# M/S Gemini Edibles And Fats India Pvt. ... vs Union Of India (Through Its Secretary) on 10 May, 2024

## Author: Mohammed Shaffiq

## Bench: R.Mahadevan, Mohammed Shaffiq

W.A.Nos.830 an

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 10.05.2024

CORAM

THE HONOURABLE MR.JUSTICE R.MAHADEVAN
AND
THE HONOURABLE MR.JUSTICE MOHAMMED SHAFFIQ

W.A. Nos.830 and 831 of 2020
and
C.M.P. Nos.10550 and 10557 of 2020

M/s Gemini Edibles and Fats India Pvt. Ltd.,
Freedom House, 8-2-334/70 and 71,
Road No.5 Banjara Hills,
Hyderabad-500 034. .. Appellant in both Appeal

V.

1.Union of India (Through its Secretary),
Ministry of Finance, Department of Revenue,
Shastri Bhawan, New Delhi-110 001.

2.Assistant Commissioner of Customs,
Customs Division,
No.4, First Line Beach Road,
Nagapattinam - 611 001.

3.Zonal Joint Director General of Foreign Trade,
Shastri Bhawan, Annexe Building, 4th Floor and 5th Floor,
26, Haddows Road, Nungambakkam,
Chennai - 600 006.

4.Director General of Foreign Trade
Udyog Bhawan, H-Wing, Gate No.2,
Maulana Azad Road, New Delhi-110 011. .. Respondents in both Appeals

Common Prayer: Writ Appeals filed under Clause 15 of the Letters Patent praying to set aside the judgments of this Court in W.P. Nos.24490 and 2 2019 dated 03.01.2020.

For Appellant in both appeals : Mr.Sujith Ghosh, Senior Couns for Mr.Adithya Reddy

For Respondents in both Appeals : Mr.M.Santhanaraman, Senior Standing Counsel for R2, R3 & R4 in WA No.831/202 Ms.Anu Ganesan Junior Panel Counsel for R2 in WA Nos.830 and 831/2020 Dr.G.Babu, CGSC for R1, R3 and R in WA No.830 of 2020

COMMON JUDGMENT

MOHAMMED SHAFFIQ, J.

The present appeals are filed challenging the order of the learned Judge insofar as it finds that the appellant is liable to pay Social Welfare Surcharge (hereinafter referred to as “SWS”) and it cannot be discharged by debiting from the MEIS / SEIS Scrips, while directing the appellant to pay SWS either in cash or in any other mode.

2. Brief Facts:

2.1. The appellant is in the business of manufacturing and marketing of edible oils and fats. Importing of goods is part and parcel of the appellant's https://www.mhc.tn.gov.in/judis W.A.Nos.830 and 831 of 2020 business activities ordinarily attracting levy of Customs Duties. The appellant procured Merchandise Exports from India Scheme (hereinafter referred to as “MEIS”) and Service Exports from India Scheme (hereinafter referred to as “SEIS”) Scrips, from various exporters, who had obtained such scrips under Chapter 3 of the Foreign Trade Policy (hereinafter referred to as “ the FTP”).

The appellant offset Customs Duties, by utilizing such MEIS/ SEIS scrips, in terms of Chapter 3 of the FTP.

2.2. SWS was introduced vide Section 110 of the Finance Act, 2018. SWS was to be levied at the rate of 10% of the “aggregate of duties of customs levied and collected” by the Government under Section 12 of the Customs Act. Section 110 of the Finance Act, which provides for SWS, reads as under:

"110. Social Welfare Surcharge on imported goods.

(1) There shall be levied and collected, in accordance with the provisions of this Chapter, for the purposes of the Union, a duty of Customs, to be called a Social Welfare Surcharge, on the goods specified in the First Schedule to the Customs Tariff Act, 1975 (hereinafter referred to as the Customs Tariff Act), being the goods imported into India, to fulfil the commitment of the Government to provide and finance education, health and social security.

(2) The Central Government may, after due appropriation made by Parliament by law in this behalf, utilise such sums of money of the Social Welfare Surcharge levied under this Chapter for the purposes specified in sub-

section (1), as it may consider necessary.

(3) The Social Welfare Surcharge levied under sub-section (1), shall be calculated at the rate of ten per cent on the aggregate of duties, taxes and cesses which are levied and collected by the Central Government in the https://www.mhc.tn.gov.in/judis W.A.Nos.830 and 831 of 2020 Ministry of Finance (Department of Revenue) under section 12 of the Customs Act, 1962 and any sum chargeable on the goods specified in sub-section (1) under any other law for the time being in force, as an addition to, and in the same manner as, a duty of customs, but not including-

(a) the safeguard duty referred to in sections 8B and 8C of the Customs Tariff Act,

(b) the countervailing duty referred to in section 9 of the Customs Tariff Act,

(c) the anti-dumping duty referred to in section 9A of the Customs Tariff Act;

(d) the Social Welfare Surcharge on imported goods levied under sub- section (1).

(4) The Social Welfare Surcharge on imported goods shall be in addition to any other duties of customs or tax or cess chargeable on such goods, under the Customs Act, 1962 or any other law for the time being in force, (5) The provisions of the Customs Act, 1962 and the rules and regulations made thereunder, including those relating to assessment, non-levy, short-levy, refunds, exemptions, interest, appeals, offences and penalties shall, as far as may be, apply in relation to the levy and collection of the Social Welfare Surcharge on imported goods as they apply in relation to the levy and collection of duties of customs on such goods under the Customs Act, 1962 or the rules or the regulations, as the case may be." (emphasis supplied) 2.3. During the periods viz., July 2018 – July 2019 and February 2018 to July 2019, the appellant imported goods including "RBD Palm Oil Edible Grade in bulk" at Karaikal and Chennai Ports. The Bills of Entry were assessed and the appellant claimed exemption under Notification Nos. 24 and 25 of 2015 dated 08.04.2015 whereby goods imported against MEIS /SEIS Scrips were exempt from Customs Duties under the First Schedule to the Customs Tariff Act https://www.mhc.tn.gov.in/judis W.A.Nos.830 and 831 of 2020 and Additional Duties leviable thereon under Section 3 of the Customs Tariff Act, 1975. SWS was also

debited from MEIS / SEIS Scrips by including the same as part of custom duties.

2.4. The methodology adopted by the authorities concerned, after taking one of the Bills of Entry as an illustrative example, is summarized as follows:-

> i) The assessable value of Bill of Entry No. 3151249 dated 30.05.2019 is Rs.1,43,58,919.73.
>
> ii) The rate of Basic Customs Duty (BCD) applicable is at 45%.
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> iii) 45% of Rs.1,43,58,919.73 comes to Rs.64,61,513.88.
>
> iv) However, instead of debiting Rs.64,61,513.88 from the scrips of the appellant, the respondents have debited Rs. 71,07,665.30/-.
>
> v) The figure of Rs.71,07,665.30 actually debited by the respondents is not 45% of Rs.1,43,58,919.73 but at 49.5% of Rs.1,43,58,919.73, which includes SWS calculated at 10% of aggregate duties of Customs levied and collected i.e. 45% on the assessable value of the goods imported.

2.5. It is stated that the appellant, during the course of its consultation and internal audit, got to know of the debiting of MEIS / SEIS scrips towards SWS. The appellant addressed a letter dated 26.06.2019 to the 2nd respondent herein https://www.mhc.tn.gov.in/judis W.A.Nos.830 and 831 of 2020 regarding the debiting of its MEIS / SEIS scrips towards SWS. The above letter was responded to by the 2nd respondent viz., Assistant Commissioner of Customs, Nagapattinam vide letter dated 10.07.2019 explaining and justifying the debiting of MEIS scrip towards SWS. Similar letter addressed to the 2nd respondent viz., Commissioner of Customs, Rajaji Salai, Chennai in W.P.No.27452 of 2019 was not responded to.

2.6. The appellant filed W.P.Nos.24490 and 27452 of 2019 challenging the debiting of the MEIS / SEIS scrips for SWS as arbitrary, inasmuch as, there was no liability to pay SWS. The following table would show the amount of SWS debited:

| W.P. No. | Period of Dispute | Amount of SWS debited | Port | Author |
|---|---|---|---|---|
| 24490 of 2019 | July 18 – July 19 | 7,04,55,570/- | Karaikal | Respondent No. Assistant Comm Customs, Nagap |
| 27452 of 2019 | February 2018 – July 2019 | 42,42,75,319/- | Chennai | Respondent Commissioner Customs, Rajaj |

2.7. The challenge in the aforesaid Writ Petitions, viz., W.P.Nos. 24490 and 27452 of 2019 to the debiting of MEIS / SEIS scrips against SWS was primarily on the following grounds:

> (i) SWS is an independent levy and does not take colour of Customs https://www.mhc.tn.gov.in/judis W.A.Nos.830 and 831 of 2020 Duty. Therefore, exemption of Customs Duty under Notification Nos.24/2015-

and 25/2015- Customs, both dated 08.04.2015 (relating to MEIS and SEIS respectively), did not apply to SWS. Consequently, SWS could not have been debited from the scrips in terms of these notifications.

(ii) Computation of SWS under Section 110 of the Finance Act, 2018, is provided as under:

> "10% of aggregate of customs duties, levied and collected"

> (iii) In the present case, by virtue of operation of Notification No.24/2015-Customs (MEIS) and Notification No.25/2015-Customs (SEIS), both dated 08.04.2015, issued under Section 25 of the Customs Act, 1962, Customs Duty is neither levied nor collected and thus, the pre-requisite viz., levy and collection of Customs duty being absent, SWS can neither be computed nor levied.

3. Order of the learned Single Judge:

> a) Notification Nos. 24 and 25 of 2015 dated 08.04.2015 provide exemption from customs duty leviable on the imported goods. However, all they do is exempt the payment of such duty in cash. In other words, the duty is levied https://www.mhc.tn.gov.in/judis W.A.Nos.830 and 831 of 2020 and paid by debiting the same from the value of MEIS / SEIS scrips.

> b) SWS is not in the nature of duties of customs, it is an independent levy imposed and collected under a different enactment.

> c) The exemption granted under Notification Nos.24 and 25 of 2015 is only in respect of payment of customs duty in cash as evident from the fact that appropriate customs duty is debited from the value of the above scrips. In other words, the above adjustment by debiting the MEIS / SEIS scrips towards the duty leviable and payable is an act of duty neutralization and to see that the import duty component is neutralized. To put it more clearly, in effect, though no money representing the duty is physically paid nor goes to the Government exchequer, it is deducted from the value of the scrips, which has money value.

The debiting of the scrip amounts to payment of duty.

d) Scrips have money value and the act of debiting of the scrips towards Customs duty, in effect, amounts to levy and collection of duty from the importer. It is only that the duty is not paid in cash, instead, it is discharged by utilizing the scrips. Though such value of the duty in money has not gone to the Government Exchequer, it would, however, not mean that the duty was not collected from the importer at all. An adjustment of duty from the duty credit scrips by way of debit is not to be termed as Nil duty, but, discharge of the duty obligation by debiting of scrips which has money value and thus, must be https://www.mhc.tn.gov.in/judis W.A.Nos.830 and 831 of 2020 treated as payment of duty.

e) Exemption granted under the above notifications is not an exemption from payment of customs duty in toto, but, subject to the conditions stipulated therein. Exemption notifications have to be read as a whole to know the purport, ambit and scope of such notifications. No clause in a notification can be read in isolation, for, it would distort the scheme and object of the notification. A reading of the relevant notifications as a whole and Clause 3.02 of the FTP would show that duty was levied and collected by debiting the scrips and thus, the submission that the rate of duty is NIL is untenable.

f) On the strength of the above reasoning, the writ petitions were disposed of with the following directions:

> "(a) The petitioner is liable to pay the appropriate Social Welfare Surcharge on Basic Customs Duty in respect of the subject matter imported goods.
>
> (b) However, recovery of such Social Welfare Surcharge cannot be done by making debit from the value of the scrips produced by the petitioner, as Social Welfare Surcharge is not the subject matter of exemption granted under Notification Nos.24 and 25 / 2015.
>
> (c) Consequently, the respondents are liable and thus, directed to re-

credit the value of Social Welfare Surcharge so far debited from the scrips held by the petitioner, subject to a condition that the petitioner pays such Social Welfare Surcharge either in cash or in any other mode before the concerned respondent within a period of four weeks from the date of receipt of a copy of this order.

https://www.mhc.tn.gov.in/judis W.A.Nos.830 and 831 of 2020

(d) On receipt of such payment, the respondents are directed to re- credit the value of the Social Welfare Surcharge so far debited from the scrips held by the petitioner, within a period of two weeks thereafter."

4. Case of the Appellant:

a) SWS is calculated at the rate of 10% on the aggregate of custom duties levied and collected. Levy and collection of customs duty is, thus, a precondition for computing and levying SWS.

b) Notification Nos.24 and 25 of 2015 exempt goods when imported into India against a duty credit scrip from the duty of customs leviable thereon under the First Schedule to the Customs Tariff Act, 1975, and additional duty leviable thereon under Section 3 of the Customs Tariff Act.

c) Levy includes declaration of charge / liability and assessment i.e., particularization / computation of the duty that is due. Exemption Notifications ought to be taken into account while making assessment. (See Rayalseema Constructions v. Deputy Commercial Tax Officer, Mannaday Division, Madras, 1 and others1, Assistant Collector of Central Excise, Calcutta Division v. National Tobacco Co. of India Ltd.2, Mafatlal Industries Ltd. v.

Union of India and others3, Hico Products Ltd. v. CCE4 and Associated Cements Companies Ltd. v. State of Bihar and Others5). Thus, Notification 1 1959 SCC Online Mad 12 2 (1972) 2 SCC 560 3 (1997) 5 SCC 536 4 1994 (71) ELT 339 (SC) 5 (2004) 7 SCC 642 https://www.mhc.tn.gov.in/judis W.A.Nos.830 and 831 of 2020 Nos.24 and 25 of 2015 dated 08.04.2015 ought to be taken into account / factored while making assessment. As a result, there is exemption from levy of customs duty in terms of the said notifications.

d) Notification Nos. 24 and 25 of 2015 dated 08.04.2015 are issued by the Central Government in exercise of its powers under Section 25 (1) of the Customs Act. Section 25(1) of the Customs Act enables the Central Government by Notification to exempt goods either absolutely or subject to conditions from the whole or part of customs duty leviable on the goods notified. Thus, Notification Nos. 24 and 25 of 2015 provide for exemption from the levy itself.

e) Levy of SWS is computed at 10 % of the aggregate duties of customs levied and collected under Section 110 of the Finance Act, 2018. The expression “and” employed in Section 110 of the Finance Act, 2018, would show that levy of SWS is subject to the cumulative satisfaction of the twin conditions viz., levy and collection of custom duties.

f) Notification Nos.24 and 25 of 2015 dated 08.04.2015 exempt goods when imported into India against a duty credit scrip from the whole of the Customs Duty and Additional Duty leviable under the First Schedule and Section 3 of the Customs Tariff Act, 1975. In view of the exemption of customs and additional duty from levy under the above notifications, there can be no collection. Collection means physical realization of tax levied or actual https://www.mhc.tn.gov.in/judis W.A.Nos.830 and 831 of 2020 collection of duties or taxes. Debiting of duty through value scrip viz., MEIS and SEIS is for administrative reasons / convenience (See Commissioner of Customs (Exports) v. Reliance Industries Ltd.6 and Gujarat Ambuja Exports Ltd. v. Government of India7). The crediting and debiting of duty in the scrips is a matter of procedure and convenience and does not, in any manner, dilute the scope nor alter the nature of the benefit under Notification Nos.24

and 25 of 2015 issued by the Central Government in exercise of its power under Section 25 of the Customs Act which is to exempt from levy of customs and additional duty.

g) Reliance was placed on what the appellant referred to as the "Doctrine of Source of Power", on the basis of which, it was submitted that in view of the language contained in Section 25(1) of the Customs Act, any notification issued by the Central Government in exercise of its powers under Section 25(1) of the Customs Act would result in exemption from levy (See Union of India v. Modi Rubber8 and Unicorn Industries v. Union of India9).

h) Incentive schemes under MEIS and SEIS are essentially "Duty Foregone" by the Government of India and do not form part of the Consolidated Fund of India which would again demonstrate absence of collection. Perusal of 6 2005 (188) ELT 449 (Tri – Mum.) 7 2013 (289) ELT 273 (Guj) 8 (1986) 4 SCC 66 9 (2020) 3 SCC 492 https://www.mhc.tn.gov.in/judis W.A.Nos.830 and 831 of 2020 the Union Budget, in particular, Receipt Budget, would reveal that incentives granted under the MEIS and SEIS scheme form part of a "Duty Foregone", by the Government of India. It is, thus, clear that there is neither any levy nor collection of duty under the Customs Act. There is no concept of deemed collection or payment of tax under the Customs Act (See G.Viswanathan v. Hon'ble Speaker, Tamil Nadu Legislative Assembly, Madras10).

i) There was no concept of payment of duty through debit of scrips under the Customs Act until introduction of the Finance Act, 2020. It is only after the introduction of the Finance Act, 2020, that the concept of payment of duty through identified scrips was introduced. Section 51B of the Customs Act, 1962, contemplated that there shall be certain duty scrips notified by the Central Government which may be used towards making payment of duties.

5. Case of the Respondents:

> a) MEIS and SEIS are export incentives. Under both schemes, duty credit scrips are granted as export rewards by the Central Government. Such scrips can be used for payment of Custom Duties, Excise Duties and Service Tax in terms of Para 3.02 of the FTP 2015 – 20. MEIS / SEIS Schemes under FTP 2015-20 permit / allow debit of basic customs duties and other duties. MEIS /SEIS scheme is similar to DEPB Scheme.
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> b) Both MEIS and SEIS Schemes, like the earlier DEPB Scheme, provide 10 (1996) 2 SCC 353 https://www.mhc.tn.gov.in/judis W.A.Nos.830 and 831 of 2020 for payment of customs duty by utilization of credit available in the scrip granted as export rewards by the Government of India. The importer has the option to pay the customs duty either by cash or through debit of the MEIS / SEIS scrips. The levy, thus, continues to operate. Duty is collected by debiting of the scrips.

c) Para 3.15 of the FTP 2015 – 20 provides that Customs Duty paid through debit under the MEIS / SEIS scrips shall be adjusted as CENVAT Credit or duty drawback which would also indicate that Notification Nos.24 and 25 of 2015 do not provide for exemption and the goods cleared by debiting

of the scrips cannot be treated as exempt, instead, ought to be treated as duty paid goods. Thus, the submission of the appellant that despite debiting of MEIS / SEIS of Customs duty leviable, Notification Nos.24 and 25 must be treated as an exemption from levy of Customs duty, is untenable and made on a gross misconception of the schemes.

d) Clause (2) of the Notification 24/2015- Customs and Notification 25/2015-Customs dated 08.04.2015 states that the exemptions mentioned in clause (1) are subject to the conditions laid down therein. Sub clause (5) provides that the said scrips have to be produced before the proper officer of https://www.mhc.tn.gov.in/judis W.A.Nos.830 and 831 of 2020 Customs at the time of clearance for the debit of the duties leviable on the goods. Sub clauses (8) and (9) provide that the importer shall be entitled to avail the drawbacks of the customs duty and CENVAT credit or drawback or additional customs duty against the amount debited in the scrips. Thus, on a reading of the Notifications as a whole, it is evident that there is, really speaking, no exemption from customs duty, but, the Notifications only provide for payment of duty by debit of the scrips.

e) SWS is computed at 10% of the aggregate of Customs duties levied and collected. Only if the Customs duty is 'zero' without any condition attached to it, SWS would also be 'zero'. In the present case, the Customs Duty is levied and recovered by debit of the MEIS/SEIS scrips issued by the DGFT. The importer is, thus, actually paying the Customs duties not by cash, but, by debiting the scrips.

https://www.mhc.tn.gov.in/judis W.A.Nos.830 and 831 of 2020

f) Exemptions should be interpreted strictly and any ambiguity must be resolved in favour of the revenue. Reliance was placed on the Constitution Bench judgment of the Hon'ble Supreme Court in the case of Commissioner of Customs, Mumbai v. Dilip Kumar11 in support thereof.

g) The learned counsel for the respondents relied upon Circular No.02/2020-Customs dated 10.01.2020, in particular para 9, wherein it has been clarified as under:

> “9. In view of above there appears no exemption from SWS in the FTP and the relevant Customs exemption notifications. Keeping in view the ratio laid down by Hon'ble Supreme Court in judgment dated 6-12-2019 (supra), it is clarified that SWS is not exempted and has to be levied and collected on the imported goods.”

6. Discussion and analysis:

> 6.1. On considering the submissions made by both sides, the following questions of law arise for consideration:
>
> a) Whether a notification, only by virtue of having been issued under Section 25(1) of the Customs Act, can be understood as resulting in providing exemption from levy of customs duty (or) enquiry must be made as to the substance of the notification applying the doctrine of pith and substance to understand the scope and nature of the

notification?

b) Whether a notification containing a reference only to Section 25(1) of 11 (2018) 9 SCC 1) https://www.mhc.tn.gov.in/judis W.A.Nos.830 and 831 of 2020 the Customs Act can be understood as granting exemption to other levies such as Education Cess, Secondary and Higher Education Cess, SWS, etc.?

c) What is the effect of debit of duty scrips? viz., whether it is a mode of payment of duty (or) it is merely procedural and an administrative exercise?

d) Whether forming part of the Consolidated Fund of India is a sine qua non, for a levy to operate / exist?

7. We shall now proceed to answer the above questions seriatim.

(a) Whether a notification, only by virtue of having been issued under Section 25(1) of the Customs Act, can be understood as resulting in providing exemption from levy of customs duty (or) enquiry must be made as to the substance of the notification applying the doctrine of pith and substance to understand the scope and nature of the notification.

7.1. To answer the above question, it may be necessary to examine Section 25 of the Customs Act, in particular, sub-section (1) to Section 25 of the Customs Act, under which the notifications in issue, viz., Notification Nos.24 and 25 of 2015 are purportedly issued. Sub-section (1) to Section 25 of the Customs Act reads as under:

https://www.mhc.tn.gov.in/judis W.A.Nos.830 and 831 of 2020 “25. Power to grant exemption from duty.

(1)If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by notification in the Official Gazette, exempt generally either absolutely or subject to such conditions (to be fulfilled before or after clearance) as may be specified in the notification goods of any specified description from the whole or any part of duty of customs leviable thereon”.

7.2. A reading of the above provision would show that sub-section (1) of Section 25 of the Customs Act confers power on the Central Government to grant exemption either absolutely or subject to conditions from the whole or any part of duty of customs leviable thereon. Notification Nos.24 and 25 of 2015 grant exemption from the whole of the Customs duty and additional duties of customs leviable under the Customs Tariff Act, subject to condition attached thereto.

7.3. It was submitted by the learned Senior Counsel for the appellant that the very fact that Notification Nos.24 and 25 refer to Section 25 of the Customs Act as the source of their power, would, by itself, show that the benefit granted under the notifications is in the nature of exemption. In other words, any notification issued under Section 25 of the Customs Act can only be in the

nature of exemption and no further enquiry is warranted in determining the nature of the benefit. The above contention was sought to be supported by the appellant by placing reliance on what the appellant would refer to as “Doctrine https://www.mhc.tn.gov.in/judis W.A.Nos.830 and 831 of 2020 of Source of Power”.

7.4. To the contrary, it is submitted by the learned counsel for the respondents that mere reference to Section 25(1) of the Customs Act, in the notifications is not conclusive that exemption from levy is granted. Rather, Court must enquire and find the substance of the notifications to understand the scope and the nature of the benefit granted under each notification.

7.5. We agree with the contention of the revenue that while examining the nature and scope of the benefit conferred under a notification issued under Section 25(1) of the Customs Act, one cannot stop with the recitals in the notification which may contain reference to Section 25(1) of the Customs Act as the provision under which the notification is issued. Instead, it may be necessary to bear in mind that to appreciate the scope, nature and purport of a legislative instrument, be it plenary or subordinate legislation, one would have to apply the doctrine of pith and substance, keeping in mind that one must find, rather, give effect to the substance rather than the form.

https://www.mhc.tn.gov.in/judis W.A.Nos.830 and 831 of 2020 7.6. The doctrine of pith and substance and substance over form would essentially require the Courts to examine the true character of the instrument keeping in view the object, scope and effect. The Courts would be required to look beyond the nomenclature, form and appearance to discover the true character and nature of the instrument (See Municipal Council, Kota v. Delhi Cloth & General Mills Co. Ltd.12 and Dwarkadas Shrinivas v. Sholapur Spg. & Wvg. Co. Ltd.13). Though the doctrine of pith and substance is normally applied to determine the legislative competence in making an enactment, however, we see no reason as to why it should not be applied to a subordinate legislation. As a matter of fact, the above doctrine is being applied even for the purpose of determining the nature of the contract and the pleadings (See Oil and Natural Gas Corporation Ltd. v. CIT14 and Mehboob-Ur- Rehman v. Ahsanul Ghani15).

7.7. It is, thus, necessary not to be over-persuaded by the mere appearance of the notification as submitted by the learned counsel for the appellant. Instead, Courts would have to travel beyond the nomenclature, form and appearance to discover the true character and nature of the subordinate 12 (2001) 3 SCC 654 13 (1953) 2 SCC 791 14 (2015) 376 ITR 306 15 (2019) 19 SCC 415 https://www.mhc.tn.gov.in/judis W.A.Nos.830 and 831 of 2020 legislation. In the present case, the above exercise becomes necessary in view of the submission by the respondents that the Notification Nos.24 and 25 of 2015 do not, in substance, provide for an exemption from the levy itself, but, only dispense with the requirement of discharging the liability to pay the customs duty by cash, instead, enables discharging the obligation to pay customs duty by debiting the MEIS / SEIS scrips which, in turn, has money value.

7.8. From the above discussion, we have no doubt in our mind that the contention of the appellant that by mere virtue of reference to Section 25 (1) of the Customs Act, the Notifications must be treated as granting exemption from levy itself is liable to be rejected and we would have to travel

beyond the nomenclature, form and appearance to discern the true character and nature of the benefit conferred under each notification.

7.9. Before proceeding further, it may be relevant to refer to the notifications issued under Section 25 of the Customs Act in varying forms and nature viz.,

a) Absolute exemption from the whole of customs duty i.e., exemption from the levy of Customs duty:

> Notification No. 14/2024 – Customs https://www.mhc.tn.gov.in/judis W.A.Nos.830 and 831 of 2020 Date: 12th March, 2024 "G.S.R. 180(E).—In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962) and sub-section (12) of section 3 of the Customs Tariff Act, 1975 (51 of 1975), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts gold falling under Customs Tariff Heading 7108 of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975), when imported into India by Reserve Bank of India , from the whole of the duty of customs leviable thereon as specified in the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) and from the whole of Agriculture Infrastructure and Development Cess, leaviable under Section 124 of the Finance Act, 2021 (13 of 2021)." (emphasis supplied)
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> b) Exemption granted from levy in excess of a specified rate – Reduction in rate of duty/tax:
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> Notification No. 110/1995-Customs New Delhi, the 5th June, 1995 "G.S.R. 480(F.).—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 exempts goods as specified in the Table annexed hereto from so much of the duty of customs leviable thereon which is specified in the First Schedule to the Customs Tariff Act, 1975 (52 of 1975) as is in excess of the amount calculated, at the rate of 15 per cent ad valorem and whole of the additional duty leviable thereon under section 3 of the said Customs Ta'ifl Act, subject to the following conditions...." Notification No. 13/2004-Customs Dated January 8, 2004 "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 make the following further amendments in the notification of Government of India in the Ministry of Finance ( Department of Revenue) No. 137/90-Customs, dated the 20thMarch, 1990 , namely:-
>
> In the said notification,-
>
> (a). in the opening paragraph, for the words brackets and figures "in column (2) of the Table" the words ,brackets, figure and letter "in column (2) of the each of TABLE-I and TABLE-II" shall be substituted.;

https://www.mhc.tn.gov.in/judis W.A.Nos.830 and 831 of 2020

(b). in the portion beginning with the words "from so much of the duty of Customs" and ending with the words "following conditions, namely:-", for the words and figures " from so much of the duty of Customs leviable thereon under the said First Scheule as is in excess of the amount calculated at the rate of 30% ad valorem", the following shall be substituted , namely:-

> "from the whole of the duty of Customs leviable thereon under the said First Schedule in respect of goods specified in column (2) of TABLE-I annexed hereto and from so much of the duty of Customs leviable thereon under the said First Schedule as is in excess of the amount calculated at the rate of 15% ad valorem in respect of goods specified in column (2) of TABLE-II annexed hereto."

(emphasis supplied)

c) Exemption against duty credit scrips:

> Notification No. 13/2020–Customs New Delhi, the 14th February, 2020 “In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962) (hereinafter referred to as the said Act), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts goods, when imported into India against a duty credit scrip (hereinafter referred to as the said scrip) issued by the Regional Authority under the Scheme for Rebate of State and Central Taxes and Levies (hereinafter referred to as the RoSCTL scheme) in accordance with paragraph 4.01(c) of the Foreign Trade Policy read with paragraphs 4.95 and 4.96 of the Handbook of Procedures from-

https://www.mhc.tn.gov.in/judis W.A.Nos.830 and 831 of 2020

(a) the whole of the duty of customs leviable thereon under the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) (hereinafter referred to as the said Customs Tariff Act); and

(b) the whole of additional duty leviable thereon under sub sections (1), (3) and (5) of section 3 of the said Customs Tariff Act:

> Provided that the said scrip, against which goods when imported into India are exempted from duties mentioned in clauses (a) and (b) above, may include duty credit provided under the Additional Ad Hoc Incentive in terms of paragraphs 4.95 and 4.96 of the Handbook of Procedures.” Notification No. 34/97-Customs New Delhi, the 7th April, 1997 G.S.R. 197 (E) —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 exempts goods imported into India from— (1) the whole of the duty of Customs leviable thereon which is specified in the First Schedule to the Customs Tariff Act

1975 (51 of 1975); and (2) the whole of the additional duty leviable under section 3 of the said Customs Tariff Act where specifically claimed by the importer, subject to the following conditions, namely —

(i) That the importer has been issued a Duty Entitlement Pass Book by the Licencing Authority in pursuance of paragraph 7.25 read with paragraph 7.29 of the Export and Import Policy (hereinafter referred to as said Duty Entitlement Pass Book).

(ii) The importer has been permitted credit entries in the said Duty https://www.mhc.tn.gov.in/judis W.A.Nos.830 and 831 of 2020 Entitlement Pass Book at the rates notified by the Government of India in the Ministry of Commerce for the products exported or has been allowed a provisional credit in the said Duty Entitlement Pass Book by the Licencing authority to be set-off by the credits earned on exports to be subsequently effected;" (emphasis supplied) 7.10. From a reading of the above notifications, it is evident that the Central Government issues notifications in exercise of its powers under Section 25 of the Customs Act of varying nature, some of them being:

a. Absolute exemption from the whole of customs duty i.e., exemption from the levy of Customs duty.

b. Exemption granted from levy in excess of a specified rate, which is, in effect, a reduction in the rate of tax which is distinct from exemption as normally / commonly understood.

c. Exemption against duty credit scrips.

7.11. While the first category of notifications referred to above results in exemption from the levy, the second category of notifications results in reduction in the rate of tax and the levy continues to operate, while the third https://www.mhc.tn.gov.in/judis W.A.Nos.830 and 831 of 2020 category of notifications is grant of exemptions against credit scrips.

7.12. We had referred to the above notifications only to show that the Central Government, in exercise of its powers under Section 25 of the Customs Act, had issued notifications which vary in nature and scope, some of which do not conform as exemption in its classical sense. This would only show, rather, reinforce our view that it is necessary for the Courts not to assume that all notifications under Section 25 of the Customs Act would constitute exemption from the levy itself, but, would depend on the substance of the notification.

(b) Whether a notification containing a reference only to Section 25(1) of the Customs Act can be understood as granting exemption to other levies such as Education Cess, Secondary and Higher Education Cess, SWS, etc.?

7.13. The above issue had come up for consideration before the Supreme Court earlier and it was held that exemption under Section 25 of the Customs Act does not extend to other levies, unless reference is made to the provisions of those levies or the other levies are expressly exempt.

7.14. A Larger Bench of 3 Judges of the Apex Court, in Modi Rubber, supra, considered the scope of the expression "Duty of Excise" employed in notifications granting exemption as to whether exemption from levy of excise https://www.mhc.tn.gov.in/judis W.A.Nos.830 and 831 of 2020 duty would also include special excise duty and auxiliary excise duty.

7.15. It was noticed in Modi Rubber, supra, that Special Duty of Excise was levied on manufacture of tyres year-on-year since 1963 until 1971 by various Finance Acts. It was discontinued during 1972 to 1978 and was reintroduced by the Finance Act, 1978, and continued to be levied thereafter. Rule 8(1) of the Central Excise Rules conferred power on the Central Government to grant exemption from levy of excise duty. It was found that the subject notification in Modi Rubber, supra, only referred to Rule 8(1) of the Central Excise Rules without reference to any other statute. The Special Duty of Excise which was considered by the Apex Court in Modi Rubber, supra, was levied under Section 32 of the Finance Act, 1979. The Apex Court, in Modi Rubber, supra, after considering the purport of notification No.123/74 dated 01.08.1974 and the specific provisions mentioned therein, held that the expression "duty" employed therein must bear the same meaning as contained in the definition clause under Rule 2(v) of the Central Excise Rules and cannot have an extended meaning so as to include Special Excise Duty and Auxiliary Excise Duty. While arriving at the above conclusion, it was noticed that whenever exemption was sought to be extended to other levies in addition to the Central Excise Duty, reference was made to other statutes under which the other https://www.mhc.tn.gov.in/judis W.A.Nos.830 and 831 of 2020 levies were made and in its absence, it was held that the exemption is limited to the duty of excise payable under the Central Excise and Salt Act, 1944, and cannot cover Special or other kind of Excise.

7.16. It was held that if the intention was to extend the exemption to Special Duty of Excise, reference would have been made not only to Rule 8(1) but also to sub-section (4) of Section 32 of the Finance Act or other similar provision. Reliance was also made to certain other notifications wherein reference was made to the provisions relating to other levies in respect of which the exemption was sought to be extended in addition to Rule 8(1) of the Central Excise Rules. It was then held that in the absence of reference to Sub- section (4) to Section 32 in the notification, the exemption cannot be construed as covering other levies such as Special Excise Duties. The relevant portion of the judgment is extracted hereunder:

> "9. ..... Undoubtedly, by reason of sub-section (4) of section 32 of the Finance Act, 1979 and similar provision in the other Finance Acts, rule 8(1) would become applicable empowering the Central Government to grant exemption from payment of special duty of excise, but when the Central Government exercises this power, it would be doing so under rule 8(1) read with sub-section (4) of section 32 or other similar provision. The reference to the source of power in such a case would not be just to rule 8(1), since it does not of its own force and on its own language apply to granting of exemption in respect of special duty of excise, but the reference would

have to be to rule 8(1) read with sub-section (4) of section 32 or other similar provision. It is significant to note that during all these years, whenever exemption is sought to be granted by the Central Government from payment of special duty of excise or additional duty of excise, the recital of the source of power in the notification granting exemption has invariably been to rule 8(1) read with the https://www.mhc.tn.gov.in/judis W.A.Nos.830 and 831 of 2020 relevant provision of the statute levying special duty of excise or additional duty of excise, by which the provisions of the Central Excises and Salt Act, 1944 and the rules made thereunder including those relating to exemption from duty are made applicable. Take for example, the notification bearing No. 63/1978, dated August 1, 1978 where exemption is granted in respect of certain excisable goods 'from the whole of the special duty of excise leviable thereon under sub-clause (1) of clause 37 of the Finance Bill, 1978'.

.....

The respondents have in fact produced several notifications granting exemption in respect of special duty of excise or additional duty of excise and in each of these notifications, we find that the source of power is described as sub-rule (1) of rule 8 of the Central Excise Rules, 1944 read with the relevant provision of the statute levying special duty of excise or additional duty of excise by which the provisions of the Central Excises and Salt Act, 1944 and the Rules made thereunder including those relating to exemption from duty are made applicable. Moreover, the exemption granted under all these notifications specifically refers to special duty of excise or additional duty of excise, as the case may be. It is, therefore, clear that where a notification granting exemption is issued only under sub-rule (1) of rule 8 of the Central Excise Rules, 1944 without reference to any other statute making the provisions of the Central Excises and Salt Act, 1944 and the Rules made thereunder applicable to the levy and collection of special, auxiliary or any other kind of excise duty levied under such statute, the exemption must be read as limited to the duty of excise payable under the Central Excises and Salt Act, 1944 and cannot cover such special, auxiliary or other kind of duty of excise. The notifications in the present case were issued under sub-rule (1) of rule 8 of the Central Excise Rules, 1944 simpliciter without reference to any other statute and hence the exemption granted under these two notifications must be construed as limited only to the duty of excise payable under the Central Excises and Salt Act, 1944."

.....

"10. We may incidentally mention that in the appeals a question of interpretation was also raised in regard to Notification bearing No. 249/1967 dated November 8, 1967 exempting tyres for tractors from 'so much of the duty leviable thereon under item 16 of the First Schedule to the Central Excises and Salt Act, 1944 as is in excess of 15 per cent.'. The argument of the respondents in the appeals was that the exemption

> granted under this notification was not limited to the duty of excise payable under the Central Excises and Salt Act, 1944 but it also extended to special duty of excise, additional duty of excise and auxiliary duty of excise leviable under other enactments. This argument plainly runs counter to the very language of this notification. It is obvious that the exemption granted under this notification is in respect of 'so much of the duty leviable thereon under item 16 of the First https://www.mhc.tn.gov.in/judis W.A.Nos.830 and 831 of 2020 Schedule to the Central Excises and Salt Act, 1944 as is in excess of 15 per cent.' and these words describing the nature and extent of the exemption on their plain natural construction, clearly indicate that the exemption is in respect of duty of excise leviable under the Central Excises and Salt Act, 1944 and does not cover any other kind of duty of excise. No more discussion is necessary in regard to this question beyond merely referring to the language of this notification."

(emphasis supplied) 7.17. The above judgment of the Hon'ble Supreme Court was followed by another Bench of 3 Judges in the case of Rita Textiles (P) Ltd. v. Union of India16.

7.18. We find that the recitals relating to the source of power in Notification Nos.24 and 25 of 2015 only refer to Section 25 (1) of the Customs Act and there is no reference to Section 110 of the Finance Act, 2018, the provision under which SWS is levied nor do the notifications refer to the provisions under which Education Cess, Secondary and Higher Education Cess were levied prior to SWS, which would clearly show that the exemption never intended to nor cover such additional levies.

7.19. It may also be relevant to note that whenever the Central Government intended to exempt other levies such as Education Cess or Secondary and Higher Education Cess, the recitals relating to source of power provided that the exemption Notification is made under Section 25 of the Customs Act read with relevant provisions relating to such other levies, viz., Sections 91 and 94 of the Finance Act. 16 1986 Supp SCC 557 https://www.mhc.tn.gov.in/judis W.A.Nos.830 and 831 of 2020 Similarly, with the introduction of SWS whereby Education Cess and Secondary and Higher Secondary Cess stood replaced, notifications have been issued wherein the recitals of the source of power bear reference not only to Section 25 of the Customs Act but also to Section 110 of the Finance Act in the case of SWS, clearly showing that the intention was to exempt not only customs duties but also SWS as well as such other levies. The following illustrative notifications are relevant and thus extracted hereunder:

> Notification No. 27/2007-Customs New Delhi, the 1st March, 2007 “G.S.R. (E).- In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962) read with sections 91 and 94 of the Finance (No.2) Act, 2004 (23 of 2004), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts all goods specified in the First Schedule to the Customs Tariff Act, 1975 (51 of 1975), when imported into India, from so much of the Education Cess leviable thereon under the said sections 91 and 94 of the said Finance Act, which is in excess of the amount calculated at the rate of two per cent. of the aggregate of duties of customs which are levied and collected by the Central Government in the Ministry of Finance (Department of Revenue), under section 12 of

the said Customs Act, and any sum chargeable on such goods under any other law for the time being in force, in addition to and in the same manner as, a duty of customs, but not including-

(i) the additional duty referred to in sub-section (5) of section (3) of the said Customs Tariff Act;

(ii) the safeguard duty referred to in sections 8B and 8C of the said Customs Tariff Act;

(iii) the anti-dumping duty referred to in section 9A of the said Customs Tariff Act;

(iv) the Education Cess on imported goods; and

(v) the Secondary and Higher Education Cess leviable on the said goods under clause 126 read with clause 129 of the Finance Bill, 2007, which, by virtue of the declaration made in the said Finance Bill under the Provisional Collection of Taxes Act, 1931 (16 of 1931), has the force of law." https://www.mhc.tn.gov.in/judis W.A.Nos.830 and 831 of 2020 Notification No. 20/2005-Customs New Delhi, dated the 1st March , 2005 "G.S.R. (E).- In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962) read with sections 91 and 94 of the Finance (No.2) Act, 2004 (23 of 2004), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts goods specified in column (2) of the Table in the notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 19/2005-Customs, dated the 1st March, 2005), when imported into India, from so much of the Education Cess leviable thereon under the said sections 91 and 94, which is in excess of the amount calculated at the rate of two per cent. of the aggregate of duties of customs which are levied and collected by the Central Government in the Ministry of Finance (Department of Revenue), under section 12 of the said Customs Act, and any sum chargeable on such goods under any other law for the time being in force, in addition to, and in the same manner as, a duty of customs, but not including -

(a) the additional duty referred to in sub-section (5) of section 3 of the said Customs Tariff Act, as amended by clause 72 of the Finance Bill, 2005, the clause which has, by virtue of the declaration made in the said Finance Bill under the Provisional Collection of Taxes Act, 1931 (16 of 1931), the force of law;

(b) the safeguard duty referred to in sections 8B and 8C of the said Customs Tariff Act;

(c) the anti-dumping duty referred to in section 9A of the said Customs Tariff Act; and

(d) the Education Cess on imported goods".

Notification No. 8/2018-Customs Dated February 2, 2018 "G.S.R. 111(E).— In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962) read with section 139 of the Finance Act, 2007 (22 of 2007), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts all goods specified in the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) when imported into India, from whole of Secondary and Higher Education Cess leviable thereon under section 139 of the said Finance Act." Notification No. 14/2024-Customs Date: 12th March, 2024 https://www.mhc.tn.gov.in/judis W.A.Nos.830 and 831 of 2020 "G.S.R. 180(E).—In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962) and sub-section (12) of section 3 of the Customs Tariff Act, 1975 (51 of 1975), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts gold falling under Customs Tariff Heading 7108 of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975), when imported into India by Reserve Bank of India , from the whole of the duty of customs leviable thereon as specified in the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) and from the whole of Agriculture Infrastructure and Development Cess, leaviable under Section 124 of the Finance Act, 2021 (13 of 2021)." (emphasis supplied) 7.20. Similarly, whenever the Central Government intended to grant exemption to SWS, the recitals in the notification referred to the provision under the Finance Act provided for such levy. The following illustrative notifications are relevant and thus extracted:

> Notification No. 34/2022-Customs Dated June 30, 2022 "G.S.R. 487(E).—In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962) read with section 110 of the Finance Act, 2018 (13 of 2018), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts all goods falling under heading 7108 of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) when imported into India, from the whole of the Social Welfare Surcharge leviable thereon under the section 110 of the said Finance Act." Notification No. 13/2018-Customs Dated February 2, 2018 "G.S.R. 116(E).— In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962) read with clause 108 of the Finance Bill, 2018 (4 of 2018), which, by virtue of the declaration made in the said Finance Bill under the Provisional Collection of Taxes Act, 1931 (16 of 1931), has the force of law, the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the goods specified in the First Schedule to the Customs Tariff Act, 1975 (51 of 1975), when imported into India, from the whole of the Social Welfare Surcharge https://www.mhc.tn.gov.in/judis W.A.Nos.830 and 831 of 2020 leviable on Integrated tax under sub-section (7), and Goods and Services Tax compensation cess under sub-section (9), of section 3 of the said Customs Tariff Act read with the said clause 108 of the Finance Bill." (emphasis supplied) 7.21. It is relevant to note that legislative practice has been held as being important to consider the scope of the words used in the Constitution and legislations. In this regard, it may be relevant to refer to the judgment in Special Reference No. 1 of 2001, In re:17 "36. In State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd.

[AIR 1958 SC 560 : 1959 SCR 379] it was observed that it is important to consider the legislative practice in interpreting the various words used in the Constitution. Venkatarama Aiyar, J., speaking for the Bench, said: (AIR p. 568, para 20) "20. Turning next to the question as to the weight to be attached to legislative practice in interpreting words in the Constitution, in Croft v. Dunphy [1933 AC 156 : AIR 1933 PC 16] , the question was as to the validity of certain provisions in a Canadian statute providing for the search of vessels beyond territorial waters. These provisions occurred in a customs statute, and were intended to prevent evasion of its provisions by smugglers. In affirming the validity of these provisions, Lord Macmillan referred to the legislative practice relating to customs, and observed:

> 'When a power is conferred to legislate on a particular topic it is important, in determining the scope of the power, to have regard to what is ordinarily treated as embraced within that topic in legislative practice and particularly in the legislative practice of the State which has conferred the power.
>
> Wallace Bros. & Co. Ltd. v. CIT, [AIR 1948 PC 118 : 75 IA 86] Lord Uthwatt observed :
>
> 'Where Parliament has conferred a power to legislate on a particular topic it is permissible and important in determining the scope and meaning of the power to have regard to what is ordinarily treated as embraced within that topic in the legislative practice of the United Kingdom. The point of the reference is emphatically not to seek a pattern to which a due exercise of the 17 (2004) 4 SCC 489 https://www.mhc.tn.gov.in/judis W.A.Nos.830 and 831 of 2020 power must conform. The object is to ascertain the general conception involved in the words in the enabling Act.'" 7.22. We see no reason why legislative practice cannot be looked upon as a guide to understand the scope, purport and ambit of a subordinate legislation which is essentially quasi legislative in character. (See Subash Photographics & Ors v. Union of India & Ors.18, Chandappa v. Sadruddin Ansari19, S.K.Dutta, Income Tax Officer v. Lawrence Singh Ingty20, Association of Natural Gas & Ors. v. Union of India & Others21. Now, if we apply legislative practice, in particular, as to the manner in which power has been exercised by the Central Government while granting exemption from Customs and also from other allied/incidental levies, it would be clear and beyond the pale of any doubt that reference was made by the Central Government not only to Section 25 of the Customs Act, but also to the provisions under which other levies are imposed and which were intended to be exempt by the Central Government.
>
> 7.23. Going back to Modi Rubber, supra, it was held therein that if the notification refers to Section 25 of the Customs Duty Act only and not the 18 (1993) Supp (3) SCC 323 19 AIR 1958 Mys 132 20 (1968) 68 ITR 272 21 (2004) 4 SCC 489 https://www.mhc.tn.gov.in/judis W.A.Nos.830 and 831 of 2020 provisions under which other levies were imposed, it must be understood that the exemption is made only in respect of Customs Duty and does not extend to/include other levies. Now,

applying the reasoning in Modi Rubber, supra, to Notification Nos. 24 and 25 of 2015 and on contrasting the subject notification with other notifications whereby exemption is granted to other levies in particular SWS in addition to Customs Duty, wherein, reference was made to Section 110 of the Finance Act, it is clear that exemption under notifications Nos. 24 and 25 of 2015 was never intended to cover or include SWS in addition to Customs Duties as the recitals referred to only Section 25 (1) of the Customs Act, as the source of power under which the notification was issued.

7.24. On the above issue, it is necessary to refer to the judgments of the Supreme Court in SRD Nutrients Pvt. Ltd. v. C.C.E.22 and Bajaj Auto Ltd. v Union of India23, wherein, it was held that when there is no excise duty, the Education Cess and Secondary and Higher Education Cess could not have been demanded. The Apex Court, in SRD Nutrients, supra, placed reliance upon Circular dated 10.08.2004 wherein it was clarified that Education Cess is part of 22 (2018) 1 SCC 105 23 (2019) 19 SCC 801 https://www.mhc.tn.gov.in/judis W.A.Nos.830 and 831 of 2020 Excise Duty. Placing reliance on the above circular, the Apex Court held as under:

“21. One aspect that clearly emerges from the reading of these two circulars is that the Government itself has taken the position that where whole of excise duty or service tax is exempted, even the education cess as well as secondary and higher education cess would not be payable. These circulars are binding on the Department.

22. Even otherwise, we are of the opinion that it is more rational to accept the aforesaid position as clarified by the Ministry of Finance in the aforesaid circulars. Education cess is on excise duty. It means that those assessees who are required to pay excise duty have to shell out education cess as well. This education cess is introduced by Sections 91 to 93 of the Finance (No. 2) Act, 2004. As per Section 91 thereof, education cess is the surcharge which the assessee is to pay. Section 93 makes it clear that this education cess is payable on "excisable goods,"

i.e., in respect of goods specified in the First Schedule to the Central Excise Tariff Act, 1985. Further, this education cess is to be levied @ 2% and calculated on the aggregate of all duties of excise which are levied and collected by the Central Government under the provisions of the Central Excise Act, 1944 or under any other law for the time being in force. Sub section (3) of Section 93 provides that the provisions of the Central Excise Act, 1944 and the Rules made thereunder, including those related to refunds and duties, etc. shall as far as may be applied in relation to levy and collection of education cess on excisable goods. A conjoint reading of these provisions would amply demonstrate that education cess as a surcharge is levied @ 2% on the duties of excise, which are payable under the Act. It can, therefore, be clearly inferred that when there is no excise duty payable, as it is exempted, there would not be any education cess as well, inasmuch as education cess @ 2% is to be calculated on the aggregate of duties of excise. There cannot be any surcharge when

basic duty itself is NIL." 7.25. The Apex Court, in Bajaj Auto, supra, wherein the question of liability towards NCCD, Education Cess and Secondary and Higher Education Cess on manufacturing establishments exempt from Central Excise Duty was considered, relied on SRD Nutrients, supra, while concluding as under: https://www.mhc.tn.gov.in/judis W.A.Nos.830 and 831 of 2020 "Once the excise duty is exempted, NCCD, levied as an excise duty, cannot partake a different character and, thus, would be entitled to the benefit of the exemption notification. The exemption notification also states that the exemption is from the "whole of the duty of excise or additional duty of excise." We may also note that the exemption itself is for a period of ten years from the date of commercial production of the unit.

24. We are, thus, of the view that the appellant would not be liable to pay the NCCD." 7.26. The above judgments in SRD Nutrients, supra, and Bajaj Auto, supra, were rendered without noticing Modi Rubber, supra, and was thus held per incuriam in Unicorn Industries, supra. The relevant portion is extracted hereunder:

"51.Thus, it is clear that before the Division Bench deciding SRD Nutrients (P) Ltd. [SRD Nutrients (P) Ltd. v. CCE, (2018) 1 SCC 105] and Bajaj Auto Ltd. [Bajaj Auto Ltd. v. Union of India, (2019) 19 SCC 801 : 2019 SCC OnLine SC 421], the previous binding decisions of the three-Judge Bench in Modi Rubber Ltd. [Union of India v. Modi Rubber Ltd., (1986) 4 SCC 66 : 1986 SCC (Tax) 781] and Rita Textiles (P) Ltd. [Rita Textiles (P) Ltd. v. Union of India, 1986 Supp SCC 557 : 1987 SCC (Tax) 87] were not placed for consideration. Thus, the decisions in SRD Nutrients (P) Ltd. [SRD Nutrients (P) Ltd. v. CCE, (2018) 1 SCC 105] and Bajaj Auto Ltd. [Bajaj Auto Ltd. v. Union of India, (2019) 19 SCC 801 : 2019 SCC OnLine SC 421] are clearly per incuriam. ....." 7.27. In this background, it becomes necessary to take a closer look at the decision in Unicorn Industries, supra. The Apex Court, in Unicorn Industries, supra, was dealing with the question whether a notification granting exemption from Central Excise Duty and Additional Excise Duties would also result in exemption of the other duties, viz., National Calamity Contingent Duty (NCCD), Education Cess and Higher Education Cess, inasmuch as, according to https://www.mhc.tn.gov.in/judis W.A.Nos.830 and 831 of 2020 the appellant, they are also in the nature of excise duty.

7.28. We may note the facts considered by the Supreme Court very briefly. The Central Government, with a view to promote industrial development in the north eastern region, announced fiscal incentives, including total exemption from tax to new industrial units and units undertaking substantial expansion for a period of 10 years from the date of commencement of production vide Office Memorandum dated 24.12.1997. This was followed by notification No. 71 of 2003 dated 09.09.2003 issued by the Central Government, whereby, exemption from payment of duty of excise was granted in respect of goods specified in the notification and cleared from a unit located in the Industrial Growth Centre or specified areas within the State of Sikkim. In terms of the above notification, the manufacturer was required to first utilize the CENVAT credit for discharging duty liability on final products and the remaining amount of duty was to be paid through Personal Ledger

Account (PLA) or Current Account i.e., in cash. The manufacturer was entitled to claim refund or re-credit of the duties paid in cash. The appellant established a unit for manufacturing "Indian Mouth Freshener" sometime in 2006 and claimed the benefit in terms of Notification No.71 of 2003 dated 09.09.2003. The appellant therein was granted refund or was issued a certificate of re-utilization of excise https://www.mhc.tn.gov.in/judis W.A.Nos.830 and 831 of 2020 duty on a monthly basis which was re-credited by the appellant.

7.29. Notification No.71 of 2003-CE was amended vide Notification No.21 of 2007 dated 25.04.2007 excluding Pan Masala from the purview of notification. The appellant challenged the said notification before the High Court, wherein, it was held that the appellant was entitled to exemption from payment of excise duty on manufacture of pan masala for a period of 10 years from the date of commencement of commercial production i.e., 27.06.2006. The appellant filed another writ petition challenging Notification No.71 of 2003 insofar as it confined the exemption to levies under the acts mentioned in Para 1 of the Notification. In other words, the appellant sought a declaration that the exemption notification was applicable to NCCD and Education Cess on the premise that exemption to excise duty would include all levy in the nature of excise duty. In the meanwhile, another manufacturer engaged in the manufacture of Ferro Silicon filed a writ petition challenging the demand of Education Cess and Secondary and Higher Education Cess. NCCD was imposed under Section 136 of the Finance Act, 2001. Education Cess was introduced vide Sections 91 and 93 of the Finance Act 2004, while Higher Education Cess was introduced vide Section 126 of the Finance Act, 2007. The writ petition came to be dismissed holding that NCCD, Education Cess and https://www.mhc.tn.gov.in/judis W.A.Nos.830 and 831 of 2020 Secondary and Higher Education Cess were not covered under Exemption Notification No.71 of 2003-CE.

7.30. The primary contention of the appellant before the Supreme Court was that NCCD, Education Cess and Secondary and Higher Education Cess form part of Excise Duty and thus, exemption under Notification No.71 of 2003 would cover the same. In support of the above contention, reliance was placed on the judgment of the Apex Court in SRD Nutrients, supra and Bajaj Auto, supra, while also placing reliance on the circulars dated 10.08.2004 and 08.04.2011 issued by the Central Board of Excise and Customs.

7.31. Against this background, the Apex Court framed the following question:

> "22. The main question arising for consideration is when 100 per cent exemption had been granted for excise duty for a period of 10 years, whether the exemption notification issued for the state of Sikkim on 9.9.2003 shall be confined to the basic excise duty under the Act of 1944, additional duty under the Act of 1957 and additional duty under the Act of 1978, which were specifically mentioned in the notification issued on 9.9.2003, or it also include cess/duty imposed by Finance Acts of 2001, 2004 and 2007." 7.32. Reliance was placed on the 2 Judge Bench Judgment of the Apex Court in the case of SRD Nutrients, supra, which considered the Finance Act, of 2004 and 2007 by which Education Cess and Secondary and Higher Education Cess were imposed. The Apex Court proceeded to find that https://www.mhc.tn.gov.in/judis W.A.Nos.830 and 831 of 2020 Notification No.71

of 2003 dated 09.09.2003 covers excise duty and additional duty of excise under the 1957 and 1978 Acts and cannot be understood as covering / including NCCD, Education Cess and Higher Education Cess. It was held that in the absence of a notification including such levies, exemption cannot be extended to such other levies. The relevant portion is extracted hereunder :

"Notification dated 9-9-2003 issued in the present case makes it clear that exemption was granted under Section 5A of the Act of 1944, concerning additional duties under the Act of 1957 and additional duties of excise under the Act of 1978. It was questioned on the ground that it provided for limited exemption only under the Acts referred to therein. There is no reference to the Finance Act, 2001 by which NCCD was imposed, and the Finance Acts of 2004 and 2007 were not in vogue. The notification was questioned on the ground that it should have included other duties also. The notification could not have contemplated the inclusion of education cess and secondary and higher education cess imposed by the Finance Acts of 2004 and 2007 in the nature of the duty of excise. The duty on NCCD, education cess and secondary and higher education cess are in the nature of additional excise duty and it would not mean that exemption notification dated 9- 9-2003 covers them particularly when there is no reference to the notification issued under the Finance Act, 2001. There was no question of granting exemption related to cess was not in vogue at the relevant time imposed later on vide Section 91 of the Act of 2004 and Section 126 of the Act of 2007. The provisions of Act of 1944 and the Rules made thereunder shall be applicable to refund, and the exemption is only a reference to the source of power to exempt the NCCD, education cess, secondary and higher education cess. A notification has to be issued for providing exemption under the said source of power. In the absence of a notification containing an exemption to such additional duties in the nature of education cess and secondary and higher education cess, they cannot be said to have been exempted. The High Court was right in relying upon the decision of three-Judge Bench of this Court in Modi Rubber Limited (supra), which has been followed by another three-Judge Bench of this Court in Rita Textiles Private Limited (supra)." (emphasis supplied) 7.33. Importantly, the Apex Court proceeded to reject the argument that https://www.mhc.tn.gov.in/judis W.A.Nos.830 and 831 of 2020 as the excise duty was nil, no additional duty can be charged. The levy which was under consideration in particular Education Cess and Secondary Education Cess provided for computation at the rate of 2% and 1% of the aggregate of all duties of excise. The provisions levying Education Cess and Secondary and Higher Education Cess are extracted below as they would have a material bearing on the issue on hand:

"19. .....

"93. Education Cess on Excisable Goods. - (1) The Education Cess levied under Section 81, in the case of goods specified in the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), being goods manufactured or produced, shall be a duty of

> excise (in this section referred to as the Education Cess on excisable goods), at the rate of two. per cent, calculated on the aggregate of all duties of excise (including special duty of excise or any other duty of excise but excluding Education Cess on excisable goods) which are levied and collected by the Central Government in the Ministry of Finance (Department of Revenue) under the provisions of the Central Excise Act, 1944 (1 of 1944) or under any other law for the time being in force.
>
> (2) The Education Cess on excisable goods shall be in addition to any other duties of excise chargeable on such goods under the Central Excise Act, 1944 (1 of 1944) or any other law for the time being in force.
>
> (3) The provisions of the Central Excise Act, 1944 (1 of 1944) and the rules made thereunder, including those relating to refunds and exemptions from duties and imposition of penalty shall, as far as may be, apply in relation to the levy and collection of the Education Cess on excisable goods as they apply in relation to the levy and collection of the duties of excise on such goods under the Central Excise Act, 1944 or the rules, as the case may be."

"20. .....

128.(1) The Secondary and Higher Education Cess levied under section 126, in the case of goods specified in the First Schedule to the Central Excise Tariff Act, 1985, being goods manufactured or produced, shall be a duty of excise (in this section referred to as the Secondary and Higher Education Cess on excisable goods), at the rate of one per cent.. calculated on the aggregate of all duties of excise (including special duty of excise or any other duty of excise but excluding Education Cess chargeable under section https://www.mhc.tn.gov.in/judis W.A.Nos.830 and 831 of 2020 93 of the Finance (No. 2) Act, 2004 and Secondary and Higher Education Cess on excisable goods) which are levied and collected by the Central Government in the Ministry of Finance (Department of Revenue), under the provisions of the Central Excise Act, 1944 or under any other law for the time being in force." (emphasis supplied) 7.34. A reading of the provisions relating to Education Cess and Secondary and Higher Education Cess under consideration before the Supreme Court would show that both Education Cess and Secondary and Higher Education Cess were to be computed at the rate of 2% and 1% of duties of excise levied and collected. The fact that there may be an exemption of excise duty and that other duties on which exemption was sought such as Education Cess and Secondary and Higher Secondary Cess had to be computed on the basis of aggregate of excise duties levied and collected, which itself was exempt, was found to be no reason to extend the exemption to other levies / duties based thereupon viz., Education Cess and Secondary and Higher Secondary Cess. The argument that there would be difficulties in computation of duties was rejected and it was held that it could be computed. The relevant portion is extracted hereunder:

> "41.The circular of 2004 issued based on the interpretation of the provisions made by one of the customs officers, is of no avail as such circular has no force of law and cannot be said to be binding on the court. Similarly, the circular issued by the Central Board of Excise and Customs in 2011, is of no avail as it relates to service tax and has

no force of law and cannot be said to be binding concerning the interpretation of the provisions by the courts. The reason employed in SRD Nutrients P. Ltd.*** that there was nil excise duty, as such, additional duty cannot be charged, is also equally unacceptable as additional duty can always be https://www.mhc.tn.gov.in/judis W.A.Nos.830 and 831 of 2020 determined and merely exemption granted in respect of a particular excise duty, cannot come in the way of determination of yet another duty based thereupon. The proposition urged that simply because one kind of duty is exempted, other kinds of duties automatically fall, cannot be accepted as there is no difficulty in making the computation of additional duties, which are payable under NCCD, education cess, secondary and higher education cess. Moreover, statutory notification must cover specifically the duty exempted. When a particular kind of duty is exempted, other types of duty or cess imposed by different legislation for a different purpose cannot be said to have been exempted." (emphasis supplied) 7.35. From the above discussion, there is no doubt in our mind that Notification Nos.24 and 25 of 2015 are limited / confined in their operation only to customs duty and cannot be understood as resulting in exemption of SWS, inasmuch as, the notifications do not bear any reference to the provisions providing for the levy of SWS which has been found relevant by the Supreme Court in understanding the legislative intent as to whether the benefit of exemption must be limited / confined to Customs Duty or must be treated as covering other levies as well.

(c) What is the effect of debit of duty scrips viz., whether it is a mode of payment of duty (or) it is merely procedural and an administrative exercise?

7.36. Before we proceed to answer the above question, it may be relevant to bear in mind that the mere recital in the notification that it is made under Section 25(1) of the Customs Act, would not, by itself, mean that the notification grants exemption from Customs Duty, rather, notifications of https://www.mhc.tn.gov.in/judis W.A.Nos.830 and 831 of 2020 varying nature and scope had been issued by the Central Government in exercise of its powers under Section 25 of the Customs Act. That leads us to the question as to what is the effect of the condition in the notifications under Notification Nos. 24 and 25 – Cus which requires debiting of the duties leviable on the goods from the MEIS / SEIS scrips, which we should discern by applying the Doctrine of Pith and Substance, which we had already found relevant in the discussion supra in relation to Question (a).

7.37. We find that similar issue has arisen for consideration in the context of DEPB scheme, which, in many ways, is similar to MEIS / SEIS schemes. Importantly, while considering the scope of the notification involving DEPB scheme, divergent views have been expressed. One view was that notwithstanding the debiting of the scrips to the extent of duty levied, it is an exemption while the other view was that the notification requiring debiting of DEPB scrips is not an exemption from levy, but, rather, an option extended with regard to the mode of discharging the duty liability. We shall, therefore, proceed to examine the judgments rendered under the DEPB scheme in greater detail, for, they have a material bearing on the issue before us.

7.38. The Madras High Court, in TANFAC Industries Ltd. v. Assistant Commissioner of Customs, Cuddalore24, dealt with the question as to whether 24 2009 (240) ELT 341 https://www.mhc.tn.gov.in/judis W.A.Nos.830 and 831 of 2020 adjustment of credit granted by the Government on export of goods under the DEPB scheme towards customs duty payable, but for the exemption, is equivalent to payment of duty in cash. This Court referred to a Circular dated 20.07.2007 wherein it was, inter alia, clarified that clearances under the DEPB scheme require debiting from the DEPB scrips. Further, CENVAT credit or duty drawback is available even when the scrip is debited, which would show that the goods are not unconditionally exempt from duty. After referring to the above circular, this Court held that importers who use the DEPB scrip paid duty not by cash but by way of credit and debiting of the scrip is a mode of payment of duty. The relevant portions of the circular and the orders of this Court are extracted hereunder:

> "3. In brief, the issue involved is, whether the duty paid through debits under DEPB is to be treated as payment of duty of exemption from duty. Hitherto, the stand taken by the Department was that goods cleared through debit under DEPB are exempted goods and accordingly, no CENVAT or draw back was allowed for such payments. Para 4.3.5., of the foreign Trade Policy, 2004009 was amended allowing additional Customs duty paid through debit under DEPB to be adjusted as Cenvat credit or duty drawback. The said position was clarified vide Circular No.50/2004-Cus., dated 21.10.2004 (2004(173)E.L.T.T9). It implies that the goods cleared by debits through DEPBs are not to be treated as exempted but duty paid.
>
> 4. ....This is further supported by the fact that the CENVAT credit or duty drawback is available even when the additional Customs duty is debited under DEPB.
>
> 5. ..... In the case of notification governing imports under DEPB Scheme, https://www.mhc.tn.gov.in/judis W.A.Nos.830 and 831 of 2020 the situation is slightly different as explained above, the notification issued under DEPB scheme provides for exemption subject to debit of duties in DEPB scrips. It is thus not a case where the goods are unconditionally exempt from duty." .....
>
> 11. ..... The differences between DEEC and DEPB scheme has been explained in Commissioner of Customs, Calcutta v. Indian Rayon & Industries Ltd., reported in 2008 (229) E.L.T. 3(SC) which reads as follows:
>
> "DEEC Scheme Under this scheme, the importer is issued an Advance License to procure the raw material for a manufacturer of the export product. The goods which are cleared under Advance License are meant for use in the manufacture of export product or replenishment of the raw materials already used. The clearance is allowed duty free, The details of items allowed product are published by the Ministry of Commerce in their Input Output Norms which are part of the Exim Policy.
>
> DEPB Scheme Under this scheme, the exporters are issued DEPB scrips which allows them the specific amount to be utilized for payment of Customs duty. The amount for

> which DEPB scrip is issued depends upon the rate for a particular export product. The Ministry of Commerce notifies DEPB credit rates for export of an item. The DEPB scrip is freely transferable and can be used to debit the payment of duty at the time of clearance of goods except capital goods and goods mentioned in negative list."
>
> 12.In fact, in that case, there were three bills of entry, only one of them was goods exported under the DEEC Scheme and other two were under the DEPB Scheme. The difference drawn by the Supreme Court in the above judgments makes it clear that under the DEEC scheme, the clearance is allowed duty-free, whereas under the DEPB scheme, the exporters are issued DEPB scrips which allows them specific amounts to be utilised for payment of customs duty. Therefore, the importers, who use DEPB scrips, pay duty not by cash but only by way of credit.

https://www.mhc.tn.gov.in/judis W.A.Nos.830 and 831 of 2020 This is clear from the judgment of the Supreme Court extracted above. Therefore, the goods cleared under the DEPB Scheme cannot be treated as exempted goods, but they can only be treated to be duty-paid goods and therefore, the interest is payable as per section 61(2) of the Act. The debit of any amount under the DEPB scheme is a mode of payment of duty on the imported goods and cannot be treated as exempted goods, unlike the goods under the DEEC scheme. We are unable to answer the questions raised by the appellant in its favour. Therefore, the civil miscellaneous appeals are dismissed." (emphasis supplied) 7.39. From the above extracts, the following positions emerge viz.,

a) The DEPB Scrips allow specific amounts to be utilised for payment of Customs Duty.

b) Importers use DEPB scrips to discharge obligation to pay duty not by cash but by way of credit.

c) Goods cleared under DEPB cannot be treated as exempted goods but only duty paid goods.

d) Debit under the DEPB Scheme is a mode of payment of duty and cannot be treated as grant of exemption from levy.

7.40. A Special Leave Petition was filed against the above order of this Court in TANFAC Industries, supra, before the Supreme Court which was dismissed. The above judgment in TANFAC Industries, supra, was referred to https://www.mhc.tn.gov.in/judis W.A.Nos.830 and 831 of 2020 and followed by this Court in the case of Commissioner of Central Excise and another v. SPIC Heavy Chemicals Division and others.25 and while dealing with the question as to whether adjustment of credit granted by the Government on export of goods in the DEPB towards import duty payable but for the exemption is equivalent to payment of duty in cash, the Division Bench of this Court reiterated the view expressed in TANFAC Industries, supra, and held that the debit under the DEPB Scheme is a mode of payment of duty and cannot be treated as exemption. The relevant portion is extracted hereunder:

> "21..... Therefore the debit of any amount under the DEPB Scheme is a mode of payment of duty on the imported goods cannot be treated as exempted goods unlike

the goods under the DECC Scheme" (emphasis supplied) 7.41. On the other hand, the High Courts of Gujarat and Andhra Pradesh have expressed a contrary view by holding that an exemption which is subject to the condition of debiting the scrips must be understood and treated as exempted goods as such adjustment is procedural in nature and an exercise meant for administrative convenience. Importantly, the Gujarat High Court, in Gujarat Ambuja Exports Ltd. v. Government of India26, considered the decision of the Madras High Court in TANFAC Industries, supra, and expressed its inability to concur with the view expressed in the said case. The 25 2013 SCC OnLine Mad 4021 26 2012 SCC OnLine Guj 6133 https://www.mhc.tn.gov.in/judis W.A.Nos.830 and 831 of 2020 relevant portion of the said judgment is extracted hereunder:

"29. We are not unmindful of the decision of the Madras High Court in the case of Tanfac Industries Ltd. v. Asst. Commissioner of Customs reported in [2010] 2 GSTR 468 (Mad) ; (2009) 240 ELT 341 (Mad). In the said case, in the background of interest on warehoused goods where such demand of interest on goods cleared beyond 90 days arose, the Division Bench of the High Court came to the conclusion that on the imports under the DEPB Scheme, the importers pay duty not by cash but by way of credit and, therefore, the goods cleared under the DEPB Scheme cannot be treated as exempted goods. It can only be treated as duty-paid goods.

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

31. We may note that in cases of the Advance Licence Schemes under which imports are being made and which are exempt from customs duty under various notifications issued by the Central Government under section 25 of the Customs Act, 1962, no education cess is demanded by the respondents. In fact, the impugned notification itself is sufficiently clear and records that imports against advanced licences are exempt from all duties of customs and therefore, it follows that education cess at two per cent. is not leviable on such imports. In the case of DEPB, however, a distinction is sought to be drawn on the premise that though the importers are governed by exemption notification, the fact remains that in the case of such imports, the duty is debited from DEPB scrip. To our mind, such distinction is not valid. The clarificatory circular itself refers to https://www.mhc.tn.gov.in/judis W.A.Nos.830 and 831 of

2020 the imports made under the DEPB Scheme being covered under the exemption notification. Such exemption is, of course, subject to fulfillment of certain conditions. One of the conditions includes that of adjustment of credit in the DEPB scrip. This, however, is merely procedural in nature and would not change the nature of benefit from one being of exemption." (emphasis supplied) https://www.mhc.tn.gov.in/judis W.A.Nos.830 and 831 of 2020 7.42. The above view has been reiterated by the Gujarat High Court in the case of Commissioner of Customs v. Pasupati Acrylon Limited27 & 28. The Andhra Pradesh High Court has also taken a view similar to the Gujarat High Court in the case of Commissioner of Central Excise, Vishakapatnam v.

Kedia Overseas Ltd.29, wherein it was held as under:

"5. A reading of the Notification No.45/2002 would show that the intention of the Government is to exempt the whole of the duty, additional duty and special additional duty. It is, therefore, not possible to read any further restriction as to levy of education cess in respect of duty free imports under DEPB scheme. Further there is no dispute that the ruling of South Zone Bench of CESTAT in Ruchi Health Foods Ltd. and that of the Mumbai Bench in Reliance Industries Ltd. have become final and the Revenue has not challenged the same. Therefore, this appeal is misconceived.

The appeal, for the above is reasons, is dismissed." 7.43. The Special Leave Petition filed against the above order in Kedia Overseas, supra, was dismissed and a review filed also stood dismissed. One more decision which may have to be referred to is of the Madras High Court in Commissioner of Customs, Tuticorin v. DCW Ltd.30, supra, wherein, placing reliance upon a communication in DOF No.334/3/2004-TRU on the issue as to whether goods fully exempt from excise duty or cleared without payment of excise duty / customs duty (such as clearance under bond of fulfillment of certain condition) would be subject to cess, it was held that since Education Cess is to be calculated at a percentage of the duty liability. Thus, when goods 27 & 28 (2013) 296 ELT 182 29 (2014) 305 ELT 268 30 (2014) 306 ELT 398 https://www.mhc.tn.gov.in/judis W.A.Nos.830 and 831 of 2020 are exempt or chargeable to nil duty or cleared without payment of duty under specified procedure such as clearance under bond, question of levy of Education Cess does not arise. The following portions of the order are relevant and extracted hereunder:

"3. We have perused the decision of the Mumbai Tribunal. We find that Ministry of Finance clarified in the proceedings dated 8-7-2004 in D.O.F. No. 334/3/2004-TRU on the specific issue as to whether goods that are fully exempted from excise duty/customs duty or are cleared without payment of excise duty/customs duty (such as clearance under bond of fulfilment of certain conditions) would be subjected to Cess. It was stated therein that since education cess has to be calculated at the percentage on the duty liability, when the goods are fully exempted from excise duty or customs duty, are chargeable to Nil duty or are cleared without payment of duty under specified procedure such as clearance under bond, the question of education

cess to be levied does not arise.

4. Having regard to the specific understanding given on the principle of levy of education cess, and the subsequent Circular also issued in Circular No. 5/2005-Cus., dated 31-1-2005 (F. No. 605/54/2004-DBK), we have no hesitation in confirming the order of the Tribunal by dismissing the appeal." 7.44. From the above discussion, the following position emerges viz., the Madras High Court, in TANFAC Industries, supra, and SPIC Heavy Industries, supra, had taken the position that a notification requiring debiting of scrips cannot be treated as an exemption, instead, it only provides for an option for payment / discharging of duty by debiting the scrips. A Special Leave https://www.mhc.tn.gov.in/judis W.A.Nos.830 and 831 of 2020 Petition filed against the above judgment in TANFAC Industries, supra, also stands dismissed. Contrary view has been expressed by the Gujarat High Court and the Andhra Pradesh High Court and the SLP and a review petition filed in the special leave petition against the decision of the Andhra Pradesh High Court in Kedia Overseas, supra, also stands dismissed. Importantly, the judgment of the Gujarat High Court which has expressed its inability to follow the judgment of this Court in TANFAC Industries, supra, loses its relevance in view of the fact that we are bound by the judgment of the jurisdictional High Court and the judgments of the other High Court would have only persuasive effect. We would think that in the above circumstance, we are bound by the Coordinate Bench decision of this Court in TANFAC Industries, supra, since the decision of the Andhra Pradesh and Gujarat High Courts are not binding on us. In this regard, it may be relevant to refer to the judgment of the Bombay High Court in the case of Commissioner of Income Tax v. Thana Electricity Supply Ltd.31, wherein, it was held as under:

"10 Though there is no provision like article 141 which specifically lays down the binding nature of the decision of the High Courts, it is a well- accepted legal position that a single judge of a High Court is ordinarily bound to accept as correct judgments of courts of co-ordinate jurisdiction and of the Division Benches and of the Full Benches of his court and of the Supreme Court. Equally well-settled is the position that when a Division Bench of the High Court gives a decision on a question of law, it should generally be followed by a co-ordinate Bench of the same High Court. If the co-ordinate Bench in the subsequent case wants the earlier decision to be reconsidered, it should refer the question at issue to a larger Bench." 31 (1994) 206 ITR 727 https://www.mhc.tn.gov.in/judis W.A.Nos.830 and 831 of 2020 ....

"20 (d) The decision of one High Court is neither binding precedent for another High Court nor for courts or Tribunals outside its own territorial jurisdiction. It is well-settled that the decision of a High Court will have the force of binding precedent only in the State or territories on which the court has jurisdiction. In other States or outside the territorial jurisdiction of that High Court it may, at best, have only persuasive effect. By no amount of stretching of the doctrine of stare decisis, can judgments of one High Court be given the status of a binding precedent so far as other High Courts or courts or Tribunals within their territorial jurisdiction are concerned. Any such attempt will go

counter to the very doctrine of stare decisis and also the various decisions of the Supreme Court which have interpreted the scope and ambit thereof. The fact that there is only one decision of any one High Court on a particular point or that a number of different High Courts have taken identical views in that regard is not at all relevant for that purpose. Whatever may be the conclusion, the decisions cannot have the force of binding precedent on other High Courts or on any subordinate courts or Tribunals within their jurisdiction. That status is reserved only for the decisions of the Supreme Court which are binding on all courts in the country by virtue of article 141 of the Constitution." (emphasis supplied) 7.45. It must also be borne in mind that the Special Leave Petitions filed against the order of this Court in TANFAC Industries, supra, as well as the Andhra Pradesh High Court in Kedia Overseas, supra, stand dismissed. Dismissal of a Special Leave Petition does not constitute precedent nor result in merger of the High Court judgment with that of the Supreme Court order dismissing the Special Leave Petition (See Kunhayammed and others v. State of Kerala and another32).

7.46. Now, having found that the decisions of the other High Courts are not binding, but, only carry a persuasive value while a judgment of a Coordinate Bench of the jurisdictional High Court is binding and thus, the decisions in 32 (2000) 6 SCC 359 https://www.mhc.tn.gov.in/judis W.A.Nos.830 and 831 of 2020 TANFAC Industries, supra and SPIC Heavy Industries, supra, which are Coordinate Bench judgments of this Court would bind, we shall now deal with the decision of this court in DCW, supra, which is also a Division Bench judgment of this Court. We are of the view that the decision in DCW, supra, loses its relevance / significance, inasmuch as, it has been rendered without taking note of the judgment in TANFAC Industries, supra, and thus, per incuriam. In this regard, it may be relevant to refer to the judgment in the case of State of Bihar v. Kalika Kuer33:

> "5. At this juncture we may examine as to in what circumstances a decision can be considered to have been rendered per incuriam. In Halsbury's Laws of England (Fourth Edition) Vol. 26: Judgment and Orders Judicial Decisions as Authorities (pages 297-298, Para 578) we find it observed about per incuriam as follows:
>
> "A decision is given per incuriam when the court has acted in ignorance of a previous decision of its own or of a court of coordinate jurisdiction while covered the case before it, in which case it must decide which case to follow or when it has acted in ignorance of a House of Lords decision, in which case it must follow that decision; or when the decision is given in ignorance of the terms of a statute or rule having statutory force. A decision should not be treated as given per incuriam, however, simply because of a deficiency of parties or because the Court had not the benefit of the best argument and, as a general rule, the only cases in which decisions should be held to be given per incuriam are those given in ignorance of some inconsistent statute or binding authority.

33 (2003) 5 SCC 448 https://www.mhc.tn.gov.in/judis W.A.Nos.830 and 831 of 2020 Even if a decision of the Court of Appeal has misinterpreted a previous decision of the House of Lords, the Court of Appeal must follow its previous decision and leave the House of Lords to rectify the mistake".

(emphasis supplied) 7.47. Yet another reason why we would think that the decision in DCW, supra, may not have a bearing is in view of the fact that the effect of debiting of scrips was never an issue before the Madras High Court and thus, the decision in DCW, supra, is sub silentio on the above aspect and thus, loses its significance as a binding precedent. It is trite law that a judicial decision is an authority for what it actually decides and not for what can be read into it by implication or by assigning an assumed intention to the judges, and inferring from it, a proposition of law which the judges have not specifically laid down in the pronouncement (See Amrendra Pratap Singh v. Tej Bahadur Prajapati34).

7.48. We would also think that all these issues are put beyond the pale of any doubt by the Supreme Court in Unicorn Industries, supra, wherein, it was held as under:

> "41.The circular of 2004 issued based on the interpretation of the provisions made by one of the customs officers, is of no avail as such circular has no force of law and cannot be said to be binding on the court. Similarly, the circular issued by the Central Board of Excise and Customs in 2011, is of no avail as it relates to service tax and has no force of law and cannot be said to be binding concerning the interpretation of the provisions by the courts. 34 (2004) 10 SCC 65 https://www.mhc.tn.gov.in/judis W.A.Nos.830 and 831 of 2020 The reason employed in SRD Nutrients P. Ltd.*** that there was nil excise duty, as such, additional duty cannot be charged, is also equally unacceptable as additional duty can always be determined and merely exemption granted in respect of a particular excise duty, cannot come in the way of determination of yet another duty based thereupon. The proposition urged that simply because one kind of duty is exempted, other kinds of duties automatically fall, cannot be accepted as there is no difficulty in making the computation of additional duties, which are payable under NCCD, education cess, secondary and higher education cess. Moreover, statutory notification must cover specifically the duty exempted. When a particular kind of duty is exempted, other types of duty or cess imposed by different legislation for a different purpose cannot be said to have been exempted." (emphasis supplied) 7.49. It may also be relevant to understand the nature and use of the MEIS/SEIS Scrips under the Foreign Trade Policy. It was submitted that debiting of the scrips to the extent of customs duty leviable is procedural and a purely administrative exercise and cannot be treated as payment of duty and thus, the pre-requisite for levy of SWS viz., levy and collection of custom duty is absent. The above contention is liable to be rejected, inasmuch as, it is contrary to the FTP 2015-2020, wherein, it is provided as under:

> "3.00 Objective The objective of schemes under this chapter is to provide rewards to exporters to offset infrastructural inel. ficiencies and associated costs involved and to provide exporters a level playing field.
>
> 3.01 Exports from India Schemes There shall be following two schemes for exports of Merchandise and Services respectively:

(i) Merchandise Exports from India Scheme (MEIS).

(ii) Service Exports from India Scheme (SEIS).

3.02 Nature of Rewards Duty Credit Scrips shall be granted as rewards under MEIS and SEIS. The Duty Credit Scrips and goods imported/domestically procured against https://www.mhc.tn.gov.in/judis W.A.Nos.830 and 831 of 2020 them shall be freely transferable. The Duty Credit Scrips can be used for:

(i) Payment of Customs Duties for import of inputs or goods, except items listed in Appendix 3A.

(ii) Payment of excise duties on domestic procurement of inputs or goods, including capital goods as per DoR notification.

(iii) Payment of service tax on procurement of services as per DoR notification.

(iv) Payment of Customs Duty and fee as per paragraph 3.18 of this Policy.

.....

3.07 Objective Objective of Service Exports from India Scheme (SEIS) is to encourage export of notified Services from India.

.....

3.15 CENVAT / Drawback Additional Customs duty / excise duty / Service Tax paid in cash or through debit under Duty Credit scrip shall be adjusted as CENVAT Credit or Duty Drawback as per DoR rules or notifications. Basic Custom duty paid in cash or through debit under Duty Credit scrip shall be adjusted for Duty Drawback as per DoR rules or notifications.

(emphasis supplied) 7.50. A reading of the above provisions of the FTP would show that duty credit scrips under MEIS and SEIS schemes can be used for payment of customs duty, for import of inputs or goods subject to exceptions. Further, debit under duty scrip is capable of being adjusted as CENVAT credit or duty drawback. Basic customs duty paid through debit under duty credit scrips shall be adjusted for Duty drawback.

7.51. The above would clearly show that the debit of MEIS /SEIS scrips is one of the modes of discharging the duty obligation under the Customs Act. https://www.mhc.tn.gov.in/judis W.A.Nos.830 and 831 of 2020 The contention of the appellant that there is no payment although the duty credit scrips is debited is ill-founded and runs counter to the notifications, provisions of the Customs Act, the FTP and the binding decision of this Court in TANFAC Industries, supra.

(d) Whether forming part of the Consolidated Fund of India is a sine qua non for a levy to operate / exist?

7.52. It was submitted by the appellant that by virtue of Article 266 of the Constitution of India, all tax receipts form part of the Consolidated Fund of India. However, tax incentives through exemptions do not form part of the Consolidated Fund of India. The present notification which provides for exemption subject to the MEIS/SEIS scrips being produced for debit of the duty leviable on the goods imported, do not form part of the Consolidated Fund of India. Instead, it was treated by the Government of India as duty foregone and thus, there is no collection of any duty. Resultantly, there can be no levy of SWS which is computed at 10% of aggregate of customs duty levied and collected. The above submission is untenable, inasmuch as, merely because the taxes / duties levied and recovered do not form part of Consolidated Fund, it would not mean that there is no levy or collection. It was submitted that debiting of scrips https://www.mhc.tn.gov.in/judis W.A.Nos.830 and 831 of 2020 viz., MEIS and SEIS scrips would not result in the Consolidated Fund being credited and it was submitted that it is yet another reason why there is no collection of any duty which is a pre-requisite for the levy of SWS. The above argument is liable to be rejected, for, it is inappropriate, rather, illegitimate to enquire into the manner in which funds raised are utilised and the mere fact that it did not go to the Consolidated Fund of India would have no bearing on the validity of the levy. In this regard, it may be relevant to refer to the judgment in Jaora Sugar Mills (P) Ltd. v. State of M.P.35:

> "17. ..... It will be noticed that the contention raised by Mr Pathak on the basis of Article 266 makes an assumption and that is that the cesses already recovered by the different States will not be transferred to the Consolidated Fund of India, but will remain with the respective States; and that such a position would invalidate the law itself. We are not prepared to accept this argument as well. What happens to the cesses already recovered by the respective States under their invalid laws after the enactment of the impugned Act, is a matter with which we are not concerned in the present proceedings. It is doubtful whether a plea can be raised by a citizen in support of his case that the Central Act is invalid because the moneys raised by it are not dealt with in accordance with the provisions of Part XII generally or particularly the provisions of Article 266. We will, however, assume that such a plea can be raised by a citizen for the purpose of this appeal. Even so, it is difficult to understand how the Act can be said to be invalid because the cesses recovered under it are not dealt with in the manner provided by the Constitution. The validity of the Act must be judged in the light of the legislative competence of the legislature which passes the Act and may have to be examined in certain cases by reference to the question as to whether fundamental rights of citizens have been improperly contravened, or other considerations which may be relevant in that behalf. Normally, it would be inappropriate and indeed illegitimate to hold an enquiry into the manner in which the funds raised by an Act would be dealt with when the Court is considering the question about the validity of the Act itself. As we have just indicated, if the taxes or cesses recovered under an Act are not dealt with in the manner prescribed by the Constitution, what remedy a citizen may have and how it can be enforced, are

questions on which we express no opinion in this appeal. All we are considering at this stage is whether even on the 35 AIR 1966 SC 416 https://www.mhc.tn.gov.in/judis W.A.Nos.830 and 831 of 2020 assumption made by Mr. Pathak, it would be permissible for him to contend that the Act which is otherwise valid, is rendered invalid because the funds in question will not go into the Consolidated Fund of India. In truth, this argument again proceeds on the basis that Parliament has passed the Act not for the purpose of treating the recoveries made as those under its provisions retrospectively enacted, but for the purpose of validating the said recoveries as made under the invalid State Acts; and we have already pointed out that Section 3 completely negatives such an assumption. Therefore, we do not think that Mr Pathak is right in contending that the provisions of the Act are invalid in any manner." (emphasis supplied) 7.53. If the fact that taxes do not reach the Consolidated Fund of India cannot be a reason to question the levy, we fail to see how that aspect would have any bearing on determining the scope or nature of any exemption notification or in determining the imposition or otherwise of a levy or its collection. It is, thus, clear that the attempt by the appellant to suggest that there is no levy/ collection unless it forms part of the Consolidated Fund of India is unsustainable and liable to be rejected as lacking merit. We stand fortified by the decision of the Division Bench of this Court in the cases of TANFAC Industries, supra and SPIC Heavy Chemicals Division, supra, wherein, it was held that goods cleared under duty credit scrips cannot be treated as exempted goods but only as duty paid goods.

8. To sum up:

a) A Notification, merely by virtue of having been issued under Section 25(1) of the Customs Act, cannot be https://www.mhc.tn.gov.in/judis W.A.Nos.830 and 831 of 2020 understood as granting exemption from levy of Customs Duty, instead, one must enquire and find the substance of the notification.

b) The subject notifications viz., Notification Nos.24 and 25 of 2015 cannot be understood as granting exemption from levy of SWS, inasmuch as, the notifications only refer to Section 25(1) and bear no reference to Section 110 of the Finance Act under which SWS is levied.

c) The effect of debiting of duty scrips is not administrative, but, is, a mode of payment of duty and thus, the argument that there is neither levy nor collection of customs duty is untenable.

d) The fact that duty does not form part of Consolidated Fund of India does not have any bearing on determining the scope and nature of an exemption notification nor would have relevance in determining as to whether there was any levy/ collection of duty.

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9. In the light of the above discussion, we are not inclined to interfere with the order of the learned Judge. Accordingly, these writ appeals stand dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

[R.M.D.,J.] [M.S.Q.

10.05.2024

Speaking (or) Non Speaking Order
Index:Yes/No
Neutral Citation: Yes/No
Spp

To
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AND MOHAMMED SHAFFIQ, J.

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