REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 3555-3560 OF 2012

Sarla Performance Fibers Limited Etc. ... Appellant(s)

Versus

Commissioner of Central Excise, Surat-II ... Respondent(s)

J U D G M E N T

Dipak Misra, J.

The appellant is a company registered under the Companies Act, 1956 and is engaged, inter alia, in the manufacture of excisable goods, namely, synthetic yarn and for that purpose it has a factory at Unit-I, Survey No. 59/1/14, Amli, Piparia Industrial Estate, Silvassa (U.T. of D.N.&H). The said factory is a 100% Export Oriented Unit (EOU). Prior to 6th November, 2006, Sarla Performance Fibers

Limited was known as Sarla Polyesters Ltd. Shri Madhusudan Jhunjhunwala and Shri Satish Kumar Sharma were the Chairman and the excise in-charge respectively of Sarla Performance Fibers Limited. Shri Dineshchandra Pandey was the dispatch in-charge of M/s. Hindustan Cotton Company, a partnership firm, engaged *inter alia*, in trading of Polyester Textured/Twisted Dyed Yarn since 1988. Sh. Gopal Bhagwan Dutt Sharma was the Manager of Sarla Performance Fibers Limited at the relevant time. The reference to appellants herein will mean and include all the appellants.

2. The appellants had procured partial oriented yarn (POY) falling under Chapter 54 without payment of duty for the manufacture of various types of yarn, namely, polyester texturised yarn, nylon covered yarn and polyester covered yarn. A show cause notice No. V(Ch.54)15-6/OA/2000 dated 16th May, 2001 was issued by the Commissioner of Central Excise, Surat – II requiring the appellant to explain why central excise duty of Rs.32,92,854/-should not be recovered on the texturised yarn allegedly removed by the appellants

without payment of duty. The said show cause notice also required the appellants to explain why penalty should not be imposed under Section 11AC of the Central Excise Act, 1944 (for short, 'the Act'). That apart, the show cause notice also sought to confiscate the nylon covered yarn valued at Rs.1,72,186/-and further to recover duty thereon of Rs.55,202.96.

3. After the show cause notice was issued, the appellants made payment aggregating to Rs.14,89,349.00 as against the duty payable under Section 3(1) of the Act (after taking into account the cum-duty benefit) and Rs.11,19,775.00 payable in the event the benefit of Notification No. 2/05 was allowed.

4. After the reply to the show cause notice was filed, the Commissioner of Central Excise, Surat-II, by his order-in-original no. 11/MP/2002 dated 21st March, 2002 (i) confiscated the seized nylon covered yarn weighing 245.980 kgs. valued at Rs.1,72,186/- and appropriated a sum of Rs.86,093/- which was given as bank guarantee; (ii) demanded Rs.55,202.96 as differential duty on the confiscated

goods which were released provisionally before the adjudication; and (iii) confirmed the central excise duty amounting to Rs.32,92,854/- and ordered recovery of interest under Section 11AB and imposed a penalty of Rs.33,48,060/- on the appellants. The adjudicating authority also imposed penalties on various persons set out in the impugned order.

5. Being aggrieved by the aforesaid order, the appellant preferred appeals before the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) (for short, 'the tribunal') under Section 35B of the Act to the extent the said order was adverse to it. The revenue also preferred an appeal before the tribunal as certain aspects were adverse to it. The tribunal referred the issue to the Larger Bench of the tribunal for consideration whether the goods cleared by the appellant were eligible for exemption under Notification No. 125/84 dated 26.05.1984. The Larger Bench vide order dated 03.08.2007 held that in case the goods cleared by the 100% EOU and sold in India whether with or without permission, the assessment shall be made under proviso to Section 3(1) of the Act and the

exemption under Notification No. 125/84 shall not be applicable. After the matter was placed before the Division Bench of the tribunal vide its order dated 15.11.2007 referred to the Larger Bench decision and reiterated the view of the Full Bench by opining that the goods cleared by the 100% EOU and sold in India whether with or without permission of the Development Commissioner, the assessment shall be made under proviso to Section 3(1) of the Act and exemption under Notification No. 125/84 shall not be applicable but granted some relief as regards the imposition of penalty. Resultantly, the tribunal vide order dated 15.11.2007 disposed of the appeal of the appellants and dismissed the appeal of the revenue.

6. As the facts would unfold, the appellants filed an application before the tribunal for recall of order dated 15.11.2007 in terms of judgment in ***J.K. Synthetics Ltd. v. Collector of Central Excise***[1], which was dismissed on the ground that appeals were decided on merits and a detailed

[1] 1996 (86) ELT 472 (SC)

order considering all aspects was passed by the tribunal and as such it could not be said that the Bench defaulted in considering the merits of the case.

7. The aforesaid orders were assailed before the High Court in Writ Petition No. 4758 of 2008 and the Division Bench of the High Court taking note of the submissions of the learned counsel for the parties, directed as follows:-

> "3. There were certain Appeals filed by the Petitioners and also there were certain Appeals filed by the Department. Mr. Desai, the learned Senior Counsel for the Respondents, has no objection if all the Appeals are heard together denovo including the Appeals filed by the Department since the Petitioners were not heard in the Appeals. The learned Counsel for the Petitioners also has no objection for the same.
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> 4. Under the aforesaid facts and circumstances, both the impugned orders dated 21st April, 2008 and 15th November, 2007 passed by the CESTAT in the aforesaid Appeals are hereby quashed and set aside, and all the aforesaid Appeals stand restored to file. The CESTAT is directed to hear all the Appeals mentioned hereinabove afresh denovo without being influenced by their earlier orders in any manner."

8. After the remit, it was contended before the tribunal that the allegation of clandestine removal was based on a computer sheet and no other records had been recovered; that the reliance by the department to establish clandestine removal were the invoices issued by Hindustan Cotton Company; and that the appellant SPL is a 100% EOU and when case goods were cleared without permission of the Development Commissioner according to the department duty was payable under Section 3(1) of the Act and exemption was available under notification no. 125/84 CE. To sustain the stand, reliance was placed on ***SIV Industries Ltd. v. CCE & Customs***[2]. Be it stated that the reliance was placed on Larger bench decision of the tribunal in ***Shrichakra Tyres Ltd. v. CCE Madras***[3] and on that base it was contended that the amount utilized by the assessee was to be treated as duty price and no penalty could have been imposed on individuals since no evidence had been brought on record to show that they were aware of the transactions.

[2] (2000) 3 SCC 367
[3] 1999 (108) ELT 61 (Tribunal)

9. The stand of the assessee was resisted by the revenue contending, *inter alia*, that the benefit of exemption notification could not be extended since the notification incorporated several conditions to be fulfilled and unless these conditions were fulfilled, exemption could not be allowed; that the benefit of cum-duty price could not be extended and invocation of a wrong section or rule in the show cause notice would not be a bar for imposition of penalty under the correct rule or section, and that appellant was not eligible for treatment of clearances under Section 3(1) of the Act. On behalf of the revenue reliance was placed on ***Sterlite Optical Technologies Ltd. v. CC&CE Aurangabad***[4]**.**

10. At this juncture, it is relevant to state that Member, Technical came to hold that all the sales to DTA were clandestinely done in contravention of the provisions of the EXIM policy and the appellant-company did not raise any contention that the price charged included the component of excise duty. On the contrary the appellants claimed exemption

[4] 2005 (188) ELT 201 (Trib.-Mumbai)

under notification no. 125/84 and, therefore, the question of SPL having recovered any cum-duty price from the customers in DTA did not arise. Further it was evident that the transactions had been made by SPL in the name of Hindustan Cotton Company and M.M. Sanghavi and the demands had been raised on the invoices raised. The transaction itself was artificial and no justification had been shown to treat the same as cum-duty price and, therefore, the decision of the Commissioner not to treat the price as cum-duty price deserved to be upheld. As regards penalty on the company, the learned member held that it had been rightly imposed under Section 11AC of the Act read with Rule 173Q of the Central Excise Rules. As far as the individuals were concerned, the learned Member opined that the imposition on some was justified and imposition on certain individuals was not warranted. He, however, dismissed the appeal preferred by the department.

11. The Member, Judicial concurred with the view of the Member, Technical as regards the clandestine removal and

consequent confirmation of demand of duty and imposition of penalty on various appellants but, however, as far as the present appellant was concerned, the learned Member opined that the entire realization made by M/s. Sarla Polyester Ltd. were required to be treated as cum-duty and as such, the benefit had to be extended to the appellant on the above count. She further observed that:-

> "Admittedly no duty has been recovered by them from their buyers. When the duty is being subsequently demanded from them on the same realization, it is, in my view, required to be treated as cum duty and the assessable value has to be arrived at by deduction of the duty now being confirmed against the assessee. This has been the declaration of law in all the judgments relied upon by the learned Advocate. The fact as to whether the duty is being demanded on clandestine removal or on any other issue, should not make a difference".

12. The learned Member placed reliance on ***CCE Delhi v. M/s. Maruti Udyog Ltd.***[5], reproduced a passage from the same and opined that the entire realization was required to be considered as cum-duty-price and the benefit of the same had

[5] 2002 (141) ELT 3 (SC)

to be extended to the assessee and for the said purpose, the matter needed to be remanded for recalculation of the quantum of duty. As far as penalty is concerned, she concurred with the Member, Technical, but also opined that it required to be remanded for imposing penalty equivalent to the duty calculated on the determination of the quantum.

13. The two Members noted three points as difference of opinion. For the sake of completeness, we think it appropriate to reproduce the same:-

> "a. Whether the entire sales value of the goods removed clandestinely is required to be considered as cum-duty and benefit of the same is to be extended to M/s. Sarla Polyester Ltd. (Appellant no.1 herein) or not?
>
> b. Whether the ratio of law declared by this Hon'ble Court in the case of CCE Delhi vs. M/s. Maruti Udyog Ltd. reported in 2002(141) ELT 3 applies to the facts of the present case or not and as to whether the benefit of the same is to be extended to the said assessee or not?
>
> c. Whether the matter is required to be remanded for quantification of the duty by treating entire realization as cum-duty price, as held by the Member (Judicial) or the appellant's plea on the above issue is required to be rejected by upholding the decision of the Commissioner

not to treat the price as cum-duty price, as observed by learned Member (Technical)?

d. Consequent to the re-quantification of duty on the above ground, the penalty imposed upon M/s. Sarla Polyester Ltd. would get reduced to the quantum of duty reconfirmed against the said appellant?

14. It is necessary to state here that before the pronouncement of Order on 13.10.2010, counsel on behalf of the present assesee mentioned that the controversy was no more *res integra* in view of the decision rendered in ***CCE v. NCC Blue Water Products Ltd.***[6] Thereafter the matter was heard on another day and on behalf of the Bench, the learned Member, Technical passed the order. He took note of the stand of the revenue that ratio of the said decision was not applicable as it was based on the principle stated in earlier decision i.e. ***SIV Industries Ltd.*** (supra). The learned Member also took note of the fact that the Larger Bench of the tribunal had distinguished the decision in ***SIV Industries Ltd.*** (supra) which was relied upon in ***NCC Blue Water products Ltd.*** (supra). At this juncture, we think it appropriate to reproduce

[6] (2010) 12 SCC 761 : 2010 (258)_ ELT 161

a passage from the order passed by the Member, Technical on behalf of the Bench:-

> "It is quite clear that as submitted by learned SDR, the Hon'ble Supreme Court followed the decision in case of SIV Industries and also took note of the Board's circular issued in 2002 and it is quite apparent that circular issued in 2004 was not brought to the notice of learned SDR in Supreme Court. Further, we also note as submitted by the decision of the present case, the Larger Bench had considered the Hon'ble Supreme Court in case of SIV Industries Ltd. and had distinguished the same and reached the conclusion that in case of goods sold by 100% EOU in DTA, the assessment shall be made under proviso to Section 3(1) of the Act."

15. After so stating, the learned Member quoted copiously from the Larger Bench. We think it appropriate to reproduce the relevant part:-

> "14. We have considered the submissions. We find that the wordings of proviso to Section 3(1) of the Central Excise Act and Notification 125/84 which we have been called upon to interpret are similar and the basic dispute is as to how the words "allowed to be sold in India" are to be interpreted. After going through the various submissions made by both sides, we find that 100% EOUs were allowed to be established with the sole purchase of exporting 100% of their

> production as is evident from the words 100% EOUs. However, on account of certain hardship faced in getting export order, sales in DTA up to 25% were permitted from the year 1984 but there was a clear intention to distinguish between such sales by the 100% EOU from the sales by domestic units other than 100% EOU and it was for this purpose that proviso to Section 3(1) and Notification 125/84 was introduced. Since there were only two modes of clearance in which the 100% EOUs could have cleared the goods i.e. one by export and the other by domestic sale after obtaining the permission of the Development Commissioner, in respect of domestic sales the words "allowed to be sold in India" were incorporated in both the provisos."

16. Thereafter, the learned Member proceeded to state certain aspects which are not necessary and then reproduced the following passage:-

> "We also agree with the observation of the Larger Bench that the decision of the Supreme court in SIV Industries case is distinguishable for the reason stated therein, as in that case the main thrust was that whether on the date of removal the 100% EOU ceased to be 100% EOU and therefore the provisions relating to 100% EOU could not have been applied to them. For the same purpose we hold that exemption under Notification 125/84 shall not be applicable in respect of goods manufactured by 100% EOU but sold in India."

17. After reproducing number of passages from the Larger Bench, the learned Member observed thus:-

> "7. It may be seen that Larger Bench had considered the decision of Hon'ble Supreme Court in case of SIV Industries Ltd., and has agreed with another decision of the Larger Bench in the case of Himalaya International, wherein also the decision of Hon'ble Supreme Court in case of SIV Industries Ltd had been considered; and distinguished.
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> 8. To sum up, two decisions of Larger Bench of the Tribunal have considered the issue and distinguished the decision in the case of SIV Industries Ltd. and the decision of Larger Bench in the present case on a reference made in the appellant's case itself had considered, all aspects and the history of 100% EOU, statutory provisions and precedent decisions to reach conclusion that duty is chargeable under proviso to Section 3(1) of Central Excise Act, 1944."

18. Being of this view, the Bench reiterated the difference of opinion and the questions framed thereunder. After the judgment was delivered by the tribunal, the appellant preferred W.P. No. 714 of 2011. The High Court noted the submissions of the learned counsel for the writ petitioners and opined that keeping in view the concept of self-restraint and the requirement of judicial propriety, it was desirable for the

assessee to prefer an appeal before this Court. Being of this view, the High Court declined to interfere. Hence, the present appeals have been preferred under Section 35L(b) of the Act.

19. It is not in dispute that the unit of the assessee-appellant is a 100% EOU and under the EOU scheme it was required to export the goods manufactured by it. The stand of the assessee is that it was eligible to clear goods up to a certain specified limit after obtaining due permission from the Development Commissioner in terms of Export Import (EXIM) Policy read with Handbook of Procedure (HBP). It is the submission of Mr. V. Lakshmi Kumaran, learned counsel for the appellant that even if it is held that finished goods were removed by the assessee without requisite permission from the Development Commissioner, central excise duty is leviable in terms of Section 3(1) of the Act. It is contended by him that the tribunal has erroneously followed the Larger Bench decision of the tribunal in ***Himalaya International Ltd. v. Commissioner of C.Ex. Chandigarh***[7]. Learned counsel

[7] (2003) 154 ELT 580

would submit that if the submission of the assessee is accepted, he will be entitled to refund as it has paid more than the amount than the duty liability determinable under Section 3(1) of the Act.

20. Mr. K. Radhakrishnan, learned senior counsel appearing for the revenue, *per contra*, would contend that the appellant which is a continuing EOU, was bound to export finished goods and as there has been non-fulfilment of the obligation and the goods have been cleared without permission of the competent authority, the appellants are liable to pay the duty as determined by the tribunal. It is his further argument that the assessee cannot be assessed under Section 3(1) of the Act but under the proviso as held by the tribunal. Learned senior counsel would submit that the decision in ***SIV Industries Ltd.*** (supra) and ***NCC Blue Water Products Ltd.*** (supra) when seemly applied, the 100% EOU which was cleared in DTA without permission cannot be allowed to pay duty under Section 3(1) of the Act.

21. To understand the controversy, it is necessary to scrutinize the relevant provisions, circulars in the field and the interpretations placed by this Court on the pertinent provisions. The contentious part of Section 3 of the Act, prior to amendment w.e.f. 11.05.2001 read as follows:-

> **"Section 3. Duties specified in the 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,-
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> (a) a duty of excise on all excisable goods which are produced or manufactured in India as, and at the rates, set forth in the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986);
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> (b) a special duty of excise, in addition to the duty of excise specified in clause (a) above, on excisable goods specified in the Second Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) which are produced or manufactured in India, as, and at the rates, set forth in the said Second Schedule.
>
> Provided that the duties of excise which shall be levied and collected on any excisable goods which are produced or manufactured, --
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> (i) in a free trade zone and brought to any other place in India; or
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> (ii) by a hundred per cent export-oriented undertaking and allowed to be sold in India,

shall be an amount equal to the aggregate of the duties of customs which would be leviable under Section 12 of the Customs Act, 1962 (52 of 1962), 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, be determined in accordance with the provisions of the Customs Act, 1962 (52 of 1962) and the Customs Tariff Act, 1975 (51 of 1975)."

22. After the amendment the relevant part of the provision reads as under:-

"Section 3. Duties specified in the 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 the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986);

(b) a special duty of excise, in addition to the duty of excise specified in clause (a) above, on excisable goods excluding goods produced or manufactured in special economic zones specified in the Second Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) which are produced

> or manufactured in India, as, and at the rates, set forth in the said Second Schedule.
>
> Provided that the duties of excise which shall be levied and collected on any excisable goods which are produced or manufactured, --
>
> (i) in a free trade zone or a special economic zone and brought to any other place in India; or
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> (ii) by a hundred per cent 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 (52 of 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, be determined in accordance with the provisions of the Customs Act, 1962 (52 of 1962) and the Customs Tariff Act, 1975 (51 of 1975).”

23. Having noted the relevant provisions, it is apposite to appreciate what has been held in ***SIV Industries Ltd.*** (supra). In the said case, the appeal was preferred challenging the order of the tribunal whereby it had directed that the duty of central excise was not payable under Section 3(1) of the Act

but under the proviso to Section 3(1) of the Act. The appellant therein was granted permission to set up a 100% Export Oriented Unit (EOU) for the manufacture of viscose staple fibre at its factory at Sirumugal in Coimbatore District in the State of Tamil Nadu. The letter of intent dated 18.12.1991 was issued to the appellant for the purpose by the Secretariat for Industrial Approvals (SIA), Ministry of Industry, Government of India. On 08.09.1993 the appellant therein made an application to the Secretary, Ministry of Commerce, Government of India and sought debonding of its unit from 100% EOU, i.e., withdrawal from 100% EOU Scheme. By letter dated 18.10.1993 of the Ministry of Commerce it was agreed in principle to allow the appellant to withdraw from the 100% EOU Scheme subject to the conditions on which withdrawal was permitted. Once the debonding of the unit was permitted, finished goods earlier manufactured in the 100% EOU could be cleared for domestic tariff area (DTA) on levy of duty of central excise. The dispute arose as to what rate of duty was to be levied. The contention of the assessee was that excise duty

is payable on the finished goods under the main Section 3(1) of the Act together with customs duty on the imported raw material used in the manufacture of the said finished goods lying in the stock. The Revenue on the other hand contended that excise duty under the proviso to Section 3(1) of the Act was payable on the finished goods and with no customs duty being levied on the raw materials gone into the manufacture of finished goods. The Court encapsulated the issue by stating that the expression "allowed to be sold in India" appearing in the proviso to Section 3(1) of the Act was the bone of contention between the parties. The assessee contended that for the application of the proviso to Section 3(1) two conditions have to be cumulatively and simultaneously satisfied, viz., (1) goods should have been produced or manufactured by an existing 100% EOU, and (2) these goods should have been allowed to be sold in India. After analyzing various aspects and the circulars dated 17.02.1983 clarifying the introduction of the proviso and the circular dated 29.05.1984 explaining

further amendment to the proviso to Section 3(1) of the Act, the Court held :-

> "The contention of the Revenue is that permission to withdraw from the Scheme is itself a permission to sell in India, i.e., when the unit is permitted to debond, it would be deemed to have been permitted to sell the goods in India. But then permission to sell in India has to be in terms or in accordance with the provisions of the export-import policy. Permission to sell in India by 100% EOU consists of all those factors like value addition, fulfilment of export obligation, sale of a general currency licence-holder, item being not mentioned in the negative list and then there being a limit of 25%, etc. When permission to debond is given, none of these criteria or aspects are applied by the Board of Approvals (BoA) to the closing stock of finished goods. The Board of Approvals is a statutory authority, which permits debonding. It is created under the Industrial (Development and Regulation) Act. On the other hand permission to sell the goods in India under and in accordance with the import policy has to be given by the Development Commissioner in the Ministry of Commerce. The Board of Approvals and the Development Commissioner are two different authorities constituted for two different purposes. Permission to debond is a statutory function exercised by one statutory authority. On the other hand permission to sell in India is to be exercised by a different statutory authority. If reference is made to para 102 of the relevant import-export policy permission of the Development Commissioner is required for selling the goods in India up to a limit of 25% by 100% EOU. Para 117 of the policy

> deals with debonding of 100% EOU. Thus it is apparent that debonding and permission to sell in India are two different things having no connection with each other. It also becomes apparent that in view of the EOU Scheme as modified from time to time and corresponding amendments to Section 3 of the Act the expression "allowed to be sold in India" in the proviso to Section 3(1) of the Act is applicable only to sales made up to 25% of production by 100% EOU in DTA and with the permission of the Development Commissioner. No permission is required to sell goods manufactured by 100% EOU lying with it at the time approval is granted to debond."

24. After so stating the Court noted the stand of the revenue that by debonding permission had been granted by BoA for selling the closing stock of finished goods in India. Negativing the said contention, the Court held:-

> "By its application dated 8-9-1993 the appellant had only asked the Central Government for permission to debond the unit. Pending formal debonding clearance, the appellant requested the Central Government that it might allow it to sell the goods in India. This request of the appellant was never acceded to by the authority concerned and letter of debonding was issued. This application of the appellant, therefore, could not be treated as an application for permission to sell in India as contended by the Revenue and the debonding letter of BoA cannot be construed as permission to sell in India. The argument of the

> Revenue that debonding assumes allowing all closing stock of the goods on the date of debonding to be sold in India would be stretching the matter a little too far. Conditions for sale of 25% of the finished products by EOU and sale of finished stock by a debonded 100% EOU on the date of debonding are different."

25. Eventually, the Court interpreting the provision and notification issued under the relevant Rules held thus:-

> "Chapter V-A of the Central Excise Rules contains provisions for removal from a free trade zone or from a 100% EOU of excisable goods for home consumption. This chapter was made applicable to units under the EOU Scheme by Notification No. 130/84-CE dated 26-5-1984. This chapter contains Rules 100-A to 100-H. Rule 100-A provides that the provisions of this chapter shall apply to a person permitted under any law for the time being in force to produce or manufacture excisable goods in a 100% export-oriented undertaking and who has been allowed by the proper officer to remove such excisable goods for being sold in India on payment of duty of excise leviable thereon. It will be thus seen that this Chapter V-A would not be applicable where EOU is outside the EOU Scheme after the unit is debonded. Under Rule 100-H, Rule 57-A and other Rules mentioned therein shall not apply to excisable goods produced or manufactured by a 100% export-oriented undertaking. Rule 57-A relates to allowing credit of any duty of excise or the additional duty under Section 3 of the Customs Tariff Act, 1975 as may be specified by the Central Government in the notification, paid on

> the goods used in or in relation to the manufacture of the final products and for utilising the credit so allowed towards payment of duty of excise leviable on the final products."

26. In view of the aforesaid position, the Court was of the view that the tribunal was not right in holding that duty was to be leviable in terms of the proviso to Section 3(1) of the Act and, accordingly, it set aside the judgment of the tribunal and restored that of the adjudicating authority.

27. The aforesaid judgment of this Court was distinguished by the Larger Bench of the tribunal in ***Himalaya International Ltd.*** (supra). The Larger Bench referred to circular No. 618/9/2002-CX dated 13.02.2002 and ruled thus:-

> "A reading of the above circular would show that it was issued pursuant to the decision of the Supreme Court in ***SIV Industries Ltd.*** (supra), but without understanding the position that the Supreme Court did not deal with a case where clearance was made to DTA by 100% EOU in excess of the permission granted. It is contended on behalf of the assessee that the interpretation given in the circular referred to above is binding on the Revenue and therefore, this Tribunal cannot give a different interpretation to Section 3(1) and the proviso at the instance of the Revenue. In support of the above contention

reliance was placed on a decision of the Supreme Court in CCE, Vadodara v. Dhiren Chemicals Industries, 2002 (139) ELT 3 (S.C.). We find no merit in the above contention of the assessee. In CCE, Vadodara v. Dhiren Chemicals Industries the Supreme Court observed that regardless of the interpretation placed by it on the expression in the notification 'on which appropriate duty of excise has already been paid' if there are circulars which have been issued by the Central Board of Excise & Customs placing a different interpretation upon the said phrase that interpretation will be binding upon the Revenue. In the present case, we are not dealing with any circular of Central Board of Revenue interpreting the meaning of the proviso to Section 3(1) and which had been in force. On the other hand, the circular dated 13.2.2002 is one issued giving a wrong interpretation to the decision of the Supreme Court. We have no hesitation to hold that an interpretation thus given by the Board to the decision of the Supreme Court will not be binding."

28. To appreciate the whole controversy in completeness, we may reproduce the said circular dated 13.2.2002:-

"Subject: Removal of goods by 100% EOUs to DTA – Non-levy of duty under Section 3(1) of Central Excise Act, 1944.

I am directed to invite reference to Supreme Court's judgment in case of *SIV Industries v. CCE* [2000 (117) E.L.T. 281 (S.C.)] vide which the Apex Court had held that "proviso to Section 3(1) regarding the duty chargeable on goods cleared

by EOUs shall be applicable only to sales made in DTA upto 25% of production which are allowed to be sold into India as per provisions of EXIM Policy". In other words, Hon'ble Court decided that if the goods are "not allowed" to be sold in India, the proviso to Section 3(1) of Central Excise Act, 1944 shall not be applicable. The expression 'allowed to be sold' has since been replaced with 'brought to any other place' w.e.f. 11-5-2001 vide Section 120 of Finance Act, 2001 [14 of 2001].

2. It has come to the notice of the Board that field formations are interpreting the judgment of Apex Court to the effect that if the goods cleared by EOUs are not allowed to be sold into India, the Section 3(1) of Central Excise Act, 1944 is not applicable and duty can be demanded under the provisions of Customs Act, 1962 only. Board has taken a serious view of this mis-interpretation. The provisions of Central Excise Act, 1944 shall apply to all goods manufactured or produced in India for which Section 3 is the charging section. EOUs are also situated in India and the chargeability under Central Excise Act is never in doubt. Therefore, it is clarified that prior to 11-05-2001, the clearances from EOUs if not allowed to be sold in India, shall continue to be chargeable to duty under main Section 3(1) of Central Excise Act, 1944. Appropriate action may be taken immediately to safeguard revenue and all pending decisions may be settled accordingly."

29. The said circular, as is perceptible, is in accord with the decision rendered in ***SIV Industries Ltd.*** (supra). The said

circular while so indicating also clearly lays down the expression "allowed to be sold" has been replaced with "brought to any other place" with effect from 11.05.2001 vide Section 120 of Finance Act, 2001 (14 of 2001). The circular being in consonance with the decision in ***SIV Industries Ltd.*** (supra) and rightly so, it was absolute unnecessary on the part of the Larger Bench of the tribunal to say that this Court in ***SIV Industries Ltd.*** (supra) did not deal with the case where clearance was made to DTA by 100% EOU in excess of the permission granted. The attempt to distinguish the circular, in our considered opinion, was not only unnecessary but also absolutely erroneous.

30. After the judgment of the Larger Bench, the Central Board of Excise and Customs, New Delhi brought out a circular dated 05.01.2004. The relevant part of the said circular reads as follows:-

> "Subject: Withdrawal of Board's Circular No.618/9/2002-CX., dated 13-2-2002 – Removal of goods by 100% EOU to DTA – Clarification regarding levy of duty on removal of goods by 100% EOU to DTA.

I am directed to draw your attention to Board's Circular No. 618/9/2002-CX., dated 13-02-2002 [2002 (140) E.L.T. T27] on the above subject wherein it was clarified that prior to 11-5-2001, the clearances from EOUs if not allowed to be sold in India, shall continue to be chargeable to duty under main Section 3(1) of Central Excise Act, 1944.This was based on an interpretation of Apex Court's decision in the case of SIV Industries Ltd. [2000 (117) E.L.T. 281(S.C.)].

2. However, attention is now invited to the decision of Larger Bench of CESTAT in the case of M/s. Himalaya International Ltd. v. Commissioner of Central Excise, Chandigarh [2003 (154) E.L.T. 580 (Tri. – LB)], wherein it has been held that "Rate of duty as per the proviso to Section 3(1) of the Central Excise Act, 1944 would be applicable for assessing all the excisable goods, which were cleared by 100% EOU to DTA whether in terms of permission granted or in excess of permission granted". In view of the said judgment of the CESTAT, it is now clear that all the goods manufactured by EOU and cleared into DTA before final debonding of the EOU shall be chargeable to duty under proviso to Section 3(1) of the Central Excise Act, 1944 and under no condition, goods produced in 100% EOU can be charged under main Section 3(1) of Central Excise Act, 1944.

3. In view of the above judgment of the CESTAT, the matter has been re-considered by the Board and it has been decided to withdraw the Board's Circular No. 618/9/2002-CX., dated 13-2-2002. The above-mentioned judgment of CESTAT, which has been accepted by Board, may kindly be taken into consideration in deciding similar pending cases."

31. Having noted the circular, we may refer to the authority in ***NCC Blue Water Products Ltd.*** (supra). In the said case, the tribunal has held that the duty of Central excise on shrimps and shrimp seeds produced and removed by the assessee-respondent, a 100% export-oriented unit (EOU), in the Domestic Tariff Area (DTA) without the approval of the Development Commissioner, would be payable under Section 3(1) of the Act and not under the proviso appended thereto. The two-Judge Bench taking note of the fact that during the period 1994-1995 to 1997-1998, the assessee produced and sold 11,15,29,540 number of shrimp seeds and 48,365 kg of shrimps in DTA without obtaining the permission of the Development Commissioner; without issuing proper invoices as mandated under Rule 100-E of the Central Excise Rules, 1944 (for short "the Rules") and without payment of excise duty. Besides, the assessee also undertook certain job-work whereby it processed 864.238 MT of shrimps and 905.580 MT of fish and cleared the said goods in DTA. According to the assessee, these goods were ultimately exported by DTA units.

The said action of the assessee compelled the authority to issue a show cause notice requiring the assessee to show cause as to why duty of excise equal to aggregate of the duties of customs should not be levied under Section 3 of the Act read with Rule 9(2) read with proviso to sub-section (1) of Section 11-A of the Act and interest and penalty thereon. The matter was contested by the assessee and eventually the tribunal ruled in favour of the assessee. Before this Court, it was contended that since as per Note 1 of Section I of the First Schedule to the Customs Tariff Act, 1975, any reference in that section "to a particular genus or species of an animal, except where the context otherwise requires, includes a reference to the young of that genus or species" and, therefore, both live shrimps and shrimp seeds are classifiable under Sub-Heading 0306.23 of Chapter 3 of the First Schedule to the Customs Tariff Act, 1975. It was also urged that the tribunal committed an error in relying on the decision of this Court in ***SIV Industries Ltd.*** (supra) because unlike in that case the assessee had sought permission of the Development

Commissioner, who in turn had advised them to approach the SIA for permission to clear shrimps and shrimp seeds which, in fact, was granted and, therefore, they were required to pay duty under proviso to Section 3(1) of the Act. It was also urged that under the Exim Policy, an EOU is obliged to make exports of the entire production itself and not through any other entity. The Court posed the following question:-

> "The core question for our consideration, therefore, is whether the sales of shrimps and shrimp seeds by the assessee in DTA, without requisite permission from the Development Commissioner, are to be assessed to excise duty under Section 3(1) of the Act or under the proviso to the said section?"

32. To deal with the said question, the Court referred to Section 3 and it expressed understanding of the provision in the following terms:-

> "It is manifest that all excisable goods produced or manufactured in India are exigible to duty of excise under Section 3 of the Act, the charging section, at the rates set forth in the Schedule to the Tariff Act. However, the proviso to the said section provides that the duties of excise on any excisable goods, which are produced or manufactured by a 100% EOU and allowed to be sold in India shall be an amount equal to the aggregate of the duties of customs which would

be leviable under Section 12 of the Customs Act, 1962. As aforestated, the controversy at hand is whether in the absence of an order by the competent authority, allowing the assessee to sell the shrimp seeds and shrimps in India, excise duty on such sales could be levied and collected in terms of the proviso. To put it differently, the issue relates to the significance of the expression "allowed to be sold in India" as appearing in clause (*ii*) to the proviso to sub-section (1) of Section 3 of the Act."

33. After so stating the two-Judge Bench referred to the decision in ***SIV Industries Ltd.*** (supra) and opined that:-

"A similar issue fell for consideration of this Court in *SIV Industries Ltd. (supra)* In that case, the assessee was a 100% EOU. Later on, they sought permission to withdraw from 100% EOU Scheme, for which the Ministry accorded the necessary permission. However, some of the goods lying in the unit were removed prior to the debonding. A dispute arose regarding the rate of duty payable on such sales. The plea taken by the assessee was that they were liable to pay duty under Section 3(1) of the Act together with customs duty on the imported raw material used in the manufacture of said finished goods, lying in the stock whereas the stand of the Revenue was that excise duty under the proviso to Section 3(1) of the Act was payable on the finished goods with no customs duty being leviable on the raw materials used in the manufacture of finished goods. Thus, the bone of contention in that case was also with regard to the interpretation of the

> expression "allowed to be sold in India" appearing in the said proviso. Interpreting the said expression, this Court held that the expression "allowed to be sold in India" used in the proviso to Section 3(1) of the Act is applicable only to sales made in DTA up to 25% of the production by 100% EOUs, which are allowed to be sold into India as per the provisions of the Exim Policy. No permission was required to sell the goods manufactured by 100% EOU lying with it at the time the approval is accorded to debond. The Court opined that the goods having been sold without permission of the Central Government to debond the unit, the duty on the goods sold by the assessee was leviable under main Section 3(1) of the Act."
>
> [Emphasis added]

34. It is necessary to state here that after so stating the Court also noted that after pronouncement of the decision in ***SIV Industries Ltd.*** (supra), the circular was issued on 13.02.2002 clarifying the position. Interpreting the said circular, the Court held:-

> "19. As aforesaid, according to the Exim Policy 1992-1997 read with Appendix XXXIII of the Handbook of Procedures, an EOU may sell 50% of its production in value terms into a DTA only on issuance of a removal authorisation by the Development Commissioner.

> 20. In the instant case, admittedly at the time of sales of shrimps and shrimp seeds by the assessee in DTA, the Development Commissioner had not issued the requisite removal authorisation. Therefore, in view of the dictum of this Court in *SIV Industries Ltd. (supra)*, with which we are in respectful agreement, and the afore-extracted circular issued by the Board following the said decision, excise duty on such sales is chargeable under main Section 3(1) of the Act."
>
> [Emphasis added]

35. The impugned order, as is manifest, relies on the Larger Bench decision. It is to be noted that after the judgment in ***NCC Blue Water Products Ltd.*** (supra) the said decision was brought to the notice of the tribunal but it has opined that parent judgment in ***SIV Industries Ltd.*** (supra) was distinguished by the Larger Bench and further the circular dated 05.01.2004 was not taken note of by this Court in the subsequent judgment. On a careful scrutiny of the authority in ***NCC Blue Water Products Ltd.*** (supra), we are of the considered opinion that it concurs with the view expressed in ***SIV Industries Ltd.*** (supra). The circular dated 05.01.2004 came into existence after the Larger Bench decision in

Himalaya International Ltd. (supra). We have already stated that there was no justification for distinguishing the decision in ***SIV Industries Ltd.*** (supra). The Technical Member who authored the judgment after the decision in ***NCC Blue Water Products Ltd.*** (supra) was brought to the notice of the tribunal has absolutely improperly noted that the circular dated 05.01.2004 was not brought to the notice of this Court. The Court in ***NCC Blue Water Products Ltd.*** *case* had not based its conclusion on the basis of the circular dated 13.02.2002. It is clear as day that it has concurred with the ratio laid down in ***SIV Industries Ltd.*** (supra). It has been clearly opined that the expression "allowed to be sold in India" used in proviso to Section 3(1) of the Act would be applicable only to sales made in DTA of the production by 100% EOUs, which are allowed to be sold into India as per the provisions of the Exim Policy.

36. The said authority has also made it clear that the circular issued in 2002 is in consonance with the authority in ***SIV Industries Ltd.*** (supra). Thus, the view expressed by ***NCC***

Blue Water Products Ltd. (supra) has given the stamp of approval to the circular. It is a binding precedent on all the courts and the tribunals under Article 141 of the Constitution of India. The Larger Bench of the Tribunal, as stated earlier, could not have distinguished the judgment in ***SIV Industries Ltd.*** (supra). The later circular issued on 05.01.2004 on which reliance was placed by the revenue before the tribunal which has been taken note of in the impugned judgment is clearly indicative of an erroneous approach. The decision in ***NCC Blue Water Products Ltd.*** (supra) was bound to be followed and the tribunal could not have stated that 2004 circular was not taken note of. The tribunal should have appropriately appreciated that this Court was interpreting the statutory provision and it is also worthy to note that after the judgment delivered in ***SIV Industries Ltd.*** (supra) an amendment was brought into the provision. Therefore, the transaction prior to the date of amendment would be governed by ***SIV Industries Ltd.*** (supra) which has been followed in ***NCC Blue Water***

Products Ltd. (supra). Be it clarified that we are not concerned with the amended provision in this case.

37. In view of the aforesaid analysis, the appeals are allowed. The judgment and order passed by the tribunal and that of the adjudicating authority are set aside. The assessee shall be liable to pay the excise duty as per Section 3(1) of the Act. The competent authority is directed to compute the duty accordingly and proceed thereafter as per law. In the facts and circumstances of the case, there shall be no order as to costs.

.....J.
[DIPAK MISRA]

.....J.
[SHIVA KIRTI SINGH]

NEW DELHI;
June 03, 2016