

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 07.04.2017

DELIVERED ON : 14.06.2017

CORAM

THE HONOURABLE MR.JUSTICE RAJIV SHAKDHER
AND

THE HONOURABLE MR.JUSTICE R.SURESH KUMAR

W.A.Nos.1516 and 1517 of 2016

1. The Development Commissioner,
MEPZ, Special Economic Zone & HEOUs
Administrative Officer Building,
National Highway 45, Tambaram,
Chennai - 600 045.
... 1st Appellant in W.A.No.1516/2016
& 3rd Appellant in W.A.No.1517/16
 2. The Director General of Foreign Trade (DGFT)
Ministry of Commerce, Udyog Bhavan
New Delhi - 110 011.
... 2nd Appellant in both W.As
 3. The Secretary,
Ministry of Commerce and Industry,
Udyog Bhavan, Maulana Azad Road,
New Delhi - 110 107.
... 3rd Appellant in W.A.No.1516/2016
& 1st Appellant in W.A.No.1517/2016
- Vs
- M/s.Hospira Health Care India Pvt. Ltd.,
represented by the Deputy General Manager,
(Indirect Tax),
Plot No.B3 to B5, B6 (Pt.), B-11 & B18,
SIPCOT Industrial Park,
Irungattukottai,
Sriperumbudur Taluk -602 105. ... Respondent in both W.As

Prayer : Appeals filed under Clause 15 of the Letters Patent
against the order dated 30.03.2016 made in W.P.Nos.15646 and
26004 of 2014 on the file of this Court.

W.P.No.15646 of 2014 : Writ Petition filed under Article 226 of the Constitution of India, praying this Court to issue a Writ of Certiorari Mandamus, to Call for the records relating to the communication No.25/319/12-13/A1-Vol.I/1170 dated 28.04.2014 of the 1st respondent in pursuant of communication No.13/8/2013-EOU dated 11.04.2014 of the 3rd respondent and quash the same as unlawful, arbitrary and not sustainable in law and consequently direct the first respondent to grant refund.

W.P.No.26004 of 2014 : Writ Petition filed under Article 226 of the Constitution of India, praying this Court to issue a Writ of Certiorari Mandamus, to call for the entire records relating to the communication No. 13/8/2013/ EOU dated 11.4.2014 of the 1st respondent and quash the same.

For Appellants : Mr.G.Rajagopalan,
Additional Solicitor General of India
for M/s.V.P.Sengottuvel

For Respondent : Mr.N.Venkataraman, Senior Counsel
for M/s.K.Magesh

C O M M O N J U D G M E N T

(Judgment of the Court was delivered by RAJIV SHAKDHER, J.)

Background facts:

1. These two (2) appeals, which are directed against a common order rendered by a learned single Judge of this Court dated 30.03.2016.

1.1. The learned single Judge via the impugned order allowed two (2) Writ Petitions, bearing Nos.15646 and 26004 of 2014.

1.2. Pertinently, both the Writ Petitions were filed by the same petitioner.

2. The prayers in the two (2) Writ Petitions were substantially the same, which was to seek a direction from the single Judge to set aside and quash the communication dated 11.04.2014, addressed by the Under Secretary to the Government of India, Ministry of Commerce and Industry, Department of Commerce to the Deputy Director General of Foreign Trade (in short DGFT).

2.1. This prayer is common to both the Writ Petitions. The only difference being that since, the communication received from the Government of India, was, in turn, forwarded to the Writ Petitioner by the Assistant Development Commissioner vide letter dated 28.04.2013 (sic 28.04.2014), the said communication was also challenged, as based on the input of the Government of

India, the Writ Petitioner's claim for reimbursement of Central Sales Tax (in short CST), in respect of purchases made from another Export Oriented Unit (in short EOU), was declined.

3. The appellants, in these appeals, in fact, represent the Government of India, and were, originally respondents in the above-said two (2) Writ Petitions. As would be evident, the respondent company is the original Writ Petitioner.

4. The challenge, which was raised by the Writ Petitioner, was on account of the refusal on the part of the appellants to reimburse CST, in respect of the purchases made from an EOU.

4.1. It is pertinent to note that the respondent company, which is the original Writ Petitioner, is also an EOU. The request for claim for refund qua CST was made, in the context of the provision of Paragraph 6.11(c)(i) of the Foreign Trade Policy, 2009 (in short 2009 FTP), pertaining to the period 2009-2014.

4.2. The appellants resisted the claim on the ground that the reimbursement of CST vis-a-vis purchases made by an EOU was restricted to the supplies received from an unit located in a Domestic Tariff Area (in short DTA).

4.3. In support of this stance, the appellants, not only relied upon the provisions of paragraph 6.11 of the 2009 FTP, but also, sought to place reliance on the provisions of Appendix 14-I-I. In particular, emphasis was laid on clause (2) of Appendix 14-I-I.

4.4. The learned single Judge, after a detailed discussion, on the submissions raised, for and against the relief sought for in the Writ Petitions, ultimately, held, that the FTP provided for reimbursement of CST under paragraph 6.11 and that the said object of the policy was sought to be diluted by the provisions of Appendix 14-I-I. Learned Judge, thus, in effect, held, that Appendix 14-I-I, could not have run counter to the substantive right vested in an EOU under the FTP. In other words, the conclusion reached by the learned single Judge was that since, the right to claim refund of CST was vested in the respondent company/Writ Petitioner by the policy, the said right could not be taken away by the DGFT, who was empowered to only prescribe procedure in his capacity, as the implementing authority.

Submissions of the Counsels:

4.5. It is, in this context of the aforesaid broad stand of the parties before us, arguments and counter arguments were advanced by counsels on both sides.

5. Mr.Rajagopalan, learned Additional Solicitor General of India, who appeared on behalf of the appellants, assisted by Mr.V.P.Sengottuvel, assailed the judgment, passed by the learned single Judge on the short ground that it had failed to take into account the fact that the policy formulated by the Government of

India had to be read as a whole and not in a piecemeal manner, as was done in the instant case. Therefore, according to the learned single Judge, Appendix 14-I-I, if, read along with the policy, could only lead to one conclusion, which is that, only those purchases, which were made by an EOU from a DTA, would be amenable for reimbursement of CST.

5.1. Furthermore, in respect of this submission, it is contended that paragraph 6.11 read with clause (a) and (c) of 2009 FTP was clearly indicative of the fact that the reimbursement of CST was available qua "goods manufactured in India". The argument thus, was, that if, supplies were received from another EOU, the goods, so supplied, would not qualify as goods manufactured in India. The contention, therefore, was that, the goods manufactured by an EOU are deemed as goods, which are not manufactured in India and, therefore, are not amenable to excise duty under the Central Excise Act, 1944 (in short 1944 Act).

5.2. It was, therefore, contended that it is, in this background, that the Government of India had issued the impugned letter dated 11.04.2014, wherein, it had indicated that reimbursement of CST was available to an EOU, only, if, purchases were made from a DTA.

5.3. It is, in this background, learned Senior Counsel went on to submit that because the Government of India was desirous of incentivising exports, that it made the necessary amendments in the Foreign Trade Policy of 2015-2020 (in short 2015 FTP), by specifically providing in Clause (2) of Appendix 6H that reimbursement of CST would be made not only vis-a-vis purchases made from DTA, but also qua those which were sourced from EOUs, Special Economic Zones (SEZs), Electronic Technology Hardware Parks (EHTPs), Software Technology Parks (STPs) and Biotechnology Parks (BTPs).

5.4. In sum, the emphasis was that, it was an amendment, which was prospective in nature and, therefore, could not help the cause of the respondent company/original Writ Petitioner. Therefore, learned senior counsel submitted that the amendment provided a clear indication that in respect of 2009 FTP, reimbursement of CST was restricted to supplies received by an EOU from DTA.

5.5. In nutshell, Mr.Rajagopalan, contended that 2009 FTP should be construed strictly. According to him, the interpretation placed on the 2009 FTP by the learned single Judge, was flawed in law as well as on facts.

6. As against this, Mr.N.Venkataraman, learned senior counsel appearing for the respondent company/original Writ Petitioner, assisted by Mr.Magesh, contended that the substantive right, which was vested by 2009 FTP, could not be taken away by a delegatee, i.e., the DGFT, who was only an implementing authority. It was submitted that as the policy was

framed by the Central Government, in exercise of its powers under Section 5 of the Foreign Trade (Development and Regulation) Act, 1992 (in short the FTDR Act), amendment, if any, to the policy could be made only by the Central Government.

6.1. Learned counsel further submitted that the DGFT was appointed by the Central Government, in exercise of powers under Section 6(1) of FTDR Act, and that, under sub-section (2) of the very same Section, it was the responsibility of the DGFT to advise the Central Government qua the formulation of FTP. Furthermore, it was submitted that the Director General (in short, "DG") was only an implementing agency, as was clear, upon reading of the second limb to sub-section (2) of Section 6 of the FTDR Act.

6.2. In order to demonstrate that the power of amendment of policy could not be delegated to the DG or any other officer, subordinate to the DG, by the Central Government, reliance was placed on sub-section (3) of Section 6 of the FTDR Act.

6.3. It is, in this context, learned senior counsel contended that Appendix 14-I-I was ultra vires the 2009 FTP, formulated by the Central Government. Learned senior counsel emphasized that the policy did not prohibit or restrict reimbursement of CST, in respect of the purchases made by an EOU from another EOU and, therefore, such a restriction could not be incorporated into the policy, albeit, indirectly, by the DGFT, by restricting the reimbursement of CST to purchases made by an EOU from a DTA. Learned senior counsel submitted that this error, which was obvious, was realized by the appellants and, was, accordingly corrected, while formulating the 2015 FTP.

6.4. In this behalf, our attention was drawn to the relevant provisions of the 2015 FTP to highlight the fact that the Central Government had not amended paragraph 6.11 of the 2009 policy, which enabled reimbursement of CST to EOUs. It was pointed out that the amendment was brought in clause (2) of Appendix 6H, which was part of Handbook of Procedures, so as to include not only DTA's as suppliers, but also EOUs, SEZs, EHTPs, STPs and BTPs. This amendment, according to Mr.Venkataraman, was clarificatory in nature, which only restated the position of the Central Government taken while formulating the 2009 FTP, which is that, it would reimburse CST to EOUs, irrespective of the source of supply.

6.5. Furthermore, learned counsel submitted that the argument advanced by Mr.Rajagopalan to the effect that since, goods manufactured by EOU were not deemed as goods manufactured in India and, therefore, no Central Excise Duty was levied, was flawed for the reason that it was contrary to the provisions incorporated, both in the FTP, as also, in the 1944 Act.

6.6. In this behalf, Mr.Venkataraman, laid emphasis on the fact that it is not, as if, EOUs are not permitted to sell their goods in the DTA. According to the learned senior counsel, paragraph 6.8 of the FTP, permits generally 50% of FOB value of

export to be sold in the DTA. According to the learned counsel, one of the important conditions, which the EOU has to satisfy is to achieve the prescribed Net Foreign Exchange earnings (in short NFE) and, if, that is attained, the EOU would be entitled to sell 50% of FOB value of exports in the DTA.

6.7. Therefore, according to the learned senior counsel, arguments advanced on behalf of the appellants that the goods manufactured by EOU were not goods manufactured in India was flawed. It was contended that EOU is nothing but a unit located in India and, is, therefore, governed by Section 3 of the 1944 Act. The only difference being, according to the learned counsel, was that, while a normal DTA unit is governed by Section 3(1)(a) and (b) of the 1944 Act, in so far as the liability qua excise duty is concerned, the EOU is governed by second proviso to Section 3(1) read with Explanation 1 and 2 of the very same Act.

6.8. Thus, in sum, Mr. Venkataraman submitted that the 1944 Act, which provides for levy of Central Excise Duty qua manufactured goods would be applicable to both, sales made by a purely DTA unit and also that which is made by an EOU unit - the only difference being, with regard to the value on which duty would get attracted. It was submitted that in so far as the goods sold by a pure DTA unit is concerned, the valuation would be as per the central excise valuation norms, while the valuation of goods manufactured and sold by an EOU unit will be based on customs valuation, as per the provisions of Section 14 of the Customs Act, 1962.

6.9. Therefore, according to the learned counsel, EOU units ought not to be confused with units located in SEZ units. It was submitted that in so far as SEZ units were concerned, goods produced by such units were not amenable to central excise duty, as they were excluded from the purview of the 1944 Act. The SEZ units, as per the learned senior counsel, were governed by the Customs Act, 1962.

7. In order to drive home the point, learned senior counsel relied upon the definition of SEZ under Section 2(z) and the provisions of Section 53(1) of the Special Economic Zone Act, 2005. Placing reliance on the latter, it was sought to be demonstrated that SEZ was deemed to be a territory, situate outside the customs territory of India for the purpose of undertaking operations. Therefore, the argument based on the aforesaid provisions was that, while a DTA and the 100% EOU units are units, which are considered to be located in India, a SEZ unit, though geographically located within India was deemed to be a territory located outside the customs territory of India.

7.1. Learned senior counsel, thus, submitted that the argument, which may, perhaps, be available, vis-a-vis a SEZ unit to the appellants was not available qua an EOU unit. In support

of his contentions, learned senior counsel relied upon the following judgments:

- (i).Collector of Central Excise V. TVS Whirlpool Limited, 1994 (74) ELT 496 (Mad.);
- (ii).C.S.T. Vs. M/s.Auriaya Chamber of Commerce, (1986) 3 SCC 50;
- (iii).M.P.Steel Corporation V. CCE, (2015) 7 SCC 58;
- (iv).Jantia Hill Truck Owners Association V. Shailang Area Coal Dealer and Truck Owner Association, (2009) 8 SCC 492 ;
- (v).State of Bihar V. Asis Kumar Mukherjee, (1975) 3 SCC 602 ;
- (vi).State of Bihar V. Bihar Distillery Ltd. (1997) 2 SCC 453 ;
- (vii).Seaford Court Estates LD V. Asher, (1949) 2 K.B. 481;
- (viii).Kunj Behari Lal Butail V. State of H.P., (2000) 3 SCC 40;
- (ix).State of Bihar V. Bihar Distillery Ltd., (1997) 2 SCC 453;
- (x).India Cements Ltd. V. CCE, Trichy-1, 2013 (297) ELT 508 (Mad.);
- (xi).Zile Singh V. State of Haryana, (2004) 8 SCC 1 ;
- (xii).WPIL Ltd. V. CCE, (2005) 3 SCC 73 ;
- (xiii).Union of India V. National Federation of the Blind, (2013) 10 SCC 772 ;
- (xiv).Ayurveda Pharmacy V.State of Tamil Nadu,(1989)2 SCC 285;
- (xv).Judgement of the Gujarat High Court, dated 13.10.2016, made in Special Civil Application No.11262 of 2016 etc. batch, titled : Intolcast Pvt. Ltd. V. Union of India;
- (xvi).Order of the Madras High Court, dated 28.07.2016, passed in W.P.Nos.26698 and 26699 of 2015, titled : M/s.Datafield India Private Limited V. The Development Commissioner.

Reasons:

8. We have heard the learned counsel for the parties and perused the record.

8.1. What is clearly evident on a perusal of the record is as follows.

8.2. The respondent company/Writ Petitioner was set up as an 100% EOU and, as required, was registered with the Development Commissioner, Madras Export Processing Zone (MEPZ), Tambaram, Chennai. The respondent company/Writ Petitioner, appears to be in the business of manufacture and export of injectible drugs and infusion technologies. The respondent company/Writ Petitioner claims to a subsidiary of an US entity, viz., Hospira Inc., Lake Forest, Illinois, U.S.A. The respondent company/Writ Petitioner claims to produce and export high quality, low cost, generic medications.

8.3. Towards this end, the respondent company/Writ Petitioner sought and obtained the Letter Of Permission (in short LOP) from the then Commissioner, i.e., the appellant No.1. Consequently, the respondent company/Writ Petitioner was also

permitted to procure, under the FTP, after following due procedure, duty free capital goods, raw materials, and consumables.

8.4. Pertinently, the respondent company/Writ Petitioner stands duly registered with the Central Excise Department. It appears that the respondent company/Writ Petitioner has also been issued a private bonded warehouse licence and in-bond manufacturer's permission, in terms of Sections 58 and 65 of the Customs Act, 1962, respectively.

8.5. The respondent company/Writ Petitioner has averred, a fact, which has not been disputed, that for complying with the export obligations placed upon it under the FTP, it imports, for the purpose of manufacturing its final product, goods, raw-material or both, from outside the country as well as domestically. In so far as the Customs and Central Excise duty are concerned, under the relevant exemption notification, issued by the Government of India, the respondent company/Writ Petitioner is not called upon to pay the same, both for imported as well as indigenous raw materials/capital goods.

8.6. Furthermore, it appears that the imported raw material and goods are not subjected to Sales Tax or Value Added Tax (in short VAT), or CST, in terms of the CST Act, 1956. However, goods/raw material, sold domestically are taxed by certain State Governments, who seek to impose local sales tax, by virtue of local enactments.

8.7. One such case is the State of Tamil Nadu, where, local Sales Tax is levied under the Tamil Nadu Value Added Tax Act, 2006 (in short, TNVAT Act 2006). The local Sales Tax imposed via TNVAT Act 2006, as it appears, is cenvatable, as it is allowed as Input Tax Credit (in short ITC) under the TNVAT Act, 2006. In other words, the respondent company/Writ Petitioner can either utilize the ITC, while discharging the liability to pay output tax on finished goods or, simply claim refund qua the same under the TNVAT Act, 2006.

8.8. However, in so far as the CST is concerned, there is no exemption for sale and purchase of raw material or goods, which takes place in the course of inter-state sale or purchase under the CST Act, 1956. Thus, in effect, the suppliers of raw materials/ goods, charge CST, at the concessional rate of 2% against Form-C declarations furnished by respondent company/Writ Petitioner. The CST is neither cenvatable nor can it be claimed as ITC, which results in, this tax forming part of cost to the respondent company/Writ Petitioner, and/or similar circumstanced buyers.

8.9. It appears that, it is, in this background, that the reimbursement of CST on goods manufactured in India was made available, inter alia, to EOU units.

9. Evidently, the respondent company/Writ Petitioner received supplies from another 100% EOU, namely, Orchid

Chemicals and Pharmaceuticals Limited, (in short OCPL) situated in Aurangabad, Maharashtra. In so far as these supplies were concerned, the said supplier charged CST, at the concessional rate of 2% against Form-C declarations. The respondent company/Writ Petitioner, evidently, had filed for refund of CST qua supplies made by OCPL, under para 6.1 of the 2009 FTP. Most of the refund claims lodged by the respondent company/Writ Petitioner were sanctioned, except those for the period spanning between January, 2012 and March, 2012. The fate of refund claims filed thereafter, that is, for the remaining three (3) quarters of 2012 and another three (3) quarters of 2013, was the same, which is, that they were also not sanctioned.

9.1. It appears that it is, at this juncture, that the respondent company/Writ Petitioner made enquiries with the, then, Commissioner, i.e., appellant No.1, as to why the refund claims had not been sanctioned. The respondent company/Writ Petitioner avers that he was given to believe that appellant No.1 was seeking clarification from appellant No.2, i.e., DGFT. It appears, DGFT, thereafter, sought clarification of the Central Government, i.e., appellant No.3.

9.2. It is, in this background, that the two impugned communications were generated. The first communication dated 11.04.2014, is, as indicated above, an internal communication between the Central Government and the DG, while the second communication, i.e., letter dated 28.04.2014 is a communication, whereby, the decision reached by the Central Government was sought to be brought to the knowledge of the respondent company/Writ Petitioner. The net effect of the two (2) impugned communications was that, the petitioner's claim for refund of CST was declined. It is this stance of the appellants, which has brought the respondent company/Writ Petitioner to Court.

10. Therefore, in order to appreciate the controversy at hand, one would have to first set down the relevant provisions of 2009 FTP, on which reliance is placed by the parties herein. In this behalf, the provisions of paragraph 6.11, along the relevant extract of the Appendix 14-I-I is set forth hereinbelow:

"Entitlement for supplies from the DTA

6.11 (a) Supplies from DTA to EOU / EHTP / STP / BTP units will be regarded as "deemed exports" and DTA supplier shall be eligible for relevant entitlements under chapter 8 of FTP, besides discharge of export obligation, if any, on the supplier. Notwithstanding the above, EOU / EHTP / STP / BTP units shall, on production of a suitable disclaimer from DTA supplier, be eligible for obtaining entitlements specified in chapter 8 of FTP. For claiming deemed export duty drawback, they shall get brand rates fixed by DC wherever All Industry Rates of Drawback are not available.

(b)

(c) In addition, EOU / EHTP / STP / BTP units shall be entitled to following:-

(i) Reimbursement of Central Sales Tax (CST) on goods manufactured in India. Simple interest @ 6% per annum will be payable on delay in refund of CST, if the case is not settled within 30 days of receipt of complete application (as in paragraph 9.10.1 of HBP v1).

(ii) Exemption from payment of Central Excise Duty on goods procured from DTA on goods manufactured in India.

(iii) Reimbursement of duty paid on fuel procured from domestic oil companies / Depots of domestic oil Public Sector Undertakings as per drawback rate notified by DGFT from time to time. Reimbursement of additional duty of excise levied on fuel under the Finance Acts 77 would also be admissible.

(iv) CENVAT Credit on service tax paid.

APPENDIX - 14-I-I

Procedure to be followed for reimbursement of Central Sales Tax (CST) on supplies made to Export Oriented Units (EOUs) and units in Electronic Hardware Technology Park (EHTP) and Software Technology Park (STP).

Note: Please see para 6.11(c) (i) of the Chapter 6 of Foreign Trade Policy.

1.

2. The Export Oriented Units (EOUs) and units in Electronic Hardware Technology Park (EHTP) and Software Technology Park (STP) will be entitled to full reimbursement of Central Sales Tax (CST) paid by them on purchases made from the Domestic Tariff Area (DTA), for production of goods and services as per EOU Scheme on the following terms and conditions:

(a) The supplies from DTA to EOU/EHTP/STP units must be utilized by them for production of goods/services and may include raw material, components, consumables, packing materials, capital goods, spares, material handling equipment etc. on which CST has been actually paid by the EOU/EHTP/STP.

(b) While dealing with the application for reimbursement of CST, the Development Commissioner or the designated officer of the EHTP/STP shall see, inter alia, that the purchases are essential for the production of goods / services by the units.

(c) For payment of interest, in accordance with para

6.11(c) (i) of FTP, separate application for claiming interest is not required and a single cheque for main claim and interest can be issued to the claimant. However, separate account will be maintained by the Development Commissioner of Special economic Zones for the amount of interest disbursed by them."

11. Before we proceed further, it would be important to contextualise that chapter of 2009 FTP, in which, paragraph 6.11 stands incorporated.

11.1. As is, obvious, paragraph 6.11, is part of Chapter 6 of 2009 FTP, which deals with EOUs, EHTPs, STPs and BTPs. The first paragraph of Chapter 6, which contains the eligibility criteria, inter alia, is indicative of the fact that the benefits available in the said chapter are available only to those units, who undertake to export their entire production of goods and services, save and except, permissible sales in DTA, which are set out under the EOU Scheme or the EHTP Scheme or STP Scheme or BTP Scheme. Inherent in the eligibility clause of Chapter 6 is the indication that these units can make sales wherever permissible to DTAs as well.

11.2. Therefore, the argument advanced on behalf of the appellants that an EOU can never make a DTA sale is intrinsically flawed. This is also discernible, if, one reads paragraph 6.5, (which deals with NFE earnings), along with Paragraph 6.8. Paragraph 6.8¹ specifically deals with a

1 "DTA Sale of Finished Products / Rejects / Waste
6.8 Entire production of EOU / EHTP / STP / BTP units shall be exported subject to following: /Scrap/Remnants and byproducts

(a) Units, other than gems and jewellery units, may sell goods upto 50% of FOB value of exports, subject to fulfilment of positive NFE, on payment of concessional duties. Within entitlement of DTA sale, unit may sell in DTA, its products similar to goods which are exported or expected to be exported from units. However, units which are manufacturing and exporting more than one product can sell any of these products into DTA, upto 90% of FOB value of export of the specific products, subject to the condition that total DTA sale does not exceed the overall entitlement of 50% of FOB value of exports for the unit, as stipulated above. No DTA sale at concessional duty shall be permissible in respect of motor cars, alcoholic liquors, books, tea (except instant tea), pepper & pepper products, marble and such other items as may be notified from time to time. Such DTA sale shall also not be permissible to units engaged in activities of packaging / labeling / segregation / refrigeration/ compacting / micronisation / pulverization / granulation / conversion of monohydrate form of chemical to anhydrous form or vice-versa. Sales made to a unit in SEZ shall also be taken into account for purpose of arriving at FOB value

situation, where an EOU unit can make a DTA sale.

11.3. A perusal of paragraph 6.8 of the 2009 FTP would show that subject to the conditionalities contained therein, as alluded to above, an EOU unit can make a DTA sale. The primary condition being, that sales to DTA units is limited to 50% of the FOB value of exports, subject to the fulfilment of positive NFE on payment of concessional duty.

11.4. As a matter of fact, paragraph 6.9 of the 2009 FTP also points in the direction that subject to the conditions contained therein, an EOU's sale to a DTA is counted towards

of export by EOU provided payment for such sales are made from Foreign Exchange Account of SEZ unit. Sale to DTA would also be subject to mandatory requirement of registration of pharmaceutical products (including bulk drugs). An amount equal to Anti Dumping duty under section 9A of the Customs Tariff Act, 1975 leviable at the time of import, shall be payable on the goods used for the purpose of manufacture or processing of the goods cleared into DTA from the unit.

(b) For services, including software units, sale in DTA in any mode, including on line data communication, shall also be permissible up to 50% of FOB value of exports and /or 50% of foreign exchange earned, where payment of such services is received in foreign exchange.

(c) Gems and jewellery units may sell upto 10% of FOB value of exports of the preceding year in DTA, subject to fulfillment of positive NFE. In respect of sale of plain jewellery, recipient shall pay concessional rate of duty as applicable to sale from nominated 73 agencies. In respect of studded jewellery, duty shall be payable as applicable.

(d) Unless specifically prohibited in LoP, rejects within an overall limit of 50% may be sold in DTA on payment of duties as applicable to sale under sub-para 6.8(a) on prior intimation to Customs authorities. Such sales shall be counted against DTA sale entitlement. Sale of rejects upto 5% of FOB value of exports shall not be subject to achievement of NFE.

(e) Scrap / waste / remnants arising out of production process or in connection therewith may be sold in DTA, as per SION notified under Duty Exemption Scheme, on payment of concessional duties as applicable, within overall ceiling of 50% of FOB value of exports. Such sales of scrap / waste / remnants shall not be subject to achievement of positive NFE. In respect of items not covered by norms, DC may fix ad-hoc norms for a period of six months and within this period, norms should be fixed by Norms Committee. Ad-hoc norms will continue till such time norms are fixed by Norms Committee. Sale of waste / scrap / remnants by units not entitled to DTA sale, or sales beyond DTA sale entitlement, shall be on payment of full duties. Scrap / waste / remnants may also be exported.

(f) There shall be no duties / taxes on scrap / waste /

fulfilment of positive NFE. Similarly, under paragraph 6.10, an EOU is permitted to export goods manufactured by it, via any other exporter, or, through another EOU as well. This facility is available, subject to the conditions, provided in paragraph 6.18 of the Handbook of Procedures, 2009-2014.

11.5. Therefore, the entire Scheme of Chapter 6, to our minds, points to the direction that there is no impediment in an EOU making purchases from DTA unit and then, claiming reimbursement of CST.

11.6. A plain reading of clause (a) and (c) of paragraph 6.11 of 2009 FTP shows that an EOU is entitled to various

remnants, in case same are destroyed with permission of Customs authorities.

(g) By-products included in LoP may also be sold in DTA subject to achievement of positive NFE, on payment of applicable duties, within the overall entitlement of sub-para 6.8(a). Sale of by-products by units not entitled to DTA sales, or beyond entitlements of subpara 6.8 (a), shall also be permissible on payment of full duties.

(h) EOU / EHTP / STP / BTP units may sell finished products, except pepper and pepper products and marble, which are freely importable under FTP in DTA, under intimation to DC, against payment of full duties, provided they have achieved positive NFE. An amount equal to Anti Dumping duty under 74 section 9A of the Customs Tariff Act, 1975 leviable at the time of import, shall be payable on the goods used for the purpose of manufacture or processing of the goods cleared into DTA from the unit.

(i) In case of units manufacturing electronics hardware and software, NFE and DTA sale entitlement shall be reckoned separately for hardware and software.

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

(k) In case of new EOUs, advance DTA sale will be allowed not exceeding 50% of its estimated exports for first year, except pharmaceutical units where this will be based on its estimated exports for first two years.

(l) Units in Textile and Granite sectors shall have an option to sell goods into DTA in terms of sub- paras 6.8 (a), (d), (e), (g) and (k) above, on payment of an amount equal to aggregate of duties of excise leviable under section 3 of the Central Excise Act, 1944 or under any other law for the time being in force, on like goods produced or manufactured in India other than in an EOU, subject to the condition that they have not used duty paid imported inputs in excess of 3% of the FOB value of exports of the preceding year and they have achieved positive NFE. Once this option is exercised, the unit will not be allowed to import any duty free inputs for any purpose."

benefits. In so far as clause (a) to paragraph 6.1 is concerned, the supplies received from DTA by the EOU are regarded as "deemed exports" and, accordingly, the supplier is eligible for relevant entitlements under Chapter 8 of the FTP. Besides this, even an EOU on production of a suitable disclaimer from a DTA supplier would be eligible for obtaining entitlements specified in chapter 8 of FTP. It has been specifically stated in clause (a) that for claiming deemed export duty draw back, they shall be given brand rates fixed by the Development Commissioner, wherever All Industry Rates of Drawback are not available.

11.7. Similarly, in so far as the other entitlements are concerned, these are set out in clause (c) of paragraph 6.11 of the 2009 FTP. Sub-clause (i) speaks about reimbursement of CST; sub-clause (ii) speaks about exemption from Central Excise Duty on goods procured from DTA on goods manufactured in India. Sub-clause (iii) provides for reimbursement of duty paid on fuel procured from domestic oil companies/depots of domestic oil Public Sector Undertakings, as per drawback rate, notified by DGFT from time to time. It also provides for reimbursement of additional duty of excise levied on fuel under the Finance Act, and lastly, clause (iv) provides for cenvat credit on service tax paid. In chapter 6, there are provisions for other entitlements, such as, those given in paragraph 6.12.

11.8. A holistic reading of the Scheme of Chapter 6 is, indicative of the fact that, there are several entitlements available to an EOU unit, none of which seems to suggest that it is either prohibited from purchasing goods from a DTA unit or from making a domestic sale, subject to it fulfilling the threshold NFE, fixed qua the concerned unit.

12. We must, however, confess that the heading/marginal note to paragraph 6.11 is indicative of the fact that the entitlements, provided therein may, perhaps, be restricted only qua supplies received by an EOU from a DTA unit. That being said, as discussed above, the Scheme of Chapter 6 is not suggestive of the fact that there is any impediment on the EOU Unit receiving supplies from DTA or an EOU unit, making supplies to a DTA unit, as was sought to be contended by Mr. Rajagopalan. The heading or a marginal note, in our view, cannot be used to control or override the plain meaning, which emerges on a perusal of the provisions contained in sub-clause (i) of clause (c) to paragraph 6.11 of the 2009 FTP. It is only in exceptional circumstances, and that too for guidance, if, necessary, that heading or marginal notes may be used as an aid to interpretation. (see *Montila & Ors., REGINA v.*, [2005] 1 All ER 113; *Karnataka Rare Earth and another V. The Senior Geologist, Department of Mines and Geology and another*, AIR 2004 SC 2915 and *Commissioner of Income Tax, Bombay V. Ahmedbhai Umarbhai & Co.*, Bombay, AIR 1950 SC 134.)

12.1. Pertinently, clause (c) of paragraph 6.11 opens with the words "in addition". Therefore, the entitlement in clause (c), which is, inter alia, given to an EOU, is not to be linked with the supplies received or purchases made from a DTA unit. Furthermore, sub-clause (i) of clause (c) to paragraph 6.11 simply states that reimbursement of CST would be available on "goods manufactured in India".

13. Mr.Rajagopalan had argued that since, goods manufactured by an EOU were not treated as goods manufactured in India, they were not amenable to excise duty. Based on this, it was contended that sub-clause (i) of clause (c) of paragraph 6.11 would not enable an EOU to seek reimbursement of CST qua supplies received or purchases made from a unit other than a DTA unit.

14. According to us, both contentions are fallacious, for the following reasons.

(i) An EOU is nothing, but a unit, which undertakes to export its entire production of goods and services under the relevant EOU Scheme. Therefore, clearly, these are goods, which are manufactured in India. The production of such goods is, however, incentivised, under the relevant EOU Scheme only to promote exports, in order to enable generation of foreign exchange for the Country.

(ii) As correctly argued by Mr.Venkataraman, the Central Excise Duty will be payable by an EOU unit qua domestic sales. The only exception in this behalf (which is provided in Section 3 of the 1944 Act), are goods produced and/or manufactured in SEZs. Furthermore, in so far as the 100% EOUs are concerned, excise duty is levied and collected on any excisable goods which are produced or manufactured by it and brought to any other place in India. The excise duty so levied and collected is required to be equivalent to an aggregate of duties of customs, which would be leviable under the Customs Act, 1962 or any other law, for the time being in force, on like goods produced or manufactured outside India, if, they were to be imported into India and where the said duties of customs are chargeable, by reference to their value, the value of such excisable goods is required to be determined under the provisions of Customs Act, 1962 and the Customs Tariff Act, 1975. This aspect of the matter clearly emerges, upon a bare perusal of Section 3 of the 1944 Act.

15. Therefore, quite clearly, both in law and on facts, it cannot be contended by the appellants that goods manufactured by EOU units are not goods manufactured in India and, thus, do not fulfill the conditionality for reimbursement of CST, as contained in sub-clause (i) of clause (c) of paragraph 6.11 of the 2009 FTP.

16. The other argument of Mr.Rajagopalan that, if, the argument advanced on behalf of the respondent company/Writ Petitioner was to be accepted, then supplies made by one EOU unit to another EOU unit would also qualify for reimbursement of CST, which, in turn, would result in loss of Central Excise Duty to the exchequer, is obviously flawed. This argument, is, to our minds, as flawed as the earlier argument. The answer to this submission lies in our discussion above that goods produced and/or manufactured by an EOU are "goods manufactured in India" and, hence, would be liable to central excise duty qua domestic sales.

17. This apart, according to us, the 2009 FTP like any other FTP being an economic legislation, which seeks to, inter alia, promote exports by giving various incentives to the exporters, should, in case of any ambiguity, be construed liberally in favour of the exporter.

18. Therefore, the argument of Mr.Rajagopalan that sub-clause (i) of clause (c) on paragraph 6.11 of 2009 FTP should be construed strictly, that is, akin to a taxing statute does not appeal to us. Even in a taxing statute, where the purpose and object of the provision is to incentivise growth and development, the approach adopted by the Courts is that, the concerned provision should be liberally construed, so as to encourage economic activity.

18.1. In this behalf, we may quote, with profit, the observations of the Supreme Court in the matter of: *Bajaj Tempo Ltd. V. Commissioner of Income Tax - (1992) 196 ITR 188*, wherein, Justice R.M.Sahai speaking for the Court, while construing the provisions of Section 15 C of the Income Tax Act, 1922 was called upon to decide whether the tax benefit provided in the said provision could be made available to an Assessee, in respect of the profits derived from a new industrial undertaking, which was located in a leased building. The provision in issue, on a literal reading, disentitled an assessee to claim the tax benefit, if, the new industrial undertaking was formed, inter alia, by transfer to the new business any building, machinery plant, used in the previous business .

18.2. The argument advanced was that, since, the new industrial undertaking was set up in a leased building, which was received upon transfer by the assessee from another business, the tax benefit could not be extended to the assessee. The Supreme Court, while dealing with the objections of the Revenue on various grounds also took into account the purpose and the object for which the provision had been incorporated into the Act. While doing so, the Supreme Court made the following apposite observations:

"The limited question is whether the assessee which has been found by tribunal to be a new company could be denied the benefit as visualised in section 15C(1) because of operation of the clause (i) of Sub-section (2) It is a restrictive clause. It denies benefit which is otherwise available in sub-section (1) A provision in a taxing statute granting incentives for promoting growth and development should be construed liberally ! In Broach Distt. Co- Operative Cotton Sales Ginning and Pressing Society Ltd. v. Commissioner of Income Tax Ahmedabad, 177 ITR [1989] 418 SC the assessee a cooperative society claimed that the receipts from the ginning and pressing activities was exempt under- Section 81 of the Income tax Act. The question for interpretation was whether the cooperative society which carried on the business of ginning and pressing was society engaged in 'marketing' of the agricultural produce of the its members. The Court held that object of section 81(1) was to encourage and promote the growth of cooperative societies and consequently a liberal construction must be given to the operation of that provision. And since ginning and pressing was incidental or ancillary to the activities mentioned in Section 81(1) the assessee was entitled to exemption and the proviso did not stand in way. In Commissioner of Income Tax, Amritsar v. Strawboard Manufacturing Company Ltd., 177 ITR [1989] 431 SC was held that the law providing for concession for tax purposes to encourage industrial activity should be liberally construed. The question before the Court was whether Straw Board could be said to fall within the expression "paper and pulp" mentioned in the Schedule relevant to the respective assessment years. The Court held that since word "paper and pulp" was mentioned in the Schedule the intention was to refer to the paper and pulp industry and since Straw Board Industry could be described as forming part of the paper and pulp industry it was entitled to benefit. The section, read as a whole, was a provision, directed towards encouraging industrialisation by permitting an assessee setting up a new undertaking to claim benefit to the extent of six percent in a year on the capital employed. But the legislature took care to restrict such benefit only to those undertakings which were new in form and substance, by providing that undertaking should not be 'formed' in any manner provided in Clause (i) of

sub-section (2) of Section 15C. Each of these requirements, namely, formation of the undertaking by splitting up or reconstruction of an existing business or transfer to the undertaking of building, raw material or plant used in any previous business results in denial of the benefit contemplated under sub-section (1). Since a provision intended for promoting economic growth has to be interpreted liberally the restriction on it, too, has to be construed so as to advance the objective of the section and not to frustrate it.

(Emphasis is ours)

19. This brings us to other limb of the argument advanced by Mr. Rajagopalan, which is that, the provisions of Paragraph 6.11 (c)(i) should be read along with paragraph 2 of Appendix 14-I-I.

19.1. This argument proceeds on the basis that the 2009 FTP and the said Appendix is formulated by the same juridical entity, i.e., Central Government. This argument is not only factually erroneous, but also legally untenable. The reason for the same is that the FTP is formulated by the Central Government by issuing a notification under Section 5 of the FTDR Act. The DGFT is the implementing authority, as is clearly discernible on a plain reading of sub-section (2) of Section 6 of the very same Act. The amendments, if any, in the FTP can only be made by the Central Government; a position, which clearly emerges upon a reading of sub-section (3) of Section 6. The Central Government is entitled to delegate all powers to the Director General (DG) or an officer subordinate to him, except those contained in Sections 3, 5, 15, 16 and 19. Clearly, the power of formulation of FTP, which is vested in the Central Government, by virtue of Section 5 cannot be delegated to the DG or an officer subordinate to him. Thus, the amendments to the FTP can only be brought about by the Central Government and not by the DGFT.

19.2. Therefore, to our minds, as correctly argued by Mr. Venkataraman, the provisions of clause (2) of Appendix 14-I-I cannot take away what has been conferred upon the respondent company/Writ Petitioner under the 2009 FTP.

19.3. The delegatee cannot be vested with powers, beyond that which is provided under the parent legislation. Clearly paragraph 2 of Appendix 14-I-I goes beyond what is provided for in the 2009 FTP, as it seeks to change the contours of the provision made in paragraph 6.11(c)(i) of the said policy. As a matter of fact, it appears that the appellant Nos. 1 and 2 also understood the provisions of paragraph 6.11.(c)(i) of the 2009 FTP, in the manner, in which, it was understood by the respondent company/Writ Petitioner, as it granted reimbursement of CST for most part of 2010 and 2011, except for the first quarter of 2012 and the periods which followed thereafter.

20. The fact that Appendix 14-I-I went beyond the scope of 2009 FTP appears to have donned upon the Central Government, when, the 2015 FTP was formulated. Accordingly, Appendix 6H, annexed to the 2015 FTP provided that reimbursement of CST, would be available not only qua purchases made from DTAs, but also, inter alia, vis-a-vis purchases made from EOUs.

21. The submission of Mr.Rajagopalan that the provision made in Appendix 6H of 2015 FTP, should be treated as prospective in nature in the given facts and circumstances of the case, cannot be accepted for more than one reason. Firstly, as discussed by us hereinabove, even without taking recourse to Appendix 6H of the 2015 FTP, we have come to the conclusion that the 2009 FTP did not disentitle the respondent company/Writ Petitioner from claiming reimbursement of CST. Secondly, the fact that the relevant provisions of the two FTPs have not undergone a change and, that, a change has singularly been effected only in the Appendix 6H in the Hand book of Procedures, which is, formulated by the DGFT would have us, hold, that it can only be clarificatory in nature and, therefore, ought to have retrospective effect. This is so as the introduction of Appendix 6H led to a course correction instead of a change in course contrary to what is sought to be contended on behalf of the appellants.

22. Thus, having regard to the scheme of Chapter 6, we are of the view that a plain reading of the provisions of paragraph 6.11 (c)(i), would have us hold that notwithstanding the fact that the respondent company/Writ Petitioner made purchases from an EOU as against DTA unit, it would be entitled to seek reimbursement of CST.

23. Therefore, for the foregoing reasons, we are of the view that no interference is called for with the impugned judgment. Consequently, the Writ Appeals are dismissed. However, there shall be no order as to costs.

Sd/-

Assistant Registrar(CS VI)

//True Copy//

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Sub Assistant Registrar

To

1. The Development Commissioner,
MEPZ, Special Economic Zone & HEOUs
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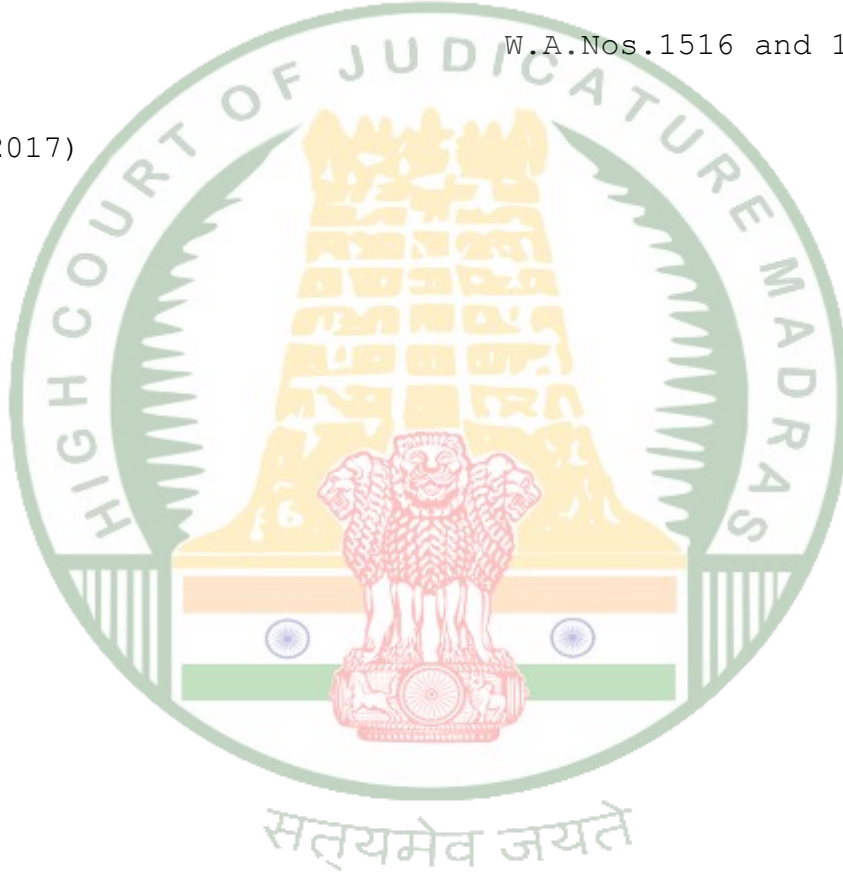
2. The Director General of Foreign Trade (DGFT)
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3. The Secretary,
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+1cc to Mr.V.P.Sengottuvel, Advocate, S.R.No.42490

W.A.Nos.1516 and 1517 of 2016

SKS (CO)
CA(29/06/2017)



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