IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 12183 OF 2022

LA TIM Metal & Industries Limited ….Petitioner

V/s.

The Union of India and Ors. …Respondents

Mr. Prakash Shah i/b PDS Legal for Petitioner.
Mr. Jitendra B. Mishra a/w Mr. D.B. Deshmukh for Respondents.

CORAM : K.R. SHRIRAM &
ARIF S. DOCTOR, JJ.
DATED : 15th NOVEMBER 2022

P.C. :

1. Prayers in the petition reads as under :

a. that this Hon'ble Court be pleased to issue Writ of Prohibition or any other appropriate writ, order or directions under Article 226 of Constitution of India prohibiting the Respondents from any manner collecting the notional Social Welfare Surcharge on the goods cleared without payment of Basic Customs Duty and Additional Duty Customs under Notification No.24/2015 – Customs dated 08.04.2015 as amended;

b. that this Hon'ble Court may be pleased to issue Writ of Mandamus or a Writ in the nature of Mandamus or any other appropriate writ, order or direction under Article 226 of the Constitution of India ordering and directing Respondents by themselves, their subordinates, servants and agents to forthwith:

i. re-assess the Bills of Entry detailed in Exhibit B hereto and assessed the SWS as nil in compliance of the Circular No. 3/2022-Customs dated 1st February, 2022;

ii. refrain from collecting notional SWS on the goods cleared without payment of Basic Customs Duty and Additional Duty Customs under Notification No.24/ 2015-Customs dated 08.04.2015 as amended;

iii. *Refund INR. 22,56,650.80/- collected in the guise of notional Social Welfare Surcharge on the goods imported by the Petitioner without payment of Basic Customs Duty and Additional Duty Customs under Notification No.24/2015-Customs dated 08.04.2015 as amended; and*

iv. *make necessary changes to the ICEGATE portal to ensure that no notional Social Welfare Surcharge is assessed on the goods assessed without payment of Basic Customs Duty and Additional Duty Customs under Notification No.24/2015-Customs dated 08.04.2015 as amended.*

2. Petitioner is a trader engaged in trading of colour coated coils and profile sheets. Petitioner filed Bill of Entry No.6532249 dated 18th January 2020 and Bill of Entry No. 2485287 dated 17th September 2022. Petitioner thereafter also filed 12 other Bills of Entry referred to in paragraph no.9 of the petition. It is petitioner's case that in each of the Bill of Entry, petitioner claimed and was allowed exemption under Notification No. 24/2015-Customs dated 08.04.2015. The proper officer assessed zero/nil Basic Customs Duty (BCD) and Additional Customs Duty (ACD). The proper officer, however, notionally assessed SWS, i.e., Social Welfare Surcharge and collected amount in cash from petitioner.

3. Petitioner states that with respect to the recent Bill of Entry No.2485287 dated 17th September 2022, respondents have assessed the Bill of Entry and the proper officer has assessed BCD and ACD at zero/nil. The proper officer, however, notionally assessed SWS at 10% of the BCD. It is

not in dispute that SWS is levied and calculated at 10% of the BCD. It is petitioner's case that if the BCD is Nil whatever may be the percentage of SWS, the amount will also be Nil because anything multiplied by zero is zero. Mr. Shah submitted that this has been confirmed in Circular No.3/2022-Customs dated 1st February 2022 issued by the Department of Revenue (Tax Research Unit), Ministry of Finance, Government of India. Mr. Shah submitted that in an identical matter of the same petitioner being Writ Petition No. 8677 of 2019 this court in order dated 10th August 2022 after considering Notification dated 1st February 2022 has held that there was no SWS payable.

4. Mr. Mishra submitted that in the Bill of Entry itself it is mentioned that the Basic Customs Duty on the goods imported was 7.5%. Mr.Mishra also submitted that the Madras High Court in the matter of ***M/s.Gemini Edibles and Fats India Pvt. Ltd. vs. Union of India and Ors.***[1] has held that appropriate SWS on BCD was payable. Mr. Mishra also submitted that the Madras High Court has relied upon the judgment of the Hon'ble Apex Court in ***Unicorn Industries vs. Union of India***[2] where also the court had held that SWS was payable.

5. In rejoinder, Mr. Shah submitted that in *Unicorn Industries* (supra) the excise duty recovered under diverse names/nomenclature and

1 Writ Petition No. 24490 and 27452 of 2019 dated 03.01.2020
2 2019 (370) E.L.T. 3 (S.C.)

rates were on the value of the goods and not on the BCD. Mr. Shah submitted that if the SWS was on diverse names or value of the goods petitioner will have no case. But since SWS is directly linked to BCD anything multiplied with zero is zero.

6. Mr. Mishra also relied upon the Circular dated 10th January 2020. Mr. Shah submitted and rightly says after those judgments and the circular relied upon by Mr. Mishra the Department of Revenue (Tax Research Unit), Ministry of Finance, Government of India had issued Circular dated 1st February 2022 where it has clarified that where the SWS applied is at percentage of the aggregate of customs duty payable on import of goods and not on the value of imported goods, the SWS shall be computed on the percentage of value equal to Nil (as aggregate amount of customs duty payable is zero). For ease of reference, the Circular dated 1st February 2022 is scanned and reproduced herein below :-

Circular No. 3/2022-Customs

F. No. CBIC-190354/262/2021-TRU Section-CBEC
Government of India
Ministry of Finance
Department of Revenue
(Tax Research Unit)
*****

Room No. 156, North Block
New Delhi, dated the 1st of February, 2022

To,

All Principal Chief Commissioners/ Chief Commissioners of Customs/Customs (Preventive),
All Principal Chief Commissioners/ Chief Commissioners of Customs & Central Tax,
All Principal Commissioners/ Commissioners of Customs/Customs (Preventive),
All Principal Commissioners/ Commissioners of Customs & Central Tax

Madam/ Sir,

Subject: Clarification regarding applicability of Social Welfare Surcharge on goods exempted from basic and other customs duties/cesses –reg.

References have been received seeking clarification on the issue of applicability of Social Welfare Surcharge (SWS) on goods that are exempted from basic customs duty or taxes or cesses which are levied as a duty of customs. In absence of any specific exemption on Social Welfare Surcharge, certain field formations have taken a view that Social Welfare Surcharge shall be payable on notional customs duty as determined on Tariff rate.

2. The matter has been examined. Social Welfare Surcharge (SWS) is levied and collected, as a duty of customs, *vide* Section 110 of the Finance Act, 2018 (13 of 2018) and is calculated at the rate of 10 per cent. on the aggregate of duties, taxes and cesses which are levied and collected by the Central Government as a duty of customs on goods imported into India.

3. In this regard, it may be noted that at present SWS applies at the rate of 10% of the aggregate of customs duties payable on import of goods and not on the value of imported goods. If aggregate customs duty payable is zero on account of an exemption, the SWS shall be computed as 10% of value equal to 'Nil' (as aggregate amount of customs duties payable is zero). Law does not require computation of SWS on a notional customs duty calculated at tariff rate where applicable aggregate of duties of customs is zero.

4. Thus, it is clarified that the amount of Social Welfare Surcharge payable would be 'Nil' in cases where the aggregate of customs duties (which form the base for computation of SWS) is zero even though SWS has not been exempted.

5. The contents of this circular may please be brought to the notice of trade and industry through issue of Trade/ Public notices. The field formations may also be suitably sensitized in this regard. Difficulty, if any, in the implementation of this Circular may be brought to the notice of the Board. Hindi version follows.

Yours faithfully,

(Nitish Karnatak)
Under Secretary to the Government of India

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7. Mr. Mishra also submitted that petitioner's claim about assessment and recovery of amounts in the guise of Social Welfare Surcharge on the goods cleared without payment of BCD is factually incorrect as BCD was chargeable at 7.5% on the goods imported and the same was paid/debited by using the Merchandise Export from India Scheme (MEIS) Scrips issued under Notification No.24/2015-Customs dated

08.04.2015. In response Mr. Shah relied upon General Exemption No.162 by which the Central Government, exercising its powers under Section 25 of the Customs Act, has exempted goods when imported into India against duty credit scrip from the whole of the customs duty leviable thereon and the whole of the additional duty leviable thereon under the Customs Tariff Act. The fact that the goods imported under the concerned Bill of Entry has been cleared with Nil BCD is not disputed.

8. Therefore, in our view if the SWS is payable at 10% on BCD but where the BCD is Nil, SWS shall also be computed Nil.

9. Respondents are directed to refund Rs.22,56,760/- that Petitioner has paid towards Notional Social Welfare Surcharge within 8 weeks from the date of receipt of a copy of this order.

10. Petition accordingly stands disposed.

(ARIF S. DOCTOR, J.) **(K.R. SHRIRAM, J.)**