



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

CENTRAL EXCISE APPEAL NO. 29 OF 2020

WITH

CENTRAL EXCISE APPEAL NO. 21 OF 2022

The Commissioner of CGST and Central
Excise, Thane Rural Commissionerate,
4th floor, GST Bhavan, Plot No. C-24,
Sector-E, Bandra-Kurla Complex,
Bandra (E), Mumbai – 400 051.

..Appellant

Vs.

Technocraft Industries (India) Ltd.
Yarn Div – (Unit-II) Village-Dhanivali
Tal-Murbad, Thane – 421 401.

..Respondent

Mr. Swapnil Bangur a/w. Mr. Ram Ochani for the appellant.
Ms. Padmavati Patil i/b. CEN-Ex. Services for the respondent.

CORAM	:	G. S. KULKARNI & JITENDRA JAIN, JJ.
RESERVED ON	:	SEPTEMBER 21, 2023
PRONOUNCED ON	:	OCTOBER 3, 2023

JUDGMENT (Per G.S. Kulkarni, J.):

1. These two appeals have arisen from a common order dated 13 August, 2019 passed by the Customs, Excise & Service Tax Appellate Tribunal, Mumbai (for short “CESTAT”) on Custom Appeal No, 120 of 2011 and Custom Appeal no. 121 of 2011 filed by the respondents whereby the respondent’s appeals have been allowed against the Order- in- Appeal dated 23 November, 2020 passed by the Commissioner of Central Excise (Appeals), Mumbai Zone-1. The revenue has proposed the

following substantial questions of law for determination of this Court:

“a) Whether the CESTAT was right in holding that the Respondent-assessee fulfilled the conditions of Exemption Notification No. 23/03-CE dated 31.03.2003 and thus, entitled for exemption?”

b) Whether the assessee rightly availed exemption under Notification No. 53/97 dated 03.06.1997 & Notification No. 52/03-Cus dated 31.03.2003 on the portion of imported Cotton contained in Cotton Waste which is subsequently cleared at NIL rate of duty, under Notification No. 6/97-CE dated 01.03.1997 & Notification No. 23/03-CE dated 31.03.2003?”

Central Excise Appeal No. 29 of 2020

2. The facts of the case lie in a narrow compass, which are as follows -

The assessee is a manufacturing unit operating as a 100% Export Oriented Unit (EOU)” under the EXIM policy. It was issued a Letter of Permission (LOP) by the jurisdictional Development Commissioner for the manufacture of cotton yarn.

3. The case of the revenue is that during excise audit of the assessee, it was noticed that the assessee had removed waste cotton generated during the course of manufacture of cotton yarn at “nil” rate of duty under Notification no. 1/95-CE dated 4 January, 1995 and Notification no. 22/03-CE dated 31 March, 2003 on the issue of domestic procurement of raw materials and consumables and Notification No. 53/97-Cus dated 3 June, 1997 and Notification No. 52/03-Cus dated 31 March, 2003 pertaining to imported raw materials and consumables. The revenue was

of the view that being a 100% EOU, the assessee was procuring consumable items indigenously without payment of duty under Customs Tariff-3 by availing exemption under Notification No. 1/95-CE dated 4 January, 1995. The revenue was of the opinion that such notification was a conditional notification, which allowed 100% EOU to procure capital goods, raw materials, inputs, consumables etc. without payment of Central Excise duty for the purpose of manufacture of articles including waste, scrap, rejects etc. to be exported out of India. However, condition no. 5 of Notification No. 1/95-CE dated 4 January, 1995 allowed the manufactured articles to be cleared into Domestic Tariff Area (DTA) under EXIM policy norms, on payment of duty of excise leviable thereon under Section 3 of the Central Excise Act, 1944, the relevant extract of which reads thus:

“Notwithstanding anything contained in this notification, the exemption contained herein shall also apply to the said goods used for the purposes of production, manufacture, processing or packing of articles in a user industry and such articles (including rejects, waste, scrap and remnants arising out of such production, manufacture, processing or packaging of such articles) even if not exported out of India are allowed to be cleared outside the user industry and in accordance with the Export-Import Policy and subject to such other limitations and conditions as may be specified in this behalf by the said Board or the said Committee, as the case may be, on payment of appropriate duty of excise.”

4. The revenue was of the opinion that the above conditions of the said notification and more particularly when it contained the words “on payment of duty of excise leviable thereon”, the intention of the

notification was clear that it sought to levy specified duty on the articles (manufactured out of duty free goods) cleared into DTA in order to avail the exemption on the duty free goods. The revenue was of the opinion that the existence of “nil” duty liability situation in DTA does not spontaneously meet or satisfy the condition warranting “payment of excise duty” in DTA. It was of the opinion that if the article or waste or reject is removed to any place in India outside the 100% EOU it has to be done on payment of duty of excise leviable thereon under section 3 of Central Excise Act, 1944. This is in view of the decision of the Constitution Bench of the Hon’ble Supreme Court in **Commissioner of Central Excise, Vadodara vs. M/s. Dhiren Chemicals Industries**¹. The revenue thus forming an opinion that when no duty was paid on such resultant article (including rejects, wastes and scrap material arising in the course of manufacture of such articles) owing to the reason that such resultant articles were exempted or were chargeable to duty at NIL rate, the condition “on payment of duty of excise leviable thereon” under Section 3 of Central Excise Act, 1944 was not satisfied. It is on such premise, a show cause notice dated 11 September, 2007 came to be issued to the assessee to show cause as to why the exemption availed by the assessee under the said notification on the portion of imported Cotton contained in Cotton waste ought not to be denied and appropriate central excise/customs duty should

¹ 2002 (139) ELT 3(SC)

not be demanded and recovered from the assessee. The relevant part of the show cause notice is required to be noted, which reads thus:

“a) the exemption availed by the assessee under Notification No. 01/95-CE dated 04.01.1995 & Notification No. 22/03-CE dated 31.03.2003/Notification No. 53/97-Cus dated 03.06.1997 & Notification No. 52/03-Cus dated 31.03.2003 on the portion of Fuel and Lubricating Oil procured indigenously/imported and used in the generation of Cotton Waste which is subsequently cleared in DTA without payment of duty should not be denied and appropriate Central Excise/Customs duty of Rs.1,17,63,618/- (Rupees One Crore Seventeen Lacs Sixty Three Thousand Six Hundred Eighteen Only) as detailed in the Annexure-I to this notice for the period from 1998-1999 to 2006-2007 should not be demanded and recovered by enforcing the B-17 Bond executed by them under the provisions of Section 72 of Customs Act, 1962 read with Section 65 of the Customs Act, 1962.

b) The Interest at appropriate rate should not be charged and recovered from them on the Central Excise/Customs duty demanded/payable as above in terms of Section 72 of Customs Act, 1962 from the date of procurement till the date of payment of duties.

c) a penalty should not be imposed on them under Section 72 of the Customs Act, 1962 read with Section 112(a) of the Customs Act, 1962.”

5. The assessee responding to the show cause notice contended that the exemption availed by the assessee ought not to be denied. It was contended that earlier an action was initiated against the assessee on the ground that there was clearance of cotton waste at “Nil” rate of duty, however, such action was dropped, to the effect that the show cause notice dated 26 April, 2000 came to be dropped, by an order dated 14 August, 2001. This had attained finality inasmuch as thereafter for long years despite the revenue been aware that the cotton waste was being cleared by

the assessee in the DTA at nil rate of duty no action was resorted and the returns filed by the assessee were accepted. It was contended that the show cause notice in question was issued solely relying on the decision of Supreme in the case of **Commissioner of Central Excise, Vadodara vs. Dhiren Chemical Industries** (supra), which according to the assessee was not relevant in the facts and circumstances of the case.

6. The show cause notice in question was adjudicated by the Assistant Commissioner, Central Excise, Kalyan-II Division by Order-in-Original dated 20 August, 2008, whereunder the duty demand against the assessee came to be confirmed, and an order in regard to payment of interest and penalty was passed against the assessee. The operative part of the Order-in-original reads thus:

“ORDER

(i) I confirm the duty demand amounting to Rs.1,17,63,618/- (Rupees One Crore Seventeen Lacs Sixty Three Thousand Six Hundred Eighteen Only), payable by the assessee. This amount should be recovered from M/s. Technocraft Industries (India) Ltd. I also order the enforcing of B-17 Bond executed by them for this purpose.

(ii) I hereby order the payment of interest at appropriate rate, on the above said amount of Rs.1,17,63,618/- (Rupees One Crore Seventeen Lacs Sixty Three Thousand Six Hundred Eighteen Only), and order for its recovery from the date of importation/procurement till the date of payment of duty from M/s. Technocraft Industries (India) Ltd.

(iii) I hereby impose a penalty of Rs.1,17,63,618/- (Rupees One Crore Seventeen Lacs Sixty Three Thousand Six Hundred Eighteen Only) under Section 112(a) read with Section 72 of the Customs Act, 1962 on M/s. Technocraft Industries (India) Ltd.”

7. Being aggrieved by the Order-in-Original, the assessee filed an appeal before the Commissioner (Appeals), Central Excise, Mumbai Zone-1, who by an order dated 10 December, 2010 rejected the appeals filed by the assessee.

8. The assessee being aggrieved by the order passed by the Commissioner (Appeals) approached the Customs, Excise & Service Tax Appellate Tribunal (CESTAT) by filing the appeal in question, which has been allowed by the impugned order. The CESTAT in allowing the assessee's appeal has *inter alia* held that the assessee's unit in question was an export oriented unit and under the EXIM policy, which provided for special policies to units that are engaged in export and even in matters of clearance within the domestic tariff area. It was observed that a unit operating outside the scheme was subject only to the excise duties on the finished products and there was no limit on the clearance that may be effected from the factory. It was further observed that the scheme of the exemption notifications under the Central Excise Act, 1944 and the Customs Act, 1962 is intended to ensure that a unit operating under the scheme does not derive any unintended advantage vis-a-vis a unit operating outside by utilization of exempted raw material and consumables. It was observed that it cannot have been the intention behind the scheme to subject the waste generated by such units to a levy,

that is not less than that devolving outside the scheme, more so, as the cost of production of the finished goods invariably subsume the value of the materials that are embedded in the waste. It was hence observed that such value which has already been either included in the obligation for export or subject to rate of duty not less than that suffered by the domestic unit does not confer any unwarranted advantage to the assessee. Thus, considering the purport of the notification under which the assessee had paid Nil duty, the assessee's appeal was allowed. It is against such orders of the CESTAT, the appellant is before this Court.

9. Learned counsel for the appellant, in support of the questions of law as proposed to be raised, has limited submissions. The primary contention as urged on behalf of the revenue is that the impugned order is cryptic on the issue as to how the decision of the Supreme Court in *M/s. Dhiren Chemical Industries (supra)* would not be applicable in the facts of the present case, and it is for such reason, the impugned order is required to be set aside and the proceedings remanded to the CESTAT. It is next contended that the CESTAT could not have placed reliance on the decision of the Tribunal in **Winsome Yarns Ltd. vs. Commissioner of Central Excise, Chandigarh**² when the decision of the Supreme Court in *M/s. Dhiren Chemical Industries (supra)* was squarely applicable. It is

² 2001 (127) ELT 833 (Tri-Del)

next contended that the decision of the Madras High Court in **HGL Trading vs. Union of India**³ also has not been appropriately considered by the CESTAT in allowing the assessee's appeal.

10. On the other hand, learned counsel for the assessee would support the impugned order. She would submit that the contention as urged on behalf of the revenue ought not to be accepted inasmuch as such contentions do not consider that the assessee's unit is an export oriented unit and that the Notifications in question were squarely applicable warranting payment of Nil duty. She has drawn our attention to the Notifications No. 52/2003 dated 31 March, 2003, being a Notification – General Exemption No. 46 providing that the assessee's unit was exempted from the whole of the duty of customs leviable under the First Schedule to the Customs Tariff Act, 1975. It is also contended that insofar as the provisions of Customs Tariff Act are concerned, cotton waste (including yarn waste and garnetted stock) under Heading No. 52.02, the rate of duty was nil. In support of her contention, learned counsel for the assessee has placed reliance on the decision of the Supreme Court in the case of **Commissioner vs. Indian Polyfins Ltd.**⁴ whereby the Supreme Court had confirmed the orders passed by the Tribunal in similar facts and circumstances. As also reliance is placed on the decision of the Division

3 2016 (331) ELT 651 (Mad.)

4 2016 (335) E.L.T. A213 (S.C.)

Bench of Madhya Pradesh High Court in the case of **The Commissioner, Customs, Central Excise and Service Tax vs. Shri Mukesh Maheshwari and Others**⁵ It is accordingly prayed that the appeal be dismissed.

11. We have heard learned counsel for the parties. We have also perused the record and the impugned order.

12. At the outset, we may observe that it is not in dispute that the assessee's unit is an export oriented unit (EOU) since the year 1997, hence, being entitled to the benefits as conferred under the EXIM policy. It also appears to be not in dispute that the assessee was clearing cotton waste which was generated from the process of manufacturing of cotton yarn. Thus cotton waste was not the product for which the LOP was granted. Such cotton waste was excisable and the rate of duty specified for cotton waste being Nil, also appears to be not in dispute. Even otherwise, in respect of cotton waste generated in a 100% export oriented unit, the rate of duty was Nil as specified in Notification No. 23/2003 dated 31 March, 2003 being General Exemption No. 32. The relevant extract of said notification needs to be noted which reads thus:

“GENERAL EXEMPTION NO. 32

Exemption to DTA clearances of specified goods produced in EOU/EHTP/STP. - In exercise of the powers conferred by sub-section (1) of Section 5A of the Central Excise Act, 1944 (1 of 1944) (hereinafter referred to as the Central Excise Act), the Central

⁵ CEA No. 32 of 2017 & CEA No. 34 of 2017

Government, being satisfied that it is necessary in the public interest so to do, hereby exempts excisable goods of the description specified in column (3) of the Table below, and falling within the Chapter, heading No. or sub-heading No. of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) (hereinafter referred to as the Central Excise Tariff Act) specified in the corresponding entry in column (2) of the said Table, produced or manufactured in an export oriented undertaking or an Electronic Hardware Technology Park (EHTP) Unit or a Software Technology Park (STP) Unit and brought to any other place in India in accordance with the provisions of (Foreign Trade Policy) and subject to the relevant conditions specified in the Annexure to this notification, and referred to in the corresponding entry in column (5) of the said Table, from so much of the duty of excise leviable thereon under Section 3 of the Central Excise Act as specified in the corresponding entry in column (4) of the said Table.

Sr.No.	Chapter or heading No. sub-heading No.	Description of goods	Amount of Duty	Conditions
1	..	..	..	..
2	..	..	..	..
...				
15	52.02	Cotton waste (including yarn waste and garnetted stock)	In excess of "Nil"	..

13. Further, subsequent Notification No. 52 of 2003 dated 31 March, 2003 under the Customs Tariff Act is also required to be noted, which reads thus:

"GENERAL EXEMPTION NO. 46

Exemption to specified goods imported or procured from Public/Private warehouse or from International exhibitions held in India by a EOU for production or packaging or job work for export of goods or services. - In exercise of the powers conferred by sub-section (1) of Section 25 of the Customs Act, 1962 (52 of 1962) (hereinafter referred to as the said Customs Act), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts, -

- a) all goods as specified in the Annexure-I to this notification, when imported or procured from a Public Warehouse or a Private Warehouse appointed or licensed, as

the case may be, under section 57 or section 58 of the said Customs Act or from International exhibition held in India for the purposes of -

- (i) manufacture of articles for export or for being used in connection with the production or packaging or job work for export of goods or services by export-oriented undertaking (hereinafter referred to as the unit) other than those referred to in clauses (b), (c) and (e) or

.....

from the whole of the duty of customs leviable thereon under the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) and the additional duty, if any, leviable thereon under Section 3 of the said Customs Tariff Act, subject to the following conditions.

3. Notwithstanding anything contained in this notification, the exemption herewith shall also apply to goods which on importation into India or procurement, are used for the purpose of manufacture of finished goods or services and such finished goods and services (including by-products, rejects, waste and scrap arising in the course of production, manufacture, processing or packaging of such goods) even if not exported, are allowed to be sold in Domestic Tariff Area in accordance with the Foreign Trade Policy and subject to such other limitations and conditions as may be specified in this behalf by Development Commissioner or the Board of Approval or the Inter Ministerial Standing Committee, as the case may be, on payment of applicable duty of excise leviable thereon under section 3 of the Central Excise Act, 1944 (1 of 1944) or where such finished goods (including by-products, rejects, waste and scrap) or services are cleared to the warehouse appointed or registered under notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 26/98 Central Excise (N.T.) dated the 15th July, 1998 or No. 46/2001 Central Excise (N.T.) dated the 26th June, 2001 or cleared to the warehouse authorized to carry out manufacturing process or other operation under section 65 of the Customs Act, 1962 (52 of 1962) and under the Manufacture and Other Operations in Warehouse Regulation, or cleared to organizations which are entitled for duty free import of such goods in terms of the exemption notification.”

14. Also cotton waste being excisable was classified under Heading no.

52.02 under Chapter 52 of the Central Excise Tariff Act 2001-2002 at Nil

rate of duty. It thus appears that on clear application of Notification No. 23/2003-CE dated 31 March, 2003 as also Notification No. 52/2003-Cus dated 31 March, 2003, the cotton waste as generated in the assessee's unit and as cleared in the domestic tariff area, although excisable fell under the category of Nil duty.

15. The CESTAT, in our opinion, was thus correct in observing that when a manufacturer sets out to produce waste which is only incidentally generated in the process of manufacture of finished goods, the law would regard such waste as excisable goods, however, being exempted by application of notifications as discussed above, which permitted clearance into the domestic tariff area by adhering to the prescribed procedure. Once the notification(s) as discussed hereinabove provided Nil rate of duty in respect of such goods incidentally produced or manufactured by 100% export oriented unit and allowed it to be sold in the domestic tariff area, no duty could be leviable thereon. Even otherwise not only the notification provided for exemptions but also the provisions of the Customs Tariffs Act provided for Nil duty.

16. We find ourselves in agreement that the observations of the Tribunal that the decision of the Supreme Court in *Collector of Central Excise vs. M/s. Dhiren Chemicals Industries (supra)* would not apply to

the present case. In any event, M/s. Dhiren Chemicals Industries was not a case which pertained to an export oriented unit. Such decision as rendered by the Constitution Bench of the Supreme Court had arisen in view of the conflict between the view taken in the decision of **Collector of Central Excise, Patna vs. Usha Martin Industries**⁶ and the decision in **Motiram Tolaram & Anr. vs. Union of India & Anr.**⁷. The Constitution Bench resolved the conflict by holding that the conclusion reached in *Usha Martin Industries (supra)* that the exemption notification had imposed a condition on the export product should contain the raw materials on which an appropriate amount of duty of excise has already been paid, was not a correct view.

17. We may usefully refer to another decision of the Supreme Court in the case of **Collector of Central Excise, Vadodara vs. Dhiren Chemical Industries**⁸ rendered on 21 February, 2002 wherein the Supreme Court considering the decision of Constitution Bench in the case of *Dhiren Chemicals Industries (supra)* thereby clarified that if there were circulars which had been issued by the Central Board of Excise and Customs which placed a different interpretation of the phrase which fell for consideration of the Constitution Bench, namely, “on which the appropriate amount of duty of excise has already been paid”, such interpretation would be

⁶ 1997(7) SCC 47

⁷ 1999 (6) SCC 375

⁸ (2002) 10 SCC 64

binding on the revenue. The Supreme Court observed thus:

“The issue involved in these appeals is covered by the decision of a Constitution Bench in CCE vs. Dhiren Chemical Industries. The Constitution Bench interpreted the phrase “on which the appropriate amount of duty of excise has already been paid” in favour of the revenue. However, it held that regardless of the interpretation placed by it on that phrase, if there were circulars which had been issued by the Central Board of Excise and Customs which placed a different interpretation upon that phrase, that interpretation would be binding on the Revenue. It is not disputed that there are circulars issued by the Central Board of Excise and Customs which place a different interpretation upon that phrase and which apply to the facts of these two appeals. For that reason, these appeals are dismissed. No order as to costs.”

The aforesaid observation of the Supreme Court further makes it clear that the reliance placed by revenue on *Dhiren Chemicals Industries (supra)* even otherwise would be misplaced in the facts and circumstances of the case, this more particularly, as in the present case, there were clear notifications under which the amount of excise duty on cotton scrap was nil.

18. In view of the above discussion, we are unable to persuade ourselves to agree with the submission of the learned counsel for the revenue that the findings of the Tribunal in regard to non-applicability of the decision of the Supreme Court in *M/s. Dhiren Chemicals Industries (supra)* are incorrect or cryptic. The Tribunal has discussed the said decision in detail and also has given appropriate findings that the decision would not be applicable to the facts in hand, which in our opinion, is a correct finding. Thus, only on such limited ground, in our opinion, there is no reason to offset the impugned order passed by the Tribunal.

19. We find that the Tribunal in the case of *Winsome Yarns Ltd. (supra)* in similar circumstances, had held that when the exemption notification provide Nil rate of duty and as such no duty was payable by the appellant therein on the cotton waste falling under heading 52.02 of the Central Excise Tariff Act. It appears that the said decision has been accepted by the Department as there is no material placed on record that the said decision of the Tribunal was assailed much less reversed.

20. Learned counsel for the assessee would be correct in placing reliance on the decision of the Tribunal in case of *Commissioner vs. Indian Polyfins Ltd. (supra)* whereby the Tribunal had held that since waste and rejects arising in manufacture of final products being cleared by 100% EOU in domestic market as per permission granted by Development Commissioner, demand on raw material attributable to such waste and reject was not sustainable. It was also held that it is not a case of removal of raw material as such and duty was being demanded on final product. The said decision has been confirmed by the Supreme Court in the said case.

21. In the light of the above discussion, we are of the opinion that the appeal does not involve any substantial question of law. It is accordingly rejected. No costs.

Central Excise Appeal No. 21 of 2022

22. This Appeal has arisen from the common order passed by the CESTAT, which we have upheld in the aforesaid appeal filed by the revenue. Hence the present appeal stands covered by our aforesaid decision. We accordingly dismiss this appeal while holding that no substantial question of law arises. No costs.

[JITENDRA JAIN, J.]

[G. S. KULKARNI, J.]