

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

**Customs Appeal No. 89234 of 2013**

(Arising out of Order-in-Appeal No. PUNE-EXCUS-001-APP-79-13-14 dated 26.07.2013 passed by Commissioner (Appeals), Central Excise, Pune-I, Pune.)

**Montanari Lifts Components Private Limited**

Plot No. G-3, Phase-III, Chakan MIDC Industrial Area  
Chakan District, Pune-410 501.

**.....Appellants**

*VERSUS*

**Commissioner of Central Excise**

Pune-I Commissionerate,  
41A, ICE House, Sassoon Road, Pune - 411 7007.

**.....Respondent**

**Appearance:**

Shri Mayur Shroff, Advocate for the Appellants

Shri D.S. Mann, Authorized Representative for the Respondent

**CORAM:**

**HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)**

**HON'BLE MR. M.M. PARTHIBAN, MEMBER (TECHNICAL)**

**FINAL ORDER NO. A/85002/2024**

Date of Hearing: 30.08.2023

Date of Decision: 01.01.2024

**PER : M.M. PARTHIBAN**

This appeal has been filed by M/s Montanari Lifts Components Private Limited, Pune (herein after, referred to as 'the appellants'), assailing Order-in-Appeal No. PUNE-EXCUS-001-APP-79-13-14 dated 26.07.2013 (herein after, referred to as 'the impugned order') passed by the learned Commissioner (Appeals), Central Excise, Pune-I, Pune.

2.1. Briefly stated, the facts of the case are that the appellants herein is an Export Oriented Unit (EOU) holding a Private Customs bonded warehouse license No. VIII(Cus)30-136/LIC/09-10 and are engaged in the manufacture of gear box for lifts and other parts & accessories of lifts falling under tariff item 8483 4000 of the Central Excise Tariff Act, 1985. A letter of permission (LOP) No. PER:02(2009)SEEPZ-SEZ/EOU/06/2009/10/5037 dated 19.05.2009 was issued to the appellants by the jurisdictional Joint Development Commissioner, SEEPZ, Ministry of Commerce & Industry, Mumbai (JDC, SEEPZ) for setting up an unit under

EOU Scheme for manufacture of gear box for lifts, parts and accessories of lifts. The appellants have accepted the terms and conditions of LOP issued for their EOU and executed Letter of Undertaking (LUT) with the Joint Development Commissioner, SEEPZ. In pursuance of the LOP given and LUT executed by the appellants, they were allowed duty free import or procurement of capital goods, raw material, components and other required items as approved by the Development Commissioner, in terms of notifications No.52/2003-Customs and No.22/03-C.E. dated both dated 31.03.2003. The appellants had also executed necessary B-17 Bond with the jurisdictional Central Excise authorities to comply with the conditions of the aforesaid notifications. The appellants had imported capital goods and raw materials duty free by availing the above notifications for use in their 100% EOU for manufacture and export of finished goods. However, due to recession in the export market and availability of cheap alternate products there was no demand for the finished product manufactured by the appellants. Thus, they had applied to the JDC, SEEPZ for advance clearance of goods in Domestic Tariff Area (DTA) with the expectation that the export market may pick-up in near future and cleared the goods on payment of applicable duty. However, as they could not export their products, they decided to exit from the EOU scheme and made necessary application on 13.01.2020 for de-bonding their unit from EOU scheme and to shift their goods to their Chakan Plant in DTA. Further, the appellants had also calculated the differential duties payable in respect of capital goods, raw materials on account of their debonding of EOU unit and paid the same along with applicable interest. The same were verified by the jurisdictional Central Excise authorities and necessary 'No Dues Certificate' have been issued by the jurisdictional Central Excise authorities vide letter F. No. VGN(19)30-40/MLC/2009-10 dated 22.10.2010. The JDC, SEEPZ after going through the details of the appellant's representation and that 'No Dues Certificate' of Central Excise authorities, had issued Final Debonding Order dated 01.02.2011 cancelling the LOP given for operation under the EOU Scheme. The appellants have also paid the differential duty in respect of DTA clearances of the final products, which had been initially cleared availing concessional benefit applicable to EOUs voluntarily along with applicable interest, due to their coming out of the EOU scheme. Accordingly, the jurisdictional Commissioner of Central Excise, Pune-I had accepted the appellant's request and closed the issue under the provisions of Section 11A(2B) of the Central Excise Act, 1944 and informed the same to the

appellants vide Letter F. No. VGN(19)30-180/MLC/SCN/10-11 dated 31.01.2011.

2.2 In terms of the conditions of the LOP and LTU, the appellants were required to achieve Positive Net Foreign Exchange earnings (NFE). However, the appellants were unable to achieve the positive NFE during the period 2009-2010 as the NFE worked out was negative i.e., (-) Rs.128.11 lakhs. Further, the appellants EOU had failed to make any export during the period 2009-2010. Subsequently, the Central Excise authorities have found that due to the appellants having not exported any goods, and thus are required to pay the differential duty for having availed concessional duty in respect of inputs that were contained in the final products which were cleared in the DTA. Accordingly, the appellants were issued with the demand of differential duty vide show cause notice dated 26.12.2011. In adjudicating the SCN, the original authority i.e., Additional Commissioner, Central Excise, Pune-I had confirmed the demand of differential duty of Rs.6,83,301/- under Section 28 of the Customs Act, 1962 along with interest and imposed mandatory penalty on the appellants under Section 112(a) *ibid* besides confiscation of imported goods under Section 111(o) *ibid* and allowing the same on redemption fine of Rs.1,00,000/- under Section 125 *ibid*. The appellants had filed an appeal against the aforesaid order before the appellate authority. The learned Commissioner of Customs (Appeals) while deciding the case, had confirmed the order of the original authority in respect of duty demand and interest, and confiscation of the impugned goods but reduced the penalty imposed under Section 112(a) *ibid* to Rs.5,000/- as the assessments were provisional and as he found that there is no case for evasion of duty with an intention to evade duty or suppression of facts. Being aggrieved with the impugned order, the appellants have preferred this appeal before the Tribunal.

3.1. Learned Advocate for the appellants contended that they have paid all applicable duties in respect of raw materials, capital goods and finished goods in terms of existing legal provisions, when the appellants' EOU unit was de-bonded. He also stated that after issue of the NOC by the jurisdictional Central Excise authorities, and upon satisfaction of all compliances the JDC, SEEPZ had issued final de-bonding letter on 01.02.2011. Even, the jurisdictional Central Excise authorities have accepted their payment of applicable duties on raw material, capital

goods and voluntary payment of full differential duty on finished goods cleared in DTA. Thus, they claimed that the demand in the present case is not sustainable. Thus he pleaded that the impugned order is liable to be set aside.

3.2. In support of their stand, the learned Advocate relied upon the decisions taken by the Tribunal and Hon'ble Supreme Court in the following cases:

(i) *Commissioner of Central Excise, Surat Vs. Sanjari Twisters* – 2009 (235) E.L.T. 116 (Tri. – Ahmd.) and the department's appeal in C.A. Mo. D13631 of 2008 dismissed - 2010 (255) E.L.T. A15 (S.C)

(ii) *Sarla Polyester Ltd. Vs. Commissioner of Central Excise, Surat-II* – 2008 (222) E.L.T. 376 (Tri. – Ahmd.)

(iii) *Vandevi Texturisers Pvt. Ltd. Vs. Commissioner of Central Excise, Surat* – 2007 (220) E.L.T. 289 (Tri. – Ahmd.)

(iv) *Sterlite Optical Technologies Ltd. Vs. Commissioner of Customs & Central Excise, Aurangabad* – 2011 (270) E.L.T. 266 (Tri. – Mumbai).

4. Learned Authorised Representative (AR) reiterated the findings made in the impugned order and stated that the differential duty has been correctly demanded in view of the specific condition provided in paragraph 1(3)(d)(ii) of the notification No.52/2003-Customs dated 31.03.2003. Thus, learned AR justified the action of Commissioner (Appeals) in confirming the original order in respect of confirmation of the differential duty along with interest, redemption fine and for modifying the reduced penalty.

5. Heard both sides and perused the case records.

6.1. The issue involved herein is to decide whether the demand of differential duty in respect of raw materials/inputs, consumed in the finished goods which have not been exported by an EOU in terms of notification No. No.52/2003-Customs dated 31.03.2003 is sustainable and whether such goods are liable for confiscation under Section 111(o) *ibid* and for imposition of penalty on the appellants under Section 112(a) *ibid*.

6.2 We find that the issue in dispute lies in the narrow compass of determining the legal requirements for compliance with one of the conditions prescribed under Notification No. 52/2003-Customs dated

31.03.2003 as amended. The relevant condition of the said Notification is as follows:

*"(d) to pay on demand –*

*(I) An amount equal to duty leviable on the goods and interest at a rate as specified in the notification of the government of India in the Ministry of Finance (Department of Revenue) issued under Section 28AB of the said Customs Act on the said duty from the date of duty free import of the said goods till the date of payment of such duty, if -*

- (i) In the case of capital goods, such goods as are not proved to the satisfaction of the said officer to have been installed or otherwise used within the unit within a period of one year from the date of import or procurement thereof or within such extended period not exceeding five years as the said officer may, on being satisfied that there is sufficient cause for not using them as above within the said period, allow;*
- (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 in accordance with SION 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 may, on being satisfied that there is sufficient cause for not using them as above within the said period, allow:..."*

For the purpose of the issue in dispute, the above condition no. (ii) of paragraph 1(3)(d) of Notification No.52/2003-Customs dated 31.03.2003 is relevant.

6.3. We find that the Commissioner (Appeals) had given a finding that inasmuch as the conditions of the notification No.52/2003-Customs dated 31.03.2003 not having been satisfied by the appellants, they are liable to pay duty on raw materials which have not been used for the manufacture of finished goods for export. The relevant decision of the learned Commissioner (Appeals) in the impugned order is extracted for immediate reference as below:

*"12..... It is evident from the above paras of the bond that the Appellants are liable to pay Customs duties on the raw materials imported or Excise duties in case of raw materials procured from the domestic market and they are also liable to pay excise duties on the finished product cleared in the domestic market for non fulfillment of the condition of the Notification i.e., the raw material not used for the manufacture of the goods for export. Admittedly in this case the raw materials have not been used for the manufacture of goods for export, the final products having been cleared in the domestic market. As such the condition of the notification for which exemption was availed is not satisfied and consequentially the Appellants are liable to pay duty on the said raw material in terms of the notification and bond. The clearance of the final products in DTA on payment of duty does not*

*take away the duty liability on the imported raw material when not used in the manufacture of goods exported. Therefore the said argument of Appellant that they are not liable to pay duty on the imported raw material since they have paid duty on the finished product at the time of clearance in DTA is devoid of any merits when admittedly this is not a case of export of finished product in which case the duties of customs and excise, as the case may be, are not chargeable on the raw material or inputs as well as finished product. The Adjudicating Authority in para 20 of the Order-in-Original has rightly held that in view of para 1(3)(d)(ii) of Notification 52/2003-Cus. And para 1(4)(b) of Notification 22/2003-CE both dated 31.03.2003, the duty on imported raw materials not used in the export of goods is recoverable from Appellants."*

7. We find from the factual matrix of the case, that the appellants had imported capital goods, raw materials, inputs after having obtained valid LOP for an EOU and upon execution of LTU to abide by the conditions of the notification No.52/2003-Customs dated 31.03.2003. These goods were also used in the manufacture of finished goods and awaiting the export orders, the appellants had also obtained advance DTA clearance permission of finished goods from the JDC, SEEPZ. Thus at the time of import of such goods, and their use in the EOU premises for manufacture of finished goods, there was no apparent violation of the said notification by the appellants. However, due to the reasons adduced by the appellants in their appeal memorandum, they were unable to export the finished goods and thus had sought permission from JDC, SEEPZ and informed the jurisdictional Central Excise authorities for paying the appropriate differential duties involved in debonding of the EOU. It is also an admitted fact that the duties paid by the appellants before debonding of the EOU scheme were acknowledged by the jurisdictional Central Excise authorities i.e., Deputy Commissioner of Central Excise, Pune-III Division, Pune by issue of 'No Objection Certificate' vide letter F. No. VGN(19)30-40/MLC/2009-10 dated 22.10.2010. The relevant portion of the said NOC letter is extracted below:

*"Please refer to letter F. No. SEEPZ-SEZ/EOU/A-II/09-10/8563 dated 6<sup>th</sup> August, 2010, issued by the Asst. Development Commissioner, SEEPZ-SEZ Mumbai on the above subject.*

*In this context, it is to inform you that no Central Excise or Customs dues are pending against you as on the date."*

Further, the appellants had made voluntary payment of differential duty involved in respect of DTA clearance of finished goods during the period May, 2009 to December, 2009, for which initially concessional duty was

availed for DTA clearances applicable for EOU units and later upon debonding from EOU scheme such differential duty was paid. They had also informed such differential duty payment to the jurisdictional Central Excise authorities vide their letter dated 22.11.2010, and their request for waiver of show cause notice and penalty under Section 11A(2B) of the Central Excise Act, 1944 was considered by the Central Excise authorities and the same was accepted. The relevant portion of the said letter F. No. VGN(19)30-180/MLC/SCN/10-11 dated 31.01.2011 is extracted below:

*"Please refer to your letter F. No. Excise/Montanari/2010 dt. 22.11.2010 on the above subject.*

*Commissioner, Central Excise, Pune-I has accepted your request and has closed the issue under Section 11A(2B) of the Central Excise Act, 1944."*

8.1. However, subsequently show cause proceedings were initiated by the department by SCN dated 26.12.2011, leading to the present dispute. From the above factual details, it transpires that the department had sufficient opportunity to examine the issue of differential duty payable by the appellants EOU unit when the same had applied for de-bonding. It is only upon the subjective satisfaction of concerned jurisdictional Central Excise authorities about the calculation of the duties payable for debonding as worked out by the appellants, and as are required under the law, the department had given NOC letter for issue of final de-bonding permission by the JDC, SEEPZ. Accordingly, differential duty in respect of capital goods imported duty free for the EOU operations, inputs/raw materials procured duty free which were lying in stock, were paid along with applicable interest. However, later the differential duty on the inputs/raw materials procured duty free which were consumed in the finished goods which have been cleared in DTA have been demanded, on the ground that the raw materials have not been consumed in the finished products exported and on the other hand have been cleared for DTA consumption. It is also seen that the same jurisdictional Central Excise authorities have accepted the voluntary payment of differential duty on finished goods cleared for DTA and finalized the issue without issue of show cause notice in terms of legal provisions under Section 11A(2B) of the Central Excise Act, 1944. Thus, we are unable to appreciate how and on what basis, the learned Commissioner (Appeals) had come to the conclusion that demand raised in this regard, by the

original authority is sustainable. In fact such an assertion in the impugned order is contrary to the facts of the case on record, as at one point of time the department had concluded the proceedings under the provisions of Section 11A(2B) *ibid* and the same authorities have on the other hand had issued show cause proceedings under Section 28 of the Customs Act, 1962.

8.2 Further, from the above perusal of the conditions specified in paragraph 1(3)(d)(ii) of the Notification No. 52/2003-Customs dated 31.03.2003 as amended, it transpires that there are two category of the goods for which these conditions are specified. One, in respect of capital goods and the second one, in respect of all other goods, other than the capital goods. The condition to be fulfilled in respect of capital goods is that these shall be installed within the EOU unit within specified time limit or such extended time limit, as may be allowed. Similarly, in respect of all other goods, which are mainly in the nature of inputs or raw materials, the condition is that they shall be used in connection with or in relation to the production or packaging of finished goods with in the specified time period or such extended period, as may be allowed; such finished goods may either be used in accordance with Standard Input Output Norms (SION) for export out of India or cleared for home consumption, as may be permitted by the JDC, SEEPZ in terms of extant provisions of EOU Scheme under the Foreign Trade Policy. In the present case, the facts of the case indicate that out of the imported duty free raw material/inputs for a total value of Rs.73.85 lakhs, part of it were used in the manufacture of finished goods at the EOU unit and remaining part of the raw materials/inputs which were lying in stock, at the time of de-bonding of the EOU unit of the appellants. In terms of the aforesaid condition, payment of an amount equal to duty leviable on the goods and applicable interest would arise, only if the imported duty free raw material/inputs have not been used either for export or for DTA home consumption. This is not the case of the appellants. Further, it is not the case of the department that the finished goods have been removed for DTA home consumption without valid permission or diverted illegally. On the other hand, the finished goods have been cleared for DTA home consumption on obtaining advance release orders from the JDC, SEEPZ. Thus, we are of the considered view that the appellants have not violated the condition specified in paragraph 1(3)(d)(ii) of the Notification No. 52/2003-Customs dated 31.03.2003 as amended.



8.3 We further find that the issue in dispute in the present case in no more *res integra* in view of the decisions taken by the Co-ordinate Bench of the Tribunal in the case of (i) *Sanjari Twisters* (Supra) and (ii) *Sarla Polyester* (Supra) holding that no duty is required to be paid on the raw materials used in the finished products sold by the EOUs in domestic tariff area. These decisions of the Tribunal have also been upheld by the Hon'ble Supreme Court in a number of cases by dismissing the Civil Appeals filed by the department. The extract of the relevant paragraphs in the said orders is extracted below:

### ***Sanjari Twisters***

*"3. The Commissioner vide his impugned order confirmed the demand of duty on certain finished goods, wastes and rejects cleared by the respondent who are a 100% EOU. These clearances were effected by them into DTA. However, he did not demand the duty on the duty free imported raw material used in the manufacture of such goods on the ground that the respondents being a 100% EOU, only Central Excise duty in terms of Section 3 of the Central Excise Act, 1944 can be recovered.*

*4. The department being aggrieved with the said portion of the impugned order by which no duty stand was confirmed in respect of raw materials, has filed the present appeal. The appeal has been filed on the ground that non-duty paid raw materials were admittedly used in finished products which were cleared to DTA in contravention of provisions of law. Such raw materials, which were imported by availing the benefit of notification No. 53/97-Cus. dt. 3-6-97, should have discharged the duty.*

*5. After hearing the Id SDR, we find that the main issue involved relates to the determination of FOB value of export to arrive at the quantum of eligible domestic clearances and whether the same should include only physical export or it should include deemed export as well. If deemed exports are held to be not included, then the quantum of clearances permitted in DTA will be accordingly reduced. This issue has been decided by the Tribunal in favour of the assessee on a number of precedent decisions, holding that the value of deemed export should be included while determining the FOB value of export, based on which DTA clearances are permitted. However, in this case, the assessee is not in appeal before us. The duty on finished goods stands demanded on the ground that the same is in excess of the permissible limit for the purpose of DTA clearance. The department's claim is to the effect that the raw material used in such finished products cleared in DTA should be treated as not used for the intended purposes and the duty on import should be demanded. We do not agree with this view. In this case, it can not be said that the raw materials have not been used for the intended purpose. Even if there was clearances in excess of permissible limit it may amount to be case of diversion of finished goods, the duty shall be payable in respect of finished goods and no duty become demandable on the raw material used in the manufacture of such diverted goods.*

*6. Therefore, the appeal by the department is rejected."*

**Kaybee Tex Spin Ltd.**

"4. We have carefully considered the submissions made by both the sides and perused the records. The revenue has confirmed the demand of customs duty on the raw material imported duty free in terms of Notifications No. 52/2003-Cus., dated 31-3-2003 on the ground that the appellant have cleared the goods in DTA without obtaining the permission of Development Commissioner therefore, the appellant failed to follow the procedure laid down under the EXIM Policy and failed to fulfil the condition of exemption Notification No. 52/2003-Cus., dated 31-3-2003. There is no dispute in the fact that though the appellant have not obtained the permission from Development Commissioner for removal of goods in DTA but the appellant have paid full duty on the finished goods wherein, such imported raw material have been consumed. In case of 100% EOU, as per the policy, the appellant is required to clear the finished goods for export and if any part of the finished goods cleared in DTA, they are required to pay the excise duty equivalent to all customs duty. As per this policy in respect of DTA clearances, the customs duty which was forgone at the time of import of raw material gets subsumed in the excise duty paid on the finished goods at the time of clearance in DTA therefore, the customs duty which was forgone at the time of import stands paid in the form of excise duty on the finished goods. Once the duty free raw material got consumed in the manufacture of final product and the final product is cleared on payment of excise duty then demanding of customs duty on the raw material shall amount to double payment of duty. Therefore, in our view in the facts of the present case as the appellant have paid the full excise duty on the finished goods wherein, the raw material imported duty free has been consumed, no duty of customs can be demanded on such raw material. The issue has been considered in various judgments as cited by the appellant. In the case of *Commissioner of Customs v. Suresh Synthetics - 2007 (216) E.L.T. 662 (S.C.)* it was held by the Apex Court that customs duty is not sustainable on the raw material when the finished goods have been cleared on payment of excise duty in DTA.

**4.1** In the case of *Saheli Synthetics Pvt. Ltd. v. CCE, Surat-I - 2002 (139) E.L.T. 594* the following order was passed :

"Saheli Synthetics (Appeal C/398/2001) is a 100% export oriented unit at Surat. It is engaged in printing and dyeing of fabrics which it imports, predominantly for the purpose of export. It also sells part of the production in the domestic tariff area. The notice issued to it demanded duty under Section 28 of the Customs Act, 1962 on the ground that it had removed quantities of such processed fabrics to the domestic tariff area without payment of duty and on the further ground that it had short paid customs on some other quantities which it sold. Penalty under Section 112 of the Act was proposed on it and on R.R. Agarwal, its director for its contravention. Penalty under Section 112 was also proposed on Gajanand Fabrics, Kamdhenu Textiles and Shalimar Fabrics, for having purchased such goods.

2. The contention of the common counsel for the appellants is that no duty under the Customs Act, 1962 could be demanded on these goods which the appellant manufactures in its factory in India and sells in the domestic tariff area and, therefore, no penalty can be imposed on the appellant, or anyone else for this contravention. We are not able to understand the rationale for demanding duty on the goods under consideration under Section 28 of the Customs Act, 1962. The show cause notice does not propose to demand customs duty on the fabrics the appellant imported on any ground such as that they were not utilised in the manufacture of exported goods. Such a demand could be justified where goods are manufactured by a 100% export oriented unit in a factory in a free trade zone using imported raw materials or components are cleared to a buyer in the domestic tariff area they are not imported.

*The 100% export oriented unit and a free trade zone are located in India. What is correctly payable is excise duty. The proviso under sub-section (1) of Section 3 of the Central Excise Act, 1944 provides that the duties of excise payable on such goods manufactured in a free trade zone or by export oriented unit shall be equal to the aggregate of the customs duties leviable under Section 12 of the Customs Act, 1962 on like goods imported into India. It also provides that where such duties are ad valorem the value shall be determined in accordance with the provision of the Customs Act, 1962 and Customs Tariff Act, 1975. The measure, therefore, in the statute for the calculation of duty is the customs duty payable on such goods if they were imported. The levy and collection of duty is covered to be governed by the provisions of enactments relating to Central Excise. The provisions of the Customs Act, 1962 and Customs Tariff Act, will have no application in this regard.*

*3. On this point, without going to the merits of the issue, we hold that the show cause notice demanding duty and proposing penalty under the Customs Act is not maintainable, set aside the order confirming this notice and allow this appeal. We however make it clear that the department is at liberty to proceed to recover excise duty, if any, payable on the goods and initiate acts for contravention of the Central Excise Act and the rules thereunder in accordance with law."*

*The above judgment has been upheld by the Hon'ble Supreme Court reported in 2015 (316) E.L.T. A29 (S.C.).*

**4.2** *The identical issue has also been considered by this Tribunal in the case of Sanjari Twisters - 2009 (235) E.L.T. 116 (Tri. - Ahmd.) wherein the Tribunal passed the following order:*

*"This is a departments appeal against the order of the Commissioner No. 03/Dem/2002, dated 13-2-2002*

*2. Heard the Ld. SDR. None appeared for the respondent.*

*3. The Commissioner vide his impugned order confirmed the demand of duty on certain finished goods, wastes and rejects cleared by the respondent who are a 100% EOU. These clearances were effected by them into DTA. However, he did not demand the duty on the duty free imported raw material used in the manufacture of such goods on the ground that the respondents being a 100% EOU, only Central Excise duty in terms of Section 3 of the Central Excise Act, 1944 can be recovered.*

*4. The department being aggrieved with the said portion of the impugned order by which no duty stand was confirmed in respect of raw materials, has filed the present appeal. The appeal has been filed on the ground that non duty paid raw materials were admittedly used in finished products which were cleared to DTA in contravention of provisions of law. Such raw materials, which were imported by availing the benefit of Notification No. 53/97-Cus., dated 3-6-97, should have discharged the duty.*

*5. After hearing the Ld. SDR, we find that the main issue involved relates to the determination of FOB value of export to arrive at the quantum of eligible domestic clearances and whether the same should include only physical export or it should include deemed export as well. If deemed exports are held to be not included, then the quantum of clearances permitted in DTA will be accordingly reduced. This issue has been decided by the Tribunal in favour of the assessee on a number of precedent decisions holding that the value of deemed export should be included while determining the FOB value of export, based on which DTA clearances are permitted. However, in this case, the assessee is not in appeal before us. The duty on finished goods stands demanded on the ground that the same is in excess of the permissible limit for the purpose of DTA clearance. The department's claim is to the effect that the raw material used in such finished products cleared in DTA should be treated as not used for the intended purposes and the duty on import should be demanded. We do not agree with this view. In this case, it cannot be said that the raw materials have not been used for the intended purpose. Even if there was clearances in excess of permissible limit it may amount to be case*

*of diversion of finished goods, the duty shall be payable in respect of finished goods and no duty become demandable on the raw material used in the manufacture of such diverted goods.*

6. *Therefore, the appeal by the department is rejected."*

*The above decision of the Tribunal was maintained by the Hon'ble Supreme Court by dismissing the revenue's appeal reported at Commissioner v. Sanjari Twisters - 2010 (255) E.L.T. A15 (S.C.)*

**4.3** *In view of the above judgments, it is settled that once in the 100% EOU the raw material imported duty free is used in the manufacture of final product and final product is cleared on payment of duty in DTA, for any reason the customs duty on the raw material which was used in the finished goods cannot be demanded therefore, the demand of customs duty on this ground is clearly not sustainable.*

**4.4** *As regard the judgment relied upon by the Learned Authorized Representative, we find that as regard the Hon'ble Supreme Court judgment in the case of Dilip Kumar & Co., the said judgment was decided on the point that the exemption notification should be followed strictly and any violation of any condition will amount to denial of the exemption.*

**4.5** *We find that in the present case, as we have viewed that once the Excise duty has been paid on DTA clearances, no customs duty can be demanded on the raw material. In these circumstances, the judgment of Dilip Kumar & Co. is not applicable in the facts of the present case. As regard the judgment in the case of L.R. Brothers Indo Flora Ltd. relied upon by the Learned AR, we find that the facts of that case are entirely different. In the said case, the final product was not dutiable and cleared without payment of duty for this reason; the Hon'ble Apex Court has held that the demand of customs duty in respect of raw material is sustainable.*

**4.6** *We are also of the opinion that the duty of customs on raw material cannot be demanded on the ground that once the full excise duty is paid on the final product which is equivalent to the all customs duty, the customs duty on the raw material gets subsumed in the duty of excise paid on the final product cleared in DTA. Therefore, on the above cited judgment of L.R. Brother's case since the duty was not paid on the final product, the duty of customs on raw material is clearly sustainable therefore, the facts of the present case and the case of L.R. Brothers Indo Flora Ltd. are entirely different and hence ratio of L.R. Brothers Indo Flora Ltd. case is not applicable.*

**4.7** *We find that the appellant have also raised the ground of limitation, on this, the fact is that the appellant have cleared the goods in DTA on payment of full duty by following the procedure such as issuance of excise invoice wherein the duty payment has been shown, the same particulars were reflected in their monthly ER-2 return. In this fact when the department was in complete knowledge regarding the clearance of finished goods in DTA, they were not prevented from verifying the fact that whether the appellant have obtained the permission from Development Commissioner or not. However, the department has not raised any objection at the relevant time, it is only subsequently on scrutiny of ER-2 return were carried out. There is no change of circumstances at the time of clearance of goods, filing of ER-2 return and the verification of the same at the later stage therefore, there is absolutely no suppression of fact or mis-declaration with intend to evade payment of duty on the part of the appellant. Therefore, we are of the clear view that extended period of demand cannot be invoked hence the demand for extended period is not sustainable on limitation also."*

9. From the above, we find that appellants have duly provided all the details necessary for debonding of the raw material/inputs, capital goods and paid the applicable duties in the present case. Thus, we are of the view that the alleged violation of 111(o) *ibid*, as concluded in the impugned order is not sustainable. Further, we are of the considered view that the conclusion arrived by the learned Commissioner of Customs (Appeal) in the impugned order that the condition 1(3)(d)(ii) has been violated is not supported by any legal basis as per the text of the relevant condition in the notification; rather such an assertion is contrary to the legal provisions of the said notification. Thus there is no evidence or factual detail, to fasten the liability on the part of the appellants for payment of differential duty in respect of raw materials/inputs consumed in the manufacture of finished goods cleared for DTA or for its confiscation and for imposition of penalty on the appellants.

10. In view of the foregoing discussions, we do not find any merits in the impugned order passed by the learned Commissioner (Appeal), Pune- in confiscation of goods, inasmuch as there is no violation of Section 111(o) *ibid*, and the demand of differential duty and imposition of penalty is not legally sustainable. In the result, by setting aside the impugned order, we allow the appeal in favour of the appellants.

(Order pronounced in open court on 01.01.2024)

**(S.K. Mohanty)**  
**Member (Judicial)**

**(M.M. Parthiban)**  
**Member (Technical)**