CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL REGIONAL BENCH AT KOLKATA

Division Bench

Court No. 2

Excise Appeal No. 75677 of 2017

(Arising out of Order-in-Original No.80-83/COMMR/DGP/2016dt.26.02.2016 passed by CCCE& ST, Durgapur Commissionerate)

M/s Sova Solar Ltd
Layout Plot No.25, EPIP,
Vill – Banskopa, P.O. – Rajbandh,
Durgapur – 713 212 (W.B.) **.....Appellant**

VERSUS

Commissioner of Central Excise & Service Tax, Durgapur
Satyajit Roy Sarani, City Centre,
Burdwan (W.B.), Durgapur – 713 216 **.....Respondent**

Appearance

Shri A.K. Raha & Shri Aditya Das Gupta, Advocates for the Appellant.
Shri S.S. Chattopadhyay, Authorized Representative for the Respondent.

Coram:

HON'BLE MR. S.S. GARG, MEMBER (JUDICIAL)
HON'BLE MR. P. VENKATA SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER No. 75365/2020

Date of Hearing: 04.02.2020
Date of Decision: 03/07/2020

[Order per: P. VENKATA SUBBA RAO.]

1. This appeal is filed by the appellant challenging the impugned Order-in-Original No.80-83/COMMR/DGP/2016 dt.26.02.2016.

2. Heard both sides and perused the records. The appellant is a 100% Export Oriented Unit (EOU) registered with the department. EOUs are units which are primarily setup to manufacture of goods for export and are given special concessions by the Government. The capital goods, raw materials, etc., which are procured by them are exempted from payment of customs duties (in case of imports) and Central Excise duty (in case of domestic

procurement). They are required to export their final products. They are also permitted to sell some portion of their final products within the country (Domestic Tariff Area) subject to conditions as specified from time to time. As EOUs are practically duty-free, they are also treated as if they are outside India. Therefore, in respect of any goods which are cleared by the EOU for sale within India, excise duty is collected at a rate equivalent to Customs duty leviable on identical goods imported into India in terms of the proviso to section 3 of Central Excise Act, 1944.

3. In this case, the appellant had imported inputs claiming the benefit of exemption notification No.52/2003-CUS dt.31.03.2003 for Basic Customs Duty and applicable Central Excise Duty (on indigenously procured raw materials). They were supposed to manufacture solar modules and export. However, the appellant was not able to export goods and had cleared their final products in DTA claiming exemption under notification Nos.24/2005-CUS as amended by notification No.132/2006-CUS and notification No.06/2006-CE and notification No.12/2012-CE. Final products manufactured by the appellant have zero basic customs duty because they appear in List-5 of notification No.06/2006-CUS dt.01.03.2006 and at Sl.No.332 of notification No.12/2012-CE dt.17.03.2012. In other words, the final products manufactured by the appellant were fully exempted from payment of duty. The question which arises is, under such circumstances, whether the appellant is entitled to claim the benefit of exemption notifications meant for 100% EOUs in respect of the inputs which they had procured. It is the case of the revenue that the appellant is not entitled to the benefits of exemptions on the inputs. It is the case of the assessee that they were entitled to the benefits of these exemption notifications. Four Show Cause Notices (SCN) were issued as follows:

Sl.No.	SCN No. & Date	Issued by	Period of demand
1	71/Commr/Bol/13 dt.07.10.2013	Commissioner of Central Excise, Service Tax & Customs, Bolpur	Feb 2011 to March 2013
2	33/Commr/Bol/14 dt.29.04.2014	-do-	April 2013 to Dec 2013
3	06/Commr/Dgp/15 dt.29.01.2015	Commissioner of Central Excise, Service Tax & Customs, Durgapur	Jan 2014 to Aug 2014
4	35/Commr/Dgp/15 dt.01.10.2015	-do-	Sep 2014 to July 2015

4. The appellant contested the jurisdiction of the adjudicating authority as two of the SCNs were issued by the Commissioner of Central Excise, Bolpur and the other two SCNs were issued by the Commissioner of Central Excise, Durgapur. All were decided by the Commissioner of Central Excise, Durgapur. During hearing, learned Departmental Representative (DR) has clarified that there was only re-organisation of the Commissionerates' jurisdiction and as a result, the Commissioner of Central Excise and Service Tax, Durgapur had decided all the four matters. Learned Counsel for the appellant also did not press this point before us. It is not in dispute that the appellant's final products were exempted from payment of duty under both the customs notifications and the central excise notification. As the appellant is a 100% EOU the duty has to be paid on their final products cleared to the DTA as if such goods are imported into India i.e., at the rate at which customs duties will be applicable if similar goods were imported to India. If such goods were imported to India they would be subjected to basic customs duty as per the Customs Tariff and additional duty of customs (also known as CVD) as per the Central Excise Tariff. Both the basic customs duty and additional duty of customs are 'NIL' for their final products by virtue of the exemption notifications available to them. Therefore, no duty was paid on the final products cleared by the appellant to the DTA. There is no dispute regarding the eligibility of the exemption notification for their final products.

5. What is in dispute is whether the appellant is also entitled to duty-free inputs (both imported and indigenous) under the exemption notifications 52/2003-CUS dt.01.03.2003 and 22/2003-CE.

6. It is undisputed that the notification Nos.52/2003-CUS and 22/2003-CE are meant for exemption to 100% EOUs. It is also not in dispute that both these exemption notification are issued by the Finance Ministry in consonance with corresponding provisions of Foreign Trade Policy. Para 6 of notification No.22/2003-CE reads as follows:

> *"6. Notwithstanding anything contained in this notification,* ***the exemption contained herein shall also apply to the goods used for the purposes of processing, manufacture, production or packaging of articles in an user industry*** *and such articles (including rejects, wastes, scrap and remnants arising out of such processing, manufacture, production, or packaging of such articles)* ***even if not exported out of India are allowed to be cleared outside the user industry*** *under and in accordance with the Export and Import Policy and subject to such other limitations and conditions as may be specified in this behalf*

by Development Commissioner, or the Board of Approval or the Inter Ministerial Standing Committee (IMSC), as the case may be, on payment of appropriate duty of excise, or where such articles are cleared to the warehouse appointed or registered under notification of the Government of India in the Ministry of Finance, Department of Revenue, No. 26/98-Central Excise (NT), dated the 15th July,1998 or No. 46/2001-CE (NT), dated 26th June, 2001 or cleared to the warehouse authorised to carry on manufacturing process or other operation under section 65 of the Customs Act, 1962 (52 of 1962) and under the Manufacture and Other Operations in Warehouse Regulations, 1966, or cleared to the holders of certificate for duty free import from Apparel Export Promotion Council and Council for Leather Export as specified in paragraph 6.9(e) of Export and Import Policy, without payment of duty.

Provided that goods which have been repaired, reconditioned, re-engineered shall not be allowed to be cleared outside the units.

Provided further that where such articles (including rejects, waste and scrap materials) are not excisable, duty foregone equal in amount to that leviable on the inputs obtained under this notification and used for the purpose of manufacture of such articles, which would have been paid but for the exemption under this notification, shall be payable at the time of clearance of such articles.*"*

7. Similarly, Para 3 of notification No.52/2003-CUS dt.01.03.2003 reads as follows:

"3. Notwithstanding anything contained in this notification, ***the exemption herewith shall also apply to goods which on importation into India or procurement, are used for the purpose of manufacture of finished goods or services and such finished goods and services****, (including by-products, rejects, waste and scrap arising in the course of production, manufacture, processing or packaging of such goods)* ***even if not exported, are allowed to be sold in Domestic Tariff Area*** *in accordance with the Export and Import Policy and subject to such other limitations and conditions as may be specified in this behalf by Development Commissioner, or the Board of Approval or the Inter Ministerial Standing Committee, as the case may be, on payment of appropriate duty of excise leviable thereon under section 3 of the Central Excise Act, 1944 (1 of 1944) or where such finished goods (including by-products, rejects, waste and scrap) or services are cleared to the warehouse appointed or registered under notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 26/98-Central Excise (NT), dated the 15th July, 1998 or No. 46/2001-Central Excise (NT), dated the 26th June, 2001 or cleared to the warehouse authorised to carry out manufacturing process or other operation under section 65 of the Customs Act, 1962 (52 of 1962) and under the Manufacture and Other Operations in Warehouse Regulation, or cleared to the holders of certificate from Apparel Export Promotion Council and Council for Leather Export for duty free imports as referred to in clause (e) of the paragraph 6.9 of the Export and Import Policy, without payment of duty.*

Provided that where such finished goods (including rejects, waste and scrap and remnants) are not excisable, customs duty equal in amount to that leviable on the inputs imported under this notification and used for the purpose of manufacture of such finished goods, which would have been paid but for the exemption under this notification shall be payable at the time of clearance of such finished goods.

Provided further that the Software Technology Park (STP) unit and the Electronic Hardware Technology Park (EHTP) unit engaged in manufacture of electronic hardware and software in integrated manner, shall be allowed to sell software, data entry and conversion, data processing, data analysis, control data management or rendering of call center services through data communication link and or tele communication link subject to such conditions as may be specified by the Commissioner of Customs or Commissioner of Central Excise, as the case may be."

8. As may be seen, both the exemption notifications extend the exemption even to inputs which are used for manufacture of goods which are cleared to DTA. However, if such final products are "not excisable", duty foregone equal in amount to that leviable on inputs obtained under these notifications and used for manufacture of such articles would have to be paid at the time of clearance of such articles. This is evident in the second proviso to Para 6 of notification No.22/2003-CE above and first proviso to Para 3 of notification No.52/2003-CUS.

9. That takes us to the next question as to what is the meaning of "not excisable", within the context of this particular exemption notification. This is clear from the corresponding Foreign Trade Policy. Para 6.08(J) of Foreign Trade Policy 2015-2020 as well as Para 6.8(J) of Foreign Trade Policy 2009-2014 which explained that non-excisable products in the context of EOU/EHTP/STP/BTP includes any product where the basic customs duty and CVD is 'NIL'. This Para reads as follows:

> "***In case of DTA sale of goods manufactured by EOU/EHTP/STP/BTP, where basic duty and CVD is nil, such goods may be considered as non-excisable for payment of duty.***"

10. It is the case of the revenue that since the final products cleared by the appellant were chargeable to 'NIL' basic customs duty and 'NIL' CVD and were also cleared paying 'NIL' rate of duty, they are not excisable and the exemption on the inputs under the notification No.52/2003-CUS and 22/2003-CE on the inputs is not available to the appellant. Accordingly, the following duties were demanded in the four SCNs.

Sl.No.	SCN No. & Date	Central Excise Duty	Customs Duty	Total
1	71/Commr/Bol/13 dt.07.10.2013	77,65,349	1,61,64,228	2,39,29,577
2	33/Commr/Bol/14 dt.29.04.2014	71,19,907	1,22,95,842	1,94,15,749
3	06/Commr/Dgp/15 dt.29.01.2015	66,34,027	76,39,578	1,42,73,605
4	35/Commr/Dgp/15 dt.01.10.2015	1,37,80,071	2,63,08,348	4,00,88,419
TOTAL		**3,52,99,354**	**6,24,07,996**	**9,77,07,350**

11. Interest was also demanded on the aforesaid amounts and penalties were proposed to be imposed under section 11AC of Central Excise Act and Rule 25 of Central Excise Rules (CER), 2002. Penalty was also proposed to

be imposed under section 112 of Customs Act, 1962. The appellant contested the demands and after following due process, the learned Commissioner, in the impugned order, held as follows:

> *" In view of the discussions made hereinbefore, I pass the following order:*
>
> *i. I confirm the demand of Central Excise duty of an amount **Rs.3,52,99,354/- (Rupees Three Crore Fifty-two lakh Ninety-nine thousand Three hundred Fifty-four only)** and order recovery of the same from M/s Sova Power Ltd., under proviso to erstwhile Section 11A(1) and Section 11A(10) of the Central Excise Act, 1944.*
>
> *ii. I impose interest at appropriate rate under provision of Section 11AA (Erstwhile Section 11AB) of Central Excise Act, 1944.*
>
> *iii. I impose penalty **Rs.3,52,99,354/- (Rupees Three Crore Fifty-two lakh Ninety-nine thousand Three hundred Fifty-four only)** on the said notice Company under Rule 25 of Central Excise Rules, 2002 read with Section 11AC of Central Excise Act, 1944.*
>
> *iv. I confirm the demand of Customs duty of amount **Rs.6,24,07,996/- (Rupees Six crore Twenty-four lakh Seven thousand Nine hundred Ninety-six only)** and order recovery of the same from M/s Sova Power Ltd., in terms of Section 28(2) of Customs Act, 1962 as amended from time to time.*
>
> *v. I impose interest at appropriate rate under provision of Section 28AB of Customs Act, 1962 (Section 2811 wherever applicable).*
>
> *vi. I impose penalty of **Rs.6,24,07,996/- (Rupees Six crore Twenty-four lakh Seven thousand Nine hundred Ninety-six only)** on teh said notice Company under section 114A of Customs Act, 1962."*

12. Aggrieved, the appellant filed the present appeal. Before filing this appeal, the appellant had approached the Hon'ble High Court of Kolkata by filing Writ Petition No.10544/2016 which was dismissed by the Hon'ble High Court of Kolkata on 15.07.2016 giving the appellant the opportunity to seek alternative remedy before this Tribunal. Thereafter, they filed the present appeal. The SCN was issued seeking to deny benefit of notification No.52/2003-CUS and 22/2003-CE on the inputs which they used to manufacture. Learned counsel for the appellant did not contest that they were not eligible for the aforesaid two notifications. Instead his argument was that even if they were not entitled to the benefit of the aforesaid two notifications, they were indeed entitled to the benefit of notification Nos.24/2005-CUS dt.01.03.2005 as amended by notification No.132/2006-CUS dt.30.12.2006 read with notification No.06/2006-CE dt.01.03.2006 and notification No.12/2012-CE dt.17.03.2012 in respect of the inputs which were imported as well as which were procured indigenously. His argument was that if they are covered by other exemption notifications, even if they

are not entitled to the benefit of exemption notifications which they had sought, they would still be eligible for the exemption and therefore, no demand can be confirmed against them. Accordingly, the entire demand needs to be set aside along with interest and penalties.

13. Learned DR argues in the first place that this bench cannot go beyond the scope of the SCN which only sought to deny the benefit of such exemption notifications which they were admittedly not entitled to. However, even if the submissions of learned counsel were accepted, the appellant was not entitled to the benefit of the other exemption notificationswhich they now claimed in respect of these inputs which they had procured. Therefore, he submits that this appeal needs to be rejected.

14. In this factual background, we proceed to examine the appellant's eligibility to exemption notifications which are now being sought. Notification No.24/2005-CUS reads as follows:

> *" In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962(52 of 1962), the Central Government, on being satisfied that it is necessary in the public interest so to do, herebyexempts the following goods, falling under the heading, sub-heading or tariff-item of the First Schedule to the CustomsTariff Act, 1975 (51 of 1975) and specified in column (2) of the Table below, when imported into India, from the wholeof the duty of customs leviable thereon under the said First Schedule, namely:-*

TABLE

S.No.	*Goods falling under Heading, Sub-heading or Tariff item*
1.	*3818 00*
2.	*8456 91 00, 8469 11 00, 8470, 8471, 8473 21 00, 8473 29 00, 8473 30, 8473 50 00*
3.	*8517, 8520 20 00, 8523 (other than those falling under tariff item 8523 3000), 8524 31, 852440, 8524 91, 8525 20, 8531 20 00, 8532, 8533, 8534 00 00,* ***8541****, 8542, 8543 11 00, 8543 81 00,8544 70*
4.	*9009 11 00, 9009 21 00, 9009 91 00, 9009 92 00, 9009 93 00, 9009 99 00, 9010 41 00, 9010 4200, 9010 49 00, 9013 80 10, 9013 90 10, 9026, 9027 20 00, 9027 30, 9027 50, 9027 80, 9030 4000, 9030 82 00, 9031 41 00*
5.	***All goods for the manufacture of goods covered by S.Nos. 1 to 4 above, provided that the importer follows the procedure set out in the Customs (Import of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 1996.***

(This was amended by notification No.132/2006 dt.30.12.2006.)

Notification No. 132/2006-CUS dt.30.12.2006:

" In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962(52 of 1962), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby makes the followingamendments in the notification of the Government of India in the Ministry of Finance (Department of Revenue), No.24/2005-Customs, dated the 1st March, 2005, namely:-

In the said notification

(i) in the opening paragraph for the words, figures and letters "following goods, falling under the heading, sub-heading or tariff-item of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) and specified in column (2) of the Table below", the words "following goods of the description as specified in column (3) of the Table below and falling under the heading, sub-heading or tariff-item of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) as specified in the corresponding entry in column (2) of the said Table" shall be substituted;

(ii) for the table, the following table shall be substituted, namely:-

TABLE

S.No.	*Heading, Sub-heading or Tariff item*	*Description*
23.	*8541*	*All goods*
39.	*All Chapters*	*All goods for the manufacture of goods covered by S.Nos. 1 to 38 above, provided that the importer follows the procedure set out in the Customs (Import of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 1996.*

15. Notification No. 06/2006-CE reads as follows:

"In exercise of the powers conferred by sub-section (1) of section 5A of theCentral Excise Act, 1944 (1 of 1944), the Central Government, on being satisfied that it is necessary inthe public interest so to do, hereby exempts the excisable goods of the description specified in column (3)of the Table given below read with the relevant List appended hereto, as the case may be, and fallingwithin the Chapter, heading or subheading or tariff item of the First Schedule to the Central Excise TariffAct, 1985 (5 of 1986) (hereinafter referred to as the Central Excise Tariff Act), as are given in thecorresponding entry in column (2) of the said Table, from so much of the duty of excise specified thereonunder the First Schedule to the Central Excise Tariff Act, as is in excess of the amount calculated at therate specified in the corresponding entry in column (4) of the said Table and subject to the relevantconditions specified in the Annexure to this notification, and condition number of which is referred to inthe corresponding entry in column (5) of the Table aforesaid:

Provided that nothing contained in this notification shall apply to goods specified against S.No.10 of thesaid Table on or after the 1st day of May 2007.

Explanation.-For the purposes of this notification, the rates specified in columns (4) of the said Table aread valorem rates, unless otherwise specified.

TABLE

S.No.	*Chapter or heading or sub-heading or tariff item of the First Schedule*	*Description of excisable goods*	*Rate*	*Condition No.*
84	*Any Chapter*	***Non-conventional energy devices/ systems specified in List 5***	*Nil*	------

LIST 5
(See S. No.85 of the Table)

(1) Flat plate solar Collector

(2) Black continuously plated solar selective coating sheets (in cut length orincoil) and fins and tubes

(3) Concentrating and pipe type solar collector

(4) Solar cooker

(5) Solar water heater and system

(6) Solar air heating system

(7) Solar low pressure steam system

(8) Solar stills and desalination system

(9) Solar pump based on solar the rmal and solar photovoltaic conversion

(10) Solar power generating system

(11) Solar photovoltaic module and panel for water pumping and otherapplications

(12) Solar crop drier and system

(13) Wind operated electricity generator, its components and parts thereofincluding rotor and windturbine controller

(14) Water pumping wind mill, wind aero-generator and battery charger

(15) Bio-gas plant and bio-gas engine

(16) Agricultural, forestry, agro-industrial, industrial, municipal and urbanwaste conversion deviceproducing energy

(17) Equipment for utilising ocean waves energy

(18) Solar lantern

(19) Ocean thermal energy conversion system

(20) Solar photovoltaic cell

(21) Parts consumed within the factory of production of such parts for the manufacture of goods specified at S. Nos. 1 to 20 above."

16. Notification No.24/2005-CUS exempts certain goods including the final products manufactured by the appellant viz., solar modules which fall under the Customs Tariff 8541. These are covered at Sl.No.3 of the table. The inputs which they used are admittedly not covered at Sl.No.3. Learned counsel for the appellant submits that all goods used for manufacture of goods covered at Sl.No.1 to Sl.No.4 of the table are also covered at Sl.No.5 of the table which is reproduced above.

17. This notification was revised by notification No.132/2006-CUS which also covers the products at Sl.No.23 of the table and their inputs at Sl.No.39 of the table. Both S.No.5 of Notification No.24/2005-CUS and S.No.39 of the Notification No.132/2006-CUS require the importer to follow the procedure

set out in Customs (Import of goods at concessional rate of duty for manufacture of excisable goods) Rules, 1996. These rules require the claimant to obtain a registration from the department and also follow some procedures. However, they were already registered with the Central Excise department as an EOU. The CBEC had issued a clarification in DOF No.334/7/2017/TRU dt.01.02.2017. Para 6 of which *interalia* reads as follows:

> *" ... EOUs will also be eligible to import or procure raw materials/ inputs at other concessional/ nil rate of BCD, excise duty/ CVD or SAD, as the case may be, provided they fulfil all conditions for being eligible to such concessional or nil rate of duty.* ***For these purposes, if an EOU is already registered with the jurisdictional central excise authority, it will not be required to take any fresh registration under the Customs (Import of Goods at Concessional Rate of duty for manufacture of Excisable Goods and Other Goods) Rules, 2016, as the case may be****."*

18. Learned counsel would submit that although the clarification was issued by the CBEC in 2017, this should be applied to earlier periods also as it is only a question of technicality of being registered once or registered twice. Therefore, they cannot be denied the benefit of this exemption notification on the ground that they were not registered separately under the Rules.

19. Per contra, learned DR argues that a plain reading of the clarification shows that the exemption was given only with respect to the registration clarifying that two registrations, one with Central Excise department in the normal course of business and another for this purpose under the Customs (Import of goods at Concessional Rate of Duty for Manufacture of Excisable goods) Rules, 1996 was not required. This clarification was issued in the context of 2016 Rules which are more or less similar to the 1996 Rules. A perusal of these rules shows that several procedures have to be followed under these rules and the registration is only one of the steps. What has been exempted by the Board is only an additional registration but the remaining part of the rules has not been exempted. He would take us through these rules which read as follows:

> *" In exercise of the powers conferred by section 156 of the Customs Act, 1962 (52 of 1962),and in supersession of the Customs(Import of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules,2016 except as things done or omitted to be done before such supersession, the Central Government hereby makes the following, namely: –*

1. Short title and commencement. –

(1) These rules may be called the Customs (Import of Goods at Concessional Rate of Duty) Rules, 2017.

(2) They shall come into force on the 1st day of July, 2017.

2. Application. –

(1) These rules shall apply to an importer, who intends to avail the benefit of an exemption notification issued under sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962) and where the benefit of such exemption is dependent upon the use of imported goods covered by that notification for the manufacture of any commodity or provision of output service.

(2) These rules shall apply only in respect of such exemption notifications which provide for the observance of these rules.

3. Definition. –

In these rules, unless the context otherwise requires, –

(a) "Act" means the Customs Act, 1962 (52 of 1962);

(b) "exemption notification" means a notification issued under sub-section (1) of section 25 of the Act;

(c) "information" means the information provided by the manufacturer who intends to avail the benefit of an exemption notification;

(d) "Jurisdictional Custom Officer" means an officer of Customs of a rank equivalent to the rank of Superintendent or an Appraiser exercising jurisdiction over the premises where either the imported goods shall be put to use for manufacture or for rendering output services;

(e) "manufacture" means the processing of raw material or inputs in any manner that results in emergence of a new product having a distinct name, character and use and the term "manufacturer" shall be construed accordingly;

(f) "output service" means supply of service with the use of the imported goods.

4. Information about intent to avail benefit of exemption notification.–

An importer who intends to avail the benefit of an exemption notification shall provide the information to the Deputy Commissioner of Customs or, as the case may be, Assistant Commissioner of Customs having jurisdiction over the premises where the imported goods shall be put to use for manufacture of goods or for rendering output service, the particulars, namely:-

(i) the name and address of the manufacturer;

(ii) the goods produced at his manufacturing facility;

(iii)the nature and description of imported goods used in the manufacture of goods or providing an output service.

5. Procedure to be followed. –

(1) The importer who intends to avail the benefit of an exemption notification shall provide information –

(a) in duplicate, to the Deputy Commissioner of Customs or, as the case may be, Assistant Commissioner of Customs having jurisdiction over the premises where the imported goods shall be put to use for manufacture of goods or for rendering output service, the estimated quantity and value of the goods to be imported, particulars of the exemption notification

applicable on such import and the port of import in respect of a particular consignment for a period not exceeding one year; and

(b) in one set, to the Deputy Commissioner of Customs or, as the case may be, Assistant Commissioner of Customs at the Custom Station of importation.

(2) The importer who intends to avail the benefit of an exemption notification shall submit a continuity bond with such surety or security as deemed appropriate by the Deputy Commissioner of Customs or Assistant Commissioner of Customs having jurisdiction over the premises where the imported goods shall be put to use for manufacture of goods or for rendering output service, with an undertaking to pay the amount equal to the difference between the duty leviable on inputs but for the exemption and that already paid, if any, at the time of importation, along with interest, at the rate fixed by notification issued under section 28AA of the Act, for the period starting from the date of importation of the goods on which the exemption was availed and ending with the date of actual payment of the entire amount of the difference of duty that he is liable to pay.

(3) The Deputy Commissioner of Customs or, as the case may be, Assistant Commissioner of Customs having jurisdiction over the premises where the imported goods shall be put to use for manufacture of goods or for rendering output service, shall forward one copy of information received from the importer to the Deputy Commissioner of Customs, or as the case may be, Assistant Commissioner of Customs at the Custom Station of importation.

(4) On receipt of the copy of the information under clause (b) of sub-rule (1), the Deputy Commissioner of Customs or, as the case may be, Assistant Commissioner of Customs at the Custom Station of importation shall allow the benefit of the exemption notification to the importer who intends to avail the benefit of exemption notification.

6. Importer who intends to avail the benefit of an exemption notification to give information regarding receipt of imported goods and maintain records. –

(1) The importer who intends to avail the benefit of an exemption notification shall provide the information of the receipt of the imported goods in his premises where goods shall be put to use for manufacture, within two days (excluding holidays, if any) of such receipt to the jurisdictional Customs Officer.

(2) The importer who has availed the benefit of an exemption notification shall maintain an account in such manner so as to clearly indicate the quantity and value of goods imported, the quantity of imported goods consumed in accordance with provisions of the exemption notification, the quantity of goods re-exported, if any, under rule 7 and the quantity remaining in stock, bill of entry wise and shall produce the said account as and when required by the Deputy Commissioner of Customs or, as the case may be, Assistant Commissioner of Customs having jurisdiction over the premises where the imported goods shall be put to use for manufacture of goods or for rendering output service.

(3) The importer who has availed the benefit of an exemption notification shall submit a quarterly return, in the Form appended to these rules, to the Deputy Commissioner of Customs or, as the case may be, Assistant Commissioner of Customs having jurisdiction over the premises where the imported goods shall be put to use for manufacture of goods or for rendering output service, by the tenth day of the following quarter.

7. <u>Re-export or clearance of unutilised or defective goods</u>. –

(1) The importer who has availed benefit of an exemption notification, prescribing observance of these rules may re-export the unutilised or defective imported goods, within six months from the date of import, with the permission of the jurisdictional Deputy Commissioner of Customs or, as the

case may be, Assistant Commissioner of Customs having jurisdiction over the premises where the imported goods shall be put to use for manufacture of goods or for rendering output service:

Provided that the value of such goods for re-export shall not be less than the value of the said goods at the time of import.

(2) The importer who has availed benefit of an exemption notification, prescribing observance of these rules may also clear the unutilised or defective imported goods, with the permission of the jurisdictional Deputy Commissioner of Customs or, as the case may be, Assistant Commissioner of Customs having jurisdiction over the premises where the imported goods shall be put to use for manufacture of goods or for rendering output service, within a period of six months from the date of import on payment of import duty equal to the difference between the duty leviable on such goods but for the exemption availed and that already paid, if any, at the time of importation, along with interest, at the rate fixed by notification issued under section 28AA of the Act, for the period starting from the date of importation of the goods on which the exemption was availed and ending with the date of actual payment of the entire amount of the difference of duty that he is liable to pay.

8. Recovery of duty in certain case. –

The importer who has availed the benefit of an exemption notification shall use the goods imported in accordance with the conditions mentioned in the concerned exemption notification or take action by re-export or clearance of unutilised or defective goods under rule 7 and in the event of any failure, the Deputy Commissioner of Customs or, as the case may be, Assistant Commissioner of Customs having jurisdiction over the premises where the imported goods shall be put to use for manufacture of goods or for rendering output service shall take action by invoking the Bond to initiate the recovery proceedings of the amount equal to the difference between the duty leviable on such goods but for the exemption and that already paid, if any, at the time of importation, along with interest, at the rate fixed by notification issued under section 28AA of the Act, for the period starting from the date of importation of the goods on which the exemption was availed and ending with the date of actual payment of the entire amount of the difference of duty that he is liable to pay.

8. References in any rule, notification, circular, instruction, standing order, trade notice or other order pursuance to the Customs (Import of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules,1996 and any provision thereof or to the Customs (Import of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 2016 and any corresponding provisions thereof shall, be construed as reference to the Customs(Import of Goods at Concessional Rate of Duty) Rules, 2017.

20. He would submit that the above rules are not a mere formality but have a specific purpose of ensuring that the goods are not diverted and they are used for a particular purpose. The appellant has neither registered under the Rules nor followed any of the procedures required. Unless all the conditions of an exemption are fulfilled, the benefit of this exemption cannot be given. He would further argue that even if it is held that both views are possible the benefit of doubt has to go in favour of the revenue and against the assessee while applying an exemption notification as per law laid down by the Constitutional Bench of the Hon'ble Supreme Court in the case of Dilip Kumar and Co. & Ors [2018 (361) ELT 577 (SC)]. Learned counsel for

the appellant argues that once they are exempted from the registration under the rules, it automatically means that they are exempted from all the remaining rules altogether. Therefore, they are entitled to the exemption even though they have not followed any of the Rules.

21. As far as the Central Excise duty is concerned, the learned counsel for the appellant submits that their final products are exempted by notification 06/2006-CE and they had indeed availed the benefit of this exemption notification. Their goods are covered at Sl.No.84 of the table in this exemption notification. This notification refers to List-5 annexed to the exemption notification. Sl.No.11 of the List-5 reads "Solar Photovoltaic module and panel for water pumping and other applications." There is no dispute that their final products fall under this category being solar modules. Therefore, their parts are covered at Sl.No.21 which reads "Parts consumed within the factory of production of such parts for the manufacture of goods specified at Sl.No.1-20 above". He would, therefore, argue that all the parts which they have imported are covered by Sl.No.21 List-5 read with Sl.No.84 of the table of exemption notification 06/2006-CE. Therefore, no demand can be sustained on the CVD components as well as on the indigenously procured goods.

22. Per contra, learned DR argues on this point that a plain reading of exemption notification undoubtedly exempts the final products of the appellant being covered at Sl.No.84 of the table read with Sl.No.11 of List-5. In fact they have also availed benefit of exemption notification. As far as Sl.No.21 of List-5 is concerned, it is very specific that it exempts parts consumed within the factory of production of such parts. It does not exempt parts which are sold outside the factory. There is no dispute that the parts have not been manufactured by the appellant. In fact, there is no demand on any parts manufactured by the appellant and used within the factory of the manufacture. The demand is on account of the parts which are either been purchased by them from other suppliers or parts which have been imported by them. In either case, they are clearly not covered by Sl.No.21 of List-5. Therefore, the appellant is not entitled to the benefits of this exemption notification as well.

23. In conclusion, learned counsel for the appellant submits that since they are entitled to the benefit of the aforesaid notification i.e., 24/2005-

CUS, as amended by notification 132/2006-CUS dt.30.12.2006 and notification 06/2006-CE, regardless of the fact that the parts which were used were not manufactured within their factory of production and regardless of the fact that they have not followed the rules required for claiming the Customs exemption notification, they should be given the benefit of these exemption notifications on all the inputs which they have used. If they do get the benefit of these exemption notifications, no demand will survive and therefore, the impugned order needs to be set aside.

24. The learned DR, in conclusion, argues that the SCN was with respect to two exemption notifications which admittedly are not available if the final products cleared by the appellant to the DTA were exempted from duty. There is no doubt that the final products were exempted from duty and were indeed cleared without payment of duty. Therefore, the demand is on the duties foregone on the inputs in terms of the exemption notifications. In the first place, this bench, at this stage, cannot go beyond the SCN and give the benefit of some other exemption notifications which was not the point of dispute in SCNs themselves. Further, he would argue that even if the benefit of these exemption notifications now claimed by the appellant are considered, a plain reading of all the exemption notifications shows that the appellant was clearly not entitled to the benefit of these exemption notifications. Even if it is argued that more than one view is possible, with respect to the exemption notifications, the benefit of doubt, if any, cannot go to the appellant and must go in favour of the revenue as per the ratio of the judgment of the Constitutional Bench of the Hon'ble Apex Court in the case of Dilip Kumar & Co. and Ors. (supra).

25. We have considered the arguments made exhaustively by both sides and perused the records. It is undisputed that the appellant is a 100% EOU, they imported inputs availing the benefit of exemption notifications available only to 100% EOUs. These exemption notifications are available to the EOUs even if the final products are cleared to DTA. However, where the final products are cleared to DTA and such final products are not excisable, no benefit of exemption on the inputs is available to the appellant. The term non-excisable in this context has been clarified in the Foreign Trade Policy (in consonance of which the exemption notifications are issued) as "such

goods which are exempted from both the basic customs duty and additional duty of customs".

26. It is not in dispute that the final products manufactured and cleared by the appellant are exempted from both the basic customs duty and additional duty of customs. Therefore, they are non-excisable and inputs used in their manufacture are clearly not covered by the exemption notifications originally claimed by the appellant andwhich were sought to be denied in the SCNs. Hence the demands on this ground must sustain.

27. The argument before us by the learned counsel is that even if their inputs are not covered by exemption notifications which they claimed and which are disputed in the SCN, they are covered by other exemption notifications. Therefore, no demand can be sustained against them. Learned DR argues that in the first place this amounts to going beyond the scope of the SCN. He also argues that they are otherwise also not entitled to the benefit of these exemption notifications. It is true that once an SCN is issued, the demand cannot go beyond the scope of the SCN nor can any penalties not proposed in the SCN be imposed. However, the noticee is not estopped from putting forth other grounds of defence and if he does so,fairness requires that they are also considered. We, therefore, find in favour of the appellant as far as the question as to whether the new exemption notifications not being the subject matter of the SCN can be raised as a point of defence at this stage of appeal. Evidently, if the goods are otherwise covered by another exemption notification and the appellant is entitled to such exemption notification, fairness requires that such benefit should be given to the appellant.

28. This leadsus to the next question as to whether the appellant was entitled to the benefit of the exemption notifications now claimed. We find that the notification 24/2005-CUS dt.01.03.2005 as well as amended notification 132/2006-CUS dt.30.12.2006 exempt the final products manufactured by the appellant unconditionally. However, they exempt the inputs used by the manufacturer conditionally the condition being that they have to follow the procedure set out in the Customs (Import of goods at concessional rate of duty for manufacture of excisable goods) Rules, 1996. Among these rules is also a requirement of registration with the department. In 2017, TRU clarified that if the appellant is already registered with the

Central Excise department, obtaining a fresh registration under the rules is not required. However, the remaining conditions of the rules which are equally substantive have not been waived by the department. They must be followed to claim the exemption notification. At this stage, we feel that it is also pertinent to consider whether CBEC can enlarge or modify the scope of an exemption notification which is in the form of a subordinate legislation through a letter or circular. Taxing statutes have to be strictly construed and the power of taxation lies with the Parliament. The power to issue exemption notifications rests with the Central Government. Every exemption notification which is issued is placed before the Parliament and is subjected to scrutiny by a Committee of sub-ordinate legislation of each House which at times modify the notifications on their instructions. Therefore, as far as the exemption notifications issued by the Government are concerned, they are clearly in the nature of sub-ordinate legislations. We do not think that a letter issued by the CBEC can enlarge the scope of the exemption notifications thereby truncating the scope of taxation levied by the Parliament. Even if it is presumed that CBEC had such power, these letters are not subject to scrutiny and review by the Parliament.

29. Notwithstanding the above observations, we find that the exemption given by the CBEC by way of a letter was only to the extent of avoiding two registrations but no exemption has been given with respect to following remaining conditions of the Rules to be followed. In view of this, we find that the appellant is not entitled to benefit of the exemption notification 24/2005-CUS or 132/2006-CUS in respect of the inputs procured by them.

30. As far as the exemption notification 06/2006-CE dt.01.03.2006 is concerned, what is claimed is an exemption available for "parts consumed within the factory of production of such parts for manufacture of goods specified at Sl.No.1-20 above" (Sl.No.21, List-5 read with Sl.No.84 of the table). Clearly, there is no dispute with regard to the parts manufactured by the appellant and consumed within their factory. What is in dispute is that the parts which they have procured either by importing or from other indigenous suppliers, those are not consumed within the factory of production. There is no exemption for such parts. Therefore, the appellant is also not entitled to the benefit of exemption notification 06/2006-CE.

31. Notwithstanding the above observations and our clear finding that appellant is not covered by any of the exemption notifications claimed, even if a view can be taken that the exemption notifications may be available to them, the benefit of such doubt cannot go to the appellant as this is a case of exemption notification which must be interpreted as per the ruling of the Constitutional Bench of the Hon'ble Supreme Court in the case of Dilip Kumar & Co. and Ors (supra). Para 52 of this reads as follows:

> *"52. To sum up, we answer the reference holding as under -*
>
> *(1) Exemption notification should be interpreted strictly; the burden of proving applicability would be on the assessee to show that his case comes within the parameters of the exemption clause or exemption notification.*
>
> ***(2) When there is ambiguity in exemption notification which is subject to strict interpretation, the benefit of such ambiguity cannot be claimed by the subject/assessee and it must be interpreted in favour of the revenue.***
>
> *(3) The ratio in Sun Export case (supra) is not correct and all the decisions which took similar view as in Sun Export case (supra) stands overruled."*

32. In view of the above, we find that the appellant is not entitled to the benefit of the exemption notifications which they have wrongly claimed and is liable to pay duties on the inputs as demanded in the SCNs.

33. Now coming to the penalties imposed under Rule 25 of the Central Excise Rules, 2002 and Section 114A of the Customs Act, 1962, we find that in the impugned order, the learned Commissioner imposed penalties under Rule 25 of the Central Excise Rules, 2002 read with Section 11AC of the Central Excise Act, 1944 without specifying as to which particular clause of Rule 25 has been contravened by the appellant. None of the show-cause notices mentioned regarding the violation of particular clause of Rule 25. In such circumstances, as per the Apex Court's decision in the case of Amrit Foods Vs. CCE, UP [2005(190) ELT 433 (SC)], imposition of penalty is bad in law and is liable to be set aside. This decision of the Apex Court was subsequently followed by the Apex Court in the case of Noble Moulds Pvt. Ltd. Vs. CCE [2010(259) ELT 338 (Del.)] wherein the Hon'ble Apex Court has held in para 9 as under:-

> ***9.*** *We may, with advantage, referred to another judgment of the Apex Court in the case of Amrit Foods v. Commissioner of Central Excise, U.P. - 2005 (190) E.L.T. 433 (S.C.). In that case, penalty was imposed under Rule 173Q of the Central Excise Rules, 1944 without mentioning*

that provision in the show cause notice. The said penalty was set aside and in the process, the Court made the following observations :-

> *"5.The Revenue has preferred an appeal from the order of the Tribunal setting aside the imposition of penalty under Rule 173Q of the Central Excise Rules, 1944. The Tribunal has set aside the order of the Commissioner on the ground that neither the show cause notice nor the order of the Commissioner specified which particular clause of Rule 173Q had been allegedly contravened by the appellant. We are of the view that the finding of the Tribunal is correct. Rule 173Q contains six clauses the contents of which are not same. It was, therefore, necessary for the assessee to be put on notice as to the exact nature of contravention for which the assessee was liable under the provisions of the 173Q. This not having been done the Tribunal's finding cannot be faulted. The appeal is, accordingly, dismissed with no order as to costs."*

Further, the Apex Court decision in the case of Amrit Foods cited supra was followed by the Tribunal in the following cases:-

i. Tata Motors Ltd. Vs. CCE, Jamshedpur
[2006(199) ELT 837 (Tri. Kol.)]
ii. Shree Precoated Steel Vs. CCE, Pune
[2006(203) ELT 506 (Tri. Mum.)]

Hence by following the ratio of the above said decisions, we set aside the penalties imposed under Rule 25 which is pari materia to erstwhile Rule 173Q.

34. Coming to the penalties imposed under Section 114A of the Customs Act, 1962, we find that in all the 4 show-cause notices issued to the appellant, penalty was proposed under Section 112 of the Customs Act, 1962 but while passing the impugned order, the learned Commissioner imposed penalty under Section 114A of the Customs Act by observing in para 5.12.5 of the impugned order that the provision of Section 114A of the Customs Act is more appropriate in the present case. Here we note that it is settled law that any penalty not proposed in the show-cause notice cannot be imposed. The justification given by the learned Commissioner for imposition of penalty under Section 114A instead of Section 112 of the

Customs Act, 1962 as proposed in the show-cause notice is not tenable in law and do not apply to penalty provisions which are to be strictly construed in view of the following judgments:-

i. CCE, Nagpur Vs. Ballarpur Industries Ltd.
[2007(215) ELT 489 (SC)]
ii. B. Lakshmichand Vs. GOI
[1983(12) ELT 322 (Mad.)]
iii. Shree Precoated Steel Vs. CCE, Pune
[2006(203) ELTG 506 (Tri. Mumbai)]

Hence by following the ratio of the decisions cited supra, we also set aside the penalty imposed under Section 114A of the Customs Act, 1962.

35. In the result, both the penalties imposed under Rule 25 of the Central Excise Rules, 2002 and Section 114A of the Customs Act, 1962 are set aside and rest of the impugned order remains intact and is upheld. The appeal is accordingly disposed of.

(Pronounced in the open court on 03-07-2020)

Sd/-

(S.S. GARG)
MEMBER (JUDICIAL)

Sd/-
(P. VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

Veda