative instruments to urge that the privilege of 'duty exempt' goods was not to be extended to anything but export goods. Carrying this proposition further, he contended that the absence of any reporting of clearance of goods, to the domestic undertaking of the respondent-assessee, in the prescribed returns as well as the subsequent admission of such goods not being 'similar' to that approved for export rendered any claim of *bona fide* use in manufacture of goods cleared into 'domestic tariff area (DTA)' to be untenable. He relied upon statements of the Chief Operating Officer and the General Manager in support of unpaid duty liability arising on such clearances. However, his support of the decision of the original authority to impose duty liability on such clearances is not entirely congruent with the stand of the appellant-Commissioner that the approach of the adjudicating-Commissioner to quantification of levy was wanting.

40. Turning to the challenge to the impugned order by the appellant-Commissioner, he contended that conformity with ‘standard input output norms (SION)’ was the core of responsibility in accordance with the *minutiae* of the scheme in the Foreign Trade Policy (FTP) along with the condition in the operationalizing exemption notifications and that the records claiming such utilization was a sleight intended to throw the jurisdictional authorities off the scent of this elaborately devised diversion effected by the respondent-assessee. He cited the admission by the key personnel of the assessee that norms had not been followed, that sales made to GEE TEE was typical of the commercial trade that the respondent-assessee was actually engaged in and that this was further amplified in the statements of the transporters.

41. Taking us through the grounds adduced by appellant-Commissioner, he argued that the adjudicating-Commissioner had failed to appreciate the intent of the scheme from a holistic perspective in ruling on the want of evidence to support the allegation of diversion. He echoed the criticism in the ground of appeal about the acceptance by the adjudicating-Commissioner of the contentions of the assessee without considering the proposition in the notice that, with non-conformity to the ‘norms’ along with manipulation of records, onus of disproving diversion vested with the assessee. The acceptance of the plea of Shri Rangnath Shinde on the variation in the handwriting in the statements recorded from him was, according to Learned Special Counsel, incorrect inasmuch as the language

deployed for the exercise should have been factored in. He also contended that the adjudicating-Commissioner had, without considering the significance of the buyer named therein as merely symptomatic of *mala fides* on the part of the assessee, set more store, and inappropriately, on the particulars of the buyer to reject its evidentiary potential in the context of statement of one Keyur Umrana attesting to the veracity of the printout and manner in which the records suppressed the true picture. The discarding of the testimony of the transporters by the adjudicating-Commissioner was also criticized by him for inappropriateness to conclude that dropping of portion of demand in the impugned order had not been adequately justified.

42. At the core of the primary cavil of the appellant-Commissioner, as well as the notice initiating proceedings, is the arrogating of ‘standard input output norms (SION)’, incorporated in the Handbook of Procedures (HoP) attending upon the relevant Foreign Trade Policy (FTP), to conclude that ‘raw material’ in excess of the norms had been procured without payment of duty with intention to divert to the local market for ineligible deployment and the arrogation of authority to determine duty liability to the extent that alleged procurement was found to have deviated from internal parity among several ‘raw materials’ permitted in the relevant norms. As we have premised *supra*, the appropriateness of the proposal in the notice to revise the classification within the norms will be pertinent only if the plea of the appellant-Commissioner succeeds on the two premises set out above.

43. The first relies on

‘13) Issue VI of the Order-in-Original -

The next issue dealt with in the impugned Order-in-Original is whether the allegation in the Show Cause Notice evidencing the diversion of duty free procured raw materials in the DTA during the transit from JNPT to factory and from factory after bonding stands proved as against to the contrary proof shown by the assessee. In this regard, it is submitted as under –

- (a) As per the Foreign Trade Policy and Notification Nos. 52/2003 - Cus and 22/2003 - C.E., the onus lies on the EOU who claims exemption under the said notifications to prove that the inputs procured by them duty-free were used for the intended purpose.*
- (b) The noticee/assessee has executed a Bond undertaking to comply with the provisions of the Customs Act, 1962, the Central Excise Act, 1944, the conditions of the said notifications and the FTP and to pay the appropriate duty on their failure to do so.*
- (c) Therefore, it is for the assessee to satisfy the proper authority that the duty-free inputs procured by them were used in a manner as provided under the said notification and the FTP.*
- (d) In their reply to the Show Cause Notice, it has been contended by the assessee that the Revenue has failed to prove diversion of duty-free inputs. This contention has been accepted by the Adjudicating Authority without evaluating the evidences in the Show Cause Notice and without considering the Revenue's submission that the onus was on the assessee to prove otherwise. The Adjudicating Authority has completely failed to appreciate the crux of the case. It is logically evident that inputs procured way in excess of the finished goods have been obviously diverted. Furthermore, enough*

corroborative evidence has been provided in the Show Cause Notice in this regard to establish this fact.

(e) *Without having to prove any diversion, the Revenue's case holds good on the following grounds itself-*

(i) *The duty-free inputs procured by the assessee were not used for the intended purpose; and*

(ii) *The goods cleared to DTA were "not-similar" to the goods exported as mandated under para 6.08 (a) of the FTP.*

Though the adjudicating authority has agreed to this basic fact, he has gone ahead to arrive at a conclusion which is not legal and proper.

(f) *In addition to the above, the documentary evidences relied upon in the Show Cause Notice are additional/ corroborative evidences only to bring home the fact that the assessee was manipulating their documents for the purpose of projecting that they were complying with the legal requirements.'*

and the second relies on

'15) *Para 9d of the Order-in-Original -*

(a) *The Adjudicating Authority has made the following observation at para 9d of the impugned Order-in-Original - If the Noticee has procured lesser quantity of Plasticizers as compared to PVC Resins, it cannot be concluded that PVC Resins has been procured in excess. Therefore, nothing adverse can be concluded against the Noticee.*

(b) *The basic premise of the Show Cause Notice is diversion of duty-free inputs by the assessee. **Diversion can occur only after procurement**. What is sought to be brought out at*

para 44 of the Show Cause Notice has been completely misunderstood by the Adjudicating Authority. Adjudicating Authority has failed to appreciate that excess inputs which were procured and not used in finished goods were obviously and logically diverted.

- (c) *The SION prescribes the maximum quantum of duty-free inputs that can be consumed by an EOU for a given unit of finished product. PVC Resin and Plasticizers are the two ingredients that make up more than 90% of the weight of the finished product manufactured by the assessee.*
- (d) *Plasticizer is the liquid into which the PVC Resin is mixed to form a paste which then, depending on the type of finished goods, is either calendered or spread out on a fabric. Therefore, **if plasticizer was not available in sufficient quantity** with the assessee, **there was no question of consumption of PVC Resin** to the extent that they had procured.*
- (e) *"PVC Leather Cloth" was manufactured maximum by the assessee. As per SION, for the manufacture of 1.000 Kg of PVC Leather Cloth, the maximum quantity of duty-free inputs - PVC Resin and Plasticizers, allowed is 0.587 Kg and 0.405 Kg, respectively.*
- (f) *From para 44c of the Show Cause Notice the quantum of PVC Resin and Plasticizers procured by the assessee is reproduced below -*

xxxxxx

*For example, if the assessee claims that during the year 2010-11 they had consumed entire quantity of 5922925 Kgs of duty-free Plasticizers for manufacture of "PVC Leather Cloth" for export and DTA, then as per SION, **the maximum quantity of duty-free PVC Resin** allowed to be consumed would be = [5922925 Kgs x 0.587/0.405 (refer*

SION for PVC Leather Cloth)] = 8584585 Kgs only. **The procurement of PVC Resin in excess of the above quantity therefore becomes dutiable.**

- (g) The use of Plasticizer has been confirmed by the following employees of the assessee - Shri Sharad Chandra vide his Statement dated 25-08-2015 [RUD-B48], Shri R. K. Parsania vide his Statements dated 23-11-2015 [RUD-B77] and 28-12-2015 [RUD-B81] and also by the assessee vide letter dated 31-07-2015. The Plasticizer is the chemical that gives flexibility to the finished product. Lesser the Plasticizer, more rigid the product.
- (h) The argument put forth by the assessee is that SION provides for maximum quantity of inputs that can be used but there was no restriction on lesser quantity being used. There's no harm in this argument **but the moot question is then whether the resultant finished goods would be as intended by the assessee?** Even the basic tenets of chemistry, which states that in a given manufactured substance one chemical cannot be unilaterally altered without proportionately altering the other required chemicals, has been overlooked by the Adjudicating Authority. There has been a failure on the part of the Adjudicating Authority in not correctly considering the allegations made in para 44 of the Show Cause Notice.
- (i) Another observation made by the Adjudicating Authority in the impugned Order-in-Original at para 9d is - The data compiled in the notice at Annexure - O and P itself varies. For example, in the year 2010-11, in Annexure - O, all grades of PVC Resins consumption is as 1,57,38,452 kgs while in Annexure - P the consumption data of PVC Resins is shown as 8,27,60,000 kgs.

In this regard, it is submitted that Annexure-O is "Summary of Input Consumption Data" whereas Annexure-P is a

"Summary of the Inputs [duty-paid + duty-free] procured" by the assessee. When a comparison of "consumption" figures with "procurement" figures is made there is bound to be a difference.

It is obvious from the statement that the Adjudicating Authority has not understood even the basic difference in the data presented and has dropped the demand without appreciating the basic facts / data. Therefore, such comparison of divergent parameters cannot form the basis for dropping the demand.'

to urge the criticality of 'plasticizer' in the conclusion that 'polyvinyl chloride (PVC) resin' had not been used in manufacture.

44. The case for recovery of differential duty, and, that too, on a single 'raw material', viz., 'polyvinyl chloride (PVC) resin' sourced under exemptions accorded by notifications under Customs Act, 1962 and Central Excise Act, 1944, is diversion, derived from implausibility of deployment in terms of 'standard input output norms (SION)' that has been incorporated in those very notifications as condition for availment of exemption, into the market unauthorizedly. Indubitably, the mandate of the exemptions is 'actual use' by the importer and, doubtlessly, the availment is predicated by adherence to norms as ceiling of entitlement to duty exemption. The former, connoting illegality of use by another entity in which the importer is complicit through deliberate transfer of possession, is distinguishable from the latter which may not exclude the possibility of sub-optimal manufacturing efficiency. In the notice which, in the urgings on behalf of appellant-Commissioner, is pressed for adoption, there is no evidence of

usage by another entity; nor is there anything to suggest that such misuse by another can be gleaned from the circumstances. Even if the importer has been found wanting in adhering to the norms, a consequential presumption of misuse, in contradistinction with inefficiency, must necessarily rest upon unearthing of some destination for the goods impugned in the appeal. The lack thereof circumscribes the extent of detriment that could, possibly, be fastened on the importer.

45. The dichotomy *supra* is apparent in the evolution of the notification itself. In the original version of 2003, neither of the notifications placed emphasis on monitoring of the manufacturing process. Unlike the schemes in chapter 4 of the Foreign Trade Policy (FTP) which conferred privilege of exemption to undertakings that carried out manufacture for exports in de-regulated environment warranting some ‘record based’ surety of utilization by the importer, the ‘export oriented units (EOU)’ scheme entities were not only confined to ‘warehouses’ but also required to ‘manufacture in bond’, as envisaged in section 65 of Customs Act, 1962, with risk of leakage restricted to deliberate removal that was unlikely to remain undetected for long. The rigour of handling of ‘waste and scrap’ in such ‘manufacture in bond’, with potential for distorting the intent of the scheme in the Foreign Trade Policy, was cause for incorporating ‘tolerance limits’ insofar as ‘waste and scrap’ was concerned. That such supervised manufacture was not attuned to ensuring optimal use of ‘raw materials’, with consequent cost to the exchequer, compelled policy fine-tuning

towards that end by adopting monitorial mechanism of ‘standard input output norms (SION)’ which had been gainfully employed in restricting use of exemption driven ‘raw materials’ for factories operating under export promotion schemes of the Foreign Trade Policy (FTP). The intent therein was not to negate deliberate diversion, which the notification and control system was already geared to handle, but the next logical step of ensuring efficient deployment without having to evidence misuse inherent in monitoring ‘actual use’ by subjective satisfaction. There were, thus, recourse to dual compliance – ‘actual user’ deployment and ‘optimal’ deployment – by reference to evidence and presumption respectively. It does not appear to us, therefore, that the incorporation of adherence to ‘norms’ as a condition was actuated to supplant the rigour of evidence that taxing statutes require for bringing charge of diversion of exempted goods against units operating under the scheme. That presumption of conferment of such armoury goes against the grain of circumscribing prescribed in section 111(o) of Customs Act, 1962 with its consequential penal detriment of section 112 of Customs Act, 1962 as well recovery mechanism of section 28 of Customs Act, 1962 entailing penal imposition of section 114A of Customs Act, 1962. It is, therefore, appropriate to dwell on the facility afforded by, and evolution of, the exemption notifications issued by the Government of India in Department of Revenue to give effect to ‘export oriented unit (EOU)’ scheme in chapter 6 of the Foreign Trade Policy (FTP) emanating from the Government of India in the Department of Commerce.

46. The two notifications are twinned, so to speak, in the privileges, conditions and prescriptions. We, therefore, restrict ourselves to notification no. 52/2003-Cus dated 31st March 2003 as representative of waiver of levy on procurement of goods – capital equipment, consumables and raw materials – required for manufacture of goods, enumerated in the ‘letter of permission (LoP)’ issued by jurisdictional Development Commissioner, for export, and even clearance of like or similar goods into ‘domestic tariff area (DTA)’ on payment of appropriate duties of central excise, in fulfillment of ‘export obligation’, i.e., being ‘net foreign exchange (NFE) positive’ over five year period as prescription for renewal. While there is no ceiling, either under the policy or in terms of either notification, on the quantity or value of such procurement on ‘duty foregone’ basis, deployment in manufacture of goods to be exported or cleared on payment of duty by the approved unit is mandated. Procedurally, the operations under bond is subject to continuance of the facility of the unit as a warehouse that is also approved under section 65 of Customs Act, 1962 to carry out manufacturing activities with stipulation that waste generated by such operation be subjected to restitution of ‘duty foregone’ to the extent of clearance for domestic consumption while departing from the statutory prescription therein of duty liability to duties of customs under section 12 of Customs Act, 1962 on domestic clearance of finished goods by the special levy of duties of central excise under section 3 of Central Excise Act, 1944. Diversion of procured goods into the domestic market erases the regularity of import of such goods *ab initio* to invoke confiscation under

section 111(o) of Customs Act, 1962 attended by recovery empowered by section 28 of Customs Act, 1962 in conjunction with penal provision of section 112 or section 114A of Customs Act, 1962 which is not the substance of the proceedings in the present dispute that has ought to do with the presumption of diversion by attribution of such as inhering in the content of bond, as prescribed in third condition of first paragraph of the notification, to comply with demand in relation to goods, other than capital goods, that are not in proportion to goods manufactured.

47. At this stage, it does strike us, and rather forcefully, that the evident compartmentalized approach to the exemption facility on the part of the tax authorities manifests discordance with the contents, and particularly, when it comes to the proposition that exemption is available only to the ‘raw materials’ enumerated in the norms. From our narration *supra*, it is evident that the notifications in the original form did not stipulate such restriction and the specific incorporation of

‘Provided that –

where no SION have been notified, the generation of waste, scrap and remnants upto 2% of input quantity shall be allowed;

where additional items other than those given in SION are required as input or where generation of waste, scrap and remnants is beyond 2% of the input quantity, use of such shall be allowed on the basis of self-declared norms till such norms are fixed on as hoc basis by the jurisdictional Development Commissioner within a period of three months from the date of self-declared norms and the unit shall undertake to adjust the self-declared/ ad-hoc norms in accordance with norms as finally fixed

by the Norms Committee further unit. The ad-hoc norms will continue till such time the final norms are fixed by the Norms Committee.

.....’

identically in condition 3(d)(I)(ii) of first paragraph in notification no. 52/2003-Cus dated 31st March 2003 and in condition 4 (a)(ii) of first paragraph in notification no. 22/2003-CE dated 31st March 2003 conceives of such deployment and resort to measure of efficiency in use of these. The purpose of these exemptions is to give effect to the scheme in the Foreign Trade Policy which has not envisaged restriction on deployment of raw materials and it is merely the unwieldiness in exhaustive enumeration of each and every conceivable article of manufacture that appears to have prompted prescription limited to that most commonly known without intruding upon management of manufacturing facility. The assumption of the tax authorities is not echoed in the notifications or the scheme and must be discarded without any let or hindrance. Thus, we find that, in the two-pronged approach to enforcement of the norms, both intent and content have been maimed by the tax authorities; not only in the issuing of the show cause notice but also by persisting with the appellate remedies.

48. Before the incorporation of the *proviso* to conditions in the two notifications *supra*, the reference to, as well as contingency of non-existent, norms for product group with authority to finalise norms vested in the Board of Approval effective between 6th July 2007 and 5th May 2008, satisfaction of customs authorities that

‘(ii) in the case of goods other than capital goods, such goods as are not proved to the satisfaction of the said officer to have been used in connection with the production or packaging of goods for export out of India or cleared for home consumption within a period of three years from the date of import or procurement thereof or within such extended period as the said officer, as the case may, on being satisfied that there is sufficient cause for not using them as above within the said period, allow;’

in condition 3(d) of first paragraph of notification no. 52/2003-Cus dated 31st March 2003, as well as in condition 4(a) of first paragraph in notification no. 22/2003-CE dated 31st March 2003, which held sway with no reference to ‘standard input output norms (SION)’ as a validation guide. Thus, even before 6th July 2007 and akin to monitoring of warehoused goods to safeguard interest of revenue in goods already assessed but entitled to deferment of duty, it was the utilization within the normal period of warehousing that was of principal concern, and could be permitted to continue to be so warehoused, that fell within the discretion of customs officers. The intent of notification no. 84/2007-Cus dated 6th July 2007 and notification no. 29/2007-CE dated 6th July 2007 appears to be have been the rescinding of discretion conferred upon officer of customs to allow further time for utilization of the exempted goods and confining monitorial oversight of utilization strictly within the norms. The ‘norms’ themselves were borrowed from schemes in chapter 4 of the Foreign Trade Policy (FTP) that convenience officers empowered under Foreign Trade (Development & Regulation) Act, 1992 in specifying quantities in ‘authorization’ for import of goods (other than ‘capital goods’) required for

production of goods intended for fulfillment of pre-determined 'export obligation'; for chapter 6 of Foreign Trade Policy (FTP), those very 'norms' were to assist officers of customs in *post facto* monitoring of efficiency of production. It does not bear repetition that the contents of an exemption notification does not have to be the authority for interdiction of 'smuggling' by diversion of 'duty exempt' material; the provisions of Central Excise Act, 1944 and Customs Act, 1962 did already afford jurisdiction for enforcement.

49. The question that begs answer is the extent to which these 'norms', borrowed for its empirical acceptability and contextual validity, can be stretched to presume inclination to misuse exemption intended for fulfillment of 'net foreign exchange (NFE)' earning. As we have noticed *supra*, 'standard input output norms (SION)', designed for another and later scheme in the Foreign Trade Policy (FTP), was grafted into the already existing 'export oriented unit (EOU)' scheme in the same policy without any alterations in structuring. Again, as we have noticed *supra*, the grafting narrowed down the existing latitude in empowering of customs authorities to track usage of 'duty exempt' materials and even to the extent of prescribing 'tolerance' for 'waste' arising in the production process. Once again, as we have noticed *supra*, the distinction lay in employing of the 'norms' to limit import of 'raw materials' physically at the threshold for the purpose of export promotion scheme while employing it as a template for determining deviations when 'raw materials' are not physically available

any longer and, consequently, cannot be accorded the rigour, by subsequent adoption, for presumption of diversion with penal consequence in the case of ‘export oriented units (EOU)’ in the Foreign Trade Policy (FTP). Case for diversion-driven detriment has always existed, independent of the customs notification relevant to either of the schemes, in Customs Act, 1962, by recourse to 111(m) of Customs Act, 1962 or section 111(o) of Customs Act, 1962 and rule 25 of Central Excise Rules, 2002 respectively; the rigour of those provisions cannot be diluted through arrogation of empowerment in a notification issued under section 25 of Customs Act, 1962 or section 5A of Central Excise Act, 1944 and, especially, as neither these notifications nor the corresponding provisions in the Foreign Trade Policy (FTP) allude, even remotely, to such intent. Therefore, a case of diversion cannot be made out without reference to the movement of the goods alleged to have been diverted. We now turn to the issue of recovery, intended by the impugned notifications, of duty liability, for non-conformity with the ‘standard input output norms (SION)’, on post-procurement evaluation.

50. From our exposition *supra*, it is clear that the ‘norms’ are an estimate of most commonly used ‘raw materials’ for a specific product; its utility did not lie in ‘mathematical precision’ which was not *sine qua non* for authorization of quantity limits for ‘duty exempt’ imports. Such precision, therefore, is not to be presumed for monitorial oversight and, concomitantly, such ‘intra mural’ correlation, between enumerations on

one side of the 'norms', cannot also be insinuated for any purpose whatsoever. Underlying such insinuation is the presumption of exactitude in matrix of product engineering which has neither been set out in the show cause notice nor suggested by the formulation of 'norms' for grant of authorization in schemes constituting chapter 4 of the Foreign Trade Policy (FTP); on the contrary, their relationship to export goods is that of 'ceiling' or maximum requirement for each of the 'raw materials' so enumerated as corresponding to a specific output. Therefore, recovery of duty in the event of excessive usage in comparison with actual production is also limited to each of the 'raw materials' on the logical premise of non-optimal deployment which the exchequer is not obliged to subsidize. The ascertaining of compliance with the second limb, of condition 3(d) of first paragraph of notification no. 52/2003-Cus dated 31st March 2003, as well as in condition 4(a) of first paragraph in notification no. 22/2003-CE dated 31st March 2003 is limited to each of the 'raw materials' in isolation from the rest of the mix. That, then, should be the test for allowing the relief sought by appellant-Commissioner.

51. The extent of exports is not in dispute. The entitlement in procurement of 'polyvinyl chloride (PVC) resin' to the extent effected by the unit is not in dispute and it is not in dispute that the production was not proportional to such quantity. The contention of the appellant-Commissioner rests upon the procurement of 'plasticizer' not being in proportion with procurement of 'polyvinyl chloride (PVC) resin' implying

that consumption of the former was higher than justified for the quantity of consumption of the latter leading to the allegation, thereby, that lesser quantity of ‘polyvinyl chloride (PVC) resin’ was actually used; this is the pitfall of embarking upon mathematical computation that was not designed into ‘norms’ formulation – a case of logic being stood on its head for contriving a desired end.

52. The adjudicating-Commissioner has, on the other hand, noted that ‘plasticizer’ imparts flexibility to products of resinous origin and that the manifold variations of goods, within the product groupings, manufactured by the appellant does not lend itself to acceptance of the proposition in the show cause notice that consumption of ‘plasticizer’ should govern restrictions on use of ‘polyvinyl chloride (PVC) resin’ for determining recovery of ‘duty foregone’ at the time of procurement. The grounds enumerated for relief sought by appellant-Commissioner have not put forth any contention to override this conclusion. Mere reproduction of extracts from the notification coupled with reiteration of the proposition in the notice is not tenable surrogate either. We find no valid ground to hold that any part of ‘duty foregone’ is recoverable for the reasons offered in the appeal of jurisdictional Commissioner of Customs.

53. We have very carefully, and deliberately, avoided resorting to the brief, and usual, description of such appeals as that of Revenue for this misadventure on the part of the show cause notice issuing authority, and

now perpetuated, for recovering of 'duty foregone' is not only illogical but so ill-conceived as to be forborne from attribution to all that Revenue stands for as instrument of public interest in a Republic governed by rule of law distinguishable from the armoury of crusading zeal. There is no evidence available, even remotely proximate, to suggest that 'polyvinyl chloride (PVC) resin' procured by the appellant-assessee had reached any user/trader. There is no ground to infer that 'polyvinyl chloride (PVC) resin' has been used in excess of that indicated in the 'norms', as adopted, for monitorial oversight of 'actual user' access to 'duty exempt' privilege. Consequently, the pleas of appellant-Commissioner fail.

54. The appeal of M/s Responsive Industries Ltd is allowed. The appeals of Commissioner of CGST & Central Excise, Palghar are dismissed.

(Order pronounced in the open court on 22/12/2023)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)