

Uday S. Jagtap

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 627 OF 2008

M/s. Tata Yazaki Autocomp Ltd.	]	
a Company registered under the	]	
Companies Act, 1956 and	]	
having its Registered Office at	]	
Gat No.93, Survey No.166,	]	
High Cliff Industrial Area,	]	
Wagholi-Rahu Road, Kesnand	]	
Maharashtra – 412 207	]	.. Petitioner

Vs.

1. Union of India,	]	
through the Secretary,	]	
Ministry of Finance	]	
Department of Revenue,	]	
North Block, New Delhi – 110 001	]	
2. Settlement Commission	]	
Customs & Central Excise,	]	
Utpad Shulk Bhavan,	]	
Bandra-Kurla Complex,	]	
Bandra (East), Mumbai – 400 051	]	
3. Commissioner of Central Excise,	]	
Pune – III, ICE House, 41/A, Sasson	]	
Road, Opp. Wadia College,	]	
Pune – 411 011	]	
4. Additional Director General	]	
Directorate General of Central Excise	]	
Intelligence, Mumbai Zonal Unit,	]	
III Floor, NTC House, 15, NH Road,	]	
Ballard Estate, Mumbai – 1	]	
5. Development Commissioner	]	
SEEPZ Special Economic Zone,	]	
Andheri (E), Mumbai – 400 096	]	.. Respondents

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.....
Mr. Sriram Sridharan a/w Mr. Biswajit Chaki, Senior General Manager
Finance for petitioner
Mr. Dhananjay Deshmukh for respondent
.....

**CORAM : K. R. SHRIRAM &
PRITHVIRAJ K. CHAVAN, J.J.**

DATED : 23rd JUNE, 2022

Judgment : (Per K.R. Shriram, J.).

1. Petitioner is impugning orders dated 27th September, 2006 (admission order) and 14th January, 2008 (Final order) passed by respondent no.2, Settlement Commission, Customs and Central Excise. We are dealing only with the final order dated 14th January, 2008 since the order of admission is subsumed with the final order.

2. At the outset, Mr. Sridharan states that name of petitioner has been changed from “Tata Yazaki Autocomp Ltd.” to “Yazaki India Ltd.” and the company is also been converted into ‘Private Company’ from ‘Public Company’. Mr. Sridharan tenders a copy of fresh certificate of incorporation consequent upon conversion from ‘Public Company’ to ‘Private Company’ dated 29th January, 2015. In this certificate, it is also mentioned that the previous name of petitioner, i.e., “Tata Yazaki Autocomp Ltd.” was changed to “Yazaki India Ltd.” and once again into “Yazaki India Pvt. Ltd.”. Mr. Sridharan craves leave to amend the cause title. Leave to amend granted. Amendment to be carried out within two weeks from today.

3. Petitioner had set up a unit in 1998 for manufacture of wiring harness (hereinafter referred to as “goods”) falling under heading 85.44

of the Central Excise Tariff (hereinafter referred to as “domestic unit”). The factory was located at Kesnand, Pune. In July, 2002, petitioner set up another unit as 100% Export Oriented Unit for manufacture of the goods, wiring harness (hereinafter referred to as “EOU”). The EOU was set up by converting a portion of the existing domestic unit into EOU. Both the units, i.e., the domestic unit and EOU obtained separate Central Excise Registration certificates from the Central Excise department. From July, 2002 to November, 2004, both EOU and domestic units were situated in the same building at Kesnand, Pune. Thereafter, the domestic unit was shifted to another building within the same plot.

4. It is not disputed by respondent that wiring harness manufactured by both the units of petitioner were liable to excise duty. In respect of goods manufactured by the domestic unit, excise duty is levied in terms of Section 3(1) of the Central Excise Act, 1944 (hereinafter referred to as ‘said Act’) at the rates mentioned in the Schedule thereto. It was 16% at that time. The value of goods manufactured and cleared by the domestic unit is determined in terms of Section 4 of the said Act.

5. In respect of goods manufactured by the EOU and exported, there was no excise duty payable. But in respect of goods manufactured by the EOU and cleared to Domestic Traffic Area (DTA), i.e., not exported but sold within India, the excise duty levied was in terms of the proviso to Section 3(1) of the Act. The duty levied was equal to the aggregates of duties of customs leviable under Section 12 of the Customs Act, 1962 or any other law for time being in force, at the rate mentioned in the Customs Tariff Act, 1975 on like goods imported in India. It was in the range of 39.2% to 56.832% depending upon the period. The value of

such goods manufactured by the EOU is determined in terms of Section 14 of the Customs Act, 1962.

6. Investigation by the Custom Excise Department revealed that petitioner was selling goods that were manufactured in the EOU in the DTA as if it was manufactured by the domestic unit, thereby paying lesser excise duty. For example, if petitioner had sold goods within DTA manufactured from the domestic unit, the excise duty payable would have been 16% approximately. If petitioner sells goods manufactured in the EOU within DTA, the rate of excise duty would have been from 39.2% to 56.83% depending upon the period. Therefore, Mr. Sridharan in fairness admits, and it is also reflected in the impugned order, that the sale of wiring harness made by the EOU in the DTA as if it was made in the domestic unit was not an innocent act but was made with an intention to deprive the exchequer of its rightful dues. Petitioner states that after the investigation commenced, petitioner was ready and willing to pay the excise duty that was payable on the goods manufactured by EOU and sold in the DTA. Petitioner, therefore, decided to apply to respondent no.2 under Section 32E of the Act, apply for settlement of the cases. The application was admitted on 27th September 2006 and after petitioner was given a personal hearing, the impugned order dated 14th January 2008 came to be passed.

7. In the show-cause notice dated 12th April 2006, respondent had proposed a Central Excise Duty demand of Rs.18,83,39,902/- against petitioner on the goods manufactured in the EOU but sold in DTA. Petitioner admitted the duty demand but paid only Rs.9,22,61,405/- to the Government. Petitioner disputed the balance amount of Rs.9,60,78,987/- as payable. This amount of Rs.9,60,78,987/- and

petitioner's reason for dispute can be bifurcated as under:

“(a) Amount of Rs.7,31,58,191 : The rate of excise duty payable by the EOU unit varied from 39.2% to 56.832% (depending upon the period) whilst the rate of excise duty payable by the DTA unit was 16%. The excise duty demanded against Petitioner in the SCN was on the premise that the EOU unit was liable to excise duty at the rate of 39.2% to 56.832%. The amount of Rs.7,31,58,191 was the amount of excise duty paid by the DTA unit at the rate of 16%. The only dispute in the present matter is whether the EOU unit is liable to pay duty at the rate of 39.2% – 56.83% minus 16%. It is undisputed that only a single event of manufacture occurred for which the duty was demanded. It is case of the Department that goods actually manufactured by the EOU unit had been wrongly shown / declared as manufactures of the DTA unit. Given that the DTA unit has already discharged Central Excise duty of Rs.7,31,58,191, this amount of Rs.7,31,58,191 is liable to be adjusted against the duty demanded against the EOU unit. This is especially so given that there is only single legal entity (i.e. Petitioner-company) who merely possesses separate registrations. Demanding the same amount once again amounts to double taxation.

(b) Amount of Rs.1,92,39,856 : This amount was claimed as not payable since it was the duty already paid by the EOU unit itself. This claim was accepted by the Department before Respondent No.2 and was hence allowed by Respondent No.2. This amount is hence not under dispute in the present Petition.

(c) Amount of Rs.36,80,850 : This demand arose on account of the denial of the benefits of the Notification No.23/03 to Petitioner. This denial has been done primarily on the basis that Petitioner has not achieved the positive Net Foreign Exchange (‘NFE’) as required under the said Notification. The Affidavit-in-Reply of Respondent No.5 also specifically provides that Petitioner had achieved the positive Net Foreign Exchange (‘NFE’) as required under the said Notification.”

8. As regards the second item, i.e., (b) of Rs.1,92,39,856/-, we have to note that respondent no.2 has accepted and has been allowed by respondent no.2. What is required to be considered is item (a) and item (c).

9. So far as item (a) is concerned, i.e., Rs.7,31,58,191/- according to respondent no.2, petitioner should pay the entire amount and claim refund of Rs.7,31,58,191/-. According to respondent no.2, the DTA unit and the EOU unit are independent of each other and, therefore, petitioner cannot claim adjustment / credit for the amount, which was paid to the DTA unit for the liability of the EOU. At the same time, in the impugned order, respondent no.2 says that the duty liability under Excise Act devolves on manufacturer of goods. In our view, the manufacturer of goods is petitioner as a corporate legal entity. Petitioner was having two separate units, one for manufacturing the goods for exports without payment of excise duty and one for domestic consumption to the DTA. Also, there was no bar on petitioner selling the goods made by EOU within the DTA but if that was done, petitioner would have paid excise duty in the range of 39.2% to 56.832% depending upon the period as against 16% for goods manufactured in the domestic unit and sold in the DTA. Therefore, we are unable to accept that both are separate units and separate entities. It is not disputed anywhere or denied that petitioner has not paid Rs.7,31,58,191/- but according to respondent no.2, the EOU was not entitled to discharge the duty payable of DTA clearances from Cenvat credit, but the duty discharge by DTA unit in this case was substantially from Cenvat credit account and only partly from the current account. We find it rather difficult to accept this argument because whether it is by way of Cenvat credit or through current account, the fact is that there has been a payment. The only obligation for assessee is to pay

the duty on the goods sold. Admittedly, it has been paid. We are unable to agree with the contention of respondent no.2 in the absence of any specific prohibition that payment cannot be made through Cenvat credit for goods manufactured by EOU. Mr. Deshmukh in fairness also agreed to a query posed by the Court that he has not come across any such specific prohibition. Even, the impugned order does not specify any prohibition or the specific provision of prohibition.

10. In the circumstances, we are unable to accept the stand of respondent no.2 that even though petitioner has already paid Rs.7,31,58,191/- through the DTA unit, the amount should once again be paid through the EOU unit and petitioner should apply for a refund of the amount paid through the DTA unit. If petitioner is compelled to do that, it would only mean that petitioner has to pay the said amount twice and then claim refund.

11. As regards item (c) is concerned, i.e., Rs.36,80,850/-, abatement on account of applicability of Notification No.23 of 2003, according to respondent no.2, the DTA permission referred to on behalf of petitioner, was not fully operational but had been suspended. Moreover, petitioner had also not achieved positive NFE and, therefore, was not entitled to abatement. On the first point of suspension, in the final order itself, respondent no.2 admits that the DTA permission granted was not yet cancelled for the amended period and only a show-cause notice has been issued proposing to cancel the DTA and show-cause notice was still pending. In the petition also there is an averment that the show-cause notice was still pending. Therefore, that could not have been the basis to deny the abatement of Rs.36,80,850/-.

As regards the achievement of positive NFE, respondent no.5

through one P. S. Raman, Deputy Development Commissioner, has filed an affidavit affirmed on 5th October, 2012, in which there is a positive averment that appellant had achieved positive NFE as per the details submitted in the DTA Sale. It is also stated that DTA Sale permissions were issued to the unit only after ascertaining the fact that the unit has achieved positive NFE.

Therefore, petitioner will be entitled to the abatement on account of applicability of Notification No.23 of 2003.

12. In the circumstances, we are inclined to allow the petition. Rule made absolute in terms of prayer clause (a). Prayer clause (a) reads as under :

“(a) that this Hon’ble Court be pleased to issue a writ of Certiorari or a writ in the nature of Certiorari or any other appropriate writ, order or direction under Article 226 of the Constitution of India, calling for the records of the Petitioner’s case and after going into the validity and legality thereof to quash and set aside the Orders dated 27.9.06 and 14.1.2008 passed by Respondent No.2, to the extent directing the Petitioners to pay Rs.7,68,39,041/-, to the extent levying interest @ 10% per annum and levying penalty on both the units of the Petitioners.”

13. It is open for respondents to calculate if the figures really tally and if there is difference in amounts paid and amounts adjusted, respondents may take such further steps as advised.

14. After respondent no.2 had admitted the application, petitioner had approached this Court by way of Writ Petition No.6741 of 2006. An order dated 22nd November, 2006 came to be passed by this Court pursuant to which, petitioner had given a bank guarantee of a nationalized bank for Rs.7.70 crores. Mr. Sridharan, on instructions

from Mr. Giswajit Chaki (Senior General Manager Finance) states that the bank guarantee has been kept alive even today.

Respondents to cancel the bank guarantee and return the same to petitioner within four weeks from today.

15. Petition disposed. No order as to costs.

(PRITHVIRAJ K. CHAVAN, J.)

(K.R. SHRIRAM, J.)