

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON 18.12.2019

DELIVERED ON 03.01.2020

CORAM

THE HONOURABLE MR. JUSTICE K.RAVICHANDRABAABU

W.P.Nos.24490 and 27452 of 2019
and

WMP Nos.24211 and 26924 of 2019

WP.No.24490 of 2019 :

M/s.Gemini Edibles and Fats India Pvt. Ltd.
Freedom House 8-2-334/70 & 71,
Road No.5, Banjara Hills,
Hyderabad 500034.

....Petitioner
in both W.Ps.

Vs

- 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 & 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 W.P.24490/19

WP.No.27452 of 2019 :

- 1.Union of India (Through its Secretary),
Ministry of Finance, Department of Revenue,
Shastri Bhawan, New Delhi 110 001.
2. Commissioner of Customs, Commissionerate-II,
Customs House, Rajaji Salai, Chennai 600 001.

3.Zonal Joint Director General of Foreign Trade,
Shastri Bhawan, Annexe Building, 4th Floor & 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 W.P.27452/19

Prayer in W.P.No.24490/2019:Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of certiorarified mandamus to call for the records of letter dated 10.07.2019 issued by the second respondent and the 35 Bills of Entry Listed at Ground (I) of the petition and quash the same to the extent the respondents have sought to debit Social Welfare Surcharge.

(Prayer amended as per order dated 21.10.2019 in WMP No.30107 of 2019 in W.P.No.24490 of 2019 by KRCBJ)

Prayer in W.P.No.27452/2019:Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of certiorarified mandamus to call for the records of the 193 Bills of Entry listed at Ground (I) of the petition and quashing the same as being contrary to law and directing the respondents to re-credit the Social Welfare Surcharge component in all the MEIS and SEIS duty credit scrips of the petitioner from which such surcharge was deducted and further restrain the respondents from debiting any amount pertaining to SWS from the MEIS and SEIS duty credit scrips and from debiting any amount pertaining to BCD over and above the prescribed rate on all future imports.

(Prayer amended as per order dated 21.10.2019 in WMP No.30114 of 2019 in W.P.No.27452 of 2019 by KRCBJ)

For Petitioner
in both W.Ps.

: Mr.Sujith Gosh
for Mr.Aditya Reddy

For Respondents

: Dr.G.Babu, CGSC for R1, 3 and 4
in both W.Ps.

for R2 in W.P.24490/19

: Mrs.Aparna Nandakumar
Standing Counsel

for R2 in W.P.27452/19

: Mr.M.Santhanaraman
Standing Counsel

COMMON ORDER

W.P.No.24490 of 2019 is filed challenging the order of the second respondent dated 10.07.2019, wherein and whereby the petitioner was informed that 49.5% 49.5% on assessable value (BCD at 45% and Social Welfare Surcharge at 4.5%) of the goods imported is being debited from Scrips and no excess duty is being collected and thus, the question of refund does not arise.

2. W.P.No.27452 of 2019 is filed to quash 193 Bills of Entry listed therein, as the same being contrary to law and for direction to the respondents to re-credit the Social Welfare Surcharge component in all the MEIS and SEIS duty credit scrips of the petitioner from which such surcharge was deducted and further to restrain the respondents from debiting any amount pertaining to SWS from the MEIS and SEIS duty credit scrips and from debiting any amount pertaining to BCD over and above the prescribed rate on all future imports.

3. The petitioner in both the writ petitions is one and the same.

4. The case of the petitioner is as follows:

The petitioner is in the business of manufacturing and marketing edible oils and fats. Importing of goods is part and parcel of the petitioner's activities ordinarily attracting the levy of Customs Duties. The petitioner offset such Customs Duties, by procuring scrips under the MEIS (Merchandise Exports from India Scheme) and SEIS (Service Exports from India Scheme) provided for under Chapter 3 of the FTP and utilizing such scrips. The concept of MEIS and SEIS Schemes are as follows:

MEIS

i) A claimant needs to export notified goods (coded under the ITC-HS) to notified places, as provided for under Appendix 3B to the Handbook of Procedures ("HOP") of the FTP, in order to be entitled to MEIS benefit. The rate of reward for each type of export is also provided for under Appendix 3B. (Para 3.04 -FTP)

ii) The value considered for calculating MEIS benefit is the realized FOB value of exports in free foreign exchange of the FOB value of exports as given in the shipping bills in free foreign exchange whichever is lesser. (Para 3.04 -FTP)

iii) The claimant is then granted a 'Duty Credit Scrip' which can be used for defraying Customs Duties on imports, Excise Duties on manufactured goods and Service Tax on the procurement of services. However, the goods and services in question are to be notified by the Department of Revenue. (Para 3.02- FTP)

iv) Duty Credit Scrips are freely transferable meaning that they can be sold and procured for a consideration. (Para 3.02-FTP)

v) Chapter 3 of the HOP covers all the procedure related aspects of the MEIS scheme.

SEIS

i) The claimant needs to export certain notified services listed under Appendix 3D, rendered in the manner prescribed under Para 9.51(i) and Para 9.51(ii) of the FTP. (Para 3.08(a))

ii) The claimant needs to have a minimum prescribed threshold of Net Free Foreign Exchange earnings. (Para 3.08(b))

iii) The claimant is then granted a 'Duty Credit Scrip' which can be used for defraying Customs Duties on imports, Excise Duties on manufactured goods and Service Tax on the procurement of services. However, the goods and services in question are to be notified by the Department of Revenue. (Para 3.02- FTP)

iv) Duty Credit Scrips are freely transferable meaning that they can be sold and procured for a consideration. (Para 3.02-FTP)

v) Chapter 3 of the HOP covers all the procedure related aspects of the SEIS scheme."

b) The petitioner procured MEIS and SEIS scrips from various exporters, who had obtained the same under Chapter 3. Notification No.24/2015-Customs dated 08.04.2015 exempts goods imported against MEIS scrips from Customs Duties under the First Schedule to the Customs Tariff Act, 1975 and additional Duties leviable thereon under Section 3 of the Customs Tariff Act, 1975. A similar Notification in Notification No.25/2015 dated 08.04.2015 was issued exempting goods imported against SEIS scrips, as well. By virtue of the aforesaid provisions, notifications and scrips, the customs duties, that were otherwise payable by the petitioner became exempt.

c) Social Welfare Surcharge (hereinafter referred to SWS) was introduced as a levy under Section 110 of the Finance Act, 2018 to meet the Government's obligations to finance education, health and social security. The said surcharge was 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, 1962.

d) The petitioner imported certain goods at Karaikal Port in the normal course of its business during the period July 2017 to July 2018 and its Bills of Entry were assessed. The petitioner's MEIS licenses and SEIS licenses were debited by the amounts pertaining to SWS by the second respondent by including

the same as part of customs duties. The petitioner through letter dated 26.06.2019 sought to ascertain the methodology adopted by the second respondent in deducting excess duties of customs from the scrips. The second respondent responded through the impugned letter stating that there was no excess duty being collected from the petitioner. The deduction of the amounts pertaining to SWS from the petitioner's MEIS and SEIS licenses is incorrect, unwarranted. Only Customs Duty leviable under the First Schedule to the Customs Tariff Act and Additional Duty under Section 3 of the Tariff Act can be debited from the MEIS and SEIS scrips other than what has been mentioned in the exempted notification. SWS is levied under Section 110 of the Finance Act 2018 as a duty of customs and not under the First Schedule to the Customs Tariff Act. Even if SWS is considered as equivalent to Customs duty, it is still not levied under the First Schedule to the Customs Tariff Act and therefore, not exempted under Notification No.24/2015 or 25/2015. Hence, the second respondent does not have power to deduct SWS amount from the MEIS and SEIS scrips. SWS is not in the nature of Customs Duties. The levy of SWS is not attracted at all. SWS is not to be charged on the imports because Section 110(3) of the Finance Act, 2018 provides for it to be calculated at the rate of 10% on the aggregate of duties of Customs, which themselves are exempted. SWS is calculated at the rate of 10% on the aggregate of duties "levied and collected". The imports made through MEIS and SEIS scrips are exempted from the levy and collection of Customs Duty by virtue of Notification Nos.24 and 25 of 2015. Therefore, the levy of SWS is not attracted. Circulars dated 10.04.2011 and 10.08.2004 clarified that goods exempt from Service Tax, Excise Duties and Customs Duties are effectively leviable to Nil duty and customs duties are effectively leviable to Nil duty and therefore, the levy of education cess would not be attracted. The above circulars issued by the Department of Revenue are binding on its functionaries.

5. In W.P.No.27452 of 2019, the petitioner is aggrieved against debit of SWS in respect of goods imported at Chennai Port during the period February 2018 to July 2019.

6. Counter Affidavit is filed in W.P.No.24590 of 2019. Learned counsel appearing for the Revenue in W.P.No.27452 of 2019 submitted that he is adopting the counter filed in W.P.No.24490 of 2019 as well as the argument advanced by the learned counsel appearing for the Revenue in the above writ petition.

7. The averments made in the counter affidavit are as follows:

a) Merchandise Exports from India Scheme (MEIS) and Service Exports from India Scheme (SEIS) are export incentives. Under both the scheme, duty credit scrips are granted as rewards and such scrips can be used for payment of Custom Duties, payment of excise duties, payment of service tax, payment of customs duty and fee as per paragraph 3.18 of the policy. Under the earlier Foreign Trade Policy namely FTP 2004-2009, the duty paid through debits under DEPB Scheme which is similar to MEIS Scheme and SEIS Scheme under FTP 2015-2020 was originally treated as exemption from duty and that goods cleared through debit under DEPB Scheme were exempted goods. Subsequently para 4.3.5 of the FTP 2004-09 was amended so as to give the benefit of Cenvat credit or duty drawback to additional customs duty paid through debit under DEPB Scheme. Customs Notification 96/2004 dated 17.09.2004 read with Customs Circular No.59/2004 dated 21.10.2004 laid down that the additional customs duty paid through debit under DEPB Scheme shall be allowed to be availed as cenvat credit or duty drawback. Thus, it is submitted that the MEIS Scheme and SEIS Scheme under FTP 2015-20, which allows the debit of basic customs duties and other duties from duty credit scrips is the same as the DEPB Scheme available under the amended para 4.3.5 of Foreign Trade Policy 2004-2009. Thus, these schemes provide the objective to neutralize the incidence of customs duties on import component of the export product. This neutralization is provided by way of duty credit against export product which is at a specified percentage of FOB value of export. Thus, the MEIS Scheme and the SEIS Scheme like the earlier DEPB Scheme provides for payments for customs duty and additional duty by utilization of credit available in the credit schemes which are given as export rewards by the Government of India. In other words, the importer has the option to pay the customs duties either by cash or through debit under duty credit scrips. Para 3.15 of the Foreign Trade Policy 2015-20 laid down in categorical terms that the customs duties paid through cash or through debit under duty credit scrips shall be adjusted as Cenvat credit or duty drawback. Thus the provisions of the FTP 2015-20 make it very clear that the duty credit scrips awarded under the MEIS and SEIS Schemes is not an exemption from the duties but only a revenue neutralization scheme where the customs duties otherwise payable are debited from the duty credit scrips awarded by the Government of India. In such an event the submission of the petitioner herein that the imports are exempted from the levy of customs duty in cases where MEIS and SEIS Scrips are utilized is wholly untenable and incorrect. The SWS is a duty on the imported goods in addition to the other customs duties except the ones mentioned in clause (a) to (d) of

sub Section (3) and is collected as a duty of customs. Sub Section 5 of Section 110 of Finance Act 2018 lays down that the provisions with regard to assessment, non levy, short levy, refunds, exemptions, interest, appeals, offences and penalties shall apply to the levy and collection of SWS as they applied to other customs duties and also the rules and regulations as the case may be. Thus, it is submitted that in such an event the debit of the SWS from the duty credit scrips treating it as an additional customs duty is well justified. Notification 24/2015-Customs dated 08.04.2015 and Notification 25/2015-Customs dated 08.04.2015 have to be read in the context of para 3.15 of FTP 2015-20.

b) The MEIS and SEIS Scheme do not give the benefit of exemption of customs duty and additional customs duty but only give the benefit of neutralization in the form of debit from the duty credit scrips. Clause 2 of the Notification 24/2015-Customs and Notification 25/2015-Customs dated 08.04.2015 states that the exemption mentioned in clause (1) are subject to the conditions laid down in sub clause (1) to (10) of clause 2 of the Notifications. Sub clause (8) and (9) lays down 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. Sub clause (5) lays down that the said scrips has to be produced before the proper officer of customs at the time of clearance for the debit of the duties leviable on the goods. Thus on a conjoint reading of the clauses in the Notifications, it is evident that there is no factual exemption on the customs duty but the Notifications only speak about the debit of the leviable duties from the duty credit scrips. Thus the SWS which was introduced as an additional customs duty under Section 110 of the Finance Act, 2018 has to be treated on the same plane as the basic customs duty and other customs duties as per sub section (5) of Section 110 of the Finance Act, 2018. Thus, in such an event the debit of SWS from the duty credit scrips is wholly justified and well in order and in accordance with the provisions of sub section (5) of Section 110 of the Finance Act, 2018 read with para 3.02 of the FTP 2015-2020. The Customs Circular issued by the CBIC Circular No.5/2005-Customs dated 31.01.2005 have clarified that in the case of DEPB Scheme, though the imports are governed by an exemption notification, the fact remains that in case of such imports the duty is debited from the DEPB scrips. The same Circular also lays down that the education cess which was in existence at that time and which was leviable at 2% of the aggregate duties of customs except safeguard duty, countervailing duty and anti dumping duty can be debited from the DEPB scrips when the imports are made under the DEPB scheme.

The present SWS has replaced the education cess and is now calculated as 10% of the aggregate of basic customs duties and other additional duties except safeguard duty, countervailing duty, anti dumping duty and the SWS. Further, as Circular No.5/2005-Customs dated 31.01.2005 has not been rescinded till date, the same is applicable to SWS also. It is true that Social Welfare Surcharge is a Surcharge on the Basic Customs duty. Only if the BCD is 'zero%' without any condition attached to it, the Social Welfare Surcharge would also be 'zero'. But in the present case, it is not 'zero%'. The BCD which is leviable is being debited from the scrips issued by DGFT. So, the importer is actually 'paying' the BCD but not by cash but by using the scrips. Hence, the contention of the petitioner is not sustainable. The Constitutional Bench of the Hon'ble Supreme Court in the case of Commissioner of Customs, Mumbai v. Dilip Kumar (2018 (9) SCC 1) held that every taxing statute including charging computation and exemption clause should be interpreted strictly, in the case of exemption notification the benefit of ambiguity must be strictly interpreted in favour of the revenue only.

8. Mr.Sujit Ghosh, the learned counsel for the petitioner made his oral submissions. A written submission and an additional written submission on behalf of the petitioner are also filed. The sum and substance of the submissions made by the petitioner are as follows:

a) Both these writ petitions are filed challenging the arbitrary and illegal debit of Social Welfare Surcharge from the scrips obtained by the petitioner under the Merchandise Exports and India Schemes (MEIS) and the Service Exports from India scheme(SEIS) under the Foreign Trade Policy 2015-2020 relevant to two imports made at Karaikal Port and Chennai Port. The respondents instead of debiting Basic Customs Duty(BCD) at 45% on the assessable value of bill of entry from the scrips of the petitioner have debited 49.5% by adding 10% of Social Welfare Surcharge, which is illegal, arbitrary and unsustainable in law. Notification Nos.24 & 25/2015 specifically exempt goods when imported using MEIS and SEIS scrips from the whole of the duty of customs leviable thereon under the First Schedule to the Customs Tariff Act 1975 and the whole of additional duty leviable thereon under Section 3 of the Customs Tariff Act, 1975. The exemptions under the aforesaid Notifications are effectuated by way of debiting the duty amount from the value that the MEIS and SEIS scrips bear. Debiting of the scrip is only an administrative mechanism of tracking when the upper limit of exemption is reached. Therefore, it cannot be stated that the debit of scrip means payment of Customs Duties or that the duties are paid through the scrips. As per the above said

two Notifications, the act of debit is permitted only for those duties which are leviable on the goods but for the specific exemption provided in the Notifications. In other words, only the Customs Duty leviable under the First Schedule to the Customs Tariff Act and Additional Duty under Section 3 of the Tariff Act can be debited, which is specifically exempted. In other words, if the rates of duties are prescribed under some other statute, even if those may be in the nature of Customs Duties, debit of such duties is not permissible under the said notification. Insofar as Social Welfare Surcharge (SWS) is concerned, the same is levied under Section 110 of the Finance Act, 2018 and not under the Customs Tariff Act, 1975. Consequently, since the rate of SWS is not prescribed under the Customs Tariff Act, neither SWS is exempted under the aforesaid Notification, nor it is debitable under the said notification. However, where the Basic Customs Duty as also to CVD is exempted under the said notification, then the effective tax rate of those imports works out to NIL.

b) By virtue of Section 110(3) of the Finance Act 2018, Social Welfare Surcharge would also be NIL, since the same is calculated at the rate of 10% on the aggregate of Duties, Taxes and Cesses which are levied and collected under the Customs Act where the Basic Customs Duties and CVD is exempted on the use of the scrips, the customs authorities have no authority to either debit SWS or recover any SWS, since SWS would be NIL where the petitioner is eligible for exemption from Basic Customs Duty and CVD.

c) The above contention is squarely covered by a decision of the Division Bench of this Court reported in 2014(306) ELT 398 (Mad). The above position has also been accepted by other High Courts in number of cases as follows:

- i) 2013 (296) ELT 182 (Guj.) (Commissioner of Customs vs. Pasupati Acrylon Ltd.)
- ii) 2015(322) ELT 121 (Bom.) (Commissioner of Customs (Export) vs. Reliance Industries Ltd.)
- iii) 2013 (289) ELT 273 (Guj.) (Gujarat Ambuja Exports Ltd.)
- iv) 2011 TIOL 1063-HC-AP-CUS (Commissioner of Central Excise Vishakapatnam vs. Kedia Overseas)

d) The above Notifications grant exemption from payment of duties and cannot be read as requiring the importer to "pay duty through debit". If the Notification contemplates payment of duty through the scrips, then monies paid by way of tax would have formed part of the Consolidated Fund of India and not shown as "Duties Foregone" in the Budget Documents. Tax incentives through exemptions etc. do not form part of the Consolidated

fund of India. From a perusal of Union Budget of 2018-19 and more particularly, Annexure 7 of the Receipt Budget presented before the Parliament makes it abundantly clear that Revenue Impact on account of Export Promotion Concessions such as SEIS schemes and MEIS schemes etc. adds up to the Total Customs Duty Foregone by the Government of India. It is crystal clear that the incentives available under the DEPB scheme, SEIS Scheme, MEIS Scheme etc. tantamount to Revenue Foregone by the Central Government and thus do not form part of the Consolidated Fund of India. If debit of Duty through the scrips indeed amounted to payment of Tax, then for sure, such payment would have contributed to the Revenue Earned by the Government of India and not the "Revenue Foregone".

e) If debit of Duty amounts to "payment of tax" then occasion for imposition of interest in case of irregular utilization of the scrips could not have arisen. Even in a situation where Duty has been paid, as per the pleadings of the Respondent (through a scrip) where such scrip was irregularly used by exporter, there can be no occasion for the Revenue to recover further duties along with interest, solely on account of such irregular usage of the scrip. This hypothesis is on the edifice that having collected the Duty through debiting the Scrip, no loss to the ex-chequer could have taken place, warranting a further recovery of Duties collected earlier at the time debit and charging of interest thereon.

f) The respondents have placed undue reliance on the term "debit" that occurs in Notifications 24 and 25 of 2015. The respondents lost sight of the fact that the very term "debit" occurs in the Exemption Notification No.18/2015 pertaining to Advance Authorization and Exemption Notification No.19/2015 pertaining to Duty Free Import Authorization i.e., the so called exemption and remission schemes under Chapter 4 of the FTP. The fact that the said term i.e. "debit" is used both for SEIS and MEIS notifications as also Advance Authorization and DFIA Notifications, goes on to indicate that the said term "debit" is only used to refer to a mechanism of subtracting from the instruments in question, the extent of the exemption availed by an claimant. The said term "debit" cannot, by any stretch of imagination, be equated with "payment through a scrip/ license".

g) Aspect of Duty Foregone i.e., grant of exemption adequately demonstrated in the Bill of Entry. On a perusal of the Bill of Entry it is clearly noticed that in the first table contained in the Bill of Entry, after making reference to the exemption notification made applicable to the petitioner an amount of Rs.7107665.30/- has been indicated as "BCD Fg". The

term "fg" stands for nothing other than "Foregone". Therefore the phrase BCD Fg 7107663.30/- can only mean that, it is the quantum of Basic Customs Duties that has been Foregone by the Customs Authorities and hence cannot mean that that is the amount of Basic Customs Duties paid by the petitioner. From a perusal of the Notification concerned, it is abundantly clear that the same has been issued under Section 25(1) of the Customs Act Under that Section, power has been granted to the Central Government, to grant exemption from Customs Duty either conditionally or subject to certain conditions. Accordingly, where the source of power of the legislative action of the executive is under Section 25(1) of the Customs Act (power to grant exemption), such a delegated legislation in the form of Notification cannot be anything other than a Notification granting exemption. Any other interpretation suggestive of the Notification requiring payment of tax, would run wholly contrary to the source of power, effectuated for issuing the subject notification and thus cannot be countenanced.

h) Significance of the phrase "But for this exemption". On a perusal of Clause 2(v) of the present Notification, it can be noticed that the power has been granted to the proper officer to debit the duties leviable on the goods but for this exemption. The choice of the words "but for this exemption" essentially denotes that where without the operation of the exemption notification, Customs Duty is payable, however, on application of the exemption notification, the duties are exempt. The present notification is only an exemption notification. The petitioner relies upon the Constitution Bench decision of the Supreme Court in the case of AV Fernandes vs. State of Kerala - AIR 1957 SC 657. The petitioner also relies upon the Division Bench decision of the Supreme Court in the case of HICO Products vs. CCE 1994 (71) ELT 339 (SC).

i) The substance of the Notification ought to be relied upon and not certain words used out of context. The reference to the word "paid" used in the foreign trade policy or the word "debit" used in the Notifications concerned, ought not to be read out of context in appreciating whether or not the notification concerned is an exemption notification or not. Instead it is the substance of the notification that ought to be looked at and not certain words used out of context. Accordingly, words such as "paid" used in the FTP or "Debit" used in the "Notification" ought not to be considered in coming to the conclusion that the exemption is indeed an exemption notification and not a notification in which duty is being asked to be paid through the mechanism of debit. A Division Bench of the Supreme Court in the case of Asst.Commr. Commercial Taxes.

Vs. Dharmendra Trading Company 1988(3) SCC 570 at para 6 had the occasion, to adopt the above test of "substance of the concession" as opposed to "certain words used out of context" to ascertain the nature of the incentive granted. In summary it is the petitioner's submission that ab initio exemption or outright exemption is not the only way in which duties are foregone. Instead based on policy and expediency and such other factors, there are other methods through which exemptions are granted (such as refund to the taxable person or refund to the recipient of services or refund net of credit utilized) and in similar vein debiting of duty through the value scrip is yet another administrative methodology adopted, to confer the exemption and may not be read to mean that such debiting is a method of payment of Duty. Since the respondents have themselves pleaded that where customs duties are exempted, Social Welfare Surcharge would also be exempted accordingly, considering that the Basis Customs Duty under the present exemption notifications are exemption there can be no occasion for imposition of SWS through the mechanism of debit. Furthermore, since SWS is calculated at 10% of the aggregate of Duties payable (pursuant to Section 110 (3) of the FA 2018) which in the present case would be NIL by operation of the present exemption notifications, the liability to pay SWS would also be NIL (10% of NIL being Zero).

j) Decisions of the Division Bench of the Madras High Court in Tanfac and SPIC are distinguishable. Furthermore the Tanfac decision was rendered by the Madras High Court in 2009, whereas in the year 2013, a Division Bench of the Madras High Court in case of Commissioner of Customs Tuticorin vs. DCW reported in 2014(306) ELT 398 (Mad.) in identical facts and issues involved as in the present petition, had come to the conclusion that the notification concerned therein i.e. Notification 96/2004 dated 17.09.2004 under which customs duties were being debited under the DEPB scheme, essentially granted a total exemption from the payment of Customs Duties, and consequently, it was held that Education Cess (similar to SWS) was also exempt.

k) The Respondents' reliance on Circular No.5/2005 dated 21.05.2005 is wholly misplaced. It is submitted that such reliance is wholly misplaced because the said circular had been set aside as constitutionally invalid by the Hon'ble Gujarat High Court. Alternative remedy is not efficacious in the present case. In fact alternate remedy is an exercise in futility and the petitioner rightly approached this Hon'ble Court in writ proceedings under Article 226.

9. Mrs.Aparna Nandakumar, learned counsel for the second respondent in W.P.No.24490 of 2019 made her oral submissions.

Learned counsel also filed written submissions. Mr. Santhanaraman, learned counsel for the second respondent in W.P.No.27452 of 2019 submitted that he is adopting the argument advanced by Mrs.Aparna Nandakumar. Thus, the sum and substance of the submissions made on behalf of the second respondent in both the writ petitions are as follows:

a) The petitioner herein is challenging the debit of Social Welfare Surcharge (SWS) from the duty credit scrips. The petitioner herein is under the Exports of India Incentive Schemes namely Merchandise Export India Scheme (MEIS in short) and Service Export from India Scheme (SEIS in short) under the Foreign Trade Policy 2015-20 (FTP in short). The object of these scheme is to offset infrastructure inefficiencies and to provide exporters a level playing field. The Exports from India Schemes falling under Chapter 3 of the FTP 2015-20 are different from the duty exemption/remission scheme which fall under Chapter 4 of the FTP 2015-20. Para 3.02 of the FTP 2015-20 lays down the nature of rewards available under the MEIS and SEIS Schemes. These rewards are in the nature of duty credit scrips which are freely transferable. These duty credit scrips are identical to DEPB Scrips which was introduced in the year 1997 under the FTP 1997-2002. The DEPB Scrips ceased to be in operation from the year 2015. Under FTP 2004-2009 there were five schemes which were identical to the DEPB Schemes like VKGUY. These five schemes have been replaced by the MEIS AND SEIS Schemes under FTP 2015-2020. Under both the schemes, the basic customs duty, additional customs duty and central excise in respect of certain inputs can be debited from the duty credit scrips as provided in para 3.03 of the FTP 2014-2019.

b) Notification 24 & 25/2015-Customs which lay down about the MEIS and SEIS Schemes is similar to Notification 96/2004-Customs. Clauses 8 and 9 speaks about the admissibility of CENVAT Credit. Chapter 3 and Chapter 4 of the FTP 2015-2020 operate on different premises. While Chapter 3 lays down that duties can be paid by way of debit through scrip rewards in which case the benefit of CENVAT credit/Duty Drawback is available, Chapter 4 speaks about exemptions/conditional exemptions and circumstances in which CENVAT Credit/Duty Drawback can be availed when there is no specific exemption. Thus, the petitioner endeavour to equate all the incentive schemes under one umbrella of exemption is wholly erroneous. The Duty Entitlement passbook Scheme or the Duty Credit Scrips Scheme cannot be treated as an exemption from payment of duty. In this regard, the second respondent herein places reliance on the decision of the Hon'ble Supreme Court in Commissioner of Customs, Calcutta v. Indian Rayon and Industries Ltd. [2008 (10) SCALE 498]. The decision of the Apex Court has been followed by

the Division Bench of this Court in Tanfac Industries Ltd. v. The Assistant Commissioner of Customs, Customs Division, 2009 (165) ECR 186 (Madras). SLP 24638-24640/2009 filed against this decision dismissed by the Hon'ble Supreme Court. Tanfac Industries decision has been followed by another Division Bench of this Court in CCE v. SPIC, Heavy Chemicals Division, [2014] 25 GSTR 538 (Mad). The second respondent herein also places reliance on the decisions of the Hon'ble Supreme Court in Yasha Overseas v. Commissioner of Sales Tax, (2008) 8 SCC 681. The second respondent herein also places reliance on the decisions of the Hon'ble Gujarat High Court in Ratnamani Metals And Tubes Ltd. v. Union of India, 2016 (339) ELT 509 (Guj). The decision of the Gujarat High Court in Gujarat Ambuja Exports Ltd v. Government of India (289) ELT 273 (guj) relied on by the petitioner herein is not applicable to the facts of the present case.

c) The petitioner herein has argued that the sub silentio principle will be applicable to the decisions referred to by the second respondent for the reason that the Hon'ble Supreme Court and the Division Bench of this Court do not refer to the debit of education cess which has been addressed by the Hon'ble Gujarat High Court in Gujarat Ambuja. Thus, in the context, the second respondent herein relied on the decision of this Court in QD Seatamon Designs Private Limited v. P.Suresh 2019 (1) MLJ 163 (Mad), which has relied on two judgments of the Supreme Court and one judgment of the Full Bench of this Court lays down that the sub silentio principles cannot be an exception to Article 141 of the Constitution of India.

d) SWS was introduced vide Section 110 of the Finance Act, 2018 and it was essentially to replace Education cess. As laid down in Section 110 of the Finance Act, 2018 the SWS is a duty of customs in addition to other duties of customs under the Customs Act, 1962. Therefore, the second respondent submits that the SWS is not an independent levy but takes the nature and colour of the parent levy viz basic customs duty (BCD). If the BCD is exempt then SWS being an allied levy will also be exempt. If the BCD is exempt then SWS being an allied levy will also be exempt. If the BCD is debitable a duty credit scrip schemes like the MEIS and SEIS, the SWS which is also a duty of customs and an allied levy, is also debitable from the duty credit scrips. There is no specific bar for debiting the SWS from the duty credit scrips.

e) It is further submitted that Section 110(5) of the Customs Act makes it crystal clear that the treatment meted out to the levy, assessment, etc., on the BCD would mutatis mutandis

be applicable to SWS also. In this connection, the second respondent places reliance on the decisions of High Court and Apex Court laying down that Automobile Cess/Education Cess/Secondary and Higher Education Cess/National Calamity Contingent Duty are duties of excise and are not independent levies:

A. CCE v. TELCO (1997) 5 SCC 275.

B. Banswara Syntex v. UOI (Rajasthan High Court) RLW 2007(4) Raj.2995.

The provisions of Section 110 of the Finance Act, 2018 are similar to Section 93 of the Finance Act, 2004 by which Education cess was introduced. While Section 93(1) of the Finance Act 2004 is comparable to Section 110(1) of the Finance Act, 2018, Section 93(2) and 93(3) of the Finance Act, 2004 are comparable to Section 110(4) and (5) of 2018. Thus, it is submitted that the decision in Banswara rendered in the context of education cess is applicable in all fours to the issue of SWS. The decision of the Hon'ble Rajasthan High Court in Banswara has been affirmed by the Hon'ble Supreme Court in SRD Nutrients v. CCE, (2018) 1 SCC 105 and in Bajaj Auto Ltd. Vs. UOI 2019 (366) ELT 577 (SC).

f) Based on the ratio laid down by the Hon'ble Supreme Court, when the basic customs duty is not exempted and is debitable from the duty credit scrips, the SWS which takes the colour of parent levy viz., basic customs duty and is not an independent levy, is also debitable from the duty credit scrips. The Constitutional Bench of the Hon'ble Supreme Court in Commissioner of Customs v. Dilip Kumar 2018 9 SCC 1 has laid down that exemption notifications must be construed very strictly and when there is an ambiguity in exemption notification, it should be in favour of the Revenue. The petitioner herein has now filed an amendment petition to amend the prayer and grounds seeking for a certiorarified mandamus as against the Bill of Entry. Thus the second respondent submits that the Bill of Entry which reflects the debit of Social Welfare Surcharge, the action by which the petitioner herein is aggrieved is an appealable order under Section 128 of the Customs Act, 1962. BCD and Additional Customs Duty can be debited from duty credit scrips which are export rewards under MEIS and SEIS Schemes. The debit through the duty credit scrips is only payment of customs duty and is not an exemption. SWS is calculated at 10% of the BCD. This being an additional customs duty takes the colour of parent levy namely BCD. In the present case, as BCD is not exempt but debitable from duty credit scrips, SWS is also not exempt but debitable from duty credit scrips.

10. After hearing the oral submission of the learned counsels for both sides and receiving their written submissions as well, this Court reserved the matter "for orders" on 18.11.2019. However, on 09.12.2019, both the learned counsels appeared before me and made a mention in the open Court that a recent decision rendered by the Hon'ble Supreme Court dated 06.12.2019 in the case of Unicorn Industries v. Union of India & others (Civil Appeal No.9237 of 2019 dated 06.12.2019), has a bearing on the issue involved in these cases and therefore, for the purpose of explaining the effect of the said decision, they requested for listing the matter for further hearing. Accordingly, the matter was listed on 16.12.2019 and at the request of the learned counsel for the petitioner, it was adjourned to 18.12.2019. On 18.12.2019, the learned counsels appearing on either side made their submissions regarding the effect of the above decision of the Apex Court made in Unicorn Industries case, and also filed additional written submissions (by the petitioner) and revised written submissions (by the respondent). Accordingly, the matter was reserved "for orders" on 18.12.2019.

11. In the revised written submission filed by the learned counsel for the revenue, apart from reiterating the earlier contentions, the learned counsel fairly submitted that the revenue can no longer rely upon the decisions of the Apex Court in SRD Nutrients Private Limited and Bajaj Auto Limited cases, in support of their contention that the Social Welfare Surcharge is not an independent levy but took the colour of the parent levy. However, the revenue sought to contend that the present issue is not a case of exemption of basic customs duty to test whether the exemption is at all applicable to social welfare surcharge and on the other hand, the issue revolves around the question whether the payment of SWS can be debited from the duty credit scrips like the customs duty.

12. In the additional written submissions filed on behalf of the petitioner, they relied on the recent decision of the Apex Court made in Unicorn Industries case, and contended that SWS could not have been debited from the scrips because notification Nos. 24 and 25 of 2015 exempted only Customs Duties levied under the Customs Act and Customs Tariff Act and therefore, in the absence of any machinery for debiting SWS from the scrips, the revenue ought not to have debited the same from the scrips.

13. Heard Mr.Sujith Ghosh, learned counsel for the petitioner and Mrs.Aparna Nandhakumar, learned counsel for the

Revenue. Perused the pleadings, written submissions and case laws cited on either side.

14. Point for consideration in this writ petition is as to whether the Revenue is justified in debiting the Social Welfare Surcharge also from and out of the value of the relevant scrips issued under two schemes viz., MEIS and SEIS, while debiting the customs duty from those two scrips.

15.a) The petitioner is in the business of manufacturing and marketing of eatable oils and fats. They import certain goods as a part and parcel of their business activities.

b) Foreign Trade Policy 2015-2020 contains two schemes viz., Merchandise Exports from India Scheme (MEIS) and Service Exports from India Scheme (SEIS). Under the MEIS, a claimant has to export notified goods to notified places in order to be entitled to MEIS benefit, calculated based on the realised FOB value of exports in free foreign exchange or the FOB value of the exports as given in the shipping bills in free foreign exchange, whichever is lesser. Once such export is made, the claimant is granted a duty credit scrip, which can be used for paying the customs duty, excise duty on manufactured goods and service tax on the procurement of service.

c) Likewise, for taking benefit under SEIS, the claimant needs to export certain notified services rendered in the manner prescribed under the Foreign Trade Policy. Accordingly, the claimant is granted a duty credit scrip under SEIS, which can be used for paying the customs duty on imports, etc., Thus, it is seen that under both schemes, the basic customs duty, additional customs duty and central excise duty in respect of certain inputs can be debited from the duty scrips.

d) Clause 3.02 under Chapter 3 of Foreign Trade Policy for the period 01st April 2015 to 31st March 2020 reads as follows:

"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 them shall be freely transferable. The Duty Credit Scrips can be used for:

(i) Payment of Basic Customs Duty and Additional Customs Duty specified under Sections 3(1), 3(3) and 3(5) of the Customs Tariff Act, 1975 for import of inputs or goods, including capital goods, as per DoR Notification, except items listed in Appendix 3A.

(ii) Payment of Central excise duties on domestic procurement of inputs or goods;

- (iii) Deleted
- (iv) Payment of Basic Customs Duty and Additional Customs Duty specified under Sections 3(1), 3(3) and 3(5) of the Customs Tariff Act, 1975 and fee as per paragraph 3.18 of this Policy."

16. The Central Board of Indirect Taxes and Customs issued two notifications in Nos.24/2015 and 25/2015, both dated 08.04.2015. The petitioner seeks to rely on the above said notifications in support of their contention that the Social Welfare Surcharge (SWS) cannot be debited from the above duty credit scrips.

17. Notification No.24/2015-Customs dated 08.04.2015 reads as follows:

"[TO BE PUBLISHED IN THE GAZETTE OF INDIA, EXTRAORDINARY, PART II SECTION 3, SUB-SECTION (i)]

GOVERNMENT OF INDIA MINISTRY OF FINANCE (DEPARTMENT OF REVENUE)

Notification No. 24 / 2015- Customs

New Delhi, the 8th April, 2015.

G.S.R. 269 (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 when imported into India against a duty credit scrip issued by the Regional Authority under the Merchandise Exports from India Scheme in accordance with paragraph 3.04 read with paragraph 3.05 of the Foreign Trade Policy (hereinafter referred to as the said scrip) from,-

(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 said Customs Tariff Act); and

(b) the whole of the additional duty leviable thereon under section 3 of the said Customs Tariff Act.

2. The exemption shall be subject to the following conditions, namely :-

- (1) that the duty credit in the said scrip is issued -

(a) against exports of notified goods or products to notified markets as listed in Appendix 3B of Appendices and Aayat Niryat Forms of Foreign Trade Policy 2015-2020;

(b) against exports of notified goods or products transacted through e-commerce platform as listed in Appendix 3C of Appendices and Aayat Niryat Forms of Foreign Trade Policy 2015-2020. In such cases the maximum free on board value, for calculation of duty credit amount, shall not exceed Rs.25,000 per consignment;

(2) that the export categories or sectors specified in paragraph 3.06 of the Foreign Trade Policy and listed in Table annexed hereto shall not be counted for calculation of export performance or for computation of entitlement under the scheme;

(3) that the imports and exports are undertaken through the seaports, airports or through the inland container depots or through the land customs stations as mentioned in the Table 2 annexed to the Notification No. 16/2015- Customs dated 01.04.2015 or a Special Economic Zone notified under section 4 of the Special Economic Zones Act, 2005 (28 of 2005):

Provided that the Commissioner of Customs may within the jurisdiction, by special order, or by a Public Notice, and subject to such conditions as may be specified by him, permit import and export through any other sea-port, airport, inland container depot or through any land customs station:

Provided further that the exports of notified goods or products transacted through e-commerce platform as listed in Appendix 3C of Appendices and Aayat Niryat Forms of Foreign Trade Policy 2015-2020 are undertaken either through the courier mode from airports at Chennai, Mumbai or Delhi or through the Foreign Post Offices at Chennai, Mumbai or New Delhi;

(4) that the said scrip is registered with the Customs Authority at the port of registration specified on the said scrip;

(5) that the said scrip is produced before the proper officer of customs at the time of clearance for debit of the duties leviable on the goods and the proper officer of customs taking into account the debits already made under this exemption and debits made under the notification Nos.20/ 2015 - Central Excise, dated the 8th April, 2015 and 10/ 2015 -Service Tax, dated the 8th April, 2015, shall debit the duties leviable on the goods, but for this exemption;

(6) that the said scrip and goods imported against it shall be freely transferable;

(7) that where the importer does not claim exemption from the additional duty of customs leviable under section 3 of the said Customs Tariff Act, he shall be deemed not to have availed the exemption from the said duty for the purpose of calculation of the said additional duty of customs;

(8) that the importer shall be entitled to avail of the drawback of the duty of customs leviable under the First Schedule to the said Customs Tariff Act against the amount debited in the said scrip;

(9) that the importer shall be entitled to avail drawback or CENVAT credit of additional duty leviable under section 3 of the said Customs Tariff Act against the amount debited in the said scrip;

(10) that the benefit under this notification shall not be available to the items listed in Appendix 3A of Appendices and Aayat Niryat Forms of Foreign Trade Policy 2015-2020.

Explanation. - In this notification -

(I) "Capital goods" has the same meaning as assigned to it in paragraph 9.08 of the Foreign Trade Policy;

(II) "Foreign Trade Policy" means the Foreign Trade Policy, 2015-2020, published by the Government of India in the Ministry of Commerce and Industry

notification number 01/2015-2020, dated the 1st April 2015 as amended from time to time;

(III) "Goods" means any inputs or goods including capital goods;

(IV) "ITC (HS)" has the same meaning as assigned to it in paragraph 9.27 of the Foreign Trade Policy;

(V) "Regional Authority" means the Director General of Foreign Trade appointed under section 6 of the Foreign Trade (Development and Regulation) Act, 1992 (22 of 1992) or an officer authorised by him to grant an authorisation including a duty credit scrip under the said Act.

Table

Export categories or sectors ineligible for duty credit scrip entitlement	
i	EOUs / EHTPs / BTPs / STPs who are availing direct tax benefits / exemption;
ii	Supplies made from DTA units to SEZ units;
iii	Export of imported goods covered under Para 2.46 of FTP;
iv	Exports through transshipment, meaning thereby that exports originating in third country but transhipped through India;
v	Deemed Exports;
vi	SEZ/EOU/EHTP/BPT/FTWZ products exported through DTA units;
vii	Items, which are restricted or prohibited for export under Schedule-2 of Export Policy in ITC (HS), unless specifically notified in Appendix 3B of Appendices and Aayat Niryat Forms of Foreign Trade Policy 2015-2020;
viii	Service Export;
ix	Red sanders and beach sand;
x	Export product which are subject to Minimum export price or export duty;
xi	Diamond, Gold, Silver, Platinum, other precious metal in any form including plain and studded jewellery and other precious and semi-precious stones;
xii	Ores and concentrates of all types and in all formations;

- xii Cereals of all types;
 - i
- xiv Sugar of all types and all forms;
- xv Crude/ petroleum oil and crude/primary and base products of all types and all formulations;
- xvi Export of milk and milk products;
- xvi Export of Meat and Meat products;
 - i
- xvi Products wherein precious metal/diamond are used or
 - ii Articles which are studded with precious stones; and
- xix Exports made by units in FTWZ.

[F.No.605/55/2014-DBK]

(Sanjay Kumar)

Under Secretary to the Government of India"

18. Notification No.25/2015-Customs dated 08.04.2015, reads as follows:

"[TO BE PUBLISHED IN THE GAZETTE OF INDIA, EXTRAORDINARY, PART II SECTION 3, SUB-SECTION (i)]

GOVERNMENT OF INDIA MINISTRY OF FINANCE (DEPARTMENT OF REVENUE)

Notification No.25 / 2015- Customs

New Delhi, the 8th April, 2015.

G.S.R. 270 (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 when imported into India against a Service Exports from India Scheme duty credit scrip issued by the Regional Authority under paragraph 3.10 read with paragraph 3.08 of the Foreign Trade Policy (hereinafter referred to as the said scrip) from,-

(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 said Customs Tariff Act); and

(b) the whole of the additional duty leviable thereon under section 3 of the said Customs Tariff Act.

2. The exemption shall be subject to following conditions, namely:-

(1) that the duty credit in the said scrip is issued to a service provider located in India against export of notified services listed in Appendix 3D of Appendices and Aayat Niryat Forms of Foreign Trade Policy 2015-2020;

(2) that the imports and exports are undertaken through the seaports, airports or through the inland container depots or through the land customs stations as mentioned in the Table 2 annexed to the Notification No. 16/2015- Customs dated 01.04.2015 or a Special Economic Zone notified under section 4 of the Special Economic Zones Act, 2005 (28 of 2005):

Provided that the Commissioner of Customs may within the jurisdiction, by special order, or by a Public Notice, and subject to such conditions as may be specified by him, permit import and export through any other sea-port, airport, inland container depot or through any land customs station;

(3) that the said scrip is registered with the Customs Authority at the port of registration specified on the said scrip;

(4) that the said scrip is produced before the proper officer of customs at the time of clearance for debit of the duties leviable on the goods and the proper officer of customs, taking into account the debits already made under this exemption and debits made under the notification Nos. 21 of 2015 - Central Excise, dated the 8th April, 2015 and 11 of 2015 - Service Tax, dated the 8th April, 2015, shall debit the duties leviable on the goods, but for this exemption;

(5) that the said scrip and goods imported against it shall be freely transferable ;

(6) that where the importer does not claim exemption from the additional duty of customs leviable under section 3 of the said Customs Tariff Act, he shall be deemed not to have availed the exemption from the said

duty for the purpose of calculation of the said additional duty of customs;

(7)that the importer shall be entitled to avail drawback of the duty of customs leviable under the First Schedule to the said Customs Tariff Act against the amount debited in the said scrip;

(8)that the importer shall be entitled to avail drawback or CENVAT credit of additional duty leviable under section 3 of the said Customs Tariff Act against the amount debited in the said scrip.

(9)that the benefit under this notification shall not be available to the items listed in Appendix 3A of Appendices and Aayat Niryat Forms of Foreign Trade Policy 2015-2020.

Explanation.- In this notification-

(I) "Capital goods" has the same meaning as assigned to it in paragraph 9.08 of the Foreign Trade Policy;

(II) "Foreign Trade Policy" means the Foreign Trade Policy, 2015-2020, published by the Government of India in the Ministry of Commerce and Industry notification number 01/2015-2020, dated the 1st April 2015 as amended from time to time;

(III) "Goods" means any inputs or goods including capital goods;

(IV) "Regional Authority" means the Director General of Foreign Trade appointed under section 6 of the Foreign Trade (Development and Regulation) Act, 1992 (22 of 1992) or an officer authorised by him to grant an authorisation including a duty credit scrip under the said Act.

[F.No.605/55/2014-DBK]

(Sanjay Kumar)

Under Secretary to the Government of India"

19. Under the above said two notifications, the Central Government, in exercise of the power conferred under Section 25 (1) of the Customs Act, 1962, exempted goods imported into India, against a duty credit scrip issued by the Regional Authority under the Merchandise Exports from India Scheme (MEIS) and Service Exports from India Scheme (SEIS) in accordance with the relevant Paragraphs of the Foreign Trade Policy, from the whole of the customs duty leviable thereon under the First Schedule to the Customs Tariff Act, 1975 and the whole of additional duty leviable thereon under Section 3 of the Customs Tariff Act, 1975. It is further contemplated therein that the said exemption granted is subject to certain conditions referred to at Paragraph No.2 of each notification. Clause 2(5) of the conditions referred to therein clearly contemplates that the above said scrips should be produced before the proper officer of the Customs at the time of clearance of the goods for debit of the duties leviable on such goods and that the proper officer of the Customs, after taking into account the debits already made under these exemption notifications and the debit made under Notification No.20/2015-Central Excise dated 08.04.2015 and No.10/2015-Service Tax dated 08.04.2015, shall debit the duties leviable on the goods, but for this exemption.

20. A careful perusal of these two notifications, more particularly, Clause 2(5) of the same would thus, indicate that though the said notifications at the beginning gives an impression as if the duty leviable on the goods is exempted, in effect, it is only the payment of such duty in cash alone is exempted and on the other hand, such duty leviable and payable has to be debited from the value of the above scrips every time. In other words, the scrips in the hands of the importer, loaded with the FOB value of exports in free foreign exchange or the FOB value of exports as given in the shipping bills in free foreign exchange, realized by the importer are allowed to be utilized for paying the Duty. To put it simply, the incentives/benefits derived out of the exports in free foreign exchange are valued, calculated and loaded in a format given as the scrips, which could be used for payment of basic customs duty and additional customs duty, evidently as referred in Clause 3.02 of the Foreign Trade Policy, as extracted supra. These scrips are transferable commodities.

21. The case of the petitioner is that the above two notifications grant exemption from payment of duty and additional duty of customs leviable under the First Schedule to the Customs Tariff Act, 1975 and therefore, when there is a total exemption granted for payment of basic customs duty and additional customs duty, the Social Welfare Surcharge leviable

at 10% of such basic customs duty under normal circumstances, cannot be levied and collected in the case of the petitioner. It is their further contention that under the above said notifications, the Revenue is entitled to debit only the basic customs duty and additional customs duty, if any, on the goods imported from the value of the scrips and not the SWS, since those two notifications do not refer or include SWS anywhere for effecting the debit on that account also, out of the value of the scrips. According to them, in view of exemption granted duty paid is NIL and so, SWS also should be treated as NIL.

22. In support of their contention, the learned counsel for the petitioner relied on the certain decisions, which are discussed as hereunder:

a) A Division Bench of this Court, in a case of Commissioner of Customs, Tuticorin, Vs. DCW Limited, 2014 (306) E.L.T. 398 (Mad.), while dismissing a Civil Miscellaneous Appeal filed by the Revenue, confirmed the order of the CESTAT. The issue raised before the Division Bench was as to whether the Revenue was entitled to collect Customs Educational Cess on Basic Customs Duty, which was debited in the DEPB licence. The Tribunal upheld the contention of the assessee therein that the levy of Education Cess under Section 84 of the Finance Act, 2004 was not to be levied on the exempted items and that the assessee therein was covered by the DEPB scheme and so, the liability therein was NIL. The Tribunal thus, found that when the assessee therein was totally exempted from payment of duty as per Notification No.96/2004 dated 17.09.2004, the question of levy of Education Cess did not arise. The said finding of the Tribunal was confirmed by the Division Bench. The order of the Division Bench reads as follows:

"1. This Civil Miscellaneous Appeal is filed at the instance of the Revenue as against the order of the Customs, Excise & Service Tax Appellate Tribunal, South Zonal Bench at Chennai [2006 (206) E.L.T. 1024 (Tri. - Chennai)], by raising the following substantial questions of law :--

"(1) Whether the Department is entitled to collect Customs Educational Cess on Basic Customs Duty which was debited in the DEPB Licence?

(2) Whether the Tribunal is right in not considering that the Notification No. 96/2004-Customs dated 17-9-2004 passed in exercise of powers under Section 25(1) of the Customs Act, 1962 grants exemption of Basic Customs Duty (BCD) subject to debit of the BEPD Licence?

(3) Whether the Tribunal erred in not considering the Board Circular No. 5/2005 dated 31-1-2005?"

The Tribunal rejected the Revenue's appeal, thereby upholding the contention of the assessee that the levy of education cess under Section 84 of the Finance (No. 2) Act, 2004 was not to be levied on the exempted items. In so holding, the Tribunal followed the decision of the Mumbai Tribunal reported in 2005 (188) E.L.T. 449 - Commissioner of Customs, Mumbai v. Reliance Industries Limited. On the admitted fact position that the assessee herein is covered by DEPB scheme and that the liability thereon is NIL, in other words, totally exempted from payment of duty, as per Notification No. 96/2004, dated 17-9-2004, the Tribunal held that question of levy of education cess as per Finance Act did not arise.

2. 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.

3. 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. In the result, the above Civil Miscellaneous Appeal is dismissed. No costs. Consequently, connected MP is closed."

b) It is to be noted at this juncture that Notification No.96/2004 dated 17.09.2004 referred to in the above decision is similar to the subject matter Notifications viz., Notification Nos.24 & 25 of 2015.

c) A Division Bench of the Gujarat High Court in the case of Commissioner of Customs Vs. Pasupati Acrylon Ltd., 2013 (296) E.L.T 182 (Gujarat) considered similar issue. The issue raised therein was whether the Education Cess was not leviable on goods which have been exempted from payment of customs duty and additional duty of customs under Notification No.32/2005 dated 08.04.2005. The Gujarat High Court, by following its earlier decision made in the case of Gujarat Ambuja Exports Ltd., 2013 (289) E.L.T 273 (Gujarat), dismissed the Tax Appeal filed by the Revenue against the order of the Tribunal in holding that the Education Cess is not leviable on goods which have been exempted from payment of customs duty and additional duty of customs under Notification No.32 of 2005. In Gujarat Ambuja Exports Ltd. case, the very same Court has observed as follows:

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

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

the incidence of customs duty on the import component of the export product. It further provides that such neutralisation shall be provided by way of grant of duty credit against the export product.

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

19. It can thus not be denied that for the imports made under the DEPB scheme, there is total or partial, as the case may be, exemption in payment of customs duty. At the relevant time, for the goods other than edible oil, such exemption was total. For edible oil, such exemption was to the extent of 50% of the customs duty and additional duty payable. In essence, therefore, for imports made under the DEPB scheme, of course, subject to the conditions specified in the exemption notification, the customs duty was exempt. Merely because the conditions provided for adjustment of credit in the DEPB scrips, it cannot be stated that either there was no exemption from payment of customs duty or that the Central Government was levying and collecting customs duty from the importers in form of adjustment of credit in the DEPB scrips. We may recall that such credits are given at specified rates on the basis of SION norms primarily taking into account deemed import contents of an export product and the basic customs duty payable on such deemed imports. Thus through such adjustments on the DEPB scrips at the time of further imports, customs duty component is sought to be neutralised. The view expressed by the Tribunal in the case of Reliance Industries Ltd. (supra) appeals to us. In the said decision, the Tribunal taking note of the provisions contained in Sections 81 and 84 of the Finance Act, 2004 held that the impugned Circular No. 5/2005 is not legally sustainable. The Tribunal held that crediting and debiting of entries in the passbook is a matter of procedure and convenience and in essence, the Notification No. 45/2002 provides for full exemption from payment of customs duty.

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

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

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

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

24. With respect, we are unable to concur with such a view. Firstly, in the said decision, the question of levy of Education Cess was not involved. More

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

25. We may note that in cases of Advance Licence Schemes under which imports are being made and which are exempt from customs duty under various notifications issued by the Central Government under Section 25 of the Customs Act, 1962, no Education Cess is demanded by the respondents. In fact, the impugned notification itself is sufficiently clear and records that imports against Advanced Licences are exempt from all duties of customs and therefore, it follows that Education Cess at 2% is not leviable on such imports. In case of DEPB, however, a distinction is sought to be drawn on the premise that though the importers are governed by exemption notification, the fact remains that in case of such imports, the duty is debited from DEPB scrip. To our mind, such distinction is not valid. The clarificatory circular itself refers to the imports made under the DEPB scheme being covered under exemption notification. Such exemption is, of course, subject to fulfillment of certain conditions. One of the conditions includes that of adjustment of credit in the DEPB scrip. This, however, is merely procedural in nature and would not change the nature of benefit from one being of exemption."

d) Perusal of the above decision made in Gujarat Ambuja Exports Ltd. case would show that the Division Bench of the Gujarat High Court had considered the Division Bench decision of this Court made in TANFAC Industries Ltd., Vs. Assistant Commissioner of Customs, Cuddalore, 2009 (240) E.L.T. 341 (Mad.) taking a different view that on the imports under the DEPB Scheme, the importers should pay the duty not by cash, but by way of credit and therefore, the goods cleared under the DEPB

scheme cannot be treated as exempted goods. However, the Gujarat High Court did not concur with the above view of this Court made in Tanfac Industries Ltd. case and given its reasoning for differing so. It is relevant to note at this juncture that Notification No.32/2005-Customs dated 08.04.2005 referred to in Pasupati Acrylon Ltd., case by the Gujarat High Court also reads similar to the subject matter Notifications viz., Notification Nos. 24 and 25 of 2015.

e) Challenging the above order of the Gujarat High Court made in Pasupati Acrylon Ltd. case, which in fact, followed its earlier decision of Gujarat Ambuja Exports Ltd. case, the Revenue filed SLP before the Apex Court. By an order dated 08.05.2013, the Hon'ble Supreme Court dismissed the Special Leave Petitions by observing that no ground was made out to interfere with the matter.

f) A Division Bench of the Bombay High Court in the case of Commissioner of Customs (Export) Vs. Reliance Industries Ltd., 2015 (322) E.L.T. 121 (Bombay) considered the issue as to whether the Education Cess is leviable on imports made under the DEPB scheme. The notification No.45/2002-Customs dated 22.04.2002 was the relevant notification therein. The Division Bench of the Bombay High Court, by taking note of the decision made by this Court in 2014 (306) E.L.T. 398 (Mad.), and that of the Andhra Pradesh High Court in 2014 (305) E.L.T. 268 (A.P.), and also by taking note of the fact that the view taken by the Gujarat High Court in Pasupati Acrylon case, following the Gujarat Ambuja Exports Ltd. Case, has not been interfered with by the Hon'ble Supreme Court, dismissed the appeal filed by the Revenue. The order of the Bombay High Court reads as follows:

"The revenue appealed to the Tribunal against the order dated 6th December, 2004, that was delivered by the Commissioner of Customs (Appeal), Mumbai.

2. This appeal has been admitted on the following substantial questions of law.

"(a) Whether the CESTAT is vested with powers or has jurisdiction to hold and declare that notification/circulars issued by the Board are inconsistent to legislature?

(b) Whether Education Cess is leviable on imports made under DEPB Scheme as per Finance (No. 2) of 2004 read with Board's Circular No. 5/2005, dated 31-1-2005?"

3. The Counsel appearing for both sides have addressed us on Question 2(b). In their submission, same would suffice for disposal of this appeal.

4. The respondent-assessee filed about 16 bills of entries for the purpose of assessment of various goods imported by them and claimed benefit of Notification No. 45/02-Customs, dated 22nd April, 2004. On finalization of the assessment, the benefit of this notification was extended to all the bills of entries inter alia, exempting duties leviable subject to the conditions that the duties leviable were debited from the relevant pass book under a scheme known as DEPB Scheme. The Education Cess at 2% on these duties was also debited from the duties of DEPB as per clause of the Finance Bill, 2004.

5. The respondent protested against the debit of education cess by submitting various letters addressed to the Assistant Commissioner of Customs. They did not insist on issuance of show cause notice. However, they did not get satisfactory solution and therefore, preferred an appeal. That appeal has been allowed, inter alia, holding that debit of education cess and in terms DEPB Scheme so also exemption notification was impermissible in law.

6. The Tribunal has upheld this view in the impugned order.

7. The Tribunal has in dealing with this controversy referred extensively to the salient features of the DEPB Scheme, relevant provisions of the Finance Act, 2004 and the Exemption Notification dated 22nd April, 2002. The Tribunal has held as under :--

"We find that the DEPB Scheme operates under an exemption Notification No. 45/2002-Customs, dated 22nd April, 2002. The said notification specifically exempts goods imported under DEPB Scheme from basic, additional and special additional duties of Customs. However, in terms of the conditions specified in the said notification, the exemption operates by allowing duty credit in the Duty Entitlement Pass Book on exports at the rate specified and subsequently by debiting an amount equal to duty payable, against such credit in the pass book, on imports. As such, such crediting and debiting of duty amounts is a matter of procedure and convenience, but the notification basically provides full exemption from Customs duty. Our view is supported by earlier decision of the Tribunal in Essar Steel Ltd. v. CCE, Visakhapatnam,

2004 (173) E.L.T. 239 (Tri.) wherein it was held that Modvat credit against DEPB debits cannot be allowed as duties are exempted under DEPB Scheme and the relevant notification."

We find that the provisions in the said Finance Act specify the Education Cess as 2% of the Customs duty levied and collected. In the case of imports under the DEPB Scheme, which are fully exempt, the Customs duty is nil. Hence, the Education Cess being 2% of the Customs duty is also nil. If it were the intention of the Parliament to debit and credit Education Cess for imports under DEPB Scheme, then the quantum of cess would have been specified in absolute terms with a notification similar to Notification No. 45/2002, with similar conditions. That is, however, not the case. On the other hand, the cess has been specified at the rate of 2% of the Customs duty in relative terms. In which case, it becomes nil for exempted DEPB imports.

Accordingly, we hold that no education cess is leviable on fully exempted DEPB imports and therefore, no debits from DEPB scrip are required. We are also of the view that the circular dated 31st January, 2005 is contrary to the provisions of the Finance (No. 2) Act, 2004 read with Notification No. 45/2002-Customs, dated 22nd April, 2002. The revenue appeal is, therefore, rejected."

8. It is the correctness of this view of the Tribunal which is challenged before us. Mr. A.S. Rao appearing on behalf of the revenue submits that merely because there is a scheme and an exemption is granted that does not wipe out the duties. The Customs duty is leviable and recoverable. In the light of the exemption it cannot be said that these duties are not legally recoverable. Therefore, the education cess also could have been levied and recovered. The Tribunal's view is therefore, erroneous in law.

9. On the other hand, Mr. Patel appearing on behalf of the respondent assessee submits that the Tribunal's view as taken above has found favour at least with three High Courts in India and in that regard he invites our attention to the judgment of High Court of Gujarat in the case of Gujarat Ambuja Exports Ltd. v. Government of India 2013 (289) E.L.T. 273 (Guj.) and Commissioner of Customs v. Pasupati Acrylon Ltd., 2013

(296) E.L.T. 182 (Guj.). He submits that the view taken by Gujarat High Court in Pasupati (supra) has been not interfered with by the Hon'ble Supreme Court and the revenue's appeal is dismissed on 8th May, 2013.

10. The Tribunal's view is endorsed not only by the High Court of Gujarat but equally by the High Court of Madras in Commissioner of Customs, Tuticorin v. DCW Ltd., 2014 (306) E.L.T. 398 (Mad.) and the High Court of Andhra Pradesh in Commissioner of C. Ex., Visakhapatnam v. Kedia Overseas Ltd., 2014 (305) E.L.T. 268 (A.P.). Our attention is invited to the judgments of the Gujarat and Andhra Pradesh High Courts.

11. After hearing both sides we find that the Gujarat High Court has extensively dealt with this issue. It has expressed an opinion that the duty exemption remission scheme and the duty exemption passbook scheme are essentially to promote economic growth and in terms of the new policy adopted by the Government of India. The education cess on imported goods shall be in addition to any other duties of Customs chargeable on such goods under the Customs Act, 1962 or any other law for the time being in force. By Section 84(3) the provisions of the Customs Act, 1962 and the rules and regulations made thereunder including those relating to refund and exemption from duty and imposition of penalty shall as far as may be applied in relation to levy and collection of the education cess on the imported goods. If education cess is to be collected from the Customs duty levied and collected by the Central Government, then, in the given facts and circumstances when there is exemption from payment of that duty which exemption is in favour of the respondent assessee, then, there is no collection of the Customs duty. The Customs duty may be leviable but in the light of the exemption in favour of the respondent assessee, the duty has not been recovered and collected from the assessee. In view thereof the education cess on imported goods has also not been levied and collected. It is in that regard that the view taken by the High Court of Gujarat in the case of Gujarat Ambuja Exports Ltd. (supra) from paras 9 to 19 has been quoted and followed with approval of the same High Court. That view has also been applied by the High Court of Gujarat in the case of Pasupati (supra).

Once the Tribunal's view taken in the present case has found favour with at least three High Courts and has not been interfered with, then, we are of the view that the Tribunal's decision cannot be termed as perverse. It is also not vitiated by any error of law apparent on the face of the record. Following the High Court Gujarat judgment as above, we answer the substantial question of law in Para 2(b) in favour of the assessee and against the revenue. Appeal of the revenue fails and is dismissed. There shall be no order as to costs."

g) The High Court of Andhra Pradesh in the case of Commissioner of Central Excise, Visakhapatnam, Vs. Kedia Overseas Ltd., 2011-TIOL-1063-HC-AP-CUS has observed that the Education Cess was not leviable in respect of duty free imports under DEPB scheme. Notification No. 45/2002 dated 22.04.2002 was the relevant notification considered therein. The Division Bench of the Andhra Pradesh High Court in the above case observed as follows:

"2. The respondent is importer of edible refined oil. They imported crude palm oil through their agents, M/s. D.S. Narayana & Co. Pvt. Ltd., Kakinada under various bills of entry. The customs duty payable was discharged through Duty Entitlement Pass Book (DEPB) scrips under Notification No. 45/2002-Cus, dated 22-4-2002.

3. The provisional assessments were finalized by discharging the duty through a debit made in DEPB. However, education cess @ 2% on the customs duty was charged and collected by the Revenue. On a request made by the respondent the assessment was finalized but their plea for noncharging of education cess on the payments/debits made through DEPB was not accepted purporting to place reliance on the Central Board for Excise & Customs Circular No. 5/2005-Cus., dated 31-1-2005. Aggrieved by the final assessment vide letter dated 3-3-2006 of, the Superintendent, Kakinada the respondent filed an appeal. The same was dismissed by Order-in-Appeal, dated 10-8-2007. The respondent then moved the CESTAT, Relying on its decision in Ruchi Health Foods Ltd. v. CC, Cochin, 2007 (81) RLT 309 (CESTAT-Ban.) and the decision of the CESTAT, Mumbai in CC (Exports), CC, Mumbai v. Reliance Industries Ltd., -[2005 (7-1). RLT 681 (CESTAT-Mum.) :2005 (188) E.L.T. 449 (Tri.-Mum.)] the CESTAT allowed the appeal holding that education

cess is not leviable in respect of duty free import under DEPB scheme.

4. The Senior Standing Counsel for Central Excise submits that the exemption available under DEPB scheme is not an unconditional exemption. It is available only when the merits imports are made under normal course and the duty is debited from the credit available in DEPB scrips-. While doing so, an importer is entitled to claim the benefit only with regard to basic customs duty and not the education cess. He would rely on the circular of the CBE & C dated 31-3-2005.

5. A copy of the notification No. 45/2002 issued under Section 25(1) of the Customs Act, 1962 is placed before us. Under the said notification the whole of the duty of Customs leviable, the whole of the additional duty leviable under Section 3 of the Customs Tariff Act, 1975 and the whole of the special additional duty of Customs leviable under Section 3A of the Customs Tariff Act are exempted from duty. The availment of exemption is subject to inter alia the following conditions: (i) the importer has been issued DEPB in terms of paragraph 4.3 of the Export and Import Policy; (ii) the importer has been permitted credit entries in the said DEPB by the Licensing Authority at the rates notified by, the Government of India; and (iii) the DEPB is produced before the proper officer of Customs for debit of the duties leviable on the goods but for exemption contained therein. The only disability is when there is no sufficient credit in the DEPB for debiting the duty leviable on the goods.

6. 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.

7. The appeal, for the above is reasons, is dismissed."

23. On the other hand, the learned counsel for the Revenue, in support of her contention that the duty credit scrips scheme cannot be treated as exemption from payment of duty, relied on the following decisions.

a) In the case of TANFAC Industries Ltd., Vs. Assistant Commissioner of Customs, Cuddalore, 2009 (240) E.L.T. 341 (Mad.), the Division Bench of this Court has observed that the goods cleared under DEPB Scheme cannot be treated as an exempted goods, but they can only be treated to be duty paid goods. At paragraph Nos.5, 6, 10 & 12, the Division Bench has observed as follows:

"5. The learned Counsel appearing for the appellant strenuously contended that the debit entries and the DEPB scrips shall be treated as payment of duty only for the purpose of availment of CENVAT credit and as far as liability to pay duty under the Act is concerned, one should look Section 25 of the Act and the relevant Notification issued under this Act, which clearly speak of exemption from duty. Section 25 of the Act deals with the power of the Central Government to grant exemption from duty, if it is necessary in public interest to do so, either absolutely or subject to such condition as may be specified. The Duty Entitlement Pass Book-Customs Duty Exemption Notification, which deals with DEPB refers to exemption from payment of duty as well as additional duty under Sub-section 3 of the Customs Tariff Act.

6. We are here concerned with the question, whether the debits under DEPB is equivalent to payment of duty in cash.

.....

10. The Duty Entitlement Pass Book Scheme has the objective of neutralising the incidence of Customs duty on the import content of the export product and it is provided by way of grant of duty credit against the export product and the additional customs duty/excise duty paid in cash or through debit under DEPB shall be adjusted as CENVAT Credit or Duty Drawback. The important paragraphs of the Circular dated 20.7.2007 are extracted hereunder:

Interest payable on clearance of warehoused goods when duty paid through DEPB debit.

Subject : Waiver of interest on goods cleared from a warehouse when duty is paid by way of debit in DEPB licenses-Regarding.

I am directed to refer to instructions contained in Board's Circular No. 10/2006-Customs, dated 14.2.2006 (F. No. 473/07/2005-LC) (2006 (194) E.L.T. T23) regarding waiver of interest on Customs duty on warehoused goods and to say that a reference was received in the Board seeking clarification whether interest on warehoused goods is chargeable, if the Customs duty is paid by way of debit in DEPB.

2. The issue was examined and necessary clarification in the matter has been issued vide F. No. 605/85/2006-DBK, dated 21.7.2006 to the Commissioner concerned. Having regard to the general implications of the matter, a copy of the same is enclosed for information and necessary action.

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 drawback was allowed for such payments. Para 4.3.5., of the Foreign Trade Policy, 2004-09 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. 59/2004-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. Section 61 of the Customs Act, 1962 provides for charging of interest on duty payable on clearance of warehoused goods. Section 61(d)(i) and (ii) provides that the interest shall be payable on the amount of duty payable at the time of the clearance of the goods from the warehouse. In case of clearances under DEPB Scheme, the amount of duty payable is required to be debited from DEPB scrip. Therefore, it cannot be considered that the duty payable is nil or exempted. 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. The issue regarding interest on warehoused goods has already been clarified by the Board vide Circular No. 10/2006-Cus., dated 14.2.2006 clarifying, inter alia, that interest on warehoused goods is not payable where the principle amount (duty) itself is not payable following the Apex Court Judgment in the case of Pratibha Processors 1996(88)ELT12(SC) on this issue. In the case of notification governing imports under DEPB Scheme, 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.

6. In the light of the position explained above, it is clarified that interest is chargeable on duty paid by way of debit in DEPB on goods cleared from the warehouse.

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12. In fact, in that case, there were three bills of entries, only one of them was goods exported under DEEC Scheme and other two were under the DEPB Scheme. The difference drawn by the Supreme Court in the above judgments make it clear that under the DEEC Scheme, the clearance is allowed duty free, whereas under 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. This is clear from the judgment of the Supreme Court extracted above. Therefore, the goods cleared under 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 DEEC Scheme. We are unable to answer the questions raised by the appellant in its favour. Therefore, the civil miscellaneous appeals are dismissed."

The above said decision was put to challenge before the Hon'ble Supreme Court in Special Leave Petition Nos.24638-24640/2009 and the same was dismissed on 09.10.2009.

b) Tanfac Industries Ltd. case was subsequently followed by another Division Bench decision of this Court, in the case of Commissioner of Central Excise Vs. SPIC Heavy Chemicals Division, (2014) 25 GSTR 538 (Mad.). At paragraph Nos.7, 8, 9, 12, 21 & 22, the Division Bench has observed as follows:

"7. In this connection, learned counsel appearing for the assessee placed reliance on the decision of this court reported in [2010] 2 GSTR 468 (Mad) : [2009] 240 ELT 341 (Mad) Tanfac Industries Ltd. v. Assistant Commissioner of Customs, wherein this court had referred to the decision of the apex court reported in [2008] 11 RC 285 : [2008] 229 ELT 3 (SC) Commissioner of Customs v. Indian Rayon and Industries Ltd., and held that when a clearance is allowed in the DEEC Scheme, even if the duty is not paid in cash but only by way of credit, the same would tantamount to payment of duty in cash. Consequently, unlike the DEEC Scheme, the debit of additional customs duty liability under the DEPB Scheme is a mode of payment of duty on the imported goods. He also took us through the decision of the Gujarat High Court reported in [2012] 16 GSTR 279 (Guj) : [2013] 289 ELT 273 (Guj) Gujarat Ambuja Exports Ltd. v. Government of India as well as the decision of the Supreme Court reported in [2008] 11 RC 285 : [2008] 229 ELT 3 (SC) Commissioner of Customs v. Indian Rayon and Industries Ltd., to emphasise his submission that the duty credit under the scheme has to be treated as payment in cash and that under no circumstances, the benefit of Modvat credit could be denied to the assessee. In this connection, he also placed reliance on Notification No. 34/1997-Customs, dated April 7, 1997, on which heavy reliance was placed by the Revenue, only to contend that when the notification spoke about the exemption, the exemption was only by way of payment in cash, which has to be adjusted as per the Export and Import Policy, prescribing DEEC to the eligible assessee. In the context of the notification and in the context of relevant clause 7.25 of the Export and Import Policy, he submitted that the Tribunal committed serious error in denying the relief to the assessee.

8. The learned counsel appearing for the assessee also referred to the decision reported in [1999] 106 ELT 3 (SC) Eicher Motors Ltd. v. Union of India, as to

the meaning of the expression "paid" occurring in the said rule as meaning "actual payment". Thus, the purport of the scheme as well as rule 57Q of the Central Excise Rules cannot be lost sight of to deny the relief to the assessee.

9. Countering the stand of the assessee, the learned standing counsel appearing for the Revenue, however, supported the order of the Tribunal, particularly in the face of the larger Bench decision in the case of *Essar Steel Ltd. v. CCE* [2004] 173 ELT 239 (Trib.-Delhi) [LB] on the strength of Notification No. 34/1997, dated April 7, 1997. The learned standing counsel appearing for the Revenue submitted that in the face of clause 7.41 of the Export and Import Policy on DEPB, unless and until the assessee had complied with the requirement of the Rules, viz., payment in cash, the question of granting relief under rule 57Q of the Central Excise Rules did not arise. On the admitted facts of the case, no exception could be taken to the order passed against the assessee. Consequently, there is no necessity to interfere with the order of the Tribunal which went against the assessee, in the light of the decision of the larger Bench reported in [2004] 173 ELT 239 (Trib.-Delhi) [LB] *Essar Steel Ltd. v. CCE*. He further submitted that the decision of the larger Bench has not been taken on appeal so far. In the circumstances, the view thus having attained finality, the same may be accepted by this court. Hence, he submitted that the appeal filed by the Revenue merits to be allowed.

.....

12. As is evident from the reading of the scheme, it is an export oriented scheme. The objective of the scheme is to neutralise the incidence of customs duty on the import content of the export product. A reading of the scheme shows that although DEPB holder is allowed to import without payment of basic customs duty, credit is available as regards the additional customs duty payable and the scheme further recognises that the holder has the option to pay additional customs duty, if any, in cash as well. A reading of paragraph 7.25 as extracted above thus shows that the scheme of DEPB, works on the adjustment of debit entry as against credit entry available. The credit entry includes basic customs duty as well as additional duty

of customs. Thus, with the option available, clause 7.41 provides that additional customs duty paid in cash on export made under the DEPB Scheme shall be adjusted as Modvat credit. Clause 7.41 of the Export and Import Policy with Handbook of Procedures dealt with the applicability of drawback, reads as under:

"Applicability of drawback

The exports made under the DEPB Scheme shall not be entitled for drawback. The additional customs duty paid in cash on inputs under DEPB shall be adjusted as Modvat credit or duty drawback as per Rules framed by the Department of Revenue."

.....

21. A reading of sub-clause (iii) of clause 2 shows that where the importer has been permitted credit input under the DEPB at the rate notified by the Government of India for the products exported and the book is produced before the officer of customs for debit of the duties leviable on the goods exempt from duty, the exemption from duty shall not be admissible if there is insufficient credit in the said duty entitlement passbook for debiting the duty leviable on the goods but for the exemption notification. Thus the notification gives exemption from payment of customs duty leviable as specified under the First Schedule to the Customs Tariff Act, 1975 and the additional duty leviable under section 3 of the Customs Tariff Act, subject to the condition that the importer was issued duty entitlement passbook in pursuance of paragraph 7.25 read with paragraph 7.29 of the Export and Import Policy and that the exemption would be available only when there is sufficient credit in the duty entitlement passbook for debiting the duty leviable on the goods, but for the exemption. The notification issued, however, has no relevance to the case where the assessee pays the duty by way of credit entry, in which event, the question of exemption of the notification, does not operate.

22. Thus, in view of the limited scope of exemption, the notification cannot be construed as a non-liability for the purpose of claiming Modvat credit. Read in the context of the decision of the Supreme Court reported in [1999] 106 ELT 3 (SC) Eicher Motors Ltd. v. Union of India and the policy relevant to the

period in this case, in the absence of any prohibition in clause 7.41 of the Export and Import Policy with the Handbook of Procedures as well as under rule 57Q of the Central Excise Rules, the assessee will be entitled to relief under rule 57Q of the Central Excise Rules, irrespective of whether the duty is paid in cash or through credit entry in the passbook."

c) Apart from the above decisions, the learned counsel for the Revenue, though originally relied on two decisions of the Hon'ble Supreme Court reported in the case of SRD Nutrients Private Limited Vs. Commissioner of Central Excise, Guwahati, reported in 2018 (1) SCC 105 and in the case of Bajaj Auto v. Union of India reported in 2019 (366) E.L.T. 577 (SC), in support of her contention that Social Welfare Surcharge is also having the colour of duty of customs and thus, is not an independent levy, has however fairly submitted subsequently that in view of the recent decision of the Hon'ble Apex Court made in the case of Unicorn Industries v. Union of India & others (Civil Appeal No.9237 of 2019 dated 06.12.2019), the revenue is not pressing the above point. At this juncture, it is relevant to quote the above recent decision of the Apex Court dated 06.12.2019, wherein at paragraph Nos.22, 28, 29, 38, 41, 42, 43, it has been observed as follows:

"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.

....

28. The Division Bench of this Court has rendered both the above decisions. The most unfortunate part is that the binding decision of larger bench consisting of three judges of this Court in Union of India v. Modi Rubber Limited, (1986) 4 SCC 66, dealing with the similar issue, was not placed for consideration before this Court when the above mentioned decisions came to be rendered.

29. This Court in Modi Rubber Limited (supra) has considered the similar question in the backdrop of the facts that what is the meaning of the expression 'duty

of excise' employed in the notifications dated 1.8.1974 and 1.3.1981, issued by the Government of India under Rule 8(1) of the Central Excise Rules. A question arose whether expression 'duty of excise' is limited in its connotation only to basic duty levied under the Central Excises and Salt Act, 1944 or it also covers special duties of excise levied under the various Finance Bills and Acts, additional duty of excise levied under the Act of 1957 and other kind of duty of excise levied under the Central enactments.

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38. This Court in *Modi Rubber Limited* (supra) also considered the provisions of Section 32 of the Finance Act, 1979, levying special duty making applicable to the provisions of the Act of 1944 and the Rules made thereunder, relating to refunds and exemptions from duties. They shall, as far as may be, apply in relation to the levy and collection of the special duty of excise as they apply to the levy and collection of the duty of excise under the Act of 1944. It was held that reference to the provisions under section 32 of the Finance Act as to the source of power under which notifications dated 1.8.1974 and 1.3.1981 were issued, it could not be held that exemption granted under these two notifications was extendable to Finance Act, 1979. It was limited only to the duty of excise payable under the Act of 1944. The expression 'duty of excise' in these two notifications could not legitimately be construed as comprehending special duty of excise. Merely reference to the source of power is not enough to attract the exemption and what exemption has been granted to be read from the notification issued therein. This Court has further laid down that in case notification granting exemption issued under the Central Excise Rules, 1944 without reference to any other statute, the exemption must be read as limited to the duty of excise payable under the Central Excises and Salt Act, 1944. It cannot cover such special or another kind of duty of excise. This Court in *Modi Rubber Limited* (supra) has discussed the provisions of the Finance Act, 1979 thus:

"9. We have already pointed out, and this is one of the principal arguments against the contention of the respondents, that by reason of the definition of "duty" in clause (v) of Rule 2 which must be read in Rule 8(1), the expression "duty of excise" in the

notifications dated August 1, 1974 and March 1, 1981 must be construed as duty of excise payable under the Central Excises and Salt Act, 1944. The respondents sought to combat this conclusion by relying on sub section (4) of Section 32 of the Finance Act, 1979 – there being an identical provision in each Finance Act levying special duty of excise – which provided that the provisions of the Central Excises and Salt Act, 1944 and the rules made thereunder including those relating to refunds and exemptions from duties shall, as far as may be, apply in relation to the levy and collection of special duty of excise as they apply in relation to the levy and collection of the duty of excise under the Central Excises and Salt Act, 1944. It was urged on behalf of the respondents that by reason of this provision, Rule 8(1) relating to exemption from duty of excise became applicable in relation to the levy and collection of special duty of excise and exemption from payment of special duty of excise could therefore be granted by the Central Government under Rule 8(1) in the same manner in which it could be granted in relation to the duty of excise payable under the Central Excises and Salt Act, 1944. The argument of the respondents based on this premise was that the reference to Rule 8(1) as the source of the power under which the notifications dated August 1, 1974 and March 1, 1981 were issued could not therefore be relied upon as indicating that the duty of excise from which exemption was granted under these two notifications was limited only to the duty of excise payable under the Central Excises and Salt Act, 1944 and the expression "duty of excise" in these two notifications could legitimately be construed as comprehending special duty of excise. This argument is, in our opinion, not wellfounded and cannot be sustained. It is obvious that when a notification granting exemption from duty of excise is issued by the Central Government in exercise of the power under Rule 8(1) simpliciter, without anything more, it must, by reason of the definition of 'duty' contained in Rule 2 clause (v) which according to the well recognised canons of construction would be projected in Rule 8(1), be read as granting exemption only in respect of duty of excise payable under the Central Excises and Salt Act, 1944. Undoubtedly, by reason of subsection (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 subsection (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 subsection (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 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. 63/78 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 subclause (1) of clause 37 of the Finance Bill, 1978". The source of the power recited in this notification is "subrule (1) of Rule 8 of the Central Excise Rules, 1944 read with subclause (5) of clause 37 of the Finance Bill, 1978". So also in the Notification bearing No. 29/79 dated March 1, 1979 exempting unmanufactured tobacco "from the whole of the duty of excise leviable thereon both under the Central Excises and Salt Act, 1944 and Additional Duties of Excise (Goods of Special Importance) Act, 1957", the reference to the source of power mentioned in the opening part of the notification is "subrule (1) of Rule 8 of the Central Excise Rules, 1944 read with subsection (3) of Section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957". 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 subrule (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 subrule (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 subrule (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." This Court in *Modi Rubber Limited* (supra) has also considered when the exemption is granted under the particular provision; it would not cover any other kind of duty of excise imposed under separate Acts.

This Court observed thus:

"10. We may incidentally mention that in the appeals a question of interpretation was also raised in regard to the Notification bearing No. 249/67 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 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." The appeals were allowed, and it was held that exemption was not available in respect of special duty of excise or additional duty of excise or auxiliary duty of excise. A three Judge Bench in Rita Textiles Private Limited v. Union of India, 1986 SCC Supp. 557, has followed the decision of Modi Rubber Limited (supra). The decision in Modi Rubber Limited (supra) squarely covers the issue and is rendered by a Coordinate Bench.

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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 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 Private Limited (supra) 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.

42. The decision of larger bench is binding on the smaller bench has been held by this Court in several decisions such as Mahanagar Railway Vendors' Union v. Union of India & Ors. (1994) Suppl. 1 SCC 609, State of Maharashtra & Ors. v. Mana Adim Jamat Mandal, AIR 2006 SC 3446 and State of Uttar Pradesh & Ors. v. Ajay Kumar Sharma & Ors. (2016) 15 SCC 289. The decision rendered in ignorance of a binding precedent and/or ignorance of a provision has been held to be per incuriam in Subhash Chandra & Ors. v. Delhi Subordinate Services Selection Board & Ors. (2009) 15 SCC 458, Dashrath Rupsingh Rathod v. State of Maharashtra (2014) 9 SCC 129, and Central Board of Dawoodi Bohra Community & Ors. v. State of Maharashtra & Ors. (2005) 2 SCC 673. It was held that a smaller bench could not disagree with the view taken by a larger bench.

43. Thus, it is clear that before the Division Bench deciding SRD Nutrients Private Limited and Bajaj Auto Limited (supra), the previous binding decisions of three Judge Bench in Modi Rubber (supra) and Rita Textiles Private Limited (supra) were not placed for consideration. Thus, the decisions in SRD Nutrients Private Limited and Bajaj Auto Limited (supra) are clearly per incuriam. The decisions in Modi Rubber (supra) and Rita Textiles Private Limited (supra) are binding on us being of Co ordinate Bench, and we respectfully follow them. We did not find any ground to take a different view."

Thus, from the above recent decisions of the Apex Court, it is clear that the Social Welfare Surcharge is not in the nature of duty of customs and on the other hand, it is an independent levy, imposed and collected under a different enactment.

d) The learned counsel for the Revenue further relied on the decision reported in 2016 (339) E.L.T. 509 (Gujarat), Ratnamani Metals and Tubes Ltd., and Others Vs. Union of India and Others, wherein at paragraph Nos.15 and 16 it has been observed as follows:

"15. In order to appreciate the department's concern about the customs duty not being paid when the import is made under DEPB scheme, we may broadly refer to the DEPB scheme. The scheme is framed under the import-export policy and is one of the many duty exemption or

remission schemes. The scheme provides that objective of DEPB is to neutralise incidence of customs duty on import component of export product which would include special additional duty in case of non-availment of CENVAT credit. Neutralisation would be provided by way of grant of duty credit against export product which would be at a specified percentage of FOB value of export. The holder of DEPB would have an option to pay additional customs duty in cash also. DEPB is freely transferable. The Foreign Trade Policy of 2009-2014 contained an additional clause which hitherto was not a part of the policy and reads as under:

"Applicability of Drawback.

Additional customs duty/Excise Duty and Special Additional Duty paid in cash or through debit under DEPB may also be adjusted as CENVAT Credit or Duty Drawback as per DOR rules."

16. It can thus be seen that the DEPB scheme aims at neutralising the incidence of customs duty on import component of export product, where upon export, credit would be given at specified rate on the FOB value of the exports. Such credit could be utilised for payment of duty in future or may even be traded. It was in this background that Supreme Court in case of Liberty India v. Commissioner of Income-tax reported in MANU/SC/1585/2009 : 317 ITR 218, had held that DEPB being an incentive which flows from the scheme framed by the Central Government, hence, incentives profits are not profit derived from the eligible business (in the said case falling under section 80-IB of the Income Tax Act) and belong to the category of ancillary profits of the undertaking. Such incentive in the nature of DEPB benefit from the angle of the income tax has been seen as income of the undertaking. Thus when an importer whether imports goods under DEPB scheme or pays customs duty on the imports on purchased DEPB credits, he essentially pays customs duty by adjustment of the credit in the pass-book. It would therefore, be incorrect to state that the imports made in such fashion have not suffered the customs duty."

(emphasis supplied)

24. Going by the above case laws cited on both sides and considering the submissions made by the learned counsels appearing on either side, the following questions need to be answered for the disposal of these writ petitions.

(a) Whether the petitioner is correct in claiming that the customs duty for the subject matter imported goods is exempted in total and not paid by them?

(b) If the customs duty is totally exempted and not paid, as claimed by the petitioner, whether the Revenue is justified in making deduction towards Social Welfare Surcharge out of the value of the scrips, apart from deducting the customs duty?

(c) Whether Notification Nos.24/2015 and 25/2015 dated 08.04.2015 empower the Revenue to deduct SWS, apart from the duty of customs and additional duty of customs?

d) Whether SWS is an independent levy or it also takes the colour of the parental levy viz., the customs duty?

25. I take the last question first to answer, since this issue raised in respect of nature of levy of SWS is no more res integra in view of the latest decision of the Apex Court made in the case of M/s.Unicorn Industries as referred and discussed supra. By relying on SRD Nutrients Private Limited and Bajaj Auto Limited cases, the Revenue originally sought to contend that the Social Welfare Surcharge is not an independent levy and on the other hand, it forms part of the customs duty or takes the colour and nature of the parent levy viz., customs duty. It is true that in both the above decisions, the Apex Court has taken such view. However, the above two decisions are now considered by the Larger Bench of the Apex Court in M/s.Unicorn Industries case. The Hon'ble Supreme Court, after considering those two decisions and also the earlier decision of the Apex Court made in Union of India v. Modi Rubber Limited, (1986) 4 SCC 66, found that the duty on NCCD, Educational Cess and Secondary and Higher Education Cess are in the nature of additional duties imposed by different legislation for a different purpose. The learned counsel for the Revenue fairly submitted that in view of the above recent decision of the Apex Court made in M/s.Unicorn Industries, the Revenue can no longer rely upon SRD Nutrients Private Limited and Bajaj Auto Limited cases in support of their contention that Social Welfare Surcharge is not an independent levy. Therefore, in view of the above recent decision of the Apex Court made in M/s.Unicorn Industries, I hold that Social Welfare Surcharge levied under Section 110(3) of the Finance Act, 2018, is

an independent levy imposed and collected under different enactment viz., Finance Act 2018. Consequently, I hold that SWS intended totally for a different purpose is not taking the colour of parent levy viz., customs duty.

26. Now, let me take the other three questions, which in my considered view are interlinked and thus, could be answered in common as hereunder.

27. It is true that Notification Nos.24/2015 and 25/2015 dated 08.04.2015 contemplate that the goods when imported into India against the duty credit scrips are exempted from the whole of duty of customs and the whole of the additional duty leviable thereon. However, as I have already pointed out, the above exemption is not an exemption simplicitor from payment of the duty of customs and on the other hand, such exemption is subject to certain conditions stipulated in those two notifications. One of the conditions specifically contemplates that the importer should produce the scrips before the proper officer of the customs at the time of clearance "for debit of the duties leviable on the goods" and the proper officer of customs, taking into account the debits already made under the exemption notification, "shall debit the duties leviable on the goods", but for the exemption. I have already pointed out that under Clause 3.02 of the Foreign Trade Policy, it is clearly stated that duty credit scrips are granted as rewards under MEIS and SEIS and the duty credit scrips and goods imported domestically shall be freely transferable and that the duty credit scrips can be used for Payment of Basic Customs Duty and Additional Customs Duty and Payment of Central Excise Duties. For better clarity, let me reproduce Clause 3.02 of the said policy as hereunder:

"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 them shall be freely transferable. The Duty Credit Scrips can be used for:

- (i) Payment of Basic Customs Duty and Additional Customs Duty specified under Sections 3(1), 3(3) and 3(5) of the Customs Tariff Act, 1975 for import of inputs or goods, including capital goods, as per DoR Notification, except items listed in Appendix 3A.
- (ii) Payment of Central excise duties on domestic procurement of inputs or goods;
- (iii) Deleted
- (iv) Payment of Basic Customs Duty and Additional Customs Duty specified under Sections 3(1), 3(3) and

3(5) of the Customs Tariff Act, 1975 and fee as per paragraph 3.18 of this Policy."

28. A conjoint reading of Clause 3.02 of the Foreign Trade Policy and the subject matter notifications will not give any room for doubt as to whether the duty is collected from the petitioner or not. Clause 3.02 is clear and categorical that the duty credit scrips can be used for payment of basic customs duty, additional customs duty and payment of central excise duties and therefore, the purpose for which the duty credit scrips are given is evident and apparent viz., for payment of customs and excise duties. The duty credit scrips thus, are having money value and therefore, the same can be used in lieu of cash for payment of the above duties. The exemption notifications, as already discussed supra, specifically stipulate that those duty credit scrips should be produced before the concerned officer of customs by the importer, who imports goods against those scrips, for the purpose of debiting the duty leviable on such goods, but for exemption. It is to be noted at this juncture that the term "but for exemption" is to denote that the duty liable to be paid in cash, in view of exemption, is to be accepted by way of debiting such quantum of duty from the value of scrips.

29. Therefore, it is evident that the exemption granted under the above notifications is only in respect of payment of customs duty in cash and on the other hand, such value of the customs duty is debited from the value of the scrips. In other words, the above adjustment of 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, the customs duty leviable and payable, though deducted from the value of the scrips, in effect, no money representing the duty goes to the Government exchequer. It is true that it may give an impression, as pointed out by the learned counsel for the petitioner, that it is the Duty Forgone.

30. In my considered view, the above claim of the petitioner though appears to be fascinating, in effect it is not so, more particularly, to sustain their contention that the duty paid is Nil in view of exemption. As already discussed supra, in view of the exports made under free foreign exchange, the exporter is given incentives in the form of duty credit scrips under MEIS and SEIS schemes. The very term "duty credit scrips" would undoubtedly, indicate that those scrips are loaded with money value and the same can be used for payment of customs and excise duties, when the import is made against those scrips. Therefore, insofar as the importer is concerned, when the value

of the duty, leviable on such goods of import, is debited from the scrips, he stands as a person discharging his duty liability through the duty credit scrips. Therefore, he cannot contend that the duty paid is Nil. Neutralization of duty does not mean that there was no duty levied and collected at all. On the other hand, when such duty is debited from the scrips which has a money value, such act of debiting, amounts to levy and collection of the duty from the importer. Since the duty is not paid in cash and on the other hand it is discharged by utilizing the scrips, it is true that such value of the duty in money has not gone to the Government Exchequer. But, that does 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. It is like an adjustment on balance sheet. Hence, it cannot be said that there was no payment or collection of duty at all. As I pointed out earlier, collection of duty in this case, in view of the exempted notifications, is by way of debiting the value of such duty from the scrips. If no duty is leviable and payable in view of the exemption granted under the above said notifications, as contended by the petitioner, it makes no sense for imposing conditions therein for making debits towards customs duty leviable from and out of the value of the scrips. Admittedly, in this case, the petitioner is not opposing or denying or disputing the debit of customs duty from the value of the scrips. Their only grievance is against the levy and collection of SWS.

31. Their contention against such levy and collection is that when the levy of customs duty itself is exempted, the Revenue cannot levy and collect the Social Welfare Surcharge. I have already pointed out that the exemption granted under the above said notifications is not an exemption from payment of customs duty in toto and on the other hand, subject to the conditions stipulated therein, which I have already discussed supra. Needless to state that exemption notifications have to be read in full to know the purport, ambit and scope of such notification. Isolated reading of any clause of the said notifications would not serve the purpose of knowing as to what it intends. A conjoined reading of these notifications and Clause 3.02 of the said policy does not give any scope to assume that duty was not collected or it is Nil rate.

32. No doubt, the learned counsel for the petitioner relied on various decisions in support of his contention that the duty element involved in this case is nil, in view of the exemption granted and consequently, no SWS can be imposed out of such nil duty element. One of the decisions relied on, no doubt is by the

Division Bench of this Court made in DCW Ltd., case. It is true that in the above said decision, the Division Bench of this Court found that when the goods are fully exempted from excise duty and customs duty, the question of levying Educational Cess does not arise. However, it is to be noted that well before the said decision made in DCW Ltd., case, already another Division Bench of this Court in TANFAC Industries Ltd., Vs. Assistant Commissioner of Customs, Cuddalore, reported in 2009 (240) E.L.T. 341 (Mad.) had taken a different view and found that the goods cleared under the DEPB scheme cannot be treated as exempted goods, but they can only be treated to be duty paid goods. It was observed therein that 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. It was also observed therein that the importers, who used DEPB scrips, pay duty not by cash, but only by way of credit. In support of such conclusion, the Division Bench relied on the decision of the Apex Court in the case of Pratibha Processors case, reported in 1996 (88) E.L.T. 12 (SC). A challenge made against the said decision of Tanfac Industries Ltd., before the Apex Court also ended in dismissal of SLPs on 09.10.2009. Therefore, it is evident that as on the date of rendering the decision in DCW Ltd., by the subsequent Division Bench, the decision made by the earlier Division Bench in Tanfac Industries Ltd., confirmed by the Apex Court on 09.10.2009, had already come into existence and in force. Unfortunately, it seems that the Tanfac Industries Ltd. Case, was not placed before the Division Bench, which decided DCW Ltd. case. Under the above circumstances and in the absence of any direct decision of the Apex Court on the issue as to whether exemption granted under the exemption notifications based on the incentive scrips is an exemption from payment of duty in toto (duty paid is Nil), I bound to follow the Tanfac Industries Ltd. Case, confirmed by the Apex Court. It is true that the Gujarat High Court has taken a different view in Gujarat Ambuja Exports Ltd. case, which was followed in Pasupati Acrylon Ltd., case. It is also true that in Gujarat Ambuja Exports Ltd. case, the Gujarat High Court has taken note of the view expressed in Tanfac Industries Ltd. case and however, had chosen to differ from such view. But perusal of the decision made in Gujarat Ambuja Exports Ltd., reported in 2013 (289) E.L.T 273 (Gujarat), would show that the decision of the Apex Court in dismissing SLP filed against Tanfac Industries Ltd. case seems to have not been placed before the Gujarat High Court. As already pointed out Tanfac Industries Ltd. decision of this Court was not interfered with by the Apex Court by dismissing SLP as early as on 09.10.2009. Further the Gujarat High Court in its latter decision in Ratnamani Metals And Tubes Ltd. v. Union of India, 2016 (339) ELT 509 (Guj), as extracted

supra, found that when an importer imports goods under DEPB scheme or pays customs duty on the imports on purchased DEPB credits, essentially pays customs duty by adjustment of the credit in the pass-book and therefore, it would be incorrect to state that imports made in such fashion have not suffered the customs duty. It is to be noted that the above decision of the Gujarat High Court is subsequent to Gujarat Ambuja Exports Ltd. case and Pasupati Acrylon Ltd. case. Thus I am convinced to accept the above view expressed by Gujarat High Court in Ratnamani Metals And Tubes Ltd. Case, since the same is in line with TANFAC Industries Ltd., decision rendered by the Division Bench of this Court confirmed by the Apex Court. Hence I am bound to follow the above binding decision of this Court made in Tanfac Industries Ltd. Case. It appears that the other Division Bench decision of this Court made in DCW Ltd., case seems to have not reached the Apex Court. Under such circumstances, when there are two Division Bench decisions of this Court, out of which, one is confirmed by the Apex Court, I am bound to follow the decision of the Division Bench which is confirmed by the Apex Court.

33. At this juncture, it is to be noted further that TANFAC Industries Ltd., decision has been considered by another Division Bench decision of this Court made in the case of CCE v. SPIC, Heavy Chemicals Division, [2014] 25 GSTR 538 (Mad.), as extracted supra. In that case, the assessee therein placed reliance on the decision made in TANFAC Industries Ltd., in support of their claim for Modvat credit, based on the payment of duty through DEPB scheme. The Division Bench has taken note of the finding rendered in TANFAC Industries Ltd. Case, that when a clearance is allowed in a DEEC scheme, even if the duty is not paid in cash but only by way of credit, the same would tantamount to payment of duty in cash. The Division Bench in Tanfac case in fact followed the decision rendered by the Apex Court in Commissioner of Customs Vs. Indian Rayon and Industries Ltd., [2008] 229 E.L.T. 3 (SC) that the duty credit under the scheme has to be treated as payment in cash and that under no circumstances, the benefit of Modvat credit could be denied to the assessee. Thus by following Tanfac case, subsequent Division Bench in the above SPIC case found that the exemption notification cannot be construed as a non-liability for the purpose of claiming Modvat credit and that the assessee therein was entitled to the relief under Section 57Q of the Central Excise Rules, irrespective of whether the duty is paid in cash or through credit entry in the pass-book. Therefore, the above view expressed by the other Division Bench following TANFAC Industries Ltd., made after DCW Ltd. case, undoubtedly, drive me to follow the view taken by TANFAC Industries Ltd. Case.

Accordingly, I hold that the petitioner is not justified in contending that total exemption is granted to them from payment of customs duty and that there is nil rate of duty.

34. Reliance placed on the decision of the Apex Court reported in AIR 1957 SC 657, AV Fernandes vs State of Kerala, by the petitioner to contend that the subject matter notifications granted total exemption from payment of duty, is neither helpful nor applicable to the case of the petitioner. In that case, the question was whether the assessee therein is entitled to take into computation of his sales of oils outside the state and that whether he is entitled to deduct from his gross turnover the purchase price of copra allocated to the oil sold to the persons outside the state. Under Travancore Cochin GST Amendment Act, 1951, a provision was made therein that a tax on the sale or purchase of goods shall not be imposed under the said Act where such sales or purchase takes place outside the state of Travancore Cochin, etc., Therefore, the finding rendered therein is not helping the petitioner in any manner.

35. Likewise, the decision reported in 1994 (71) ELT 339, HICO Products vs CCE is also not helpful to the petitioner in support of the above contention, since the exemption notification referred to therein grants total exemption from payment of duty of excise in respect of certain products and pharmaceuticals products. A condition for debiting the value of the duty from the scrips, as in the present case is not a condition or a condition similar in nature, was stipulated therein.

36. Likewise, the decision of the Apex Court in 1988 (3) SCC 570, Assistant Commissioner Commercial Taxes vs. Dharmendra Trading Company, is also not applicable to the present facts and circumstances, since in the case of the petitioner herein, exemption granted is not an exemption from payment of duty in toto and on the other hand, it is in respect of mode of paying such duty. In other words, the duty paid in this case is admittedly by debiting from the scrips.

37. The main issue involved in this case is not against the collection of customs duty, whether it is exempted in toto or not. The grievance is only against the collection of SWS, that too, by making debit out of total value of scrips along with the customs duty. Therefore, it is to be seen as to whether the Revenue is justified in making debit of the Social Welfare Surcharge from the value of the scrips.

38. I have already pointed out that SWS is an independent levy imposed and collected under a different enactment viz., the Finance Act, 2018. Notification Nos.24/2015 and 25/2015 specifically entitle the Revenue to debit the duties leviable viz., duty of customs under the First Schedule to the Customs Tariff Act, 1975 and additional duties leviable thereon under Section 3 of the Customs Tariff Act, 1975. Except these two duties, the above exemption notifications do not empower the Revenue to make debit of any other levy or duty or surcharge or cess either under the Customs Act, or under other enactment. It is well settled that the exemption notifications are to be construed strictly. Scope and ambit of exemption notifications cannot be enlarged or extended beyond its intend as specifically spoken to therein. A benefit given in an exemption notification must be confined only with such of those benefits referred to therein in strict sense and not to be extended beyond its scope. If the notification is unambiguous, there is no need to interpret the same. Thus, under the guide of interpreting an exemption notification, a benefit conferred on a person cannot be extended as an "undue benefit", which he is not entitled to otherwise under the notification. Going by the terms of the above exemption notifications and in view of the fact that levy and collection of Social Welfare Surcharge is an independent levy, that too, under a different enactment viz., the Finance Act, 2018, I am of the view that the respondents/Revenue are not empowered to make the debit of Social Welfare Surcharge, from and out of the value of the scrips apart from making debit of the duties leviable on the subject matter goods.

39. It is argued by the learned counsel for the petitioner that certain decisions relied on by the Revenue are the judgments passed are sub silentio, since in those cases, the issue as to whether the relevant notification therein, grants exemption or not, has not been examined and therefore, the conclusion made therein that DEPB scheme is used for payment of duty, can be said to have been passed sub silentio. For deciding the factual aspects of the present case, I am of the firm view that it can be considered and decided without the aid of any case law cited on both sides. It is not in dispute that the petitioner relied on Notification Nos. 24 and 25 of 2015. There is no dispute to the fact that those exemption notifications are conditional one as discussed supra. There is no dispute to the fact that the petitioner is not questioning the debiting of duty liability out of the value of the scrips produced by them. Their only dispute is against debiting SWS also. Under such circumstances, I am of the view that even without taking aid the facts and circumstances of any of the decisions, whether it has been dealt with the said issue or not,

this Court can safely come to the conclusion and decide that exemption granted herein is not against payment of duty in toto and on the other hand, it is against the payment of the same in cash, so as to enable the petitioner to use those scrips for debiting the quantum of duty.

40. Likewise, in view of the recent decision rendered by the Apex Court in Unicorn Industries Ltd. Case, consideration of the other decisions relied on by both sides, in support of their respective contentions regarding the nature and status of SWS, does not arise.

41. Let me, now, consider the other issue as to whether the Revenue is entitled to collect the Social Welfare Surcharge from the petitioner under the present facts and circumstances, if not by way of debiting the same from the value of the scrips. The petitioner contended that since there is nil customs duty, the Social Welfare Surcharge leviable at 10% of such customs duty, also becomes nil. The above contention of the petitioner is liable to be rejected in view of the findings and observation made by the Hon'ble Supreme Court in the latest decision made in M/s.Unicorn Industries case, wherein at Paragraph No.41, it has been observed as follows:

"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 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 Private Limited (supra) 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."

42. Above categorical finding rendered by the Apex Court, would show that the exemption granted in respect of a particular excise duty cannot be a bar for determination of yet another duty levied and collected under different enactment, even though such levy and collection was based upon the particular excise duty exempted. The Hon'ble Supreme Court has clearly held that when a particular kind of duty is exempted, other types of duty or cess imposed by legislation for a different purpose cannot be said to have been exempted. Therefore, I am of the firm view that assuming the subject matter exemption notifications grant exemption in respect of the customs duty in toto, the petitioner is not justified in contending that the other duties or levy payable under different enactment are also exempted. In this case, I have already pointed out that exemption granted is against payment of duty in cash and not the liability itself in toto, as such duty is admittedly, debited from the value of the scrips. In other words, the Social Welfare Surcharge being a levy imposed under the Finance Act, 2018 and an independent levy, the petitioner is bound to pay the same. If the liability to pay the customs duty element is discharged by effecting adjustment from the value of the scrips, the liability to pay the Social Welfare Surcharge is also to be discharged by the petitioner either by way of cash or by other mode, since the scrips cannot be used for discharging such liability. The above three questions thus, are answered accordingly.

43. In the result, the Writ Petitions are disposed of as follows:

(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.

(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.

No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar (C.S.III)

/True Copy/

Sub Assistant Registrar

To

1. The Secretary, Union of India
Ministry of Finance, Department of Revenue,
Shastri Bhawan, New Delhi 110 001.
2. The Assistant Commissioner of Customs,
Customs Division No.4, First Line Beach Road,
Nagapattinam 611 001.
3. The Zonal Joint Director General of Foreign Trade,
Shastri Bhawan, Annexe Building, 4th Floor & 5th Floor,
26, Haddows Road,
Nungambakkam, Chennai 600 006.
4. The Director General of Foreign Trade,
Udyog Bhawan, H-Wing, Gate No.2,
Maulana Azad Road, New Delhi 110 011.
5. The Commissioner of Customs, Commissionerate-II,
Customs House, Rajaji Salai, Chennai 600 001.

+1 cc to M/s.Adithya Reddy, Advocate Sr.No. 1039
+2 cc to Mr.G.Babu, Advocate Sr.No.239
+1 cc to M/s.M.Santhanaraman, Advocate Sr.No. 524

AKM/30.01.2020/62P- 10C /

COMMON ORDER
IN W.P.Nos.24490 & 27452 OF 2019