M/S.L.R.Brothers,Indo Flora Ltd. ... vs Comissioner Of Central Excise on 1 September, 2020

Equivalent citations: AIRONLINE 2020 SC 942

Author: A. M. Khanwilkar

Bench: A.M. Khanwilkar, Dinesh Maheshwari, Sanjiv Khanna

1

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 7157 OF 2008

M/s. L. R. Brothers Indo Flora Ltd. … Appellant

Versus

Commissioner of Central Excise …Respondent

JUDGMENT

A. M. Khanwilkar, J.

1. This appeal takes exception to the Final Order No. C/203/08 dated 17.7.2008 passed by the Customs, Excise & Service Tax Appellate Tribunal1 in Customs Appeal No. 9 of 2008, whereby the customs duty levied upon the appellant on the sale of cut flowers within the Domestic Tariff Area 2 had been confirmed by the Tribunal.

2. The factual matrix leading to the present appeal is that the appellant □M/s. L.R. Brothers Indo Flora Ltd. is a 100% Export 1 For short, “CESTAT” 2 For short, “DTA” Oriented Unit3 and engaged in production of cut flowers and flower buds of all kinds, suitable for bouquets and for ornamental purposes. The 100% EOU is required to export all articles produced by it. As a consequence whereof, it is exempted from payment of customs duty on the imported inputs used during production of the exported articles, vide Notification No. 126/94□Cus dated 3.6.19944. Under the said notification, exemption on levy of customs duty had been extended even to the inputs used in production of articles sold in domestic market, in accordance with the Export□Import (EXIM) Policy and subject to other conditions specified by the Development Commissioner. To wit, upon payment of excise

duty in case of excisable goods; and in case of non-excisable goods, upon payment of customs duty on the inputs used for production, manufacturing or packaging of such articles at a rate equivalent to the rate of customs duty that would have been leviable on such articles, if such articles were imported. The said notification was amended by Notification No. 56/01-Cus dated 18.5.20015, by which the customs duty in case of non-excisable goods became leviable on inputs used for 3 For short, "EOU" 4 For short, "the exemption notification" 5 For short, "the amendment notification" production, manufacturing or packaging, as if there was no exemption notification in place. The effect of this amendment was that the customs duty on inputs which was charged at the rate equivalent to the duty leviable on final articles under the exemption notification, was now chargeable at the rate specified for the inputs.

3. The EXIM Policy 1997-2002 provided that a 100% EOU in floriculture sector was permitted to sell 50% of its produce in DTA, subject to achieving positive net foreign exchange earning of 20% and upon approval of the Development Commissioner. The appellant, without obtaining the approval of the Development Commissioner and without maintaining the requisite net foreign exchange earning, made DTA sales to the extent of Rs.38,40,537/- during 1998-99 to 2000-01 (upto December 2000), in contravention of the provisions of EXIM Policy. Notably, the appellant subsequently sought ex-post facto approval from the Development Commissioner vide letter dated 6.2.2001.

4. Meanwhile, the Additional Commissioner, Central Excise, Meerut-I issued a show cause notice dated 16.3.2001 to the appellant to show cause as to why customs duty, interest and penalty should not be imposed for the DTA sales made by the appellant in contravention of the EXIM Policy, that too after having availed the exemptions under the exemption notification on the import of green house equipment, raw materials like Live Rose Plants and consumables like planting materials and fertilizers. After according opportunity of being heard, the Additional Commissioner adjudged the show cause notice and held that the DTA sales were made without permission of the Development Commissioner and in contravention of the EXIM Policy and therefore, customs duty is leviable upon the appellant for the said sales. It was further held that the appellant had wilfully suppressed facts and thus Section 28 of the Customs Act, 19626 was invoked in the present case. The relevant extract of the Order-in-Original dated 18.10.2001 passed by the Additional Commissioner, Central Excise, Meerut – I on the aforesaid findings is reproduced hereunder:

> "3.1 I find that the party had imported the capital goods and also imported raw materials like "Live Rose Plants" and consumable like "Fertilizer and Planting Materials" during 1996-97 to 2000-2001 and further that they made clearances towards Domestic Tariff Area sales without obtaining permission from the Competent Authority in the matter. On scrutiny of the records, it was observed that before making any 6 For short, "the 1962 Act" DTA sales it was required that 20% positive Net Foreign Exchange Earning (NFEP) should have been achieved i.e. annual value of export should have been 20% more than Rs.2,42,37,400/= (+) annual value of imports of raw materials and consumables during the respective year and the said noticee had exported the flowers worth Rs.91,92,000/= only which are well below prorata annual value of Import of capital goods. 3.2 I also find that as per

> condition of the approval letter No. 119(1994)EOB/34/94 dated 04.5.94, issued by Govt. of India, Ministry of Industries, Department of Industrial Development, Secretarial for Industrial approval, MUCC Section, New Delhi, the bonding period of M/s. L.R. Brothers Indo Flora Ltd., was fixed for 10 years during which they were required to achieve 62% value addition over and above the imports and other factors contributing towards the foreign exchange gone out of the country. As per the specific condition of the approval letter, the party was required to export all of its production out of India subject to permissible limit of Domestic Tariff Area Sales (herein after referred to as DTA Sales) and that, too, after specific permission from Development Commissioner of the EPZ concerned, on payment of applicable Customs & Central Excise duties. The Export Import Policy 1997□2002 specifies the condition of DTA sales by an EOU.

In this regard, I reproduce below the contents of the relevant paras of Export Import Policy 1997□ 2002..... 3.3 Therefore, in view of the above legal provisions of the Export Import Policy 1997□2002, it is amply clear that for earning DTA sales entitlement the EOU should fulfil the export obligations as prescribed in the letter of approval and also should have a positive NFEP which is 20% in case of floriculture units.

3.4 ..... As per Note 3 to paragraph 9.5 of the Export Import Policy, as discussed above, prorata annual value of imported capital goods (i.e. 1/5th of the total import of Capital Goods worth Rs.12,11,87,000/□comes to Rs.2,42,37,400/□ Therefore, before making any DTA sales it was required that 20% positive NFEP should have been achieved i.e. the annual value of export should have been 20% more than Rs.2,42,37,400/□+ annual value of imports of raw materials and consumable during the respective year, whereas in all the four years since operation, the unit had exported the flowers worth Rs.91.92 lakhs only which are well below the prorata annual value of import of capital goods. Therefore, in view of the specific provisions of the Export Import Policy 1997□2002, the unit was not entitled to sell any goods in DTA.

3.5 Moreover, the guidelines for sale of goods in the DTA by EOU are prescribed in Appendix 42 of Handbook of Procedure, Export Import Policy 1997□2002. Para (f) of the said Appendix 42 reads as: “An application for DTA sale shall be accompanied by a statement indicating the ex□factory value of the goods produced (excluding rejects) and ex□factory value of goods actually exported. The statement shall be certified by an independent cost/chartered/cost and works accountant and endorsed by the Customs/Central Excise Officer having jurisdiction over the unit. The Development commissioner of the EPZ concerned will determine the extent of DTA sale admissible in value terms and issue goods removal authorization in terms of value and quantity for sale in DTA.” However in the present case as per records, the party failed to furnish the same application as well as permission, if any to this department and did not follow the procedure as laid down in the Hand Book of Procedure, Export Import Policy 1997□2002.

3.6 Apart from the above, the floriculture EOU may Import Capital Goods and Raw Materials, without payment of Customs duties in terms of Custom Notification No. 126/94 dated 3.6.94 and accordingly M/s. L.R. Brother Indo, Flora Ltd., have imported green house equipment, raw

materials like Liver Rose Plants and Consumable like planting materials and Fertilizers under the said notification. Para 3 of the said Notification reads as under :....

3.7 Therefore, from the above provision, it is clear that the units working under the said Notification may sell their produced goods in DTA on payment of excise duty as leviable under Section 3 of Central Excise Act, 1944 if the goods are excisable and on payment of full Customs duties leviable on such goods as if imported as such if the goods are non excisable. Cut Flowers or Flower Buds are not covered under Central Excise Tariff Act, 1985 as Chapter 6 which covers such types of Flowers in Customs Tariff left blank in Central Excise Tariff Act and, therefore, such types of Flowers will be treated as non excisable in view of Section 2 (d) of the Central Excise Act, 1944. Therefore, full Customs duties will be leviable on such Flowers, if sold in DTA treating such flowers as imported into India, in terms of Notification No. 126/94-Cus dated 03.6.94. Further, M/s. L.R. Brothers Indo Flora Ltd., had made DTA sales during the year 1998-99 to 2000-01 (upto December 2000) in contravention to the aforesaid provisions. Further, they failed to show any permission from Development Commissioner for sale of their goods in DTA. It appears that the Development Commissioner has granted no such permission to them, as they have not earned the DTA sale entitlement due to very low exports in comparison to high quantum of imports. .....

3.8 I have also come to conclusion that M/s. L.R. Brothers Indo Flora Ltd., Behat Road, Saharanpur have contravened the provisions of Import & Export Policy 1997-2002 and have not fulfilled the conditions of Notification No. 126/94 dated 3.6.94. Hence the party is liable to pay the full customs duty on cut flowers sold in DTA, treating the flowers imported as such into India. Further, the said M/s. L.R. Brothers Indo Flora Ltd., have been indulged in wilful suppression of facts, as aforesaid, and sold the said goods viz., cut flowers falling under Ch. S.H. No. 0603.10 of the Customs Tariff, in D.T.A. in contravention of the provisions of Import Export Policy 1997-2002, without payment of Customs duty, hence extended period of five years as provided under proviso to section 28 of the Customs Act 1962 is invokable in the instant case. Therefore, all obligations were cast on such a large undertaking to discharge the correct duty liability i.e. Customs duty amounting to Rs.9,98,177.00. Therefore, demand of Customs duty stands recoverable from them. They are also liable to pay interest @ 24% from the 1 st day of the month succeeding the month in which the duty ought to have been paid under Section 28AB of the Customs Act, 1962. ....” (emphasis supplied)

5. The Additional Commissioner, by way of aforesaid order, confirmed the demand of customs duty of Rs.9,98,177/- under Section 28, interest at the rate of 24% under Section 28AB and penalty of Rs.9,98,177/- under Section 114A of the 1962 Act. The appellant unsuccessfully carried the matter in appeal before the Commissioner (Appeals), Customs & Central Excise, Meerut-I, wherein the Order-in-Original came to be confirmed by the Order-in-Appeal dated 29.7.2005 by holding thus:

> “5. ..... In the light of the above facts, I find myself in agreement with the findings of the adjudicating authority that the appellants have not earned the DTA sale entitlement due to very low exports in comparison to high quantum of imports. Thus, the alleged contravention of provisions of Import & Export Policy 1997-2002 and non-fulfilling of the conditions of the Notification 126/94-Cus ibid is fully established against them. Therefore, the demand of Customs duty along with interest

in this case as per the impugned order is justified.

As regards the imposition of penalty on the appellants, I find that the charges of contravention of provisions of Export & Import Policy 1997-2002 & Notification No. 126/94 Cus dt. 03.06.94 stand proved against the appellants. They were aware that they were not entitled to make DTA sales of the subjected goods, even then they made DTA sales of the same to evade payment of duty. Hon'ble Supreme Court in the case of Gujarat Travancore Agency vs. Commissioner of Income Tax 1989 (42) ELT 350 (SC), has held that the penalty under Section 271(1)(a) of the Income Tax Act is a civil obligation and unless there is something in language of the statute indicating the need to establish element of mensrea, it is generally sufficient to prove that a default in complying with the statute has occurred.

In view of the ratio of the aforesaid judgment of Apex Court, the penalty has been rightly imposed upon the appellant.

In view of the above, I find no infirmity in the order passed by the adjudicating authority and therefore disallow the appeal."

6. The matter was further carried in appeal before CESTAT whereat the impugned order was passed confirming the order of the authorities below whilst also holding that amendment notification is prospective and cannot be applied to the present case. The relevant extract of the impugned order is reproduced below:

"5. We have carefully considered the submissions made from both the sides. Irrespective of whether the DTA clearances of cut-flowers were, in contravention of the EXIM Policy or otherwise, the cut-flowers being non-excisable goods, their DTA clearance would attract, in terms of the provisions of para 3(a) of the exemption Notification No. 123/94-CUS., only the Custom Duty involved on the inputs used in the production of the cut-flowers. The point of dispute is as to whether the Custom Duty payable on the inputs used in the production of the cut-flowers which had been cleared to DTA, is to be taken as an amount equal to Custom Duty chargeable on the import of cut-flowers, as such, or it should be the actual Custom Duty on the inputs used in the production of cut-flowers cleared to DTA. 5.1 xxx xxx xxx 5.2 From reading of para 3(a) of the Notification No. 126/94-cus as it existed during the period of dispute i.e. during the period prior to 18.5.01 – and as it existed during period w.e.f. 18-5-01, it is clear that during the period of dispute, the notification contained a machinery provisions for determining, the Custom Duty chargeable on the inputs used in the production of non-excisable goods cleared to DTA and as per this machinery provision, the duty was to be in an amount equal to the Custom Duty chargeable on the finished goods, as if imported, as such. However, after the amendment of this Notification w.e.f. 18.5.01, the duty on the inputs used in the production of non-excisable goods cleared to the DTA was to be calculated on actual basis. The amendment to the Notification No. 126/94-CUS. w.e.f. 18.5.01 by the

Notification No. 56/01 can have only prospective effect and it cannot be given retrospective effect. In view of this, during the period of dispute, customs duty on the inputs used in the production of cut-flowers cleared to DTA has to be calculated as per the provisions of the Notification, as it existed during that period.

6. The Tribunal's judgment in the case of Vikram Ispat (supra) is not applicable to the fact of this case, as in the present case what is being charged in respect of DTA clearances of the cut-flowers is not the customs duty on the cut-flowers, but the custom duty on the inputs used in the production of those cut-flowers, which as per the provisions of Notification, as it existed at that time, was equal to the Customs Duty chargeable on the import of cut-flowers, as such. In the Tribunal's judgment in case of Zygo Flowers Ltd. (supra) and Cosco Blossoms Pvt. Ltd. (supra), the implications of the wording of para 3(a) of the exemption notification during the period of dispute -"or where such articles [including rejects, waste and scrap material] are not excisable, on payment of Custom Duty on the said goods used for the purpose of production, manufacture or packaging of such articles in an amount equal to the Custom Duty leviable on such articles, as if imported, as such" had not been considered. If the Appellant's view accepted, the words "in an amount equal to the Custom Duty leviable on such articles, as if imported, as such" would become redundant. It is well settled principle of interpretation of statute that a statute has to be construed without adding any words to it or subtracting any words from it and an interpretation which makes a part of the statute redundant has to be avoided.

7. In view of the above discussion, we hold that the custom duty has been correctly charged in respect of DTA clearances of the cut-flowers and as such we find no infirmity in the impugned order. The appeal is accordingly dismissed." Thus, the levy of customs duty stood confirmed.

7. Being aggrieved, the appellant has approached this Court. The thrust of the argument of the appellant is that according to Paragraph 3 of the exemption notification, sales made in DTA would attract excise duty and since the cut flowers sold by the appellant are non-excisable goods, no excise duty can be levied upon it. Further, according to the notification, in case of non-excisable goods, the customs duty is leviable on the imported inputs. In the present case, since the cut flowers are home grown, customs duty cannot be levied upon them and therefore, the demand of customs duty cannot be sustained. Reliance is placed on the decisions of CESTAT in Cosco Blossoms Pvt. Ltd vs. Commissioner of Customs, Delhi7 and larger bench of Central Excise and Gold (Control) Appellate Tribunal 8 in Vikram Ispat vs. Commissioner of Central Excise, Mumbai-III9. It is then urged that the exemption notification predicates levy of customs duty on non-excisable goods sold in DTA sales to the extent of the value of inputs and not to the extent of the value of final product. It is further urged that the amendment notification is merely clarificatory and hence it would apply retrospectively. To buttress this submission, the appellant had placed reliance on Circular No. 31/2001-Cus dated 24.5.2001 issued by Central Board of Excise and Customs, New Delhi 10, which noted that the charge of customs duty on the inputs equal to the duty leviable 7 2004 (164) ELT 423 (Tri.-Del.) 8 For short, "the CEGAT" 9 2000 (120) ELT 800 (Tribunal-LB) 10 For short, the "CBEC

Circular" on the import of final product is putting floriculture EOUs at a disadvantageous position. The circular further envisages that the central excise notifications provided for recovery of duty on inputs procured duty free, whereas the exemption notification provided for recovery on inputs equal to duty on the final product. That the amendment notification was issued to address this anomaly and to harmonise the central excise and customs notifications. The appellant placed reliance on the Constitution Bench decision of this Court in Commissioner of Income Tax (Central) – I, New Delhi vs. Vatika Township Private Limited11, wherein it had been observed that whenever the legislator intends to confer benefit upon a person, it must be presumed to have retrospective effect. The appellant relied upon yet another decision of this Court in Zile Singh vs. State of Haryana & Ors.12 to contend that the substitution of a clause which clarifies about the intent of the legislature takes effect from the date of enactment of original provision. The appellant would further urge that Section 12 of the 1962 Act being the charging section, could only be applied if the goods are imported into India 11 (2015) 1 SCC 1 12 (2004) 8 SCC 1 and since the cut flowers are not imported, the show cause notice issued under the provisions of the 1962 Act is bad in law. In this regard, the appellant had placed reliance on Commissioner of Central Excise and Customs vs. Suresh Synthetics13. The appellant further relied on the exposition of this Court in Uniworth Textiles Limited vs. Commissioner of Central Excise, Raipur14 to submit that Section 28 of the 1962 Act, extending limitation, can be invoked only in the case of deliberate default and urged that it cannot be invoked in the present case since there was no default.

8. Per contra, the respondent would urge that in the fact situation of the present case, the department has correctly levied the customs duty, as the DTA sales made were in contravention of the EXIM policy and the appellant had no permission from the Development Commissioner to clear the goods in DTA. The respondent further urged that the amendment seeks to bring about a substantive change, whilst pointing out that the CBEC Circular in its opening paragraph speaks about "carrying out" the amendment. Further, the amendment must be applied 13 2007 (216) ELT 662 (SC) 14 (2013) 9 SCC 753 prospectively. Reliance is placed upon the decision of this Court in Union of India & Anr. vs. IndusInd Bank Limited & Anr. 15, wherein it has been held that if the provision is remedial in nature, it cannot be construed as clarificatory or declaratory and has to be applied prospectively.

9. We have heard Mr. Rupesh Kumar, learned counsel for the appellant and Mr. Ashok K. Srivastava, learned senior counsel for the respondent.

10. The issues that arise for consideration in this appeal are: (i) Whether customs duty can be charged on the non-excisable goods produced in India and sold in DTA by an EOU?; and (ii) Whether the amendment in terms of Notification No. 56/01-Cus dated 18.05.2001, purporting to amend the criteria for determination of duty on inputs, is prospective or retrospective in its application?

11. At the outset, it is apposite to refer to the stated notification. The relevant extract thereof reads as under:

> "NOTIFICATION NO. 126/94□CUS DATED 3.6.1994 Exemption to import of specified goods for use in manufacture of export goods by 100% E.O.Us. □In exercise of the powers conferred by sub□section (1) of section 25 of the Customs Act, 1962 (52 of 1962), the 15 (2016) 9 SCC 720 Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts goods specified in Annexure□I to this notification (hereinafter referred to as the goods), when imported into India, for the production or manufacture of articles specified in Annexure□II for export out of India or for being used in connection with the production, manufacture or packaging of the said articles specified in Annexure□II for export out of India (hereinafter referred to as the specified purpose) by hundred per cent Export Oriented Undertakings approved by the Board of Approval for hundred per cent Export Oriented Undertakings, appointed by the notification of Government of India in the former Ministry of Industry and Civil Supplies, (Department of Industrial Development) No. S.0.163(E)/RLIU/10(2)76, dated the 3rd March, 1976 or the Development Commissioner concerned as the case may be, from the whole of the duty of customs leviable thereon under the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) and the additional duty, if any, leviable thereon under section 3 of the second mentioned Act, subject to the following conditions, namely :□(1) the importer has been granted the necessary licence for the import of the said goods;

(2) the importer, at the time of import of the said goods, produces to the Assistant Commissioner of Customs a certificate from the Development Commissioner to the effect that the importer has executed a bond in such form and for such sum as may be prescribed binding himself□

(a) to bring the said goods into his unit and to use them for the specified purpose; and

(b) to dispose of the said goods or the articles produced, manufactured or packaged in the unit or the waste, scrap or remanents arising out of such production, manufacture or packaging in the manner as may, if any, be prescribed in the Export□Import Policy and in this notification;.....

xxx xxx xxx

3. Notwithstanding anything contained in this notification, the exemption contained herein shall also apply to the said goods which on importation into India are used for the purposes of production, manufacture or packaging of articles and such articles (including rejects, waste and scrap material arising in the course of production, manufacture or packaging of such articles) even if not exported out of India are allowed to be sold in India under and in accordance with the Export□ Import Policy and in such quantity and subject to such other limitations and conditions as may be specified in this behalf by the Development Commissioner, on payment of duty of excise leviable thereon under section 3 of the Central Excises and Salt Act, 1944 (1 of 1944) or where such articles (including rejects, waste and scrap material) are not excisable, on payment of customs duty on the said goods used for the purpose of production, manufacture or packaging of such articles, in an amount equal to the customs duty leviable on such articles as if imported as such.) Explanation.□ For the purposes of this notification, "Export□Import Policy" means Export and Import Policy, 1st

April, 1997 □31st March, 2002, published by the Government of India in the Ministry of Commerce Notification No. 1/1997□2002, dated 31 st March, 1997, as amended from time to time. ....." (emphasis supplied)

12. A bare perusal of the above notification would evince that apart from providing for duty free imports of inputs for an 100% EOU in order to export all the goods produced or manufactured by it, in addition, it also gives liberty to the 100% EOUs to clear their goods in DTA to the extent permissible by and in accordance with the EXIM policy. The EXIM policy, at paragraph 9.9 provided that for earning an entitlement to make sales in DTA, the unit has to maintain positive net foreign exchange earning. The calculation of net foreign exchange earning, as defined at paragraph 9.29, is provided for at paragraph 9.5 of the Policy, which had to be done as prescribed in Appendix I of the Policy. In case of cut flowers, it has been fixed at 20% since it would come within the category of "Products not covered above".

13. On a combined reading of the notification with the conditions laid down in the EXIM policy, it is clear that the fulfilment of the aforesaid conditions is a condition precedent to become eligible to make DTA sales. Resultantly, if goods are cleared in DTA sales in breach of the aforesaid conditions, customs duty would be leviable, as if such goods were imported goods.

14. Reverting to the first question, the appellant lays emphasis that the DTA sales made by an 100% EOU can only be amenable to excise duty and show cause notice under the provisions of the 1962 Act could not have been issued. This ground finds support in the decision of larger bench of the CEGAT in Vikram Ispat (supra), which the appellant relies upon. In paragraph 16 of the said decision, it has been held as under:

> "16. Notification No. 2/95□C.E., dated 4□1□95 provides that the goods manufactured and cleared by a 100% E.O.U. to DTA will be exempted from so much of duty of excise as is in excess of the amount calculated at the rate of 50% of each of duty of customs leviable read with any other notification for the time being in force on the like goods produced or manufactured outside India, if imported into India provided that the amount of duty payable shall not be less than the duty of excise leviable on like goods produced or manufactured by the units in Domestic Tariff Area read with any relevant notification. It is, thus apparent that notification No. 2/95 provides a minimum limit of the rate of duty which has to be paid by the 100% E.O.U. while clearing the goods to DTA and this limit is provided by the duty of excise leviable on like good manufactured outside 100% E.O.U. However, if the aggregate of duty customs leviable on goods cleared by 100% E.O.U. is more than the duty of excise leviable on like goods, a 100% E.O.U. has to pay more duty. The Revenue wants to restrict the availment of Modvat credit to the components of additional duty of customs paid under Section 3 of the Customs Tariff Act by bringing the fiction that 100% E.O.U. is a place which is not in India and the sale therefrom within India is akin to import into India. We do not find any substance in this view of the Revenue. The clearance of the goods by 100% E.O.U. are not import in the terms in which it has been defined under Section 2 (23) of the Customs Act, according to which import,

with its grammatical and cogent expression means bringing into India from a place outside India. This is also apparent from the fact that when the goods are cleared from 100% E.O.U. to any place in India, central excise duty under Section 3(1) of the Central Excise Act is levied and not the customs duty under the Customs Act. If it is to be regarded as import, then the duty has to be charged under Section 12 of the Customs Act, read with Section 3 of the Customs Tariff Act. The Revenue, it seems is confusing the measure of the tax with the nature of the tax. The nature of the duty levied on the goods from 100% E.O.U. is excise duty and nothing else, whereas for determining the quantum of duty the measure adopted is duty leviable under Customs Act as held by the Supreme Court in many cases referred to above. The method adopted by the law makers in recovering the tax cannot alter its character. Once it is held that the duty paid by the 100% E.O.U. in respect of goods cleared to any place in India is excise duty, the question of dissecting the said duty into different components of basic customs duty, auxiliary duty, additional duty of Customs or any other customs duty does not arise. The proforma of AR□1A on which the reliance was placed by the learned D.R., cannot change the legal position that the duty levied on 100% E.O.U. is a duty of excise and not customs duty." (emphasis supplied) However, this exposition has no application to the fact situation of the present case, in as much as there had been no contravention of conditions of EXIM Policy and the issue was only about the nature of tax, in case of goods otherwise amenable to excise duty.

15. Concededly, the DTA sales pertaining to excisable goods made in conformity with the conditions of the EXIM policy are exigible to excise duty, but once there is contravention of the condition(s) of the EXIM policy, irrespective of the goods produced being excisable or non□excisable, the benefit under the exemption notification is unavailable. In such a situation, the very goods would become liable to imposition of customs duty as if being imported goods.

16. We may now examine as to what would be the position in case of sale of non□excisable goods as per conditions specified under the EXIM policy. Assuming there was no contravention of the EXIM policy, in case of the goods cleared being non excisable, the Paragraph 3 of the exemption notification would come into play and the duty would be leviable on the inputs used in such goods. It is relevant to bear in mind Section 12 of the 1962 Act here, being the charging section, as is set out hereunder:

"Section 12 – Dutiable Goods (1) Except as otherwise provided in this Act, or any other law for the time being in force, duties of customs shall be levied at such rates as may be specified under the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force, on goods imported into, or exported from, India.

(2) The provisions of sub□section (1) shall apply in respect of all goods belonging to Government as they apply in respect of goods not belonging to Government." It is clear from the above provision that the goods which are imported shall be charged as specified under the Customs Tariff Act, 1975 or "any other law", unless exempted under the 1962 Act or by "any other law".

17. In the present case, the notification provides for exemption on import of inputs and at the same time prescribes for adherence of certain conditions for availing the exemption. The notification further prescribes the rate at which the customs duty on the inputs used in the production of non□ excisable goods sold in DTA is to be charged. Thus, the notification, having been issued in exercise of delegated legislation under Section 25 of the 1962 Act, has to be understood as "any other law". Resultantly, the appellant, having availed exemption under the notification, cannot evade customs duty on the imported inputs at the rate prescribed by the notification.

18. The show cause notice points out that the appellant imported raw materials like "Live Rose Plants" and consumables like fertilizers and planting materials, however, the appellant advisedly chose to confine its argument to "cut flowers", which, as contended, were grown on Indian soil and thus not amenable to customs duty. However, the demand made in the show cause notice "treating" cut flowers as deemed to have been imported was only for the purpose of quantification of the customs duty on the imported inputs and not imposition of the customs duty on the domestically grown cut flowers as such.

19. The decision of CESTAT in the case of Cosco Blossoms (supra) is of no avail to the appellant. In that case, the tribunal had relied upon the decision in Vikram Ispat (supra) and held that the cut flowers cleared in DTA sales cannot be charged with customs duty, without considering that the goods were non excisable. Notably, the Tribunal had granted liberty to the authorities to charge customs duty upon the imported inputs, if used in production of the goods cleared in DTA, which supports the case of the respondent. Paragraph 5 of the aforesaid order reads as under:

> "5. It is well settled [2000 (120) E.L.T. 800] that goods produced in an EOU cannot be treated as imported goods and subjected to customs duty. The duty payable in respect of such goods is the duty of excise under Section 3 of the Central Excise Act, 1944. Therefore, the duty demand made in the impugned order under Section 28 of the Customs Act is not sustainable. Accordingly, we set aside the impugned order and allow the present appeal. However, we make it clear that revenue authorities will be at liberty to demand duty on the imported inputs, if any, used in the production of the cut□flowers in question.
>
> The appeal is disposed of as above." (emphasis supplied)

20. A priori, the demand in the present case, pertaining to the non□excisable goods has rightly been made under the 1962 Act upon the imported inputs used in the production of goods sold in DTA in violation of condition(s) in the EXIM Policy.

21. The decision of CESTAT in Suresh Synthetics (supra) is not applicable to the present case. The goods in that case were Polyster Textured Yarn, which are excisable goods. The investigations were made as per provisions of the Central Excise Act, 194416, however, show cause notice was issued under 16 For short, "the 1944 Act" provisions of the 1962 Act. Thus, it was held that the demand is not maintainable as it was made under a defective show cause notice.

22. In case of excisable goods, even the present notification takes resort to Section 3 of the 1944 Act, as can be seen from the Paragraph 3 of the notification extracted above. Whereas, the provisions of the 1962 Act are invoked only when the goods are non-excisable. In the present case, since the cut flowers are non-excisable goods, the demand for payment of customs duty had rightly been made vide show cause notice under the provisions of the 1962 Act.

23. Moving to the second question, the show cause notice was issued to the appellant prior to the issuance of the amendment notification. In this backdrop, let us now examine the contention of the appellant that the amendment notification being retrospective in its application. The relevant portion of the said notification is reproduced hereunder:

> "NOTIFICATION NO. 56 /2001-CUS DATED 18.5.2001 In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), the Central Government being satisfied that it is necessary in the public interest so to do, hereby directs that each of the notifications of the Government of India in the Ministry of Finance (Department of Revenue), specified in column (2) of the Table hereto annexed shall be amended or further amended, as the case may be, in the manner specified in the corresponding entry in column (3) of the said Table.
>
> TABLE Sr.No Notification No. Amendment and Date (1) (2) (3) xxx Xxx xxx
>
> 8. 126/94-Cus In the said notification, dated the 3rd June, 1994
>
> (a) in the first paragraph, in condition (6), after clause (d), the following shall be inserted, namely:-" (e) permit destruction of rejects and waste without payment of duty within the unit, or outside the said unit, where it is not possible or permissible to destroy the same within the said unit, in the presence of Customs or Central Excise officer.";
>
> (b) in paragraph 2, in the proviso, for the words and figures "duty of 15% ad valorem", the words and figure "duty of 5% ad valorem" shall be substituted;
>
> (c) in paragraph 3, in clause
>
> (a), for the words "on payment of customs duty on the said goods used for the purpose of production, manufacture or packaging of such articles in an amount equal to the customs duty leviable on such articles as if imported as such.", the following shall be substituted, namely:-"customs duty equal in amount to that leviable on inputs obtained under this notification and used for the purpose of production, manufacture or packaging 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.
>
> ....."

(emphasis supplied)

24. As can be seen, the aforesaid notification posits of carrying out amendments and substituting the charging clause of the inputs used in case of non-excisable goods. The language employed in the notification does not offer any guidance on whether the amendments as made were to apply prospectively or retrospectively. It is a settled proposition of law that all laws are deemed to apply prospectively unless either expressly specified to apply retrospectively or intended to have been done so by the legislature. The latter would be a case of necessary implication and it cannot be inferred lightly.

25. In this regard, the appellant has heavily relied upon the CBEC Circular to contend that the Government intended to apply the notification retrospectively as it was brought in to address an anomaly, which existed vis a vis central excise notifications. The relevant portion of the CBEC Circular is extracted hereunder:

"Circular No. 31/2001-Cus, dated 24-5-2001 xxx xxx xxx

(xi) Duty on DTA Clearance of Non-Excisable Goods;

25. At present, the EOUs and units operating under EPZ/STP/EHTP Schemes are allowed to sell finished products (including rejects, waste & scrap) in the Domestic Tariff Area (DTA) on payment of applicable excise duty as per proviso to Section 3 of the Central Excise Act, 1944. However, the same is applicable if the goods being cleared into DTA are excisable goods. Under the present dispensation, the notifications providing duty free import of goods under the above said Schemes stipulate that where the finished products (including rejects, wastes & scrap) sought to be cleared in DTA are not excisable, such products are allowed to be cleared on payment of customs duty on the inputs used for the purpose of production, manufacture, processing or packaging such products in an amount equal to the customs duty leviable on such products as if imported as such.

26. It has been brought to notice of the Board that in some Commissionerates, the floriculture units under the EOU Scheme are being asked to pay duty equivalent to the customs duty leviable on finished goods as if imported as such, for clearance of cut-flowers, which is not an excisable commodity. It has also been stated that the DTA units are not required to pay any duty for sale of cut-flowers, as the same are not excisable. This is stated to have placed the floriculture units in EOUs at a serious disadvantageous position vis-a-vis DTA units.

27. The matter has been examined. In the central excise notifications governing duty free procurement by EOUs and units under EPZ/STP/ETHP Schemes, there is a provision to recover duty on the inputs & consumables procured duty free under exemption notification, which have gone into production of non-excisable goods cleared into DTA. In the notifications governing duty free import by EOUs and the EPZ/STP/EHTP units, the anomaly, however, exists inasmuch as the notifications talk about payment of customs duty on the inputs used in the manufacture of articles in an amount equal to the customs duty leviable on such articles as if imported as such. In order to

remove this anomaly, all the notifications governing duty free import of goods by STP/EHTP/EPZ units and EOUs including those in Aquaculture and Agriculture sector have been amended so as to bring the provisions of these notifications in harmony with the provisions of corresponding Central Excise notifications. Notification No. 56/2001□Cus, dated 18□5□2001 may be seen for details."

(emphasis supplied)

26. Upon a bare reading of the circular, it can be noted that it discusses the mechanism in force before the amendment, the reason for bringing in the change and the changes brought in. The circular does not mention that the earlier methodology in force was deficient or devoid of clarity in any manner. It rather says that the same was being disadvantageous to the EOU units as compared to the DTA units due to the difference in charging rates in the respective circulars. Upon considering that, the amendment has been brought in to establish parity with the excise notifications and to vindicate the disadvantage that earlier regime was causing to EOU units. Merely because an anomaly has been addressed, it cannot be passed off as an error having been rectified. Unless shown otherwise, it has to be seen as a conscious change in the dispensation, particularly concerning the fiscal subject matters. The word “anomaly” has been defined in Webster's New Twentieth Century Dictionary to mean “abnormality; irregularity; deviation from the regular arrangement, general rule or the usual method”.

27. In the context of the subject circular, since it takes note of the previous arrangement and distinguishes it from the excise notifications, the meaning has to be taken as deviation from the regular arrangement, which by no stretch of imagination can be treated as a mere mistake. To call the amendment notification clarificatory or curative in nature, it would require that there had been an error/mistake/omission in the previous notification which is merely sought to be explained.

28. To understand if the Government brought in the amendment notification to clarify that the articles were to be charged at the rate of duty provided for inputs and not for the final articles, it would be necessary to analyse the position prior to the amendment and to see if duty on inputs chargeable at the rate of final articles was an error that crept in. In this regard, we may refer to Section 3 of the 1944 Act as it stood during the relevant period, which is set out hereunder:

> “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 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);
>
> (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,□□

(i) in a free trade zone and brought to any other place in India; or

(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).” (emphasis supplied) The proviso to the charging section of the 1944 Act provides that an EOU making DTA sales shall be charged duty as if the goods were imported into India and in value equal to the customs duty chargeable thereto. No doubt, the said provision applies only in cases of excisable goods, but the exemption notification providing for similar duty by terms thereunder for non□excisable goods, can be understood to have been made to equate the duty in case of excisable as well as non□excisable goods. Therefore, it must follow that the said provision was not an error that crept in but was intentionally introduced by the Government to determine the charging rate, as discussed above. That being the position prior to amendment, the amendment brought in cannot be said to be clarificatory in nature.

29. The decision of this Court in Zile Singh (supra) is of no avail to the appellant. In as much as it was a case of poor choice of words by the draftsmen, which led to absurdity in interpretation and a subsequent substitution of such words to make the intention clear. In the present case, as discussed above, there was no error present in the prevailing dispensation and it was a policy decision to give relief to the EOU units from the date of its amendment.

30. In Vatika Township (supra), Constitution Bench of this Court has analysed the principle concerning retrospectivity. The appellant heavily relies upon the observation made at paragraph 30 of the decision, which reads thus:

> “30. ... If a legislation confers a benefit on some persons but without inflicting a corresponding detriment on some other person or on the public generally, and where to confer such benefit appears to have been the legislators' object, then the presumption would be that such a legislation, giving it a purposive construction, would warrant it to be given a retrospective effect. ...”.
>
> The appellant clearly misinterprets the context of the above observation by reading the same in isolation. To have a better understanding of the said principle, it is relevant to read the preceding and subsequent paragraphs. We may here refer to Paragraph 32 of the said decision, which is extracted below:

> "32. Let us sharpen the discussion a little more. We may note that under certain circumstances, a particular amendment can be treated as clarificatory or declaratory in nature. Such statutory provisions are labelled as "declaratory statutes". The circumstances under which provisions can be termed as "declaratory statutes" are explained by Justice G.P. Singh in the following manner: "Declaratory statutes The presumption against retrospective operation is not applicable to declaratory statutes. As stated in CRAIES and approved by the Supreme Court: 'For modern purposes a declaratory Act may be defined as an Act to remove doubts existing as to the common law, or the meaning or effect of any statute. Such Acts are usually held to be retrospective. The usual reason for passing a declaratory Act is to set aside what Parliament deems to have been a judicial error, whether in the statement of the common law or in the interpretation of statutes. Usually, if not invariably, such an Act contains a Preamble, and also the word "declared" as well as the word "enacted".' But the use of the words 'it is declared' is not conclusive that the Act is declaratory for these words may, at times, be used to introduced new rules of law and the Act in the latter case will only be amending the law and will not necessarily be retrospective. In determining, therefore, the nature of the Act, regard must be had to the substance rather than to the form. If a new Act is 'to explain' an earlier Act, it would be without object unless construed retrospective. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended. The language 'shall be deemed always to have meant' is declaratory, and is in plain terms retrospective. In the absence of clear words indicating that the amending Act is declaratory, it would not be so construed when the pre□amended provision was clear and unambiguous. An amending Act may be purely clarificatory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect and, therefore, if the principal Act was existing law which the Constitution came into force, the amending Act also will be part of the existing law." The above summing up is factually based on the judgments of this Court as well as English decisions." Upon reading the observations at Paragraph 30 and juxtaposed with paragraph 32, it is crystal clear that an essential requirement for application of a legislation retrospectively is to show that the previous legislation had any omission or ambiguity or it was intended to explain an earlier act. In absence of the above ingredients, a legislation cannot be regarded as having retrospective effect.

31. In IndusInd Bank (supra), this Court, while examining whether the amendment made to Section 28 of the Indian Contract Act, 1872 was prospective or retrospective, has noted that the said provision is remedial in nature and not clarificatory, since prior to the amendment, the rights and liabilities accrued were sought to be taken away. Paragraph 24 of the said decision is reproduced below:

> "24. On a conspectus of the aforesaid decisions, it becomes clear that Section 28, being substantive law, operates prospectively, as retrospectivity is not clearly made

> out by its language. Being remedial in nature, and not clarificatory or declaratory of the law, by making certain agreements covered by Section 28(b) void for the first time, it is clear that rights and liabilities that have already accrued as a result of agreements entered into between parties are sought to be taken away. This being the case, we are of the view that both the Single Judge and the Division Bench were in error in holding that the amended Section 28 would apply." We are in agreement with the respondent that this decision squarely applies to the present case as prior to the amendment, the DTA sales made by the appellant have already attracted liability at the prescribed charging rate, which in facts of the present case cannot be undone in reference to the subject amendment.

32. It is relevant here to advert to a decision of Constitution Bench of this Court in Commissioner of Central Excise, New Delhi vs. Hari Chand Shri Gopal & Ors.17, wherein it has been held that an exemption clause ought to be strictly construed according to the language employed therein and in case of any ambiguity, benefit must go to the State. It will be useful to reproduce paragraphs 29 and 30 of the aforesaid decision hereunder:

> "29. The law is well settled that a person who claims exemption or concession has to establish that he is entitled to that exemption or concession. A provision providing for an exemption, concession or exception, as the case may be, has to be construed strictly with certain exceptions depending upon the settings on which the provision has been placed in the statute and the object and purpose to be achieved. If exemption is available on complying with certain conditions, the conditions have to be complied with. The mandatory requirements of those conditions must be obeyed or fulfilled exactly, though at times, some latitude can be shown, if there is a failure to comply with some requirements which are directory in nature, the non□compliance of which would not affect the essence or substance of the notification granting exemption.
>
> 30. In Novopan India Ltd. this Court held that a person, invoking an exception or exemption provisions, to relieve him of tax liability must establish clearly that he is covered by the said provisions and, in case of doubt or ambiguity, the benefit of it must go to the State. A Constitution Bench of this Court in Hansraj Gordhandas v. CCE and 17 (2011) 1 SCC 236 Customs held that (Novopan India Ltd. case, SCC p. 614, para 16) "16. ... such a notification has to be interpreted in the light of the words employed by it and not on any other basis. This was so held in the context of the principle that in a taxing statute, there is no room for any intendment, that regard must be had to the clear meaning of the words and that the matter should be governed wholly by the language of the notification i.e. by the plain terms of the exemption." " Applying the aforequoted dictum to the present case, the appellant was obliged to comply with the conditions prescribed by the EXIM Policy, to avail the exemption under the stated notification; and failure to do so, must denude them of the exemption so granted. Further, since the charging rate prescribed under the exemption notification is under question, any ambiguity in regard to the date of

application of the amendment thereto would necessarily have to be construed in favour of the State, unless shown otherwise by judicially acceptable parameters.

33. The next contention of the appellant is that Section 28 of the 1962 Act cannot be invoked to extend the limitation as there was no wilful mis-statement or suppression of facts on behalf of the appellant. The decision of this Court in Uniworth Textiles (supra), has been relied upon by the appellant. The same explains the situations in which Section 28 of the 1962 Act can be invoked. It had been held in the said decision that the extension of limitation for a period of five years can be done only in cases of deliberate default and not inadvertent non-payment. It was further held that the burden for proving mala fide conduct is on the revenue; and specific averments in that regard must find place in the show cause notice.

34. In the fact situation of the present case, the appellant was issued a show cause notice mentioning that it had suppressed the DTA sales of cut flowers to evade payment of duty. Had the appellant in good faith believed that no duty was payable upon the DTA sales of cut flowers, it would have sought prior approval of the Development Commissioner, which it failed to do. Even in the letter seeking ex-post facto approval, the appellant claimed that they had not used any imported input such as fertilizer, plant growth regulations, etc. in growing flowers sold in DTA, despite having imported green house equipment, raw materials like Live Rose Plants and consumables like planting materials and fertilizers. Therefore, it prima facie appeared that suppression by the appellant was “wilful”. The burden of proving to the contrary rested upon the appellant, which the appellant failed to discharge by failing to establish that the imported inputs were not used in the production of the cut flowers sold in DTA. In view thereof, the authorities below have rightly invoked Section 28 of the 1962 Act and allied provisions.

35. In light of the foregoing discussion and observations, we are of the view that CESTAT has rightly upheld the levy of customs duty.

36. This appeal, therefore, deserves to be dismissed. It is so ordered. There shall be no order as to costs. Pending applications, if any, shall stand disposed of.

....., J.

(A.M. Khanwilkar) ....., J.

(Dinesh Maheshwari) New Delhi;

September 1, 2020.