CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI

REGIONAL BENCH - COURT NO. I

EXCISE APPEAL NO. 89887 of 2013

(Arising out of Order-in-Original No. Belapur/91/Taloja/R-VI/COMMR/KA/2013-14 dated 18.09.2013 passed by the Commissioner of Central Excise & Customs, Belapur)

Galaxy Surfactants Limited **.... Appellants**
C-49/2, TTC Industrial area, Pawne,
Navi Mumbai – 400 701.

Versus

Commissioner of Central Excise, **.... Respondent**
Belapur Commissionerate
1st Floor, CGO Complex, CBD Belapur,
Navi Mumbai – 400 614.

APPEARANCE:

Shri Rajesh Ostwal, along with Shri Saurabh Bhise, Advocates for the Appellant

Shri C.S. Vinod, 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/87649/2024

Date of Hearing: 11.11.2024

Date of Decision: 11.11.2024

Per: M.M. Parthiban

This appeal has been filed by M/s Galaxy Surfactants Limited, Navi Mumbai (herein after, for short, referred to as 'the appellants') against the Order-in-Original No. Belapur/91/Taloja/R-VI/COMMR/KA/2013-14 dated 18.09.2013 (herein after, referred to, as 'the impugned order') passed by the Commissioner of Central Excise & Customs, Belapur.

2.1 Brief facts of the case, leading to this appeal, are summarized herein below:

2.2 The appellants are a 100% Export Oriented Unit (EOU) engaged, *inter alia,* in manufacture of Organic Surface Active Agent (OSLA) and organic chemicals, falling under Chapter 34 and 29, of the First Schedule to the Central Excise Tariff Act, 1985. They are holding the Letter of Permission No.

Per:100(2002)SEEPZ/EOU/1A(ii)-83/2002-03 dated 16.01.2003 issued by the Ministry of Commerce, indicating the approval granted under the Foreign Trade Policy (FTP) to operate as 100% EOU and are also holding Customs Bonded Warehouse License issued by the jurisdictional Deputy Commissioner of Central Excise, Belapur in respect of the EOU operations under bond executed before them with B-17 bond No.7091 dated 19.02.2004. The appellants are also clearing the excisable goods in the Domestic Tariff Area (DTA) in terms of the notifications issued by the Ministry of Finance and the Foreign Trade Policy (FTP) issued by the Ministry of Commerce. For the above purpose they are duly registered with jurisdictional Central Excise department with Registration No. AAACG1539PXM009.

2.3 In respect of the manufacturing operations of the appellants, the Department had conducted EA-2000 audit covering the period April, 2006 to October, 2010 including the clearances made in DTA. The department had interpreted that the appellants EOU had to pay the applicable central excise duty in respect of DTA clearances made on stock transfer basis to their other unit(s), based on the legal provisions of transaction value determined in terms of Rule 4 to Rule 9 of the Customs (Determination of the Value of Imported Goods) Rules, 2007 and not on the basis of cost of production of the finished goods, as had been arrived at by them. The appellants have availed the duty exemption benefits of Notification No. 23/2003-C.E. dated 31.03.2003 (Sl. No.2), but the department had alleged that they did not fulfil the conditions of the notification under Sl. No.2(i), inasmuch as the appellants had undervalued the value of DTA clearances by adopting to improper valuation method and thus exceeded the value of clearances in the DTA and thus they are not eligible to the notification benefits and are liable to pay central excise duty in respect of the DTA clearances made to their other unit(s). Accordingly, the department had initiated show cause proceedings by issue of Show Cause Notice (SCN) dated 19.03.2013, demanding payment of differential central excise duty of Rs.1,68,38,295/- along with interest on the differential value of DTA clearances of finished goods to their sister units during the period June, 2006 to October, 2012 under Section 11A(1)(a) of the Central Excise Act, 1944 read with Section 28 (1)(b) of the Customs Act, 1962 by invoking extended period of limitation and in terms of B-17 bond executed and Bank Guarantee (BG) furnished by them. The said SCN also proposed for imposition of penalty on the appellants under Section 11AC ibid read with Section 114A of the Act of 1962 and Rule 25 of the Central Excise Rules, 2002. The said SCN was adjudicated by the learned Commissioner vide the impugned order dated 18.09.2013 in confirming the proposals made in the SCN for demand of duty, but he held that the appellants had not suppressed any facts from the department and refrained from imposing penalty under Section 11AC ibid. Being aggrieved with the impugned order to the extent the duty demands were confirmed on the appellants with imposition of penalty for Rs.25,00,000/- on them, the appellants have filed this appeal before the Tribunal.

3.1 Learned Advocate appearing for the appellants submitted that the appellants have been functioning as a 100% EOU as per duly granted Letter of Permission (LoP) issued by the Development Commissioner, Ministry of Commerce from 2003 onwards. He stated that the final products manufactured by the appellants were exported out of India; part of such final products were also cleared by the appellants to DTA on payment of appropriate duties. Clearances effected in DTA were of two categories viz., (i) Out-right sales made to unrelated buyers; and (ii) Stock transfer to other unit(s) of the appellants. Both the above type of clearances made to the DTA were effected by the appellants by availing the benefit of Notification No.23/2003-CE dated 31.3.2003 (Sl. No. 2). As excise duty was payable on ad valorem basis and as proviso to Section 3(1) of the Central Excise Act, 1944 requires determination of value in terms of Section 14 of the Customs Act, 1962 and the Rules made thereunder, excise duty was paid by the appellants in respect of sales made to un-related parties, on the transaction value i.e., the price at which the goods were sold to the un-related parties. However, in respect of clearances made by way of stock transfer to their own units, excise duty was paid by the appellants on the value determined in terms of Rule 8 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007[CVR]. For the purposes of calculation of cost of production and profit margin, the appellants adopted the method prescribed under Rule 8 of the Central Excise Valuation Rules, 2000 and the Cost Accounting Standard-4 formulated by ICWAI. In other words, he stated that the appellants paid excise duty on 110% of cost of production. Even under Rule 8 of the Customs Valuation Rules, 2007, the cost of production is determined in the same manner, as prescribed in CAS-4.

3.2 Learned Counsel further stated that prior to removal of the first clearances of the goods in the DTA, that too to their own units, the appellants had duly intimated the Central Excise Department vide their letter dated 23.6.2006 stating that they will be clearing some of their products to their DTA units by way of stock transfer. In the said letter, it was specifically informed that the appellants would be valuing the goods in terms of Rule 8 of the Customs Valuation Rules, 2007. In this regard, he stated that the appellants had also submitted to the department, the certificates of Chartered Accountant indicating the manner in which the cost of production was determined by them. Further, periodical ER-2 returns was also filed with the department. Therefore, he stated that there are no grounds any suppression, misrepresentation of facts etc. for demand of differential duty invoking extended period of time. On the above basis, he submitted that the demands confirmed in the impugned orders be set aside.

3.3 Learned Advocate also stated that the issue under dispute has already been decided by the Tribunal in the case of *Cadila Healthcare Ltd. Vs. CCE – 2023 (12) TMI 473 (T),* wherein the Tribunal has held that the valuation adopted on the basis of 110% of the cost of production in terms of Rule 8 of the Central Excise Valuation Rules, 2000 is appropriate, where the goods is cleared to related DTA parties which is identical to the goods sold to the unrelated party. Further, he stated that the value adopted by the appellant is correct and legal; and on the basis of price of goods cleared to unrelated DTA parties, demanding of differential duty by the department is incorrect and illegal.

3.4 Learned Advocate further submitted that the appellants have correctly determined the value of the goods in terms of Rule 8 of the Customs Valuation Rules, 2007. In support of this he stated that through the legal fiction created by the proviso to Section 3(1) of the Act of 1944, when goods are transferred from EOU to DTA, their value shall be determined in accordance with the provisions of the Customs Act, 1962 and the Customs Tariff Act, 1975 including the Customs Valuation Rules. Thus, by applying the said rules sequentially i.e., Rule 4 to Rule 9 ibid, in the situation where DTA clearances is effected to their sister units, which is not a sale and where no transaction value of identical goods or similar goods imported into India existed or is available, the method of valuation adopted by them i.e., 110% of the cost of production of the finished goods is appropriate and correct.

3.5 He further stated that in the impugned order, the Commissioner had incorrectly confirmed demand of differential SAD on clearances made from appellants-EOU to their own units. Since, such clearances do not attract VAT or Sales Tax, and there was no sale involved, this cannot be construed as exemption from Sales Tax for the purpose of charging SAD as per conditions of Serial Nos. 1 and 2 annexed to Notification No.23/2003-C.E. dated

31.3.2003. Further, he stated that in the impugned Order, it was also held that due to execution of B-17 Bond, statutory period of limitation under Section 11A of the Central Excise Act, 1944 shall not be applicable in case of an EOU. In this regard, he submitted that despite execution of B-17 Bond, statutory period of limitation apply and therefore, confirmation of demand ought to have been restricted to normal period only.

3.6 Learned Advocate stated that in respect of clearance of goods made by appellants to DTA, they had complied with all the laws and regulations laid down under Customs statute as well as FTP. In support of their stand, they relied upon the following decisions:

> *(i) Commissioner of Central Excise, Pune-I Vs. Emcure Pharmaceuticals Ltd.* - 2014 (307) E.L.T. 180 (Tri. - Mumbai) upheld by Hon'ble Bombay High Court - 2016 (342) E.L.T. 172 (Bom.)
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> *(ii) Commissioner of Central Excise, Nagpur Vs. Morarjee Brembana Ltd.* - 2015 (318) E.L.T. 600 (S.C.)
>
> *(iii) Cadila Healthcare Ltd. Vs. Commissioner of Central Excise & Service Tax, Vadodara-I – 2023 (12) TMI 473 – CESTAT Ahmedabad*
>
> *(iv) Commissioner of Central Excise, Mumbai Vs. I.G.P. Limited – 2003 (155) E.L.T. 917 – (Tri. – Mumbai)*

4. Learned Authorized Representative (AR) appearing for Revenue, reiterated the findings made by the Commissioner in the impugned orders. He further stated that since the appellants had been working under Bond procedure, confirmation of the demands on the appellants in the impugned order is sustainable.

5. Heard both sides and perused the records of the case. We have also perused the additional written submissions presented in the form of paper book for this case.

6. The issues involved in these appeals are as follows:

> (i) To determine whether the DTA clearances of excisable goods made by the appellants EOU to their sister units have adopted proper method of valuation, and whether such clearances are eligible for duty exemption benefits under Notification No.23/2003-C.E. dated 31.03.2003 or not?
>
> (ii) whether the central excise duty demands confirmed in the impugned orders along with penalty imposed on the appellants are legally sustainable or not?

7. In order to address the above issues relating to Foreign Trade Policy, valuation of DTA clearances of excisable goods, we would like to refer the relevant legal provisions contained in Central Excise Act, 1944 for levy of Central Excise duty on 100% EOUs and Foreign Trade Policy. The disputed period in the case is from June, 2006 to October, 2012.

Central Excise Act, 1944

"Section 3. Duties specified in First Schedule and the Second Schedule to the Central Excise Tariff Act, 1985 to be levied. -

(1) There shall be levied and collected in such manner as may be prescribed,-

(a) a duty of excise, to be called the Central Value Added Tax (CENVAT) on all excisable goods (excluding goods produced or manufactured in special economic zones) which are produced or manufactured in India as, and at the rates, set forth in Schedule I to the Central Excise Tariff Act, 1985;……

Provided that the duties of excise which shall be levied and collected on any excisable goods which are produced or manufactured,--
(i) xxx
(ii) by a 100% export–oriented undertaking and brought to any other place in India,
shall be an amount equal to the aggregate of the duties of customs which would be leviable under the Customs Act, 1962 or any other law for the time being in force, on like goods produced or manufactured outside India if imported into India, and where the said duties of customs are chargeable by reference to their value; the value of such excisable goods shall, notwithstanding anything contained in any other provision of this Act, we determined in accordance with the provisions of the Customs Act, 1962 and the Customs Tariff Act, 1975 (51 of 1975)……."

Foreign Trade Policy 2004 - 2009

(Notified as updated on 07.04.2006, w.e.f. 01.04.2006)

"CHAPTER- 6
EXPORT ORIENTED UNITS (EOUs), ELECTRONICS HARDWARE TECHNOLOGY PARKS (EHTPs), SOFTWARE TECHNOLOGY PARKS (STPs) AND BIO-TECHNOLOGY PARKS (BTPs)

Eligibility
6.1 Units undertaking to export their entire production of goods and services (except permissible sales in the DTA), may be set up under the Export Oriented Unit (EOU) Scheme, Electronic Hardware Technology Park (EHTP) Scheme, Software Technology Park (STP) Scheme or Bio-Technology Park (BTP) scheme for manufacture of goods, including repair, re-making, reconditioning, re-engineering and rendering of services. Trading units, however, are not covered under these schemes.

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DTA Sale of Finished Products/ Rejects/ Waste/ Scrap/ Remnants and By-products

6.8 The entire production of EOU/EHTP/STP/BTP units shall be exported subject to the following: (a) (b) Units, other than gems and jewellery units, may sell goods upto 50% of FOB value of exports subject to fulfilment of positive NFE on payment of concessional duties. Within the entitlement of DTA *sale, the unit may sell in DTA its products similar to the goods, which are exported or expected to be exported from the units. No DTA sale at concessional duty shall be permissible in respect of motor cars, alcoholic liquors, books, tea (except instant tea), pepper & pepper products, marble and such other items as may be notified from time to time. Such DTA sale shall also not be permissible to units engaged in the activities of packaging/labelling/segregation/refrigeration/compacting/micronisation/ pulverization/granulation / conversion of monohydrate form of chemical to anhydrous form or vice-versa.*

Sales made to a unit in SEZ shall also be taken into account for the purpose of arriving at FOB value of export by EOU provided payment for such sales are made from Foreign Exchange Account of SEZ unit. Sale to DTA would also be subject to mandatory requirement of registration of pharmaceutical products (including bulk drugs)."

Foreign Trade Policy 2009 - 2014

"CHAPTER-6
EXPORT ORIENTED UNITS (EOUs), ELECTRONICS HARDWARE TECHNOLOGY PARKS (EHTPs), SOFTWARE TECHNOLOGY PARKS (STPs) AND BIO-TECHNOLOGY PARKS (BTPs).

Eligibility

6.1 Units undertaking to export their entire production of goods and services (except permissible sales in DTA), may be set up under the Export Oriented Unit (EOU) Scheme, Electronics Hardware Technology Park (EHTP) Scheme, Software Technology Park (STP) Scheme or Bio-Technology Park (BTP) Scheme for manufacture of goods, including repair, re-making, reconditioning, reengineering and rendering of services. Trading units are not covered under these schemes.

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6.8 DTA Sale of Finished Products/Rejects/Waste/Scrap/ Remnants and by-products

Entire production of EOU / EHTP / STP / BTP units shall be exported subject to following:
(a) Units, other than gems and jewellery units, may sell goods upto 50% of FOB value of exports, subject to fulfilment of positive NFE, on payment of concessional duties. Within entitlement of DTA sale, unit may sell in DTA, its products similar to goods which are exported or expected to be exported from units. However, units which are manufacturing and exporting more than one product can sell any of these productsinto DTA, upto 90% of FOB value of export of the specific products, subject to the condition that total DTAsale does not exceed the overall entitlement of 50% of FOB value of exports for the unit, as stipulated above. No DTA sale at concessional duty shall be permissible in respect of motor cars, alcoholic liquors, books, tea (except instant tea), pepper & pepper products, marble and such other items as may be notified from time to time. Such DTA sale shall also not be permissible to units engaged in activities of packaging / labeling / segregation / refrigeration/ compacting / micronisation / pulverization / granulation / conversion of monohydrate form of chemical to anhydrous form or vice-versa. Sales made to a unit in SEZ shall also be taken into account for purpose of arriving at FOB value of export by EOU provided payment for such sales are made from Foreign Exchange Account of SEZ unit. Sale to DTA would also be subject to

mandatory requirement of registration of pharmaceutical products (including bulk drugs). An amount equal to Anti Dumping duty under section 9A of the Customs Tariff Act, 1975 leviable at the time of import, shall be payable on the goods used for the purpose of manufacture or processing of the goods cleared into DTA from the unit….."

Notification No. 23/2003-C.E. dated 31.03.2003 as amended

"In exercise of the powers conferred by sub-section (1) of section 5A of the Central Excise Act, 1944 (1 of 1944) (hereinafter referred to as the Central Excise Act), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts excisable goods of the description specified in column (3) of the Table below, and falling within the Chapter No. of the Fourth Schedule of the Central Excise Act, 1944] (hereinafter referred to as the Central Excise Tariff Act), specified in the corresponding entry in column (2) of the said Table, produced or manufactured in an export oriented undertaking or an Electronic Hardware Technology Park (EHTP) Unit or a Software Technology Park (STP) Unit and brought to any other place in India in accordance with the provisions of [2][Foreign Trade Policy] and subject to the relevant conditions specified in the Annexure to this notification, and referred to in the corresponding entry in column (5) of the said Table, from so much of the duty of excise leviable thereon under section 3 of the Central Excise Act as specified in the corresponding entry in column (4) of the said Table.

Table

Sr. No.	***Chapter or heading No. or sub-heading No.***	***Description of Goods***	***Amount of Duty***	***Conditions***
(1)	***(2)***	***(3)***	***(4)***	***(5)***
1.	*Any Chapter*	*All goods*	*Duty of excise leviable thereon as is equivalent to the additional duty of customs leviable on such goods under sub-section (5) of section 3 of the Customs Tariff Act, 1975 (51 of 1975), read with the proviso to sub-section (1) of section (3) of the said Central Excise Act*	*1*
2.	*Any Chapter*	*All goods*	*In excess of the amount equal to the aggregate of duties of customs leviable on like goods, as if,-* *(a) the duty of customs specified in the First Schedule to the Customs Tariff Act, 1975 (51 of 1975), read with any other notification in force was reduced by 50%, and* *(b) no additional duty of customs was leviable under sub-section (5) of section 3 of the said Customs Tariff Act:* ***Provided** that while calculating the aggregate of customs duties, additional duty of customs leviable under sub-section (5) of section 3 of the said Customs Tariff Act shall be included if the goods cleared into Domestic Tariff Area are exempt from payment of sales tax or value added tax.* *Illustration: - Assuming product X has the value Rs. 100/- under section 14 of the Customs Act, 1962, and for the purposes of this illustration, is chargeable to basic customs duty of 10% ad valorem and additional duty of 20% ad valorem only, then the computation of duty required to be paid would be as follows:* *Basic Customs duty but for this exemption= Rs. 10/-*	*2*

			Basic Customs duty because of this exemption= Rs. 5/- *Value for the purposes of calculation of additional duty = Rs. 100/- + Rs. 5/- = Rs. 105/-* *Additional duty= 20% of Rs. 105/- = Rs. 21/-.* *Total duty payable after this exemption= Rs. 5/- + Rs. 21/- = Rs 26/-]*	

ANNEXURE

Sr. No.	Conditions
1.	If the goods being cleared into the Domestic Tariff Area are not exempt by the State Government from payment of sales tax or value added tax.
2.	If,- (i) the goods are cleared into Domestic Tariff Area in accordance with sub-paragraphs (*a*), (*d*), (*e*) and (*g*) of *Paragraph 6.07* of the Foreign Trade Policy; (ii) omitted (iii) clearance of goods into Domestic Tariff Area under sub-paragraphs (*a*), (*d*), (*e*) and (*g*) of *Paragraph 6.07* of the Foreign Trade Policy shall be allowed only when the unit has achieved positive Net Foreign Exchange Earning; and (iv) clearance of goods into Domestic Tariff Area under sub-paragraph (*d*) of *Paragraph 6.07* of the Foreign Trade Policy in excess of 5% of free on board value of exports made by the said unit during the year (starting from 1st April of the year and ending with 31st March of the next year) shall be allowed only when the unit has achieved positive Net Foreign Exchange Earning.

8.1 On plain reading of the above legal provisions under Section 3 of the Central Excise Act, 1944 and the duty exemption notification No.23/2003-C.E. dated 31.03.2003, governing the clearances from 100% EOU to DTA, it transpires that the appropriate duty leviable and chargeable on the EOU is the 'Central Excise duty' in terms of Proviso clause to Section 3 ibid. Further, the amount of central excise duty that is payable on such DTA clearances by 100% EOU is calculated as the aggregate of the duties of customs which would be leviable under the Customs Act, 1962, on like goods produced or manufactured outside India if imported into India; and the valuation of goods shall be done in terms of the provisions of the Customs Act, 1962 and the Customs Tariff Act, 1975.

8.2 In the impugned order, learned Commissioner have examined these aspects and have come to the conclusion that the appellants have undervalued the goods which were cleared to their sister units, inasmuch as 110% of the cost of production was adopted as the value, instead of comparable prices, and the differential excise duty demand was confirmed. The relevant paragraphs of the impugned order is quoted as below:

> *"14. As already elucidated by the assessee above, that in respect of clearance of goods by an EOU to the DTA, the Hon'ble Supreme Court has held that one has to forget that the said goods have been manufactured in India. It must be assumed that the said goods have been imported into*

India and accordingly compute the aggregate of the duties of customs which would be leviable on the goods imported into India. I find that in order to value the goods sold by the EOU to the sister concern in the DTA, one has to find out the value of identical goods as provided under Rule 4 of the Customs Valuation Rules, 2007. Keeping in mind the directions of the Hon'ble Supreme Court, which has been accepted by the assessee themselves, one has to forget that the identical goods have been manufactured in India and it must be assumed that the said goods have been imported into India. Once this reality is established, it becomes very easy to arrive at the value of the identical goods under Rule 4 of the Customs Valuation Rules. The assessee is selling identical goods to the unrelated parties in the DTA. The said value is available and it can be fairly assumed that the said goods have been imported into India for the purpose" of valuation of goods sold by the EOU into the DTA. Since the value of identical imported goods are now available, the valuation of the said goons can be easily adopted to arrive at the assessable value of the goods sold by the EOU to its sister concern in the DTA.

15. I find that that the assessee has argued that the value of identical goods sold by them in the DTA to unrelated buyers cannot form the basis of file value of goods sold to sister concern because the said sales cannot treated as goods imported into India and they are not goods sold for export to. India. I find that this argument of the assessee cannot be accepted because they themselves agree that in respect of sales by EOU to DTA, it should be assumed that the said goods are imported into India and applying the same logic, it can be held that the said goods manufactured by them the EOU and sold in DTA are deemed to have been sold for export into India. An EOU is considered as a foreign land for the purpose of taxation accordingly, goods sold by them in the DTA are treated as imports into the country from the EOU. The assessee cannot at one stage argue that the goods should be assumed to be imported for the purpose of payment of duty to DTA clearances of unrelated buyers and on the next footing state that [1.1(] the said goods cannot be treated as imported goods for the purpose of clearance their sister concern. This clearly reveals the double standards adopted the assessee with an intention to evade payment of proper duty. I find that the Customs Valuation Rules have to be applied sequentially. Once it is concluded that the value of identical goods are available and it can he adopted for the purpose of valuation of goods sold by the EOU to its sister concern in the DTA, I need not go into the other Rules of Valuation. The Board vide its Circular No.933/23/2010-CX dated 16.8.2010 has held while valuing the good cleared in DTA by EOU's, value will have to be determined by sequential application of Rules 3 to 9. The assessee has also accepted this method of sequential application in their reply. This view also supported by the CESTAT in the following cases:-

1. *Endress Hauser Flowtec P. Ltd. reported in 2009 (237) ELT 598 (T)*
2. *Morarjee Brembana Ltd reported in 2003 (154) ELT 500 (T)*
3. *Uniworth Textile Ltd reported in 2009 (244) ELT 401 (T)*

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17. I find that the assessee has argued that the goods cleared to sister concern should be valued at 110% of the cost of production as per the provisions of Rule 8 of Customs Valuation Rules. On a perusal of the said Rule, I find that the said Rule speaks about valuation on the basis of the computed value which shall consist of the cost or value of materials, fabrication or other processing employed in producing the imported goods + an amount for profit and general expenses equal to that usually reflected *in the sale of goods of same class or kind. For the sake of an EOU, the. words imported goods should be read as goods cleared by, the EOU to the DTA. I find that the assessee is selling identical goods to various unrelated customers in the DTA. The sale price of the said goods consist of the cost of the said goods the profit. Therefore, even if the assessee's argument that the goods should be assessed to duty as per the provisions of Rule 8 of the Customs Valuation Rules is accepted, the value of the goods cleared by them to their sister concern will be equal to the value of the goods sold by them to the unrelated parties in the DTA. Therefore, the argument of the assessee that 110% of the cost of production as per CAS 4 should be the computed value of the goods sold by them to their sister concern cannot be accepted. The method adopted by the assessee is not akin to the method proposed in Rule 8 of the Customs Valuation Rules.*

18. In view of the above, I hold that the goods cleared by the assessee to their sister concern in the DTA should be valued at the value of the identical goods sold by the assessee to the unrelated parties in the DTA. Thus, I hold that the assessee has undervalued the goods cleared to their sister concern and has therefore violated the provisions of Rule 4, 6 and 8 of the Centre! Excise Rules, 2002.

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20. As per the various conditions of the said Bond they have also undertaken pay promptly on demand all charges & any other sums dues, together with interest on the same at the prescribed rate from the due date of such demand in respect of all the warehoused goods not properly accounted for. All the fines, penalties etc if any imposed for violation of the provision of the Act of the Rules and Regulations shall also be paid promptly.

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22. I find that the assessee is bound by the said Bond and Bank Guarantees where-under they have undertaken to pay on demand any amount, which is demanded in connection with the violation of any of the provisions of the-Customs and Central Excise Act. Under the said circumstance, I find that the limitation under Section 11 A of the Central Excise Act, 1944, will not be applicable in the case of an EOU as they are bound to pay the amount demanded, so long as the bond and bank guarantees are valid. Thus, the limitation of extended period under Section 11A will not be applicable in case of an EOU. It is not necessary to prove suppression or misdeclaration to demand the Central Excise Dues from an EOU for the extended period as they have bound themselves to pay the duties on demand during the validity of the Bond. In this case, I agree that the facts were partially known to the Department that the assessee is following the method of computed value to clear the goods to their sister concern and by inference, it can be suggested that the Department should have known that the assessee was clearing identical goods to unrelated parties in the DTA. However, since the assessee is bound to pay the duty on demand, their plea that the demand is hit by limitation is not acceptable. The demand for duty is confirmed under the provisions of Section 11 A (10) read with the However, I accept the B.17 Bonds filed by the assessee from time to time. contention of the assessee that no penalty can be imposed on them under Section 11AC of the Central Excise Act, 1944, in view of the fact that they had not suppressed any facts from the Department.

23. As far as penalty under Rule 25 of the Central Excise Rules, 2002 is concerned, I find that the assessee had violated the provisions of Rule 4

> *and 8 of the Central Excise Rules, 2002, with an intent to evade payment of duty by undervaluing the goods sold to their sister concern in the DTA. Thus, they have rendered themselves liable for penal action under Rule 25 (a) of the Central Excise Rules, 2002. However, I find that this is not a fit case for imposing penalty equal to the duty involved. The issue of valuation is a matter of interpretation and in view of various Tribunal decisions and Circulars, the manner of valuation of goods sold to sister concern in the DTA when comparable price is available for identical goods sold to unrelated parties in the DTA was not free from doubt. Therefore, this is a fit case to show some leniency on the assessee as far as penalty is concerned. The provisions of Rule 25 of the Central Excise Rules, 2002, prescribe a penalty 'not exceeding' the duty or Two Thousand Rupees, whichever is greater and I find that it is not mandatory to impose a penalty equal to the duty involved."*

8.3 There is no dispute on the fact that the levy of central excise duty is required to be done under Section 3 of the Act of 1944; and that the amount of such central excise duty payable on such DTA clearances shall be the aggregate of the duties of customs which would be leviable under the Customs Act, 1962, on like goods produced or manufactured outside India if imported into India. However, in the impugned order, learned Commissioner had treated the 100% EOU, as though it is situated in a foreign land outside India and the price at which the appellants EOU unit sold to other dealers in India, was adopted as 'comparable price' for confirmation of the adjudged demands, on the ground that these are the comparable price of like goods manufactured outside India by appellants EOU and the DTA clearances have been treated as though it is 'import into India' and such price holds good for imports into India and is it correct to be treated as comparable price. This is apparently seen from the reasoning given by the learned Commissioner in the impugned order at paragraph 15.1 as "*EOU is considered as a foreign land for the purpose of taxation accordingly, goods sold by them in the DTA are treated as imports into the country from the EOU."* It is clearly laid down in the definition at paragraph 9.24 of the FTP that EOU means Export Oriented Unit for which an LOP has been issued by Development Commissioner. Further, it is also explained therein that EOU units as those units undertaking to export their entire production of goods and services except permissible sales in DTA for manufacture of goods, including repair, re-making, reconditioning, re-engineering, rendering of services etc. There are differences between EOU unit and Special Economic Zone (SEZ) unit, although both EOUs and SEZs, were initiated to boost exports. EOUs are governed by FTP, whereas SEZ are governed by Special Economic Zones Act, 2000. An EOU can be set up anywhere in the country, provided it meets the scheme's criteria. On the other hand, an SEZ is a specially demarcated enclave that is deemed to be outside the Customs jurisdiction and therefore, a foreign territory. Thus, any sale made from an SEZ to DTA is considered as import for the DTA unit. However, this is not the case in respect of EOUs. Moreover, any supply from DTA to an SEZ is considered as export. On the other hand supplies from DTA to an EOU are considered only as 'deemed exports' for the limited purpose of FTP. Being a clearly demarcated area, there is substantial control over the physical movement of goods to and from SEZs, but the same cannot be said about EOUs. In terms of the fiscal treatment, SEZs are zero rated and hence exempt from payment of GST while in the case of EOUs, the principle of refund of GST paid is applicable. Therefore, in our considered opinion, the reasoning given by the learned adjudicating authority to treat DTA clearances made by EOU, as import from outside India by the same EOU is incorrect and not supported by any legal provisions of the FTP or any other Act. Thus, the impugned order is liable to be set aside on this ground alone.

8.4 On careful reading of the legal provisions regarding valuation of the goods cleared made by EOU, it transpires that the excise duty payable on DTA clearances would be determined in terms of the Customs Act, 1962; Customs Tariff Act, 1975 and the rules made thereunder, the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, shall apply for valuation of such goods. Accordingly, in the present factual position of the case, where goods are cleared by the appellants EOU unit to their sister units on stock transfer basis, there is no sale involved. Further, since these two entities are related to each other and in the absence of sale, Rule 3 ibid cannot be applied for accepting the transaction value of goods. Furthermore, since the goods cleared for DTA to sister units cannot be compared to the goods imported from outside India, in order to treat these as 'identical goods' or 'similar goods' or such goods sold at the condition it is imported at, Rule 4, 5 & 7 ibid cannot also be applied for determining the value. Therefore, the value has to be decided on the basis of computed value determined under Rule 8 or on a residual method under Rule 9 ibid. Since, the cost of production was available, the appellants adopting 110% of such cost of production, as the basis for valuation of goods is duly in compliance with the CVR. Therefore, we find that the value of goods for clearances to DTA determined by the appellants EOU unit is in conformity with the Rules of 2007 and the customs statute.

9.1 In this regard, we find that the Co-ordinate Bench of the Tribunal in the case of *Cadila Healthcare Ltd.* (supra) had upheld the valuation of DTA clearances at 110% of the cost of production under Rule 8 ibid. The relevant paragraphs of the said order is quoted herein below:

"4.14 We find that since addition of profit margin in terms of Rule 8 cannot be made of the goods manufactured in India. Therefore, the most appropriate profit margin must be taken 10% which is prescribed as notional profit in Rule 8 of Central Excise Valuation Rules, 2000. Here we would like to make it clear that we do not mean that Rule 8 of Central Excise Valuation Rules is applicable. However, taking into consideration that the legislators with a conscious mind thought appropriate to keep 10% profit margin in case of goods manufactured in India, no different parameter can be applied only because the goods manufactured in a 100% exports oriented unit which is also located in India. Therefore, we are of the view that the appellant's valuation of goods i.e. 110% of the cost of manufacture is correct and legal and no further addition can be made in such value.

xxx xxx xxx xxx

4.17 Without prejudice to the above, we find that the appellant have also argued that demand for the extended period is hit by limitation as there is no mala fide on the part of the appellant. In this regard we find that this is not a case of clandestine removal of the goods without the knowledge of the department. However, the appellant was under bonafide belief that since the goods are manufactured in the country, the valuation of goods cleared to their related person is required to be determined as prescribed under Rule 8 of Central Excise Valuation Rules, 2000. We find that being a 100% Export Oriented Unit, there is a regular vigil of the department on the entire activity of the appellant. The fact that the appellant are clearing their goods in the DTA and to their related parties, the department was very well aware that in such case what should be the correct value of the goods and the department could have verified the correctness of the value on that basis. The appellant has adopted CAS-4 (Cost Accounting Standard-4) prescribed by the CBEC for determining the value for excise purpose for a captive consumption. 21 E/10320,10329/2020-DB Moreover, there are judgments particularly in the case of the Incowax which is an EOU unit reported at 2006 (205) ELT 773 of this Tribunal, wherein it was permitted that the value to be adopted on the basis of cost of production and 10% profit for clearance of goods in DTA to the assessee's other unit. The department in that case had accepted this method of valuation. With these undisputed fact it cannot be said that the appellant have suppressed any fact from the department with intent to evade payment of duty. It is further observed that since the supplies made under ARO and in other cases the Cenvat credit was available in respect of CVD/SAD portion to the recipient of goods, the entire issue was of revenue neutral. Therefore, for this reason also no mala fide intention can be attributed to the appellant for short payment of duty, if any. Therefore, we do not have any doubt in our mind that looking to the facts of this case the appellant have not suppressed from or mis-declared the information to the department with intent to evade payment of duty. Accordingly, the extended period is not available in the present case."

9.2 Further, we also find that the Hon'ble Supreme Court in the case of *Morarjee Brembana Ltd.* (supra) had upheld the sale price charged to a customer in India cannot be considered as the price in the course of import. The relevant paragraphs of the said order is quoted herein below:

"10. As is clear from the bare reading of the aforesaid proviso, in those cases where excisable goods are produced or manufactured by hundred per

cent export oriented undertaking are allowed to be sold in India, the duty of excise has to be the amount equal to the aggregate of the duties of customs which would be leviable under Section 12 of the Customs Act, on like goods produced or manufactured outside India if imported into India and where the said duties of custom are chargeable by reference to their value, the value of such excisable goods shall be determined, in accordance with the provisions of the Customs Act and Customs Tariff Act, 1975.

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

9.3 On the issue of confirmation of duty demands by invoking extended period of limitation, we find that the learned Commissioner had on the one hand accepted that the appellants had not suppressed any facts from the department and accordingly dropped the proposal in the SCN for imposition of penalty on the appellants under Section 11AC of the Act of 1944. However, on the other hand, he had confirmed the duty demands for the extended period of time on the grounds that the appellants had executed B-17 bond before the Central Excise authorities. We find that such a contrary stand for confirmation of adjudged demands in the impugned order does not stand the legal scrutiny.

9.4 In this regard, we find that the Co-ordinate Bench of the Tribunal in the case of *Emcure Pharmaceuticals Ltd.* (supra) had held duty demand beyond limitation period cannot be sustained on the ground of appellant having executed B-17 bond alone. The relevant paragraph of the said order is quoted herein below:

"5. *We have carefully considered the submissions made by both the sides. From the records it is clearly seen that the respondent had declared to the department that they would be availing the benefit of Notification 23/2003 in respect of advance DTA sales to be effected by them in terms of the permission granted by the Development Commissioner as early as in 2004 itself. Therefore, the respondent cannot be, said to have withheld any information from the department. The respondent's plea that they were entitled for the benefit of exemption under Notification 23/2003 under the belief that they were entitled for benefit of such Notification cannot be said to be a mis-declaration as held by the Hon'ble Apex Court in Northern Plastics Ltd. v. Collector of Customs & Central Excise - AIR 1998 SC 2371 = 1998 (101) E.L.T. 549 (S.C.). If the department felt that the respondent was not entitled to such exemption, they should have issued the show cause notice within the period stipulated under Section 11A. Revenue's reliance on the decision of the Tribunal in the case of Endress + Hauser Flowtec (I) Pvt. Ltd. (supra) does not come to their rescue for the reason that B-17 bonds are executed not only by the 100% EOUs but also units in the DTA. If Section 11A is applicable in respect of units in DTA who have executed B-17 bonds before the department, the same logic would apply in respect of 100% EOUs as well. Therefore, the argument that merely* *because the respondent has executed a B-17 bond they would fall outside the purview of Section 11A is illogical and irrational. One cannot interpret the law in such a way so as to make the provisions of law redundant."*

The department, being not satisfied with the above order, had filed an appeal before the Hon'ble Bombay High Court. In disposing the said appeal, the Hon'ble Bombay High Court had dismissed the department's appeal and upheld the order of the Tribunal. The relevant paragraph of the said order is extracted and placed below:

"4. *These very facts were, therefore, appreciated by the Tribunal and in arriving at the conclusion that the show cause notice and the proceedings in pursuance thereof were barred by limitation. It may be that the Tribunal dealt with an incidental contention of the Revenue. Merely because that incidental question has been dealt with, we cannot loose sight and shift the focus from the main question. The main question was the applicability of Section 11A and invocation of the extended period thereunder. The extended period could not have been invoked in the absence of the requisite ingredients and to be found in Clauses (a) to (e) of sub-section (4) of Section 11A of the Central Excise Act, 1944. This is clearly a finding of fact and reached in the backdrop of the assessee's peculiar case. We do not think that such findings raise any substantial question of law. The Tribunal's view cannot be said to be perverse. It is a possible view of the matter. The appeal is devoid of merits and is dismissed."*

10. In view of the settled position of law, as discussed in the above referred orders of the Tribunal, and in view of the above judgements of the Hon'ble High Court of Bombay and Hon'ble Supreme Court, the issue arising out of the present dispute is no more open for any debate and as such, the impugned order passed by the learned Commissioner of Central Excise & Customs cannot stand for legal scrutiny. Since, the confirmation of Central Excise duty demands are not sustainable, consequential imposition of penalty on the appellants cannot also be sustainable. In view of the above, we are of the considered view that the impugned order is liable to be set aside.

11. Therefore, the impugned order dated 18.09.2013 is set aside and the appeal is allowed in favour of the appellants.

(Operative portion of the order pronounced in open Court)

(S.K. Mohanty)
Member (Judicial)

(M.M. Parthiban)
Member (Technical)

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