CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI

REGIONAL BENCH - COURT NO. I

Customs Early Hearing Application No. 85849 to 85870 of 2023
In
Customs Appeals No. 86774 to 86795 of 2021

And

Customs Appeals No. 86774 to 86795 of 2021

(Arising out of Orders-in-Appeal Nos. 1416 to 1437 Gr.V/V-A/V-B/ 2020 (JNCH) / APPEALS dated 17.12.2020 passed by the Commissioner of Customs (Appeals), JNCH, Nhava Sheva)

Tata Motors Limited **.... Appellants**
Geetanil, 13-19 Nagindas Master Road,
Hutatma Chowk, Mumbai – 400 001.

Versus

Commissioner of Customs, Nhava Sheva-V **.... Respondent**
Jawaharlal Nehru Customs House (JNCH), Nhava Sheva
Taluka – Uran, District – Raigad, Maharashtra

WITH

Customs Early Hearing Application No. 85770 to 85796 of 2023
In
Customs Appeals No. 85646 to 85672 of 2021

And

Customs Appeals No. 85646 to 85672 of 2021

(Arising out of Orders-in-Appeal Nos. 59 to 101 Gr.V/V-A/V-B/ 2020 (JNCH) / APPEALS dated 29.01.2021 passed by the Commissioner of Customs (Appeals), JNCH, Nhava Sheva)

Tata Motors Limited **.... Appellants**
Geetanil, 13-19 Nagindas Master Road,
Hutatma Chowk, Mumbai – 400 001.

Versus

Commissioner of Customs, Nhava Sheva-V **.... Respondent**
Jawaharlal Nehru Customs House (JNCH), Nhava Sheva
Taluka – Uran, District – Raigad, Maharashtra

AND

Customs Early Hearing Application No.85797, 85798 to 85812 of 2023
In
Customs Appeals No. 85877 & 85673 to 85687 of 2021

And

Customs Appeals No. 85877 & 85673 to 85687 of 2021

(Arising out of Orders-in-Appeal Nos. 59 to 101 Gr.V/V-A/V-B/ 2020 (JNCH) / APPEALS dated 29.01.2021 passed by the Commissioner of Customs (Appeals), JNCH, Nhava Sheva)

Tata Motors Limited **.... Appellants**
Geetanil, 13-19 Nagindas Master Road,
Hutatma Chowk, Mumbai – 400 001.

Versus

Commissioner of Customs, Nhava Sheva-V **.... Respondent**
Jawaharlal Nehru Customs House (JNCH), Nhava Sheva
Taluka – Uran, District – Raigad, Maharashtra

AND

Customs Early Hearing Application No. 85813 to 85848 of 2023
In
Customs Appeals No. 86134 to 86169 of 2021

And

Customs Appeals No. 86134 to 86169 of 2021

(Arising out of Orders-in-Appeal Nos. 330 to 374 Gr.V/V-A/V-B/ 2020 (JNCH) / APPEALS dated 26.03.2021 passed by the Commissioner of Customs (Appeals), JNCH, Nhava Sheva)

Tata Motors Limited **.... Appellants**
Geetanil, 13-19 Nagindas Master Road,
Hutatma Chowk, Mumbai – 400 001.

Versus

Commissioner of Customs, Nhava Sheva-V **.... Respondent**
Jawaharlal Nehru Customs House (JNCH), Nhava Sheva
Taluka – Uran, District – Raigad, Maharashtra

Appearance:

Shri Sidharth Sen a/w Ms. Madhura Khandekar, Advocates for the Appellants
Shri Ram Kumar, 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/87483-87583/2023

Date of Hearing: 21.12.2023
Date of Decision: 21.12.2023

PER: M.M. PARTHIBAN

These appeals have been filed by M/s Tata Motors Limited, Mumbai (herein referred to as 'appellants' for short) against Orders-in-Appeal Nos. 1416 to 1437 (Gr.V/V-A/V-B)/2020(JNCH)/Appeals dated 17.12.2020, 59 to 101 (Gr.V/V-A/V-B)/2021(JNCH)/Appeals dated 29.01.2021 and 330 to 374 (Gr.V/V-A/V-B-IIG)/2021(JNCH)/Appeals dated 26.03.2021 (referred together, in all 101 orders, as 'impugned orders') passed by the Commissioner of Customs (Appeals), JNCH, Nhava Sheva, Mumbai Zone-II. The appellants have also filed early hearing applications on the ground that similar matter in their own case has been decided by this Tribunal. Considering the grounds for early hearing and in the interest of justice, such applications are allowed and the matter is taken up for final disposal with the consent of both sides.

2.1. Briefly stated, the issue involved in the present bunch of 101 appeals is on the levy and collection of Social Welfare Surcharge (SWS) under Section 110 of the Finance Act, 2018, in respect of import of goods which are wholly exempt from the Basic Customs Duty (BCD) through a notification issued under Section 25(1) of the Customs Act, 1962.

2.2 Learned Advocate for the appellants have stated that in an identical factual matrix, the Hon'ble Bombay High Court vide its judgement in the case of *LA TIM Metal & Industries Limited Vs. The Union of India and Ors.* in Writ Petition No.12183 of 2022, held that SWS is payable at 10% on BCD, but where the BCD is 'Nil', SWS shall also be computed as 'Nil'. He further submitted that as it is evident from the various Bills of Entry (B/Es) filed by the appellants in the present bunch of appeals where the amount of BCD is indicated is 'Zero' and therefore, he stated that the SWS which is calculated as a percentage of the customs duty payable on import of goods should also be 'Nil'.

2.3 Learned Advocate also stated that the very same issue has been decided in earlier case of the appellants themselves by this Tribunal in Final Order No. A/86279-86325/2023 dated 30.08.2023 in the case of *Tata Motors Limited Vs. Commissioner of Customs (Import), JNCH, Mumbai*– 2023 (9) TMI 463, in their favour. In view of the above, he submitted that the appellants are entitled for refund of SWS paid under protest at the time of import and prayed that the appeals filed by the appellants may be allowed.

3.1 On the other hand, learned Authorised Representative appearing for Revenue reiterated the findings of the impugned order and stated that the Revenue had filed a Review Petition before the Hon'ble High Court of Bombay against the judgement dated 03.01.2020 in the case of *LA TIM Metal and Industries* (supra) in Writ Petition No. 12183 of 2022, on the ground that imported goods under MEIS scrip are not exempt from payment of BCD under Notification No.24/2015-Customs dated 08.04.2015.Therefore, learned AR submitted that the impugned order is sustainable.

3.2 Learned AR has also relied upon the judgement of the Hon'ble High Court of Madras in the case of *Gemini Edibles and Fats India Pvt. Limited Vs. Union of India*– 2020 SCC Online Mad 11 in support of their stand.

4. Heard both sides and perused the records of the case. Further, the arguments advanced by learned Advocates and learned Authorized Representative of the Department have been considered by us. We have also perused the additional written submissions given in the form of paper books.

5. The issue in dispute is to decide whether Social Welfare Surcharge (SWS) levied and collected under Chapter VI of the Finance Act, 2018 in terms of legal provisions under Sections 110 to 113 ibid, is payable in respect of import of goods under Merchandise Exports from India Scheme (MEIS), which are wholly exempt from Basic Customs Duty (BCD) through a notification issued under Section 25(1) of the Customs Act, 1962. In order to address the above issue, we would like to refer the relevant legal provisions contained in the Customs Act, 1962; the Customs Tariff Act, 1972 and the Finance Act, 2018, for proper consideration and for appropriate decision on payment of SWS in respect of the subject goods under dispute. The relevant provisions are extracted below:

Customs Act, 1962:

"Section 2. Definitions.

In this Act, unless the context otherwise requires,—

xx xx xx xx xx

(15) "duty" means a duty of customs leviable under this Act;"

"Section 12. Dutiable goods. -

(1) Except as otherwise provided in this Act, or any other law for the time being in force, duties of customs shall be levied at such rates as may be specified under the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force, on goods imported into, or exported from, India.

(2) The provisions of sub-section (1) shall apply in respect of all goods belonging to Government as they apply in respect of goods not belonging to Government."

"Section 25. Power to grant exemption from duty. -

(1) If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by notification in the Official Gazette, exempt generally either absolutely or subject to such conditions (to be fulfilled before or after clearance) as may be specified in the notification goods of any specified description from the whole or any part of duty of customs leviable thereon.

(2) If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by special order in each case, exempt from the payment of duty, under circumstances of an exceptional nature to be stated in such order, any goods on which duty is leviable.

xx xx xx xx xx"

"Section 47. Clearance of goods for home consumption.

(1) Where the proper officer is satisfied that any goods entered for home consumption are not prohibited goods and the importer has paid the import duty, if any, assessed thereon and any charges payable under this Act in respect of the same, the proper officer may make an order permitting clearance of the goods for home consumption:

Provided *that such order may also be made electronically through the customs automated system on the basis of risk evaluation through appropriate selection criteria:*
Provided further *that the Central Government may, by notification in the Official Gazette, permit certain class of importers to make deferred payment of said duty or any charges in such manner as may be provided by rules.*

(2) The importer shall pay the import duty—
(a) on the date of presentation of the bill of entry in the case of self-assessment. Or

(b) within one day (excluding holidays) from the date on which the bill of entry is returned to him by the proper officer for payment of duty in the case of assessment, reassessment or provisional assessment; or

(c) in the case of deferred payment under the proviso to sub-section (1), from such due date as may be specified by rules made in this behalf,

and if he fails to pay the duty within the time so specified, he shall pay interest on the duty not paid or short-paid till the date of its payment, at such rate, not less than ten per cent but not exceeding thirty-six per cent per annum, as may be fixed by the Central Government, by notification in the Official Gazette:

Provided *that the Central Government may, by notification in the Official Gazette, specify the class or classes of importers who shall pay such duty electronically:*

xx xx xx xx xx"

Customs Tariff Act, 1975:

"Section 2. Duties specified in the Schedules to be levied. -
The rates at which duties of customs shall be levied under the Customs Act, 1962 (52 of 1962), are specified in the First and Second Schedules.

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

xx xx xx xx xx"

6. From plain reading of the above legal provisions, it transpires that the incidence of levy of customs duty is on importation of goods into India from a place outside India as provided under Section 12 ibid and the amount of such import duty is required to be calculated at the rates in force as specified under the First Schedule of the Customs Tariff Act, 1975. Further, in respect of importation of goods, it also transpires that an importer is required to make an entry in the form of bill of entry under Section 46 *ibid*; shall do self-assessment of amount of duty payable, if any, under Section 17 *ibid* and shall make payment of duty determined by him, in terms of Section 47 *ibid*. However, Section 25(1) of the Customs Act, 1962, has empowered the Central Government for issuance of notification, in exempting the goods either conditionally or unconditionally, subject to the satisfaction of the Central Government that in the public interest, issuance of such exemption notification is necessary or expedient. In exercise of the powers conferred under Section 25 ibid, in this case, the Central Government had issued the Notification No. 24/2015-Customs dated 08.04.2015, in exempting the goods from levy of Basic Customs Duty and Additional Duties of Customs

(CVD), on their importation into India under the MEIS Scheme in accordance with a duty scrip issued by the Regional Licensing Authority i.e., DGFT. On careful perusal of the above legal provisions, it can be concluded that there is a clear distinction between the concept of chargeability or levy of customs duty on importation of goods under Section 12 *ibid* and the concept of assessment, determination or quantification of the amount of customs duty payable and resultant payment of customs duty before clearance of imported goods under various other Sections viz., 17, 46, 47 *ibid*.

7. Further, the distinction between exemption from levy of duty and exemption from payment of duty is also evidential, inasmuch as the Central Government on the one hand provide (i) general exemption under sub-section (1) of Section 25 ibid by issue of a notification, in public interest and, on the other hand provide (ii) ad-hoc exemption by issue of special order under circumstances of exceptional nature, in each case, under sub-section (2) of Section 25 ibid. Thus, it is clearly established from the specific phrases used in the legal provisions of Section 25 *ibid,* that the former at (i) above a general exemption, is an exemption from levy of customs duty and the later ad-hoc exemption at (ii) above, is an exemption from payment of customs duty.

8.1 In order to further elaborate, it could be said that the general exemption under Section 25(1) *ibid* is provided in order to implement various policies of the Government viz., implementation of Sovereign commitments such as Free Trade Agreements, Comprehensive Economic Partnership/Co-operation Agreements with a number of countries or group of countries; implementation of Information Technology Agreements [ITA], on specified goods; technical exemptions, such as those for re-imports of Indian origin goods, temporary imports for display, exhibitions, fairs, specific events, etc., imports of replacements under warranty, exemption to containers, exemption to goods sent for execution of approved projects, goods used in Antarctica expedition, etc.; exemptions on procurements of raw materials and inputs for or against exports; exemptions to implement the Foreign Trade Policy provisions so as to only provide for tax neutralization to exporters, to ensure that EXIM trade do not export taxes.

8.2 Whereas the Government has provided for ad-hoc exemptions under Section 25(2) *ibid* from payment of duty of customs for specific circumstances of exceptional nature. These are import of specified goods for charitable purposes and for specified organizations engaged in relief & rehabilitation under notification no. 148/94-Cus., dated 13.07.1994; import of goods to meet specific needs relating to the country's defense under notifications No. 39/96-Cus., and 50/96-Cus., both dated 23.07.1996; other specific requests for exemption in cases involving circumstances of an exceptional nature, for which purpose, Government have also laid down certain guidelines in Circular No. 9/2014-Cus., dated 19.08.2014, in supersession of earlier guidelines under Circular No. 49/2003-Customs, dated 10th June, 2003 and Circular No. 10/2007-Customs, dated 13th February, 2007.

9. Thus, we are of the considered view that in the present case, the Central Government under the powers vested with it in terms of Section 25(1) *ibid*, had exempted the imports from the whole of the levy of Basic Customs Duty (BCD) and Additional Duty of Customs (CVD) in terms of the above Notification No. 24/2015-Customs dated 08.04.2015.

10. Imported goods also attract Social Welfare Surcharge (SWS) in terms of the provisions of Section 110 of the Finance Act, 2018. Sub-section (1) of Section 110 ibid provides for levy and collection of SWS, as a duty of customs, for the purpose of fulfillment of the commitment of the government to provide and finance the education, health and social security. Sub-section (2) of Section 110 ibid provides for utilization of SWS for the aforesaid purposes. Sub-section (3) of Section 110 ibid has also provided for calculation of the SWS payable on the import of goods. In terms of such provision the SWS shall be calculated at the rate of ten percent on the BCD amount. Sub-section (5) of Section 110 ibid has by reference to the existing legal provisions of the Customs Act, 1962, had also provided for machinery provisions for assessment, non-levy, short levy, refunds, exemptions, interest, appeals, offences and punishments to be made applicable in relation to levy and collection of SWS, as they apply for levy and collection of customs duty, on mutatis mutandis basis. The relevant legal provisions introduced in the Finance Act, 2018 are as follows:

Finance Act, 2018

(No.13 of 2018)

CHAPTER VI

SOCIAL WELFARE SURCHARGE

Social Welfare Surcharge on imported goods.

110. (*1*) There shall be levied and collected, in accordance with the provisions of this Chapter, for the purposes of the Union, a duty of Customs, to be called a Social Welfare Surcharge, on the goods specified in the First Schedule to the Customs Tariff Act, 1975 (hereinafter referred to as the Customs Tariff Act), being the goods imported into India, to fulfil the commitment of the Government to provide and finance education, health and social security. 51 of 1975.

(*2*) The Central Government may, after due appropriation made by Parliament by law in this behalf, utilise such sums of money of the Social Welfare Surcharge levied under this Chapter for the purposes specified in sub-section (*1*), as it may consider necessary.

(*3*) The Social Welfare Surcharge levied under sub-section (*1*), shall be calculated at the rate of ten per cent. on the aggregate of duties, taxes and cesses which are levied and collected by the Central Government in the Ministry of Finance (Department of Revenue) under section 12 of the Customs Act, 1962 and any sum chargeable on the goods specified in sub-section (*1*) under any other law for the time being in force, as an addition to, and in the same manner as, a duty of customs, but not including— 52 of 1962.

(*a*) the safeguard duty referred to in sections 8B and 8C of the Customs Tariff Act;

(*b*) the countervailing duty referred to in section 9 of the Customs Tariff Act;

(*c*) the anti-dumping duty referred to in section 9A of the Customs Tariff Act;

(*d*) the Social Welfare Surcharge on imported goods levied under sub-section (*1*).

(*4*) The Social Welfare Surcharge on imported goods shall be in addition to any other duties of customs or tax or cess chargeable on such goods, under the Customs Act, 1962 or any other law for the time being in force. 52 of 1962.

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52 of 1962. (*5*) The provisions of the Customs Act, 1962 and the rules and regulations made thereunder, including those relating to assessment, non-levy, short-levy, refunds, exemptions, interest, appeals, offences and penalties shall, as far as may be, apply in relation to the levy and collection of the Social Welfare Surcharge on imported goods as they apply in relation to the levy and collection of duties of customs on such goods under the Customs Act, 1962 or the rules or the regulations, as the case may be.

By reading the above legal provisions, it becomes clear that the levy of SWS is provided under sub-section (1) of Section 110 of the Finance Act, 2018 and it is distinct from the customs duty leviable under Section 12 of the Customs Act, 1962. However, in terms of sub-section (1) and (5) ibid, for the purpose of assessment and exemption, SWS shall be considered as 'duty of customs' under the Customs Act, 1962. Further, the amount of SWS is to be calculated at the rate of 10% on the aggregate of duties of customs as specified under sub-section (3) of Section 110 *ibid*.

11. In the present case before us, the dispute has arisen in payment of Social Welfare Surcharge (SWS) in respect on imported goods on account of Basic Customs duty (BCD) being exempt and whether in such cases, the SWS is payable or not. In assessment of the impugned goods, the department had accepted the claim of the appellants that the imported goods are eligible to exemption of BCD under Notification No. 24/2015-Cus. dated 08.04.2015 by debiting the scrips issued under the Merchandise Export from India Scheme (MEIS). However, the Department had objected to the calculation of SWS at 10% of 'NIL'/'Zero' amount of BCD, contending that the BCD amount is debited in the MEIS scrip, instead of paying the same by cash/monetary terms.

12.1 We further note that the Government of India had launched Merchandise Exports from India Scheme (MEIS) as an incentive scheme for the export of goods in the Foreign Trade Policy (FTP) for the period 2015-2020. The said scheme intends to incentivise the export of goods manufactured in India. The incentives under the scheme are calculated as percentage of the realized Free-On-Board (FOB) value of export in foreign exchange or FOB value of exports as per the shipping bills in free foreign exchange. The incentives are allocated through a MEIS duty credit scrip. This scrip contains the details of the eligible incentives which can be used for payment of customs and central excise duties as provided therein. The MEIS duty scrips and the goods imported against these scrips are freely transferrable. Thus, it is basically an accounting document to demonstrate actual availment of the incentives in terms of the value of goods exported. To illustrate the same, we may say that if the realized FOB value is Rs.20 lakhs and the incentives provided for the scheme is 5% *ad valorem*; then in such case, the importer of the goods shall be eligible for availing the benefit on account of the incentives to the tune of Rs.1 lakh. In other words, the benefit under the scheme will be restricted upto Rs.1 lakh, which is commensurate to the volume of export achieved by the scrip holder.

12.2 This is also evident from the documents presented by the Central Government to the Parliament of India as a part of the Union Budget for the year 2018-2019 in the 'Receipt Budget'. The relevant part of the 'Statement of Revenue Impact of Tax Incentives for Indirect Taxes for the period 2016-17 and 2017-18 -- Indirect Taxes -- A. Customs duties' is extracted and given below:

ANNEX-7

Statement of Revenue Impact of Tax Incentives under the Central Tax System: Financial Years 2016-17 and 2017-18

The primary objective of any tax law and its administration is to raise revenue for the purpose of funding Government expenditure. The amount of revenue raised is primarily dependent upon the collective tax base and the effective tax rates. The determinants of these two factors are a range of measures which include special tax rates, exemptions, deductions, rebates, deferrals and credits. These measures are collectively called as 'tax incentives' or 'tax preferences'. They have an impact on Government revenues and also reflect a significant policy of the Government.

The tax policy provides specific tax incentives which give rise to tax preferences. Such preferences have a definite revenue impact and can also be viewed as an indirect subsidy to preferred tax payers, also referred to as 'tax expenditures'. It is often argued that tax policy should not only be efficient but also transparent. This means that programme planning which requires specific policy objectives to be addressed using incentives having revenue impact, should be explicit. Further, transparent budgeting calls for inclusion of such indirect outlays (or revenue impacts) under the respective programme headings. Tax incentives resulting in any form of revenue impact per se are spending programs embedded in the tax statute.

The present statement is an analysis of the revenue impact of the tax incentives available under the Central Tax system. Such revenue impact of tax incentives was laid before Parliament for the first time during Budget 2006-07 as Annex-12 of the Receipts Budget by way of a statement of Revenue Foregone. It was well received by all quarters and gave rise to a constructive debate on the entire gamut of issues concerning fiscal policy. It also lent credence to the Government's intention of bringing about transparency in the matter of tax policy and tax expenditures. The second edition of this statement was placed before Parliament during Budget 2007-08 by way of Annexure-12 of the Receipts Budget and also by way of a separate budget document titled "Statement of Revenue Forgone". Thereafter, it was placed every year before Parliament during Budget from 2008-09 to 2014-15. From the year 2015-16 onwards, it has been termed more appropriately as the "Statement of Revenue Impact of Tax Incentives under the Central Tax System", since what is actually being analysed is the revenue impact.

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Statement of Revenue Impact of Tax Incentives for Indirect Taxes for the period 2016-17 and 2017-18

Indirect Taxes

A. Customs duties

1.1 Customs duty is levied under the Customs Act, 1962 at rates specified in the First Schedule to the Customs Tariff Act, 1975 (commonly referred to as basic customs duty - BCD). On exports, export duty is levied under the Customs Act, 1962 at rates specified in the Second Schedule to the Customs Tariff Act, 1975. In addition, the Customs Tariff Act, 1975 provides for levy of-

(a) Additional duty of customs [sub-section (1) of section 3] (commonly referred to as countervailing duty or CV duty), and

(b) Additional duty of customs [sub-section (5) of section 3] (commonly referred to as SAD) levied at a rate of 4%.

1.2 These rates specified against individual tariff lines in the Customs Tariff Act, 1975 are commonly known as **"tariff rates"**. Further, the Customs Act, 1962 or the Finance Acts concerned delegate powers to the Central Government [under Section 25(1) of the Customs Act, 1962, which is also made applicable to duties levied under various Finance Acts], through notifications, to prescribe duty rates lower than the Tariff rates. The rates, prescribed through such exemption notifications, are referred to as **"effective rates"**.

1.3 Further, exemption notifications issued by the Government can be broadly classified into two types,

(a) Conditional exemption notifications; and

(b) Unconditional exemption notifications.

1.4 Unconditional exemptions prescribe effective rates of duty for a commodity, applicable to all imports of that commodity, without any conditions. In such cases, the tariff rates lose their significance, as all the imports of that commodity come at such prescribed effective rate. In other words, such unconditional exemptions in effect prescribe *de facto* Tariff Rates for the commodity concerned.

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1.11 World over exports are zero rated. India also zero rates its exports. There are many ways for zero rating exports, including extending exemptions on procurements of raw materials and inputs for or against exports. These also include notifications issued to implement the Foreign Trade Policy provisions. As such, these exemptions only provide for tax neutralization to exporters, to ensure that we do not export taxes. The revenue impact from these schemes has also been excluded while estimating the revenue impact of tax incentives.

1.12 Accordingly, the estimates of revenue impact of tax incentives on customs side do not include the, -

(a) revenue implications of unconditional BCD, CVD and SAD exemptions, including those exemptions where the conditional rate is same as general unconditional rate;

(b) revenue implications of preferential tariffs under various FTAs/CEPAs/CECAs;

(c) revenue implications of technical exemptions, such as exemptions on re-imports, temporary imports, etc.; and

(d) revenue implication of tax neutralization notifications for exports.

2 Receipt Budget, 2018-2019

Tax Revenue

(In ₹crores)

		Major Head	Actual 2016-2017	Budget 2017-2018	Revised 2017-2018	Budget 2018-2019
Tax Revenue						
4.	***Customs***					
4.01.	Import Duties					
4.01.01.	Basic Duties	0037	64583.84	72150.00	80750.00	96300.00
4.01.02.	Additional Duty of Customs(CVD)	0037	111982.61	122000.00	32729.00	...
4.01.03.	Special CV Duty	0037	39944.04	35250.00	8500.00	...
4.01.04.	Additional Duty of Customs on Motor Spirit	0037	...	...	...	...
4.01.05.	Additional Duty of Custom on High Speed Diesel Oil	0037	...	...	8.00	...
4.01.06.	Special Additional Duty of Customs on Motor Spirit	0037	...	...	...	...
4.01.07.	National Calamity Contingent Duty	0037	23.80	2500.00	660.00	750.00
4.01.08.	Education Cess	0037	3922.02	4200.00	2000.00	...
4.01.09.	Secondary and Higher Education Cess	0037	1879.59	2100.00	1000.00	...
4.01.10.	Social Welfare Surcharge	0037	...	...	1300.00	8000.00
Total-Import Duties			*222335.90*	*238200.00*	*126947.00*	*105050.00*
4.02.	Export Duty	0037	-835.50	650.00	245.00	288.00
4.03.	Cesses on Exports	0037	177.21	160.00	100.00	112.00
4.04.	Other Receipts	0037	1763.36	5990.00	7950.00	7050.00
4.05.	Sale of Gold by Public Auction	0037	38.12	...	...	...
4.06.	Sale Proceeds of Confiscated Goods	0037	679.57	...	...	...
4.07.	Anti-dumping Duty	0037	1129.02	...	...	...
4.08.	Safeguard Duty	0037	82.66	...	...	...
Total-Customs			*225370.34*	*245000.00*	*135242.00*	*112500.00*

From the above examination of various documents it becomes clear that the debiting in MEIS scrip for the amount of duty, i.e., the duty otherwise leviable had the exemption was not provided under Notification No. 24/2015-Cus. dated 08.04.2015, is for the purpose of accounting the export promotion incentives granted under MEIS scheme. Therefore, we are of the considered view that that accounting treatment adopted for ensuring the purpose of grant of export incentives under MEIS, cannot be equated to the payment of duty into the government exchequer. This is also made more clear inasmuch as the customs duty refunded to an applicant under Section 27 ibid governing refund of duty and drawback paid on export of goods under Section 75 dealing with drawback of duties paid on input/imported goods used in exports, which is shown as 'deduct refunds' or 'deduct drawback' under distinct accounting sub-head under the minor sub-head for 'Imports (101)' in Major head 'Customs (0037)' are on entirely different basis from MEIS exemption and is distinct as customs duty is paid into the exchequer first and then refund/drawback is given. For the above reasons refund and drawback which are accounted in the above budget documents involving payment of duty first and repayment back are entirely different from export incentives like MEIS, where only accounting entries are made in duty credit scrip. Thus, we are of the considered view that debit of duty in MEIS scrip, as one of the condition to Notification No.24/2015-Cus. dated 08.04.2015, does not involve any payment of customs duty, as the same has been generally exempted from the whole of the customs duty under Section 25(1) *ibid*.

From the above documents it could be seen that the calculation of Net duty foregone on account of input tax neutralization schemes does not include the amount of MEIS scheme. Further, tax revenue in respect of customs duty does account for deduction in respect of drawback and refund of customs duty alone. Thus, from the aforesaid budgetary documents explaining the methodology in which duty foregone on account of various exemptions have been accounted in respect of various exemptions from levy of duty under the Customs Act, 1962 and the Customs Tariff Act, 1975, it could be concluded that the mechanism of debit of MEIS scrip is only for the purpose of accounting and do not involve payment of any customs duty.

12.3 As discussed in the foregoing paragraph 12.1 above, in order to ensure that the benefit under the MEIS is subject to achievement of the export obligation, though the Central Government has exempted the goods, vide notification dated 08.04.2015 (supra), but have provided various conditions, including the conditions contained in para 2(5) for debiting the duties being exempted under this notification. The relevant portion of the said notification is extracted and provided herein below:

"Notification No. 24 / 2015 - Customs

New Delhi, the 8th April, 2015.

G.S.R. 269 (E) .- In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, being *satisfied that it is necessary in the public interest so to do,* ***hereby exempts goods when imported into India against a duty credit scrip issued by the Regional Authority under the Merchandise Exports from India Scheme*** *in accordance with paragraph 3.04 read with paragraph 3.05 of the Foreign Trade Policy (hereinafter referred to as the said scrip) from,-*

(a) the ***whole of the duty of customs*** *leviable thereon under the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) (hereinafter referred to as said Customs Tariff Act); and*

(b) the ***whole of the additional duty*** *leviable thereon under section 3 of the said Customs Tariff Act.*

2. The exemption shall be subject to the following conditions, namely :-

(1) that the duty credit in the said scrip is issued -

(a) against exports of notified goods or products to notified markets as listed in Appendix 3B of Appendices and Aayat Niryat Forms of Foreign Trade Policy 2015-2020;

(b) against exports of notified goods or products transacted through e-commerce platform as listed in Appendix 3C of Appendices and Aayat Niryat Forms of Foreign Trade Policy 2015-2020. In such cases the maximum free on board value, for calculation of duty credit amount, shall not exceed Rs.25,000 per consignment;

(2) that the export categories or sectors specified in paragraph 3.06 of the Foreign Trade Policy and listed in Table annexed hereto shall not be counted for calculation of export performance or for computation of entitlement under the scheme;

(3) that the imports and exports are undertaken through the seaports, airports or through the inland container depots or through the land customs stations as mentioned in the Table 2 annexed to the Notification No. 16/2015- Customs dated 01.04.2015 or a Special Economic Zone notified under section 4 of the Special Economic Zones Act, 2005 (28 of 2005):

Provided that the Commissioner of Customs may within the jurisdiction, by special order, or by a Public Notice, and subject to such conditions as may be specified by him, permit import and export through any other sea-port, airport, inland container depot or through any land customs station:

Provided further that the exports of notified goods or products transacted through e-commerce platform as listed in Appendix 3C of Appendices and Aayat Niryat Forms of Foreign Trade Policy 2015-2020 are undertaken either through the courier mode from airports at Chennai, Mumbai or Delhi or through the Foreign Post Offices at Chennai, Mumbai or New Delhi ***;***

(4) that the said scrip is registered with the Customs Authority at the port of registration specified on the said scrip;

(5) that the said scrip is produced before the proper officer of customs at the time of clearance for debit of the duties leviable on the goods and the proper officer of customs taking into account the debits already made under this exemption and debits made under the notification Nos. 20/ 2015 - Central Excise, dated the 8th April, 2015 and 10/ 2015 -Service Tax, dated the 8th April, 2015, shall debit the duties leviable on the goods, but for this exemption;

(6) that the said scrip and goods imported against it shall be freely transferable;

(7) that where the importer does not claim exemption from the additional duty of customs leviable under section 3 of the said Customs Tariff Act, he shall be deemed not to have availed the exemption from the said duty for the purpose of calculation of the said additional duty of customs;

(8) that the importer shall be entitled to avail of the drawback of the duty of customs leviable under the First Schedule to thesaid Customs Tariff Act against the amount debited in the said scrip;

(9) that the importer shall be entitled to avail drawback or CENVAT credit of additional duty leviable under section 3 of the said Customs Tariff Act against the amount debited in the said scrip;

(10) that the benefit under this notification shall not be available to the items listed in Appendix 3A of Appendices and Aayat Niryat Forms of Foreign Trade Policy 2015-2020.".

12.4 Revenue has argued that since the BCD in the impugned imports are being debited by the customs authorities in the MEIS scrip, it shall be treated as though the BCD amount has been paid through such scrip and hence the SWS is chargeable on the amount of BCD. In this regard, we find that the relevance of the condition in sub-para (5) of the above notification dated 08.04.2015 is to the effect that, though the goods imported under MEIS scrip are exempted from levy of customs duty, but to ensure that the incentive is within the permissible limit, the device of maintaining the records have been prescribed therein, including debiting of duty on the MEIS duty scrip. Such maintenance of records is in context with the Foreign Trade Policy, which have to be monitored by the agencies empowered under such policy i.e., the Ministry of Commerce, through the Director General of Foreign Trade. In so far as, the Customs Department is concerned, they have to only examine the issue, as to whether the duty of customs is leviable on the importation of goods and whether such duty is exempted from payment through issuance of the notification(s) by the Central Government. In the present case, since the impugned goods were exempted from levy of duty under Notification dated 08.04.2015 and the licensing authority empowered under the FTP has not questioned achievement of export turnover and availment of the incentives, the same cannot be questioned by the Customs department. The use of specific words in condition in sub-para (5) clearly reflect that the proper officer of customs, at the time of clearance of such exempt goods, shall only for the purpose of debit of the duties is required to calculate the duties leviable on the goods, but for this exemption and in order to make an debit entry in the MEIS scrip; and this does not entail payment of customs duty, as the levy of basic customs duty itself is exempt vide Notification dated 08.04.2015. To make it clearer, we may clarify that the Customs department's responsibility is only to ensure that the goods sought to be exempted are imported under the MEIS scheme. The conditions itemized in paragraph 2, containing sub-paras from (1) to (10) are only for the purpose of examination as to whether such exemption is applicable in a particular case upon fulfillment of these conditions under Notification dated 08.04.2015 which has been issued under Section 25(1) ibid. These conditions shall not in any case would put a bar for payment of SWS which could be 'NIL' on account of its determination under Section 110 of the Finance Act, 2018 or may be exempt by means of any exemption under some other notification issued under Section 110(3) ibid read with Section 25 *ibid.*

12.5 In the present case, it is not in dispute that the licensing authority has raised any objection with regard to non-observance or non-fulfillment of the conditions mentioned in the notification dated 08.04.2015. Thus, it would not be proper on the part of the Customs authorities to say that debit of customs duty in the MEIS scrip would disentitle the imported goods from the claim of the benefit of 'Zero' rate SWS. Since, the effective rate of the customs duty is 'NIL' or 'Zero', by virtue of notification dated 08.04.2015, the rate of SWS when calculated in terms of Section 110 ibid would automatically become 'zero', inasmuch as SWS is to be calculated not on the value of the goods, but on the duty of customs levied on imported goods, which is evident from sub-section (3) of Section 110 of the Finance Act, 2018. The said statue has mandated that SWS levied under Sub-section (1) ibid, shall be calculated at the rate of 10% on the customs duty levied and collected by the Central Government. In the present case, since no customs duty is leviable in terms of notification dated 08.04.2015, there is no question of payment of SWS.

12.6 Since there was ambiguity in context with the subject issue, the Tax Research Unit in the Department of Revenue, Ministry of Finance vide Circular No. 03/2022-Customs dated 01.02.2022 had clarified that calculation of SWS is dependent on amount of the customs duty that is actually payable and not otherwise. It has been explained in specific terms that legal provisions does not require calculation of SWS on notional value of customs duty calculated, as in the present case, the BCD is calculated for purpose of accounting by debit entry in the MEIS scrip and the payment of BCD is exempt under Section 25 ibid. The said circular is extracted herein below:

"Circular No. 3/2022-Customs

F. No. CBIC-190354/262/2021-TRU Section-CBEC
Government of India
Ministry of Finance
Department of Revenue
(Tax Research Unit)
*****

Room No. 156, North Block

New Delhi, dated the 1st of February, 2022

To,

All Principal Chief Commissioners/ Chief Commissioners of Customs/Customs (Preventive),

All Principal Chief Commissioners/ Chief Commissioners of Customs & Central Tax,

All Principal Commissioners/ Commissioners of Customs/Customs (Preventive),

All Principal Commissioners/ Commissioners of Customs & Central Tax

Madam/ Sir,

Subject: Clarification regarding applicability of Social Welfare Surcharge on goods exempted from basic and other customs duties/cesses –reg.

References have been received seeking clarification on the issue of applicability of Social Welfare Surcharge (SWS) on goods that are exempted from basic customs duty or taxes or cesses which are levied as a duty of customs. In absence of any specific exemption on Social Welfare Surcharge, certain field formations have taken a view that Social Welfare Surcharge shall be payable on notional customs duty as determined on Tariff rate.

2. The matter has been examined. Social Welfare Surcharge (SWS) is levied and collected, as a duty of customs, vide Section 110 of the Finance Act, 2018 (13 of 2018) and is calculated at the rate of 10 per cent. on the aggregate of duties, taxes and cesses which are levied and collected by the Central Government as a duty of customs on goods imported into India.

3. In this regard, it may be noted that at present SWS applies at the rate of 10% of the aggregate of customs duties payable on import of goods and not on the value of imported goods. If aggregate customs duty payable is zero on account of an exemption, the SWS shall be computed as 10% of value equal to 'Nil' (as aggregate amount of customs duties payable is zero). Law does not require computation of SWS on a notional customs duty calculated.

4. Thus, it is clarified that the amount of Social Welfare Surcharge payable would be 'Nil' in cases where the aggregate of customs duties (which form the base for computation of SWS) is zero even though SWS has not been exempted at tariff rate where applicable aggregate of duties of customs is zero.

5. The contents of this circular may please be brought to the notice of trade and industry through issue of Trade/ Public notices. The field formations may also be suitably sensitized in this regard. Difficulty, if any, in the implementation of this Circular may be brought to the notice of the Board. Hindi version follows.

Yours faithfully,

(Nitish Karnatak)
Under Secretary to the Government of India"

From the above, we find that the clarification issued by the Ministry of Finance amply makes it clear that SWS is 'NIL', when the aggregate of customs duties for calculation of SWS is 'Zero'.

13.1 In the case of *LA TIM Metal & Industries Limited* (supra) the Hon'ble High Court of Bombay had held that if BCD is 'Nil', then SWS payable at 10% of BCD is also computed as 'Nil'. The relevant paragraphs of the above judgement are extracted below:

"7. Mr. Mishra also submitted that petitioner's claim about assessment and recovery of amounts in the guise of Social Welfare Surcharge on the goods cleared without payment of BCD is factually incorrect as BCD was chargeable at 7.5% on the goods imported and the same was paid/debited by using the Merchandise Export from India Scheme (MEIS) Scrips issued under Notification No.24/2015-Customs dated 08.04.2015. In response Mr. Shah relied upon General Exemption No.162 by which the Central Government, exercising its powers under Section 25 of the Customs Act, has exempted goods when imported into India against duty credit scrip from the whole of the customs duty leviable thereon and the whole of the additional duty leviable thereon under the Customs Tariff Act. The fact that the goods imported under the concerned Bill of Entry has been cleared with Nil BCD is not disputed.

8. Therefore, in our view if the SWS is payable at 10% on BCD but where the BCD is Nil, SWS shall also be computed Nil.

9. Respondents are directed to refund Rs.22,56,760/- that Petitioner has paid towards Notional Social Welfare Surcharge within 8 weeks from the date of receipt of a copy of this order.

10. Petition accordingly stands disposed."

13.2 With regard to the judgement of Hon'ble Bombay High Court delivered in the case *LA TIM Sourcing (India) Pvt. Ltd. Vs. Union of India* (Writ Petition No. 8677 of 2019) and *LA TIM Metal & Industries Limited* Vs. The Union of India and Ors., (Writ Petition No. 12183 of 2022), learned AR had submitted that the department has filed Review Petitions against those judgements and as such, the ratio therein cannot be considered for deciding the present appeals. He had also submitted a copy of the Review Petition filed in the case of *LA TIM Metal & Industries Limited (supra)* by the Commissioner of Customs, Import, JNCH, Nhava Sheva-III, wherein the Revenue have claimed that as evident from the B/Es, the proper officer of customs has assessed the B/Es with BCD @ 7.5% and the same was paid by the appellants by using MEIS scrips and accordingly SWS is also payable, as there is BCD chargeable at the rate of 7.5% *ad valorem* on the imported goods. Further, they have also claimed that appellants are not exempted from BCD under Notification No.24/2015-Customs dated 08.04.2015 read with Circular No.02/2020-Customs dated 10.01.2020 issued by the Drawback Division of CBIC. They have also relied upon the ratio of the judgement of the Hon'ble Supreme Court in Unicorn Industries (supra) and Hon'ble Madras High Court in the case of *Gemini Edibles and Fats India Pvt. Ltd (supra)* in their grounds for submission of such a review petition before the Hon'ble Bombay High Court.

13.3 In this regard, we find that the Hon'ble Supreme Court in the case of Unicorn Industries (supra) had dealt with entirely different issue, i.e., grant of exemption from payment of NCCD, Education Cess and Secondary and Higher Education Cess. The Hon'ble Apex Court have ruled that for grant of any exemption, a notification has to be issued and, in the absence thereof, automatic exemption cannot be claimed by the manufacturer. Whereas the present case involves simple calculation of SWS as provided under Section 110 of the Finance Act, 2018. Further, we find that the Hon'ble High Court of Bombay, after taking into account all the grounds raised in the Review Petitions filed by Revenue as above, in the case of *LA TIM Sourcing (India)Pvt. Ltd. Vs. Union of India* (Writ Petition No. 8677 of 2019) and *LA TIM Metal & Industries Limited Vs. The Union of India and Ors.,* (Writ Petition No. 12183 of 2022) along with other similar cases, had already disposed of the case on 21.06.2024, by dismissing the Review Petitions filed by the Revenue. The copy of the aforesaid judgement dated 21.06.2024 is extracted and given below:

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

(1) REVIEW PETITION (ST) NO. 402 OF 2023
IN
WRIT PETITION NO. 8677 OF 2019
ALONGWITH
INTERIM APPLICATION (ST) NO. 14281 OF 2023
IN
REVIEW PETITION (ST) NO. 402 OF 2023

The Commissioner of Customs Import,
NS-III ....Review Petitioner/
Applicant

In the Matter Between

LA TIM Sourcing (India) Pvt. Ltd. ....Petitioner

V/s.

The Union of India and Ors. ...Respondents

AND
(2) REVIEW PETITION (ST) NO. 14291 OF 2023
IN
WRIT PETITION NO. 8677 OF 2019

AND
(3) REVIEW PETITION NO. 71 OF 2024
IN
WRIT PETITION NO. 12183 OF 2022
ALONGWITH
INTERIM APPLICATION NO. 9573 OF 2024
IN
REVIEW PETITION NO. 71 OF 2024

AND
(4) REVIEW PETITION NO. 73 OF 2024
IN
WRIT PETITION NO. 12183 OF 2022
ALONGWITH
INTERIM APPLICATION NO. 9661 OF 2024
IN
REVIEW PETITION NO. 73 OF 2024

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AND
(5) REVIEW PETITION NO. 75 OF 2024
IN
WRIT PETITION NO. 1447 OF 2021
ALONGWITH
INTERIM APPLICATION NO. 9664 OF 2024
IN
REVIEW PETITION NO. 75 OF 2024

Mr. Jitendra B. Mishra a/w Mr. Dhananjay B. Deshmukh for Petitioners/ Applicants in all Review Petitions.

Mr. Prakash Shah a/w Mr. Jas Sanghavi i/b PDS Leagl for Respondents in RPW (ST) No.402/2023, RPW (ST) No.14291/2023, RPW No.71/2024 and RPW No.73/2024.

Mr. Sriram Sridharan a/w Mr. Dhananjay Sethuraj for Respondents in RPW No.75 of 2024.

CORAM : K.R. SHRIRAM &
ARIF S. DOCTOR, JJ.
(IN CHAMBER)
DATED : 21st JUNE 2024

P.C. :

1. All Interim Applications for condonation of delay are allowed.

2. Heard counsel and in our view no case for review is made out. This is fortified by our order dated 15th November 2022 in Writ Petition No. 12183 of 2022 (Review Petition No. 71 of 2024) where in Paragraph No. 7, we have dealt with submissions identical to those that were made by Mr. Mishra today.

3. Review Petitions dismissed.

(ARIF S. DOCTOR, J.) **(K.R. SHRIRAM, J.)**

Purti Parab

14.1 We further find that in the case viz., *Commissioner of Customs (Export) Vs. Reliance Industries Ltd.*(supra), the Hon'ble High Court of Bombay in respect of Customs Appeal No. 12 of 2006 had held that when the customs duty is fully exempt under DEPB scheme, then the education cess that is calculated at 2% on the customs duty also becomes 'Nil'. The relevant paragraphs of the aforesaid judgement are extracted and given below:

*"**8.** The Tribunal has in dealing with this controversy referred extensively to the salient features of the DEPB Scheme, relevant provisions of the Finance Act, 2004 and the Exemption Notification dated 22nd April, 2002. The Tribunal has held as under :-*

> *"We find that the DEPB Scheme operates under an exemption Notification No. 45/2002-Customs, dated 22nd April, 2002. The said notification specifically exempts goods imported under DEPB Scheme from basic, additional and special additional duties of Customs. However, in terms of the conditions specified in the said notification, the exemption operates by allowing duty credit in the Duty Entitlement Pass Book on exports at the rate specified and subsequently by debiting an amount equal to duty payable, against such credit in the pass book, on imports. As such, such crediting and debiting of duty amounts is a matter of procedure and convenience, but the notification basically provides full exemption from Customs duty. Our view is supported by earlier decision of the Tribunal in Essar Steel Ltd. v. CCE, Vishakhapatnam - 2004 (173) E.L.T. 239 (Tri.) wherein it was held that Modvat credit against DEPB debits cannot be allowed as duties are exempted under DEPB Scheme and the relevant notification."*
>
> *We find that the provisions in the said Finance Act specify the Education Cess as 2% of the Customs duty levied and collected. In the case of imports under the DEPB Scheme, which are fully exempt, the Customs duty is nil. Hence, the Education Cess being 2% of the Customs duty is also nil. If it were the intention of the Parliament to debit and credit Education Cess for imports under DEPB Scheme, then the quantum of cess would have been specified in absolute terms with a notification similar to Notification No. 45/2002 with similar conditions. That is, however, not the case. On the other hand, the cess has been specified at the rate of 2% of the Customs duty in relative terms. In which case, it becomes nil for exempted DEPB imports.*
>
> *Accordingly, we hold that no education cess is leviable on fully exempted DEPB imports and therefore, no debits from DEPB scrip are required. We are also of the view that the circular dated 31st January, 2005 is contrary to the provisions of the Finance (No. 2) Act, 2004 read with Notification No. 45/2002-Customs, dated 22nd April, 2002.The revenue appeal is, therefore, rejected."*

***9.** It is the correctness of this view of the Tribunal which is challenged before us. Mr. A.S. Rao appearing on behalf of the revenue submits that merely because there is a scheme and an exemption is granted that does not wipe out the duties. The Customs duty is leviable and recoverable. In the light of the exemption it cannot be said that these duties are not legally recoverable. Therefore, the education cess also could have been levied and recovered. The Tribunal's view is therefore, erroneous in law.*

***10.** On the other hand, Mr. Patel appearing on behalf of the respondent assessee submits that the Tribunal's view as taken above has found favour at least with three High Courts in India and in that regard he invites our attention to the judgment of High Court of Gujarat in the case of Gujarat Ambuja Exports Ltd. v. Government of India - 2013 (289) E.L.T. 273 (Guj.) and Commissioner of Customs v. Pasupati Acrylon Ltd. - 2013 (296) E.L.T. 182 (Guj.). He submits that the view taken by Gujarat High Court in Pasupati (supra) has been not interfered with by the Hon'ble Supreme Court and the revenue's appeal is dismissed on 8th May, 2013.*

***11.** The Tribunal's view is endorsed not only by the High Court of Gujarat but equally by the High Court of Madras in Commissioner of Customs,* *Tuticorin v. DCW Ltd. - 2014 (306) E.L.T. 398 (Mad.) and the High Court of Andhra Pradesh in Commissioner of C.Ex., Visakhapatnam v. Kedia Overseas Ltd. - 2014 (305) E.L.T. 268 (A.P.). Our attention is invited to the judgments of the Gujarat and Andhra Pradesh High Courts.*

12. *After hearing both sides we find that the Gujarat High Court has extensively dealt with this issue. It has expressed an opinion that the duty exemption remission scheme and the duty exemption passbook scheme are essentially to promote economic growth and in terms of the new policy adopted by the Government of India. The education cess on imported goods shall be in addition to any other duties of Customs chargeable on such goods under the Customs Act, 1962 or any other law for the time being in force. By Section 84(3) the provisions of the Customs Act, 1962 and the rules and regulations made thereunder including those relating to refund and exemption from duty and imposition of penalty shall as far as may be applied in relation to levy and collection of the education cess on the imported goods. If education cess is to be collected from the Customs duty levied and collected by the Central Government, then, in the given facts and circumstances when there is exemption from payment of that duty which exemption is in favour of the respondent assessee, then, there is no collection of the Customs duty. The Customs duty may be leviable but in the light of the exemption in favour of the respondent assessee, the duty has not been recovered and collected from the assessee. In view thereof the education cess on imported goods has also not been levied and collected. It is in that regard that the view taken by the High Court of Gujarat in the case of Gujarat Ambuja Exports Ltd. (supra) from paras 9 to 19 has been quoted and followed with approval of the same High Court. That view has also been applied by the High Court of Gujarat in the case of Pasupati (supra). Once the Tribunal's view taken in the present case has found favour with at least three High Courts and has not been interfered with, then, we are of the view that the Tribunal's decision cannot be termed as perverse. It is also not vitiated by any error of law apparent on the face of the record. Following the High Court Gujarat judgment as above, we answer the substantial question of law in Para 2(b) in favour of the assessee and against the revenue.*

13. *Appeal of the revenue fails and is dismissed. There shall be no order as to costs."*

14.2 We also find that the Hon'ble High Court of Gujarat in the case of *Commissioner of Customs Vs. Pasupathi Acrylon Ltd.,* reported in *2013 (296) E.L.T. 182 (Guj.)* had held that when the Government had provided full exemption from payment of customs duty and additional duty under Notification No. 32/2005, then there is no Education Cess payable on such clearances. The relevant paragraphs of the aforesaid judgement is extracted and given below:

*"**6.** Though three different questions have been framed, central issue is single, namely, whether on imports made by an importer which otherwise qualify for exemption from payment of customs duty and additional duty under Exemption Notification No. 32/2005, would still be liable to pay Education Cess on such basic duty of customs and additional duty on the ground that such duty-free imports were being made under DEPB scheme. The case of the Revenue before the Tribunal was that in view of the Circular of C.B.E. & C., dated 31-1-2005, such imports when made under DEPB scheme, though may enjoy exemption from payment of Customs and*

additional duty if the conditions of Exemption Notification No. 32/2005 are satisfied, nevertheless, the importers would have to pay the Education Cess on the customs duty and additional duty otherwise payable.

7. *Identical issue came up for consideration before this Court in Special Civil Application No. 11635/2005 in case of Gujarat Ambuja Exports Ltd. wherein by judgment dated 21-6-2012 [2013 (289) E.L.T. 273 (Guj.)] while allowing the writ petition of the importers, the issue was decided in following manner :-*

> *16. From the nature of DEPB scheme and the exemption granted to imports made under such scheme, it can be seen that the very purpose is to neutralise the import duty component on the imported goods used for production of export items. Such object is achieved through the DEPB scheme under which the exporter is given the facility of utilising the credits in the DEPB scrips for the purpose of adjustment against the customs duty liability on the goods imported for the ultimate purpose of export on value addition.*
>
> *17. We may recall that Chapter 7 of the Export-Import Policy pertains to duty exemption/remission schemes. Para 7.1 thereof provides that the duty exemption scheme enables import of inputs required for export production. The duty remission scheme enables post export replenishment/remission of duty on inputs used in the export product. Such remission schemes include Advance Licence Scheme and Duty Free Replenishment Certificate Scheme as also the Duty Entitlement Passbook Scheme. Para 7.14 of said Chapter 7 of the Export-Import Policy pertains to Duty Entitlement Passbook Scheme. It states at the outset that for the exporters not desirous of going through the licensing route, an optional facility is given under DEPB. The object of DEPB scheme is to neutralise the incidence of customs duty on the import component of the export product. It further provides that such neutralisation shall be provided by way of grant of duty credit against the export product.*
>
> *18. From the nature of DEPB scheme noted above and the exemption from payment of customs duty on imports made under such scheme, it can be gathered that the very purpose of granting such exemption is to neutralise the customs duty, on the import component of the export product. In essence, the Government of India grants duty remission at prescribed rates on the imports made under such a scheme.*
>
> *19. It can thus not be denied that for the imports made under the DEPB scheme, there is total or partial, as the case may be, exemption in payment of customs duty. At the relevant time, for the goods other than edible oil, such exemption was total. For edible oil, such exemption was to the extent of 50% of the customs duty and additional duty payable. In essence, therefore, for imports made under the DEPB scheme, of course, subject to the conditions specified in the exemption notification, the customs duty was exempt. Merely because the conditions provided for adjustment of credit in the DEPB scrips, it cannot be stated that either there was no exemption from payment of customs duty or that the Central Government was levying and collecting customs duty from the importers in form of adjustment of credit in the DEPB scrips. We may recall that such credits are given at specified rates on the basis of SION norms primarily taking into account deemed import contents of an export product and the basic customs duty payable on such deemed imports. Thus through such adjustments on the DEPB scrips at the time of further imports, customs duty component is sought to be neutralised. The view expressed by the Tribunal in the case of Reliance Industries Ltd. (supra) appeals to us. In the said decision, the Tribunal taking note of the provisions contained in Sections 81 and 84 of the Finance Act, 2004 held that the impugned Circular No. 5/2005 is not legally sustainable. The Tribunal held that crediting and debiting of entries in the passbook is a matter of procedure and convenience and in essence, the Notification No. 45/2002 provides for full exemption from payment of customs duty.*
>
> *20. We may also recall that the Larger Bench of the Tribunal in the case of Essar Steel Ltd. (supra) held that mere entry in the DEPB book is not sufficient for eligibility of Modvat credit availed on the strength of Bill of Entry where the importer had availed of benefit of the exemption from payment of customs duty. This would further go to show that while no customs duty is paid, there would be no question of availing Modvat credit on such duty.*

21. We may notice that vide circular dated 8-7-2004, the Ministry of Finance, in a question whether goods that are fully exempt from excise/customs duty or are cleared without payment of such duty would be subject to Education Cess, clarified that the Education Cess is leviable at the rate of 2% of the aggregate of the duties of excise/customs levied and collected. If goods are fully exempted from excise duty or customs duty or are chargeable to nil rate of duty or are cleared without payment of duty under specified procedure such as clearance bond, there is no collection of duty and, therefore, no Education Cess would be leviable on such clearances.

22. In view of such clarification by the Government and in view of our conclusions hereinabove that against an import made under the DEPB scheme, of the goods which are fully exempt from payment of customs duty and therefore no customs duty is levied and collected, the Education Cess at the prescribed rate also cannot be levied.

23. We are not unmindful of the decision of Madras High Court in the case of Tanfac Industries Ltd., v. Asstt. Commr. of Cus., Cuddalore reported in - 2009 (240) E.L.T. 341. In the said case, in the background of interest on warehoused goods where such demand of interest on goods cleared beyond 90 days arose, the Division Bench of the High Court came to the conclusion that on the imports under DEPB scheme, the importers pay duty not by cash but by way of credit and, therefore, the goods cleared under DEPB scheme cannot be treated as exempted goods. It can only be treated as duty-paid goods.

24. With respect, we are unable to concur with such a view. Firstly, in the said decision, the question of levy of Education Cess was not involved. More particularly in our view, the exemption Notification No. 45/2002 is issued under the exercise of powers under Section 25 of the Customs Act, 1962. Such notification grants total exemption from payment of customs duty and additional duty on all goods other than edible oils which are imported under DEPB scheme. It is, of course, subject to conditions specified in the notification itself. Such conditions require adjustment of the credit in the DEPB scrip against the customs duty liability. However, such adjustment is only procedural in nature. As noted earlier, para 7.14 of the Export-Import Policy clearly provided that the exporter who does not desire to go through the licensing route would have an optional facility of being governed under the DEPB scheme.

25. We may note that in cases of Advance Licence Schemes under which imports are being made and which are exempt from customs duty under various notifications issued by the Central Government under Section 25 of the Customs Act, 1962, no Education Cess is demanded by the respondents. In fact, the impugned notification itself is sufficiently clear and records that imports against Advanced Licences are exempt from all duties of customs and therefore, it follows that Education Cess at 2% is not leviable on such imports. In case of DEPB, however, a distinction is sought to be drawn on the premise that though the importers are governed by exemption notification, the fact remains that in case of such imports, the duty is debited from DEPB scrip. To our mind, such distinction is not valid. The clarificatory circular itself refers to the imports made under the DEPB scheme being covered under exemption notification. Such exemption is, of course, subject to fulfillment of certain conditions. One of the conditions includes that of adjustment of credit in the DEPB scrip. This, however, is merely procedural in nature and would not change the nature of benefit from one being of exemption.

26. Respondents, however, have contended that Education Cess is not exempt under Notification No. 5/2002 and the importer therefore cannot pay the same on imports made under the DEPB scheme. We may recall that under the impugned clarificatory circular, Government has provided that such Education Cess will also be adjusted against credit in the DEPB scrip. If Education Cess is not part of the exemption as contended by the respondents, how can it be adjusted against the credit in DEPB scrip by enforcing the condition of the Exemption Notification? This to our mind is a legal fallacy.

27. Under the circumstances, the impugned circular insofar as it pertains to DEPB scrip, is held to be invalid and contrary to section 81 read with section 84 of the Finance Act, 2004 and is hereby quashed and set aside.

8. *Under the circumstances, we find no error in the impugned orders of the Tribunal. All tax appeals are, therefore, dismissed."*

Being aggrieved with the above Order of the Hon'ble Gujarat High Court, the Department had filed a Special Leave to Appeal (Civil) before the Hon'ble Supreme Court in CC 10107-10109/2013, wherein the Hon'ble Apex Court had dismissed the appeal filed by the department, having found that there was no ground made out to interfere in this matter.

14.3 This Bench of the Tribunal had also examined the issue in the present case, on similar set of facts in the case *Tata Motors Limited Vs. Commissioner of Customs (Import)*, wherein it has been held in the Final Order dated 30.08.2023 that demand of SWS is not legally sustainable. The relevant paragraphs of the said order are extracted and given below:

"6. The incidence of levy of customs duty is on importation of goods into India from a place outside India. However, Section 25 of the Customs Act, 1962, has empowered the Central Government for issuance of notification, in exempting the goods either conditionally or unconditionally, subject to the satisfaction that in the public interest, issuance of such exemption notification is necessary/expedient. In exercise of the powers conferred under Section 25 ibid, in this case the Central Government had issued the Notification No.24/2015-Customs dated 08.04.2015, in exempting the goods from payment of Basic Customs Duty, on their importation into India under the duty credit scrip issued by the Regional Authority under the MEIS. Imported goods also attract Social Welfare Surcharge (SWS) in terms of the provisions of Section 110 of the Finance Act, 2018. Sub-section (3) of Section 110 ibid has provided that the SWS shall be calculated at the rate of ten percent on the BCD amount. The appellant did not pay the SWS, in view of the fact the BCD was NIL as per notification dated 08.04.2015. However, the department did not accept such plea of the appellant and had confirmed the adjudged demands, holding that no specific exemption has been provided for non-payment of the SWS and that since the customs duty was paid by the appellant through MEIS scrip, it was liable to pay 10% of the amount of BCD, representing the SWS.

7. MEIS was launched as an incentive scheme for the export of goods in the Foreign Trade Policy (FTP) for the period 2015-2020. The said scheme intends to incentivise the export of goods manufactured in India. The incentives under the scheme are calculated as percentage of the realized Free-On-Board (FOB) value of export in foreign exchange or FOB value of exports as per the shipping bills in free foreign exchange. The incentives are allocated through a MEIS duty credit scrip. This scrip contains the details of the eligible incentives in terms of the quantity of goods exported and the benefits obtained under different exemption notifications. This is basically an accounting document to demonstrate actual availment of the incentives in terms of the value of goods exported. To illustrate the same, we may say that if the realized FOB value is Rs.20 lakhs and the incentives provided for the scheme is 5%advalorem; then in such case, the importer of the goods *shall be eligible for availing the benefit on account of the incentives to the tune of Rs.1 lakh. In other words, the benefit under the scheme will be restricted upto Rs.1 lakh, which is commensurate to the volume of export achieved by the scrip holder. To ensure that the benefit under the MEIS is subject to achievement of the export obligation, though the Central Government has exempted the goods, vide notification dated 08.04.2015 (supra), but have provided various conditions, including the conditions, contained in para 2(5), which are reproduced herein below: "(5) that the said scrip is produced before the proper officer of customs at the time of clearance for debit of the duties leviable on the goods and the proper officer of customs taking into account the debits already made under this exemption and debits made under the notification Nos. 20/2015-Central Excise, dated the 8th April, 2015 and 10/2015-Service Tax, dated the 8th April, 2015, shall debit the duties leviable on the goods, but for this exemption;"*

8. Relevance of the above condition is to the effect that, though the goods imported under MEIS scrip are exempted from payment of customs duty, but to ensure that the incentive is within the permissible limit, the devise of maintaining the records have been prescribed therein. Such maintenance of records is in context with the Foreign Trade Policy, which have to be monitored by the agencies empowered under such policy i.e., the Ministry of Commerce, through the Director General of Foreign Trade. In so far as, the Customs Department is concerned, they have only to examine the issue, as to whether the duty of customs is leviable on the importation of goods or are exempted from payment of duty through issuance of the notification(s) by the Central Government. In the present case, since the disputed goods were exempted from payment of duty under Notification dated 08.04.2015 and the licensing authority empowered under the FTP has not questioned achievement of export turnover and availment of the incentives, the same cannot be questioned by the Customs department. To make it more clear, we may clarify that the Customs department's responsibility is only to ensure that the goods sought to be exempted are imported under the MEIS scheme. The conditions itemized in paragraph 2, containing sub-paras from (1) to (10) are for the purpose of examination by the licensing authority. In the present case, it is not in dispute that the licensing authority has raised any objection with regard to non-observance or nonfulfillment of the conditions mentioned in the notification dated 08.04.2015. Thus, it would not be proper on the part of the authorities to say that debit of customs duty in the MEIS scrip would disentitle the imported goods from the claim of the benefit of 'Zero' rate SWS. Since, the effective rate of the customs duty is 'NIL' or 'Zero', by virtue of the notification dated 08.04.2015, the rate of SWS would automatically become 'zero', inasmuch as SWS is to be calculated not on the value of the goods, but on the duty of customs levied on the imported goods, which is evident from sub-section (3) of Section 110 of the Finance Act, 2018. The said statue has mandated that SWS levied under Sub-section (1) of Section 110, shall be calculated at the rate of 10% on the customs duty levied and collected by the Central Government. In the present case, since no customs duty is leviable in terms of notification dated 08.04.2015, there is no question of payment of SWS.

9. Since there was ambiguity in context with the subject issue, the Tax Research Unit in the Department of Revenue, Ministry of Finance vide

Circular No.3/202-Customs dated 01.02.2022 has clarified that calculation of SWS is dependent on levy of the customs duty and not otherwise. The relevant paragraphs in the said circular are extracted herein below:

> *"2. The matter has been examined. Social Welfare Surcharge (SWS) is levied and collected, as a duty of customs, vide Section 110 of the Finance Act, 2018 (13 of 2018) and is calculated at the rate of 10 per cent. on the aggregate of duties, taxes and cesses which are levied and collected by the Central Government as a duty of customs on goods imported into India.*
>
> *3. In this regard, it may be noted that at present SWS applies at the rate of 10% of the aggregate of customs duties payable on import of goods and not on the value of imported goods. If aggregate customs duty payable is zero on account of an exemption, the SWS shall be computed as 10% of value equal to 'Nil' (as aggregate amount of customs duties payable is zero). Law does not require computation of SWS on a notional customs duty calculated at tariff rate where applicable aggregate of duties of customs is zero."*

10. We find that the ratio of the judgement relied upon by the learned Advocate for the appellant squarely apply to the facts of the present case. In those decided cases, it has been clarified that the amount of SWS payable would be 'NIL', in the cases, where the aggregate of customs duties is 'zero', even though SWS has not been specifically exempted through issuance of notification. 11. Reliance placed by learned AR for Revenue on the letter dated 14.11.2022 has no relevance to the case in hand, inasmuch as no clarification was furnished therein with regard to levy of SWS on the imported goods. Rather, the said letter has only referred to the Circular No.2/2020-Customs dated 10.01.2020 issued by CBEC and no clarification with regard to the subject issue was furnished therein. On examination of the said circular dated 10.01.2020, we find that with reference to the judgement of Hon'ble Supreme Court in the case of Unicorn Industries (supra), the Board has clarified that SWS cannot be debited through duty credit scrips and therefore has to be paid by the importer in cash. The case in hand does not relate to debit of any amount towards SWS from the duty scrips; rather, the issue is only confined to claim of 'zero' rated SWS, which has adequately been dealt with in the subsequent Circular No.3/2022-Customs dated 01.02.2022 issued by CBIC.

*11.1 Learned AR has relied upon the judgement of Hon'ble Supreme Court in the case of Unicorn Industries (supra), to submit that the appellant was liable to pay 10% on the amount of BCD foregone as SWS in respect of the goods imported under MEIS. On examination of the said judgement delivered by the Hon'ble Supreme Court, we find that the issue involved therein relates to grant of exemption from payment of NCCD, Education Cess and Secondary and Higher Education Cess. The Hon'ble Court have ruled that for grant of any exemption, a notification has to be issued and, in the absence thereof, automatic exemption cannot be claimed by the manufacturer. The issue involved in these appeals are based on entirely different set of facts inasmuch as benefit of exemption in respect of SWS was never claimed by the appellant; the claim was only confined to the issue that since BCD payable is 'NIL' or 'zero', the SWS payable on such duty should also be 'zero'. The said views of the appellant get support from sub-section (3) of Section 110 of the Finance Act, 2018 wherein, it has been provided that SWS levied under sub-section (1) of Section 110 shall be calculated at the rate of 10% on the aggregate duty(s). Such statutory provision has also been clarified by the CBIC vide Circular dated 01.02.2022 (supra) that SWS payable would be 'Nil', in cases where the aggregate of customs duties is 'zero', **even though SWS has not been exempted**. Since, the issue decided in the said case is based entirely on* *different sets of fact, we are of the view that the ratio of the said cited judgement relied upon by the learned AR cannot be applied in these cases and as such, are distinguishable.*

(emphasis supplied)

11.2 For better understanding of the issue, we may refer to the appended table below, wherein the calculation of SWS on different situations/ circumstances has been elucidated:

Illustrative Situation of cases	***Value of imported goods in Rs.***	***Effective rate of basic customs duty & amount in Rs.***	***Rate of SWS & amount in Rs.***	***Amount of SWS to be paid in Rs.***
Situation Case 1: *BCD at 20% adv. & SWS at 10%*	*1,00,00,000*	*Tariff rate @20% No exemption Rs.20,00,000*	*10% No exemption Rs.2,00,000*	*Rs.2,00,000*
Situation Case 2: *BCD at 10% adv. through exemption under Sec.25(1) of Customs Act, 1962 & SWS at 10%*	*1,00,00,000*	*Tariff rate @20% Effective rate @10% thro' Notification Rs.10,00,000*	*10% No exemption Rs.1,00,000*	*Rs.1,00,000*
Situation Case 3: *BCD wholly exempt through exemption under Sec.25(1) of Customs Act, 1962 & SWS at 10%*	*1,00,00,000*	*Tariff rate @20% Effective rate @NIL thro' Notification 'NIL/Rs.0'*	*10% No exemption 'NIL/Rs.0'*	*'NIL/Rs.0'*
Situation Case 4: *BCD at 20% adv. & SWS wholly exempt through exemption under Sec.25(1) of Customs Act, 1962 read with clause 108 of Finance Bill, 2018/ Sec.110 of Finance Act, 2018*	*1,00,00,000*	*Tariff rate @20% No exemption Rs.20,00,000*	*10% Whole of SWS exempted vide Notification No.11/2018-Customs dt. 02.02.2018 'NIL/Rs.0'*	*'NIL/Rs.0'*

The issue involved in the present appeals is categorized under Serial No.3 in the above table, where on account of the BCD having been wholly exempted vide notification dated 08.04.2015, the calculation of SWS @ 10% of the basic customs duty would also be 'zero' only. Thus, in effect, it is clarified that there is no SWS which needs to be paid by the importer-appellant."

14.4 On careful examination of the Circular No.2/2020-Customs dated 10.01.2020 issued by CBEC, we find that with reference to the judgement of Hon'ble Supreme Court in the case of Unicorn Industries (supra), the Board has clarified that SWS cannot be debited through duty credit scrips and therefore has to be paid by the importer in cash. The case in hand does not relate to debit of any amount towards SWS from the duty scrips; rather, the issue is only confined to claim of 'zero' rated SWS, which has adequately been dealt with in the subsequent Circular No.3/2022-Customs dated 01.02.2022 issued by CBIC.

14.5 Learned AR has also relied upon the judgement of Hon'ble Supreme Court in the case of *Unicorn Industries* (supra), to submit that the appellant was liable to pay 10% on the amount of BCD foregone as SWS in respect of the goods imported under MEIS. On examination of the said judgement delivered by the Hon'ble Supreme Court, we find that the issue involved therein relates to grant of exemption from payment of NCCD, Education Cess and Secondary and Higher Education Cess. The Hon'ble Court have ruled that for grant of any exemption, a notification has to be issued and, in the absence thereof, automatic exemption cannot be claimed by the manufacturer. The issue involved in these appeals are based on entirely different set of facts inasmuch as benefit of exemption in respect of SWS was never claimed by the appellants in terms of any exemption notification issued under the Finance Act, 2018; the claim was only confined to the issue that since BCD payable is 'NIL' or 'zero', the SWS payable on such duty should also be calculated as 'zero'. The above views is also supported by the legal provision under sub-section (3) of Section 110 of the Finance Act, 2018 wherein, it has been provided that SWS levied under sub-section (1) of Section 110 ibid shall be calculated at the rate of 10% on the aggregate duty(ies). Such statutory provision has also been clarified by the CBIC vide Circular dated 01.02.2022 (supra) that SWS payable would be 'Nil', in cases where the aggregate of customs duties is 'zero', even though SWS has not been exempted. Since, the issue decided in the said case is based entirely on different sets of fact, we are of the view that the ratio of the said cited judgement relied upon by the learned AR cannot be applied in these cases and as such, are distinguishable.

14.6 Inasmuch as the Hon'ble Supreme Court had already upheld the decision of the Hon'ble Gujarat High Court in the case of *Pasupathi Acrylon Ltd.,*(supra) wherein it was held that no cess is payable when BCD is 'Nil', we are of the considered view that the judicial discipline would not permit to take a different view than the one decided by the Hon'ble Supreme Court. Further, the Hon'ble Bombay High Court had held that if the SWS is payable at 10% on BCD, but where the BCD is Nil, SWS shall also be computed Nil and had already dismissed the Review petitions filed by Revenue against various judgements decided by the Hon'ble High Court. In view of the above and since, the said judgements of Hon'ble High Court of Bombay are in operation, this Tribunal is bound to follow the ratio decided therein.

15. In view of the foregoing discussions and analysis, we do not find any merits in the impugned orders passed by the learned Commissioner of Customs (Appeals). Therefore, by setting aside the impugned orders, the appeals are allowed in favour of the appellants, with consequential relief, if any.

16. Early hearing applications filed by the appellants are also disposed of.

(Operative portion of the order pronounced in open court)

(S.K. Mohanty)
Member (Judicial)

(M.M. Parthiban)
Member (Technical)

Sinha