IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL No.353 of 2011
With
TAX APPEAL No.383 of 2011
With
TAX APPEAL No.1135 of 2011

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COMMISSIONER OF CUSTOMS - Appellant(s)
Versus
M/S PASUPATI ACRYLON LTD - Opponent(s)

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Appearance:
MR RJ OZA for Appellant(s): 1,
None for Opponent(s): 1,

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CORAM : HONOURABLE MR. JUSTICE AKIL KURESHI

and

HONOURABLE MS. JUSTICE HARSHA DEVANI

Date : 20/09/2012

COMMON ORAL ORDER
(Per : HONOURABLE MR. JUSTICE AKIL KURESHI)

1. These appeals arise out of similar background and involve identical questions of law. They have been heard together and would be disposed of by this common order.

2. Facts may be narrated as emerging in Tax Appeal No.353/2011. The respondent company is engaged in the business of exports. The respondent had filed five bills of entries in the months of February and March, 2006 seeking imports of certain goods and claiming benefit of Exemption Notification No.32/2005-Cus. from payment of customs duty. The Assessing Officer though accepted the claim for exemption

from payment of customs duty and additional duty, demanded education cess on CVD and customs duty also. He debited such amount from the accounts of the assessee.

3. Being aggrieved by such order of the Assessing Officer, the assessee appealed to the Commissioner (Appeals). Commissioner (Appeals) allowed the appeal and set aside the action of the Assessing Officer levying education cess on the imports made by the respondent by his order dated 24-4-2006.

4. The revenue thereupon approached the Customs, Excise and Service Tax Appellate Tribunal ('the Tribunal', for short). The Tribunal relying on the decision of the Bombay Bench of the Tribunal in case of C.C., Mumbai vs. Reliance Industries Ltd., 2005 (188) E.L.T. 453 rejected the revenue's appeal holding that the Commissioner (Appeals) committed no error in deleting the levy of education cess.

5. Revenue has thereupon filed the present appeals and raised the following questions for our consideration:-

[a] Whether in the facts and circumstances of the case, the Tribunal has committed substantial error of law in holding that education cess is not leviable on goods which have been exempted from payment of customs duty and additional duty of customs under Notification No.32/2005-Cus dated 08.04.2005?

[b] Whether in the facts and circumstances of the case, the Tribunal has erred in rejecting appeal of the revenue by relying upon decision of the Tribunal in the case of CC, Mumbai v. Reliance Industries Ltd. 2005 (188) ELT 449 (Tri-Mumbai)?

[c] Whether education cess is leviable on import made

under DEPB Scheme as per Finance Act no.2 of 2004 read with Board's circular No.5/05 dtd. 31.1.2005?

6. Though three different questions have been framed, central issue is single, namely, whether on imports made by an importer which otherwise qualify for exemption from payment of customs duty and additional duty under Exemption Notification No.32/2005, would still be liable to pay education cess on such basic duty of customs and additional duty on the ground that such duty-free imports were being made under DEPB scheme. The case of the revenue before the Tribunal was that in view of the circular of CBEC dated 31-1-2005, such imports when made under DEPB scheme, though may enjoy exemption from payment of customs and additional duty if the conditions of Exemption Notification No.32/2005 are satisfied, nevertheless, the importers would have to pay the education cess on the customs duty and additional duty otherwise payable.

7. Identical issue came up for consideration before this court in Special Civil Application No.11635/2005 in case of Gujarat Ambuja Exports Ltd. wherein by judgment dated 21-6-2012 while allowing the writ petition of the importers, the issue was decided in following manner:-

16. From the nature of DEPB scheme and the exemption granted to imports made under such scheme, it can be seen that the very purpose is to neutralise the import duty component on the imported goods used for production of export items. Such object is achieved through the DEPB scheme under which the exporter is given the facility of utilising the credits in the DEPB scrips for the purpose of adjustment against the customs duty liability on the goods imported for the ultimate purpose of

export on value addition.

17. We may recall that Chapter 7 of the Export import Policy pertains to duty exemption/remission schemes. Para 7.1 thereof provides that the duty exemption scheme enables import of inputs required for export production. The duty remission scheme enables post export replenishment/ remission of duty on inputs used in the export product. Such remission schemes include Advance Licence Scheme and Duty Free Replenishment Certificate Scheme as also the Duty Entitlement Passbook Scheme. Para 7.14 of said Chapter 7 of the Export Import Policy pertains to Duty Entitlement Passbook Scheme. It states at the outset that for the exporters not desirous of going through the licensing route, an optional facility is given under DEPB. The object of DEPB scheme is to neutralise the incidence of customs duty on the import component of the export product. It further provides that such neutralisation shall be provided by way of grant of duty credit against the export product.

18. From the nature of DEPB scheme noted above and the exemption from payment of customs duty on imports made under such scheme, it can be gathered that the very purpose of granting such exemption is to neutralise the customs duty, on the import component of the export product. In essence, the Government of India grants duty remission at prescribed rates on the imports made under such a scheme.

19. It can thus not be denied that for the imports made under the DEPB scheme, there is total or partial, as the case may be, exemption in payment of customs duty. At the relevant time, for the goods other than edible oil, such exemption was total. For edible oil, such exemption was to the extent of 50% of the customs duty and additional duty payable. In essence, therefore, for imports made under the DEPB scheme, of course, subject to the conditions specified in the exemption notification, the customs duty was exempt. Merely because the conditions provided for adjustment of credit in the DEPB scrips, it cannot be stated that either there was no exemption from payment of customs duty or that the Central Government was levying and collecting customs duty from the importers in form of adjustment of credit in the DEPB scrips. We may recall that such credits are given at specified rates on the

basis of SION norms primarily taking into account deemed import contents of an export product and the basic customs duty payable on such deemed imports. Thus through such adjustments on the DEPB scrips at the time of further imports, customs duty component is sought to be neutralised. The view expressed by the Tribunal in the case of Reliance Industries Ltd. (supra) appeals to us. In the said decision, the Tribunal taking note of the provisions contained in section 81 and 84 of the Finance Act, 2004 held that the impugned circular No.5/2005 is not legally sustainable. The Tribunal held that crediting and debiting of entries in the passbook is a matter of procedure and convenience and in essence, the Notification No.45/2002 provides for full exemption from payment of customs duty.

20. We may also recall that the Larger Bench of the Tribunal in the case of Essar Steel Ltd. (supra) held that mere entry in the DEPB book is not sufficient for eligibility of Modvat credit availed on the strength of Bill of Entry where the importer had availed of benefit of the exemption from payment of customs duty. This would further go to show that while no customs duty is paid, there would be no question of availing Modvat credit on such duty.

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

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

23. We are not unmindful of the decision of Madras

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

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

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

subject to fulfillment of certain conditions. One of the conditions includes that of adjustment of credit in the DEPB scrip. This, however, is merely procedural in nature and would not change the nature of benefit from one being of exemption.

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

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

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

(Akil Kureshi, J.)

(Harsha Devani, J.)

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