(2015) 10 MAD CK 0051

In the Madras High Court

Case No : W.P. Nos. 24507, 26010, 26011 of 2015, MPs Cont. Petn. No. 2069 of 2015 and Sub-A. No. 776 of 2015

HLG Trading and Others APPELLANT

Vs

Union of India and Others RESPONDENT

Date of Decision : 30-10-2015

Acts Referred:

Additional Duties of Excise (Goods of Special Importance) Act, 1957 — Section 3
Central Excises and Salt Act, 1944 — Section 2(d), 3, 3(1), 5A, 5A(1)
Constitution of India, 1950 — Article 14
Customs Act, 1962 — Section 12
Customs Tariff Act, 1975 — Section 3, 3(1)

Citation : (2016) 331 ELT 561

Hon'ble Judges : V. Ramasubramanian and T. Mathivanan, JJ.

Bench : Division Bench

Advocate : R. Yashodh Vardhan, Sr. Counsel for S. Krishnanandh, for the Appellant; G. Rajagopalan, Additional Solicitor General assisted by T. Chandrasekaran, SPC, for the Respondent

Judgement

V. Ramasubramanian, J.—By a Notification bearing No. 30/2004-CE , dated 9.7.2004, issued by the Government of India in exercise of the powers conferred by sub-section (1) of Section 5A of the Central Excise Act, 1944 read with sub-section (3) of Section 3 of the Additional Duties of Excise Act, 1957, the excisable goods of the description specified in the table given under the Notification were exempt from payment of the whole of the Duty of Excise leviable thereon under the Central Excise Act, 1944. However, a proviso to the Notification restricted the availability of the benefit of exemption only to goods in respect of which Credit of Duty on Inputs or Capital Goods had not been taken under the provisions of the CENVAT Credit Rules, 2002.

2. In two decisions of recent origin namely Aidek Tourism Services Pvt. Ltd. Vs. Commissioner of Customs , and SRF Ltd. and Others Vs. Commissioner of Customs and Others , the Supreme Court held that the benefit of the said

exemption Notification was available to importers of the goods described in the table under the Notification and that the proviso to the Notification may not have any application to importers, as they could not in any case, avail CENVAT credit.

3. The aforesaid decisions were rendered by the Supreme Court on 19.3.2015 and 26.3.2015 respectively. Thereafter, the Central Government issued two Notifications, one bearing No. 34/2015 on 17.07.2015 and another bearing No. 37/2015 dated 21.07.2015. By the first Notification dated 17.07.2015, the proviso as it existed in the Notification No. 30/2004 dated 9.7.2004 was replaced by a new proviso. By the new proviso, the benefit of the Exemption Notification was made available only if 2 conditions are satisfied, namely (i) that the excisable goods are manufactured from inputs on which appropriate duty of excise leviable under the First Schedule to the Central Excise Tariff Act or additional duty of customs under section 3 of the Customs Tariff Act, 1975 (51 OF 1975) has been paid and (ii) that no credit of such excise duty or additional duty of customs on inputs has been taken by the manufacturer of such goods (and not the buyer of such goods), under the provisions of the CENVAT Credit Rules, 2004.

4. By the next Notification dated 21.07.2015, an explanation was inserted to the original Notification, clarifying that for the purposes of this Notification, appropriate duty or appropriate additional duty includes nil duty or concessional duty, whether or not read with any relevant exemption notification for the time being in force.

5. The Notifications bearing Nos. 34 and 37 of 2015 dated 17.07.2015 and 21.07.2015 were issued, obviously to overcome the aforesaid decisions of the Supreme Court, as could be seen by a Circular bearing No. 1005/12/2015 , dated 21.07.2015. Apart from issuing these Amendment Notifications, the Central Government also moved a petition for review of the decision in SRF Ltd., and the Supreme court has condoned the delay and ordered notice in the review petition on 9.9.2015. As a consequence, the importers who had enjoyed the benefit of the original Notification dated 9.7.2004, are now denied the benefit of the same.

6. Therefore, two importers, have come up with these three writ petitions. The first writ petition W.P. No. 24507 of 2015 is filed by a company by name HLG Trading, involved in the business of wholesale trading of yarn, fabric etc. The prayer made in W.P. No. 24507 of 2015 is to quash the Notifications bearing Nos. 34 and 37 of 2015 dated 17.07.2015 and 21.07.2015 with a consequential direction to the respondents to extend the benefit of the original Notification dated 9.7.2004, to the imports made by the writ petitioner. Along with this writ petition, the petitioner came up with a Miscellaneous Petition in M.P. No. 3 of 2015, seeking an interim direction to the respondents to allow the petitioner to file manual Bills of Entry. In the said M.P. No. 3 of 2015 in W.P. No. 24507 of 2015, this Court passed an interim order on 26.8.2015. But immediately thereafter, the Union of India came up with M.P. No. 4 of 2015 for modification of the interim order passed by us on 26.8.2015. In the meantime, the petitioner in

W.P. No. 24507 of 2015 came up with a Contempt Petition in Contempt Petition No. 2069 of 2015 alleging willful disobedience of the interim order dated 26.8.2015. However, since the Union of India came up with a petition to modify the interim order and also since the pleadings were completed and both parties got ready for arguments in the main writ petition, the main writ petition W.P. No. 24507 of 2015 itself was taken up for hearing.

7. In the meantime, another importer by name Aditya International Limited, engaged in the business of importing and trading in various textile goods including silk yarn and silk fabrics, came up with two writ petitions in W.P. Nos. 26010 and 26011 of 2015. The prayer in the first writ petition is for declaration that the words "and not the buyer of such goods" incorporated in the original Notification No. 30/2004 dated 9.7.2004, through the amending Notification No. 34/2015 dated 17.07.2015 is null and void in the light of Section 3(1) of the Customs Tariff Act, 1975 and Section 5A of the Central Excise Act, 1944. In the second writ petition W.P. No. 26011 of 2015, the prayer is for a direction to the Assistant Commissioner of Customs to release the goods covered by 6 Bills of Lading, by extending the total exemption from payment of additional duty in terms of the original exemption Notification dated 9.7.2004.

8. Since all the three writ petitions revolve around either a challenge to the amending Notification dated 17.07.2015 or to the interpretation of the contents of the amending Notification, they are taken up together for disposal.

9. We have heard Mr. R. Yashodh Vardhan, learned senior counsel assisted by Mr. S. Krishnanandh, learned counsel appearing for the petitioner in the first writ petition and in the Contempt Petition, Mr. S. Murugappan, learned counsel appearing for the writ petitioner in the second and third writ petitions, Mr. G. Rajagopalan, learned Additional Solicitor General, assisted by Mr. T. Chandrasekaran, learned Senior Panel Counsel for the Department and Mr. S. Haja Mohideen Gisthi, learned Senior Penal Counsel for the Department.

10. As we have stated earlier, there are three writ petitions on hand, one filed by one importer and two filed by another importer. The writ petition W.P. No. 26011 of 2015, is for a prayer which is only consequential to the prayer made in the other writ petition. Therefore, we are primarily concerned only with two writ petitions, to begin with. In one writ petition, the amending Notifications dated 17.07.2015 and 21.07.2015 are under challenge in entirety. In the other writ petition, the second importer is satisfied with a mere deletion of the words "and not the buyer of such goods" from the proviso to the amending Notification dated 17.07.2015.

GROUNDS OF CHALLENGE:

11. The grounds of challenge to the amending Notifications can be summarised as follows:

(i) that under Section 3 of the Customs Tariff Act, 1975, the imported goods can be made to suffer an additional duty of Customs, commonly known as CVD, equivalent only to the duty of Excise leviable on goods manufactured domestically and that therefore if the domestically manufactured goods are exempt from payment of duty of Excise, no additional duty of Customs can be levied on the importers;

(ii) that the impugned amending Notifications have been issued to overreach the decisions of the Supreme Court in Aidek Tourism Private Limited and S.R.F. Limited and hence they are contrary to law;

(iii) that when for the application of Section 3 of the Customs Tariff Act, 1975, an importer should be imagined to be a domestic manufacturer, the importer should also be taken to be a person who has fulfilled all the conditions precedent that a domestic manufacturer would have complied with before the completion of the manufacturing process and hence the importer cannot be put to an disadvantageous position on the basis of a condition which is impossible of being complied with by him; and

(iv) that at least in so far as the petitioners are concerned, goods that they import, if manufactured in India, would not have suffered any duty of Excise even on their inputs, as no duty is leviable on those inputs in India.

12. In response to the above contentions, it is submitted by Mr. G. Rajagopalan, learned Additional Solicitor General that if a Notification for exemption is made contingent upon the compliance with certain conditions, which an importer is not capable of complying with, such an importer may not be entitled to the benefit of the exemption Notification. It is his further contention that a Notification issued in exercise of a power conferred by the statute, cannot be taken to be an arbitrary or mala fide exercise of power, merely because the Notification seeks to change the basis of an existing position that lead to a judicial pronouncement in a particular way.

13. Taking the arguments on the side of the petitioners to the next level, it is contended by Mr. S. Murugappan, learned counsel for the petitioner in two writ petitions that the impugned portion of the amending Notification dated 17.07.2015, runs contrary to the provisions of the General Agreement on Tariffs and Trading, to which India was a party. Therefore, the offending portion of the Notification that runs contrary to the International Agreement to which India is a party, cannot be sustained. In support of the said contention based upon the provisions of GATT, the learned counsel also invited our attention to a Report of the Panel constituted by the United States of America on the "measures affecting Alcoholic and Malt beverages".

14. We have carefully considered the rival submissions which revolve around (i) the fundamental premise on which an additional duty of Customs, known as Countervailing Duty is levied (ii) the purport of the exemption Notifications and the amendments made thereto and (iii) certain judicial pronouncements that seem to support both views. Therefore, we shall take them up in the same order,

for consideration.

THE FUNDAMENTAL PREMISE FORCVD:

15. The fundamental premise on which additional duty of Customs is levied under Section 3(1) of the Customs Tariff Act, 1975 is to ensure that due to the imposition of a duty of Excise on an article manufactured in India, a domestic manufacturer does not suffer a disadvantage than the importer of the same article. This is why the additional duty of Customs is leviable at a rate equal to the Excise Duty, for the time being leviable on a like article, if produced or manufactured in India. In other words by imposing an additional duty of Customs, at the rate equivalent to the duty of Excise payable on the same article if manufactured in India, the Customs Tariff Act, 1975 provides a level playing field to the importer as well as the domestic manufacturer.

16. This is why the Courts have expounded the scope of Section 3(1) of the Customs Tariff Act, 1975 in such a manner as to imagine the importer as a domestic manufacturer and to find out what he would have been subjected to, had he manufactured the same item in India. Keeping this fundamental premise in mind, let us move on to the next portion of our discussion relating to the statutory prescription and the Notifications.

STATUTORY PROVISIONS, EXEMPTION NOTIFICATION AND AMENDMENTS THERETO:

17. There are certain items, which if manufactured in India, do not even attract a duty of Excise. The Central Excise Act, 1944 defines the expression "excisable goods" under Section 2(d) to mean the goods specified in the First Schedule and Second Schedule of the Central Excise Tariff Act, 1985, as being subjected to a duty of Excise and includes salt. Section 3(1) of the Central Excise Act, 1944 stipulates that a duty of Excise shall be levied and collected on all excisable goods which are produced or manufactured in India, as and at the rates set forth in the Schedule to the Central Excise Tariff Act, 1985. Therefore, if certain goods are not included in the Schedule to the Central Excise Tariff Act, 1985 or if a nil rate of duty is stipulated in those Schedules in respect of certain goods, those goods are not excisable or excisable at nil rate of duty.

18. Though all goods manufactured or produced in India and which are included in the Schedule to the Central Excise Tariff Act, 1985 are primarily excisable goods in view of the provisions of Section 3(1) of the Central Excise Act, 1944, the Central Government is empowered by Section 5A(1) of the Central Excise Act, 1944 to grant exemption, either absolutely or subject to such conditions, to be fulfilled before or after removal, from the whole or any part of the duty of Excise leviable thereon. Sub-sections (1) and (2) of Section 5A read as follows:-

"5A. POWER TO GRANT EXEMPTION FROM DUTY OF EXCISE.

(1) If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by notification in the Official Gazette exempt generally

either absolutely or subject to such conditions (to be fulfilled before or after removal) as may be specified in the notification, excisable goods of any specified description from the whole or any part of the duty of excise leviable thereon:

Provided that, unless specifically provided in such notification, no exemption therein shall apply to excisable goods which are produced or manufactured -

(i) in a free trade zone and brought to any other place in India; or

(ii) by a hundred per cent export-oriented undertaking and allowed to be sold in India.

Explanation: In this proviso, "free trade zone" and "hundred per cent export-oriented undertaking" shall have the same meanings as in Explanation 2 to sub-section (1) of section 3 .

(2) If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by special order in each case, exempt from the payment of duty of excise, under circumstances of an exceptional nature to be stated in such order, any excisable goods on which duty of excise is leviable."

19. A combined reading of Section 3(1) and 5A(1) of the Central Excise Act, 1944 together with the Schedules under the Central Excise Tariff Act, 1985 would show that all goods produced or manufactured in India can be classified into the following categories:

(i) Goods which are not excisable, in view of the fact that they are not even mentioned in the Schedules to the Central Excise Tariff Act, 1985.

(ii) Goods which are excisable at nil rate of duty, in view of the fact that they are included in the Schedule to the Central Excise Act, 1985, but the rate of duty is indicated in those schedules as zero.

(iii) Goods which are excisable at the rates specified in the Schedules under the Central Excise Tariff Act, 1985, but which are granted exemption, in terms of a Notification issued under Section 5A of the Central Excise Act, 1944.

20. In other words goods manufactured or produced in India may have to be classified into two broad categories, with one of those categories being divided into sub-categories and the sub-categories getting further divided. This can be easily understood by looking at the following chart:

21. A careful look at sub-section (1) of Section 5A would show that there are different types of exemptions that could be granted by the Central Government. They are as follows:

(i) absolute exemption

(ii) exemption subject to fulfillment of certain conditions before removal

(iii) exemption subject to fulfillment of certain conditions after removal

(iv) exemption from the whole of the Duty of Excise and

(v) exemption from any part of the Duty of Excise.

22. Due to the very fact that there are different types of exemptions contemplated by sub-section (1) of Section 5A , it follows as a natural corollary that the benefits of such exemption notifications would also fall under different categories. The position can be summarised as follows:

(i) If the exemption is absolute, all domestic manufacturers will be entitled to the benefit of the notification.

(ii) If the exemption is not absolute but made subject to certain conditions, it is only those domestic manufacturers who fulfill those conditions either before or after removal, who will be entitled to the benefit of the exemption notification. Persons who do not fulfill the conditions may not be entitled to the benefit of the notification.

23. Keeping these distinctions in mind (i) between the different types of exemptions contemplated under Section 5A(1) and (ii) between different types of domestic manufacturers who may or may not be entitled to the benefit of the exemption notification, let us now take up for consideration the different types of exemption notifications issued from time to time, so that we understand the category into which each one of those exemptions will fall.

EXEMPTION NOTIFICATIONS

24. We shall take up the notification dated 9.7.2004, together with the amendments issued to the same under the notifications dated 1.3.2006, 30.12.2006, 1.3.2007, 7.7.2009, 1.3.2011, 24.3.2011, 1.3.2013, 17.07.2015 and 27.07.2015.

25. Under the notification No. 30/2004 dated 9.7.2004, all goods under certain Chapter headings such as 50.04, 50.05, 51.05, 51.06.11 to 51.06.13 etc., were exempt from the whole of the Duty of Excise. But in so far as goods falling under certain Chapter headings such as 54.02, 54.03, 54.02.10 etc., are concerned, not all goods falling under those Chapter headings were granted exemption. The exemption was limited only to the goods described in Column (3) of the Table given under the Notification.

26. Therefore, the exemption notification dated 9.7.2004 covered all goods under certain Chapter headings and only some goods under certain other Chapter headings. Both these exemptions were also circumscribed by a proviso that restricted the benefit only to goods in respect of which credit of duty on inputs or capital gains had not been taken under the provisions of the CENVAT Credit Rules, 2002.

27. To the notification dated 09.7.2004, a corrigendum was issued under notification No. 334/3/2004, on the very same date, namely 09.7.2004. By this corrigendum, the words "inputs or capital goods" were directed to be read as

"inputs".

28. By the next notification bearing No. 10/2005 dated 01.3.2005, the Central Government amended the Table under many notifications of the years 2003 and 2004. The Table under the notification No. 30/2004 dated 09.07.2004 was also partially amended. But, we are not concerned with the same.

29. By the next notification No. 15/2006 dated 01.3.2006, the Table under the notification dated 09.7.2004 was again amended, substituting certain entries with new entries. To the same effect was another notification No. 48/2006 :dated 30.12.2006, by which several notifications of the years 1986, 1989, 1993, 1994, 1995, 1996, 2003, 2004, 2005 and 2006 were amended. These amendments also related only to the entries in the Table given under each of those notifications.

30. The next notification No. 13/2007 dated 01.3.2007, the notification No. 12/2009 dated 07.7.2009, the notification No. 12/2011dated 01.3.2011, the notification No. 30/11 dated 24.3.2011, the notification No. 11/2013 dated 01.3.2013 were also of the same type, in the sense that the entries in the Table were amended. In a few cases, all goods under certain Chapter Headings were included in column (3). In certain other amendments, the description of the goods in column (3) underwent a change.

31. Thereafter came two amendments, one dated 17.7.2015 and another dated 21.7.2015, both of which have become the subject matter of dispute at present. As we have stated in the preamble portion, the proviso under original notification No. 30/2004 dated 09.7.2004 was substituted with a new proviso by the amendment notification No. 34/2015 dated 17.7.2015. By the second amendment notification No. 37/2015 dated 21.7.2015, an explanation was inserted after the proviso to the original notification.

32. The proviso, as it existed under the notification dated 09.7.2004, the new proviso inserted by the first amendment notification dated 17.7.2015 and the explanation inserted by the second amendment notification dated 21.7.2015 are presented in a tabular column for easy appreciation of the transition that has taken place in the case on hand.

33. The manner in which the exemption notifications were amended from time to time would show that at times, the exemption granted were general in nature in respect of the goods falling under certain Chapter Headings. The exemptions granted under a few notifications were not general, but specific, in relation to some of the goods (but not all goods) falling under certain Chapter Headings. Some notifications provided for exemptions in absolute terms without any condition. But, all notifications from 2004 did not provide for absolute exemptions. They provided for conditional exemptions, some of which were capable of being complied with and some are not. Keeping in mind the purport of the various exemption notifications, we shall now move over to the next part of our discussion, where we shall deal with judicial pronouncements.

34. Interestingly, both sides rely upon the very same decisions to drive home their respective view points. Hence we shall deal with all the decisions in the chronological order.

35. In Ashok Traders Vs. Union of India and another, , a Division Bench of the Bombay High Court was concerned with a claim made by an importer of High Density Polyethylene Moulding Powder for exemption from payment of countervailing duty. The exemption Notification was actually a partial exemption and the Notification stipulated two conditions namely (a) that the product should have been manufactured from raw naptha or any chemical derived therefrom and (ii) that on such raw material, the appropriate amount of duty of excise should have already been paid. In other words, the benefit of exemption was available under the Notification only to a manufacturer, who used a particular raw material, on which, an appropriate amount of duty of excise had already been paid. Therefore, rejecting the claim of the importer for exemption, the Division Bench of the Bombay High Court held that "a tax payer, who desires to take advantage of an exemption, must bring his case within the four corners of the exemption Notification." An argument was advanced in that case that a condition, which could not be fulfilled by an importer, cannot be put against the importer and could be taken only to be directory in nature. But, the said contention was repelled by the Bombay High Court.

36. In Thermax Private Limited Vs. The Collector of Customs (Bombay), New Customs House, , the assessee, who imported certain goods from Japan for the purpose of using the same for refrigeration/air conditioning of two factories, claimed the benefit of two exemption Notifications bearing Nos. 93/76 and 63/85, which provided concession of 25% ad valorem. The Notifications stipulated two conditions to be fulfilled namely (a) that the parts indicated therein should be used for refrigeration and air conditioning appliances in any one of the places set out in the Table and (b) that the procedure specified in Chapter X of the Central Excise Rules, 1944 had been followed. The importer, admittedly, fulfilled one of the conditions. The importer used the parts indicated in the Notification for setting up refrigeration or air conditioning appliances or machinery in one of the places set out in the Notification itself. But, the assessee obviously could not specify the second of the conditions, as the same was attracted only when the Central Excise Rules are applied. Therefore, the assessee paid the CVD and then made a claim for refund. But, the claim was rejected.

37. Their appeals against two orders of rejection, suffered different consequences at the hands of the First Appellate Authority. Therefore, both the assessee as well as the Department filed appeals. The Tribunal allowed the Department''s appeal and dismissed the assessee''s appeal. When the matter landed up in the Supreme Court, the Supreme Court pointed out that for deciding the question of eligibility, one must forget the fact that the goods are imported, but imagine that the importer had manufactured the goods in India

and then determine the amount of excise duty that they would have been called upon to pay in that event. If so done hypothetically, if such a person had been entitled to the exemption or remission, then the importer will be automatically entitled to the benefit, irrespective of the non fulfillment of the second condition namely the adherence to the procedure of Chapter X of the Rules. In paragraph 11 of the report, the Supreme Court held that the Tribunal was wrong in denying the benefit to the assessee merely on the ground that the procedure stipulated in Chapter X of the Rules is inapplicable to importer as such.

38. In Hyderabad Industries Ltd. and Another Vs. Union of India (UOI) and Others, , an importer of asbestos fibre, that was separated from its parent rock, was aggrieved by a demand of additional duty of customs made under Section 3(1) of the Customs Tariff Act, 1975. The Department took a stand that the process, by which, asbestos fibre was obtained, was a process of manufacture and hence, the said item fell within Tariff Item 22F of the First Schedule to the Excise Act. Reliance was placed by the Department upon the decision of the Supreme Court in Khandelwal Metal and Engineering Works and Another Vs. Union of India (UOI) and Others, .

39. In Khandelwal, the Court was concerned with the import of brass scrap. The brass scrap so imported consisted of damaged articles like taps and pipes not manufactured in India or elsewhere. The assessee argued that additional duty of customs under Section 3(1) could be levied only if an article, which was imported into India, could be manufactured in India or elsewhere. This argument was rejected in Khandelwal by holding that the levy stipulated in Section 3(1) is a supplementary one and that it is only an enhancement of the levy charged by Section 12 of the Customs Act. In other words, the decision in Khandelwal was to the effect that an additional duty of customs is leviable even merely on the import of the article, though it may not be manufactured or produced in India.

40. But, the correctness of the decision in Khandelwal was doubted in Hyderabad Industries Limited. In paragraph 17 of the report in Hyderabad Industries Limited, a Five Judges Bench of the Supreme Court (in a majority opinion of 3:2), held that Section 3(1) of the Customs Tariff Act, 1975 is a charging section independent of Section 12 of the Customs Act. The view taken in Khandelwal that even if the article had not undergone a process of manufacture or production, it is still subjected to the levy of additional duty, was held, in Hyderabad Industries Limited, to be incorrect.

41. In M/s. Motiram Tolaram and Another Vs. The Union of India and Another, , the Supreme Court was concerned with an exemption Notification No. 185/83, which reduced the rate of duty on polyvinyl alcohol manufactured from duty paid vinyl acetate monomer to 10% ad valorem. The Department refused the benefit of the Notification to the importer on the ground that the exemption Notification was conditional in nature and that the condition could not have been fulfilled by the importer. The assessees contended that they had imported the exempted goods, which were also manufactured only with the same raw material by the

foreign manufacturer, but since no duty was payable under the Indian Law on the raw material, as it was manufactured by a foreign manufacturer, the condition stipulated in the Notification was impossible of being complied with by an importer. While rejecting the said contention, the Supreme Court held as follows:

"Vinyl acetate monomer is an item which is manufactured in India and a rate of excise duty is leviable thereon. On the polyvinyl alcohol which has been imported, vinyl acetate monomer has not been subjected to the appropriate amount of duty payable under the Indian law. Because this condition had not been satisfied in the present case, therefore, the appellants are unable to get the benefit of the said Notification."

42. In Collector of Central Excise, Vadodra Vs. Dhiren Chemical Industries, , a reference was made to a Five Judges Bench on the ground that there was a conflict between the views taken in Collector of Central Excise, Patna Vs. Usha Martin Industries, etc., and Motiram Tolaram. In Usha Martin Industries, the exemption Notification had imposed a condition that the exempted product should contain a raw material ''on which, the appropriate amount of duty of excise had already been paid''. The Department took a stand that in cases where the raw material had attracted -NIL- duty, the condition stipulated in the Notification cannot be fulfilled and that therefore, the benefit of the exemption Notification may not be available in respect of products, on whose inputs, no duty was paid. But, this stand of the Department was rejected by the Court in Usha Martin Industries on the ground that the expression ''appropriate'' cannot be sidelined. But, in Motiram Tolaram, the Supreme Court held that unless the product in question was such that if, manufactured in India, a rate of excise duty was leviable thereon, the benefit of exemption will not be available.

43. While resolving the conflict between Usha Martin Industries and Motiram Tolaram, the Five Judges Bench of the Supreme Court held in Dhiren Chemical Industries that the conclusion reached in Usha Martin Industries was not correct. Paragraphs 7 to 9 of the opinion in Dhiren Chemical Industries are extracted as follows:

"In our view, the correct interpretation of the said phrase has not been placed in the judgment in the case of Usha Martin. The stress on the word ''appropriate'' has been mislaid. All that the word ''appropriate'' in the context means is the correct or the specified rate of excise duty.

An exemption notification that uses the said phrase applies to goods which have been made from duty paid material. In the said phrase, due emphasis must be given to the words ''has already been paid''. For the purposes of getting the benefit of the exemption under the notification, the goods must be made from raw material on which excise duty has, as a matter of fact, been paid and has been paid at the ''appropriate'' or correct rate. Unless the manufacturer has paid the correct amount of excise duty, he is not entitled to the benefit of the exemption notification.

Where the raw material is not liable to excise duty or such duty is nil, no excise duty is, as a matter of fact, paid upon it. To goods made out of such material, the notification will not apply."

44. In CC (Preventive) Amritsar Vs. Malwa Industries Ltd., , the Supreme Court was concerned with a Notification dated 1.3.2006. As per the said Notification issued in exercise of the powers conferred by Section 5A(1) of the Central Excise Act, 1944, an exemption was granted subject to the condition that the product is used in the same factory. The question that arose for consideration was as to whether the goods that were used must also be manufactured in the same factory or not. While answering the question in favour of the assessee, the Supreme Court held that an exemption Notification should be read literally and that a person claiming the benefit of an exemption Notification, must show that he satisfied the eligibility criteria. But, once it is found that the exemption Notification is applicable to the case of the assessee, the same should be construed liberally. The expression ''same factory'' found in the Notification was interpreted by the Supreme Court in Malwa Industries Limited, to mean factory belonging to the importer where the manufacturing activity took place.

45. In Commissioner of Central Excise, New Delhi Vs. Hari Chand Shri Gopal and Others, etc. etc., , a Five Member Bench of the Supreme Court held that a provision in a fiscal statute providing for an exemption, concession or exception, has to be construed strictly and that an exemption Notification has to be interpreted in the light of the words employed by it and not on any other basis. The Court went on to hold that "a person, who claims exemption or concession, must establish clearly that he is covered by the provision concerned and in case of doubt or ambiguity, the benefit of it must go to the State."

46. In Hari Chand Shri Gopal, an argument revolving around the doctrine of substantial compliance was raised. But, the Court pointed out that this doctrine is a judicial invention equitable in nature, designed to avoid hardship, where a party does all that can reasonably be expected of it, but failed or faulted in some minor or inconsequential aspects, which cannot be described as the "essence" or the "substance" of the requirements. In other words, if there are certain statutory requirements, the fulfillment of which would not constitute the essence or substance, then the same can be ignored based upon this doctrine.

47. The decisions in Usha Martin Industries, Motiram Tolaram and Dhiren Chemical Industries came up for consideration before a Two Member Bench of the Supreme Court in Commissioner of Central Excise, Jalandhar Vs. Kay Kay Industries, . But, it was in a different context. The case related to a company, which availed MODVAT credit on the inputs on the strength of the invoices raised by its supplier. But, on verification, it was found that the supplier of inputs had not discharged fully the duty liability for the period covered by the invoices. Therefore, the benefit availed earlier was disallowed. The First Appellate Authority concurred with the view of the Adjudicating Authority. But, the Tribunal (CESTAT) reversed the decisions of the Adjudicating and Appellate Authorities on

the ground that there was sufficient compliance of the conditions enumerated in the Notification. The High Court, in an appeal filed by the assessee, answered the question in favour of the assessee forcing the Revenue to take up the matter to the Supreme Court.

48. After noting the conflict between Usha Martin Industries and Motiram Tolaram that was resolved by a decision of the Constitution Bench in Dhiren Chemical Industries, the Supreme Court held that the Constitution Bench was concerned in Dhiren Chemical Industries, with a Notification for exemption. But, in Kay Kay Industries, the Supreme Court was concerned with a Notification issued under Sub-Rule (6) of Rule 57A of the Rules, dealing with the availing of MODVAT credit. Therefore, the Court held that the decision of the Constitution Bench in Dhiren Chemical Industries would have no application to cases of that nature.

49. After nearly two years of the decision in Kay Kay Industries, the Supreme Court had occasion to consider the very same issue, in three decisions, within a span of a few days in March 2015. On 16.3.2015, the Supreme Court rendered a decision in Ahujasons Shawl Wale (P) Ltd. Vs. Commissioner of Customs . In this case, the assessee was an importer of shawls from Nepal. They resisted the imposition of additional Customs Duty (CVD) on the ground that locally manufactured goods of similar nature are exempted, if they are unbranded. While allowing the appeal of the assessee, the Supreme Court extracted the ratio laid down in Hyderabad Industries and held that since the purpose of CVD is to protect the domestic market from unhealthy competition, no CVD can be imposed on an importer when no Excise Duty was payable by the domestic manufacturer.

50. Within three days of the decision in Ahujasons Shawl, the Supreme Court dealt with a case relating to the importer of Honda Accord Cars. In the said case decided on 19.3.2015, in Aidek Tourism Services Pvt. Ltd. Vs. Commissioner of Customs , the assessee, which had imported Honda Accord cars, filed a claim for refund on the ground that in terms of the Notification No. 64/93, they were entitled to concessional rate of CVD. The assessee''s claim for refund at Mumbai was allowed, but their claim for refund at New Delhi was dismissed. Therefore, both matters landed up before the Supreme Court. The Supreme Court found that the benefit of concessional rate of duty was available under the Notification dated 28.2.1993 subject to the condition that the particular goods namely saloon cars are used solely as taxis. There were also four more conditions stipulated in the Notification. A Two Member Bench of the Supreme Court, allowing the claim of the assessee, held that the ratio of the decision in Thermax Private Limited would be squarely applicable to the case, going by the spirit and objective behind the Notification.

51. Aidek Tourism Services Pvt. Ltd. was followed immediately by a decision rendered on 26.3.2015 in SRF Ltd. and Others Vs. Commissioner of Customs and Others . In S.R.F. Limited, the assessee was an importer of nylon filament yarn of 210 deniers falling under Chapter LXIV. The exemption Notification No.

6/2002 : dated 1.3.2002 stipulated certain conditions, one of which read as follows:

"If no credit under Rule 3 or Rule 11 of the CENVAT Credit Rules 2002 had been taken in respect of the inputs or capital goods, used in the manufacture of these goods."

52. The contention of the Department in S.R.F. Limited was that an importer could have never satisfied the aforesaid condition No. 20, as the inputs or capital goods used in the manufacture of those imported goods would not have suffered any duty of excise, making the assessee even eligible for a CENVAT credit. But, the Supreme Court held in S.R.F. Limited that the contention of the Department was completely contrary to the judgment in Thermax Private Limited. Accordingly, the Supreme Court allowed the claim of S.R.F. Limited.

53. As we have pointed out earlier, the Central Government did two things, after the decision of the Supreme Court in S.R.F. Limited (rendered on 26.3.2015). The Central Government amended the Notification No. 030/2004 dated 9.7.2004 by two Notifications, one bearing No. 34/2015 dated 17.7.2015 and another bearing No. 37/2015 dated 21.7.2015. By the first amendment, the Central Government substituted a new proviso in the place of the existing one. The new proviso reads as follows:

"Provided that the said excisable goods are manufactured from inputs, on which, appropriate duty of excise leviable under the First Schedule to the Central Excise Tariff Act or additional duty of customs under Section 3 of the Customs Tariff Act, 1975 (51 of 1975) has been paid and no credit of such excise duty or additional duty of customs on inputs has been taken by the manufacturer of such goods (and not the buyer of such goods), under the provisions of CENVAT Credit Rules, 2004."

By the second amendment, under Notification No. 37/2015, an Explanation was inserted under the above proviso. This Explanation reads as follows:

"Explanation:-For the purposes of this Notification, appropriate duty or appropriate additional duty includes nil duty or concessional duty, whether or not read with any relevant exemption Notification for the time being in force."

54. The Central Government also filed a petition for review. On 9.9.2015, the Supreme Court condoned the delay and ordered notice in the review. Therefore, it is clear that the law has travelled in a zig zag fashion from one extreme to the other. This is at least apparently so.

55. But, a careful look at the various types of Notifications issued by the Central Government from time to time in exercise of the powers conferred by Section 5A(1) of the Central Excise Act, 1944 and the manner in which the Supreme Court interpreted the Notifications, would make clear one important fact. This fact is that all the Notifications so far issued and which had so far come up for consideration, could be categorised into four types, as follows:

(i) Notifications, which have stipulated a condition that related only to the processing of the returns or declarations, but which did not impose a condition with regard to payment of any duty of excise on the inputs.

(ii) Notifications, which contained a stipulation that the inputs that had gone into the process of manufacture of the exempted goods, should have already suffered a duty of excise.

(iii) Notifications, which contained a condition that the inputs used in the manufacture of the exempted goods should not only have suffered a duty of excise, but the manufacturer should not also have claimed CENVAT credit on the quantum of such duty of excise suffered on the inputs and

(iv) Notifications, which contain a condition that the manufacturer should not have claimed CENVAT credit on the duty of excise leviable on the inputs.

56. That the Notifications that came up for consideration so far before the Supreme Court could be classified into the above four types, can be easily from the following table:

57. In the light of what is reflected in the above table, it can safely be concluded that the interpretation given by the Supreme Court to the Notifications that were in question, depended primarily upon two important facts namely (a) as to whether the Notification imposed a condition that the input used for the manufacture of the exempted goods had already suffered a duty of excise or not and (b) as to whether the manufacturer of the exempted goods had claimed CENVAT credit in respect of a duty paid on the inputs or not.

58. Wherever the Notifications prescribed conditions, which were merely procedural in nature, but did not involve the payment of any duty of excise on the inputs, the Court interpreted the Notifications in favour of the assessee, in view of the fact that an importer could not comply with those procedural formalities. But, wherever the Notifications imposed either (i) a condition that the input used for the manufacture of the exempted goods, should have suffered a duty or (ii) a condition that duty ought to have been paid and CENVAT credit not claimed, the Court interpreted such Notifications in favour of the Revenue (except perhaps in the case of AIDEK and SRF).

59. It must be pointed out at this stage that one cannot make a distinction between (i) a Notification, which merely stipulates a condition that the manufacturer ought not to have claimed CENVAT credit in respect of the duties paid on the inputs and (ii) a Notification that imposes a condition that a duty of excise should have been paid on the inputs and no CENVAT credit should have been claimed in relation to the same. This is for the reason that the very entitlement to claim CENVAT credit would arise only in cases where a duty of excise had been paid on the inputs. For a person, who never paid a duty of excise, on the inputs used for the manufacture of exempted goods, the question of claiming CENVAT credit would never arise.

60. A Notification such as the one bearing No. 030/2004 dated 9.7.2004, which merely stipulates a condition that no CENVAT credit ought to have been availed in respect of the duties paid on the inputs, is in no way different from a Notification, which stipulates a condition that the inputs ought to have suffered a duty and no CENVAT credit should have been claimed on the same.

61. In simple terms, we can understand the proposition by looking at the different alternative scenarios as follows:

62. Therefore, the interpretation to be given to (i) a Notification stipulating a pre-condition that the inputs should have suffered a duty and no CENVAT credit should have been claimed, should be the same as the interpretation to be given to a Notification, which imposes a pre-condition that no CENVAT credit should have been claimed in relation to the duties leviable on the inputs. Once this is very clear, the juggernaut that the assessees sought to create legally, could be easily untied. The object behind the two types of Notifications, one stipulating the sufferance of duty on the inputs and another merely stipulating that no CENVAT credit should have been claimed, is to ensure that though the goods by themselves are exempt, some element of duty has been paid on the inputs that were used in their manufacture.

63. However, drawing our attention to the original text of the General Agreement on Tariffs and Trade (GATT) 1947, to which India was a signatory, it was contended by Mr. S. Murugappan, learned counsel that the products of the Territory of any contracting party imported into the Territory of any contracting party shall not be subject directly or indirectly to internal tax in excess of those applied to like domestic product. Article III of the original text of GAAT 1947 reads as follows:-

"Article III: National Treatment on Internal Taxation and Regulation

1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.

2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.

3. With respect to any existing internal tax which is inconsistent with the provisions of paragraph 2, but which is specifically authorized under a trade agreement, in force on April 10, 1947, in which the import duty on the taxed

product is bound against increase, the contracting party imposing the tax shall be free to postpone the application of the provisions of paragraph 2 to such tax until such time as it can obtain release from the obligations of such trade agreement in order to permit the increase of such duty to the extent necessary to compensate for the elimination of the protective element of the tax.

4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

64. After the issue of the original text, certain Supplementary Provisions were added to GATT 1947. It was clarified by the Supplemental Provisions that any internal tax or other internal charge which applies to an imported product and to the like domestic product and is collected in the case of imported product at the time or point of importation is to be regarded as an internal tax. Therefore, the learned counsel contended that by depriving the benefit of the exemption notification to the importers, the respondents were negating Article III of GATT 1947. Since it is a Treaty to which India is a party, the action of the respondents, according to the writ petitioner is impermissible.

65. In support of the above contention, that no contracting State to be GATT 1947 can enforce or collect the tax putting an importer to an disadvantageous position, Mr. S. Murugappan learned counsel also relied upon a Report of the Panel of the United States with regard to the "Measures Affecting Alcoholic Malt Beverages" dated 19.6.1992.

66. Let us first deal with the submission based upon the report of the GATT Panel between Canada and USA. What happened in that case was that under a statute known as the Omnibus Budget Reconciliation Act, 1990, the Excise tax of beer was increased. But the breweries located in United States with an annual production not exceeding 2 Million Barrels, had the benefit of a lower rate of tax for the first 60,000 barrels. This lower rate was not available to imported wines. Similarly, the statute increased Excise Tax of wine, but introduced a credit for the wine manufactured by small domestic producers. This credit was also not available to imported wines. Therefore, Canada initiated consultations with United States under Article XXIII. The consultations did not result in a statutory resolution. Therefore, a GATT Panel was constituted. The GATT Panel held that the provisions of a lower rate of federal Excise Tax on domestic beer from qualifying domestic producers, without making such lower rate available in the case of imported beer was inconsistent with Article III.2. A similar conclusion was reached even in respect of Excise Tax credit on domestic wine.

67. We do not think that the said report is of any assistance. Apart from the fact that a report of the GATT Panel is not binding on us, it is also to be pointed out that we are concerned in this case only with an interpretation to be given to an exemption notification. The exemption notification has to be read and understood in the context of the power of exemption available under the statute. Therefore, we do not think that the report of the GATT Panel can be pressed into service.

68. The provisions of GATT 1947 may not also be of any assistance to the petitioners. As could be seen from Article III of GATT which we have extracted above, the only restriction imposed upon a contracting party is that they should not subject the importer to internal tax in excess of those applied to like domestic products. The principle behind Article III of GATT 1947 is what is incorporated in Section 3 of the Customs Tariff Act 1975. We have no quarrel with the proportion that an importer cannot be subjected to a tax which is in excess of those imposed upon like domestic products. But the real question is as to whether by granting the benefit of the exemption notification, we will be putting the importer to a more advantageous position than the domestic purchaser of a like product. In case we find that the denial of the benefit of the exemption notification to the importer does not put him to a disadvantageous position than the domestic manufacturer, neither Section 3 nor the provisions of GATT would stand breached. Therefore, we have no hesitation in rejecting the arguments on the basis of Article III of GATT.

69. One more contention is advanced by Mr. S. Murugappan, learned counsel for the petitioner. It appears that an association of Domestic Manufacturers known as "MAIT" gave a representation to the Central Government on 15.7.2015, immediately after the decision of the Supreme Court in S.R.F., pointing out that the "make in India" policy of the Government would suffer a set back, if the benefit of the exemption notification is made available to importers of mobile hand sets and tablet computers. After obtaining a copy of the said representation under the Right to Information Act, the petitioner has come to the conclusion that the impugned notifications dated 17.7.2015 and 21.07.2015 were brought forth under external pressure.

70. We have perused the copy of the representation dated 17.7.2015 submitted by MAIT to the Central Government. It is true that the association, which represents the interests of Information and Communication Technology Sector in India took up the issue with the Central Government, on the question of extension of the benefit of concessional rate of Excise Duty to imports of tablet computers and mobile hand sets. But the said representation merely projected the view point of the domestic manufacturers. As a matter of fact, the representation submitted by them contains a condition that they wanted to incorporate in the exemption notification. The condition that MAIT wanted the Government of India to incorporate in the notification No. 12/2012 dated 17.07.2015 is as follows:-

"If manufactured in India and no credit under rule 3 or rule 13 of the CENVAT

Credit Rules, 2004 has been taken ink respect of the inputs or capital goods used in the manufacture of these goods."

71. But the Central Government did not concede to their request in toto. The words "if manufactured in India" were not incorporated in any notification, as it would have gone against the spirit of Section 3 of the Customs Tariff Act, 1975.

72. Merely because an organization representing the interests of domestic manufacturers made a representation to the Government, the amendments issued to the exemption notification cannot be said to be a mala fide exercise of power. As a matter of fact by the impugned amendment notifications dated 17.07.2015 and 21.07.2015, the Government had done something that may hit some of the domestic manufacturers also. A domestic manufacturer who would have otherwise been entitled to the benefit of the exemption notification dated 9.7.2004, may not any more be entitled to the benefit of the notification, unless he satisfies the newly incorporated proviso and the Explanation. Therefore, the amendments cannot be seen in isolation.

73. Drawing our attention to the Circular dated 21.07.2015, Mr. R. Yashodh Vardhan, learned senior counsel for the petitioners contended that in so far as the domestic manufacturers are concerned, the department itself had taken a stand that they would continue to enjoy the benefit as before prior to 17.07.2015. The Circular bearing No. 1005/12/2015, dated 21.07.2015 may be of relevance and hence it is extracted as follows:-

"It may recalled that the Hon''ble Supreme Court, in the case of SRF Ltd. and Others Vs. Commissioner of Customs and Others relating to CVD exemption, has held that the benefit of excise duty exemption [available to final products manufactured by the domestic manufacturer, subject to the condition of non-availment of CENVAT credit of duty on inputs or capital goods used by such manufacturer for manufacture of such final products] will also be available to the importers of such final products for the purpose of CVD on the ground that the importer was not availing the credit of duty on inputs or capital goods.

2. The implication of the Hon''ble Supreme Court judgment was that all such final products when imported by manufacturer importer would have attracted concessional excise duty as CVD, while the domestic manufacturer of such final products had to forgo input tax credit to be eligible for such concessional rate. This would put the domestic manufacturers at a disadvantage vis-a-vis imports and would adversely impact the Make in India Policy of the Government.

3. The judgment of the Hon''ble Supreme Court was examined in CBEC and it was found that there were certain errors apparent on record/interpretational issues and, with the concurrence of the Ld. Attorney General, a Review Petition/ Revision Application has been filed against the same.

4. However, keeping in view the adverse implications of the aforesaid judgment on the domestic industry, legal opinion was sought from the Ministry of Law &

Justice as to whether pending the aforesaid Review Petition/Revision Application, such conditions in the relevant notifications be suitably amended so as to make the intention abundantly clear (that these conditions are to be satisfied by the manufacturers of such goods and not the buyer/importer of such goods).

5. In this context, opinion of the Ministry of Law & Justice was also sought. With the concurrence of the Ld. Attorney General, notifications No. 34/2015-C.E., No. 35/2015-C.E. and No. 36/2015-C.E. all dated 17.7.2015 were issued amending the conditions in notifications No. 30/2004-C.E., dated 9.7.2004, No. 1/2011-C.E., dated 1.3.2011 and No. 12/2012-C.E. , dated 17.03.2012, respectively.

6. In the above context, apprehensions have been raised about the use of the phrase of "appropriate duty". In this regard. Explanations have been inserted in the notifications No. 30/2004-C.E. , dated 9.7.2004, No. 1/2011-C.E. , dated 1.3.2011 and No. 12/2012-C.E., dated 17.03.2012 so as to clarify that the appropriate duty or appropriate additional duty or appropriate service tax for the purposes of the said notifications/entries includes nil duty or tax or concessional duty or tax, whether or not read with any relevant exemption notification for the time being in force.

7. It may, therefore, be noted that the domestically manufactured goods covered under these notifications/entries continue to be exempt from excise duty or subject to concessional rate of excise duty, as the case may be, as they were prior to 17th July, 2015.

8. Trade Notice/Public Notice may be issued to the field formations and taxpayers.

9. Difficulties faced, if any, in implementation of this Circular may be brought to the notice of the Board."

74. Though para 7 of the Circular extracted above indicates that the domestic manufacturer would continue to be exempt from Excise Duty or subject to concessional rate of Duty as the case may be, as they were prior to 17.07.2015, we do not think that by a Circular, the notification issued in exercise of the statutory powers could be whittled down. Moreover, we are called upon in this case to test the vires of the notifications dated 17.07.2015 and 21.07.2015. The vires of these notifications can be tested only on the touchstone of the source of power or the Constitutional provisions or other legally accepted parameters. The validity of the notifications statutorily issued cannot be tested on the basis of a Circular issued by the department, post facto. Therefore, the above argument of the writ petitioners cannot be accepted.

75. One more contention raised by Mr. R. Yashodh Vardhan, learned senior counsel for the petitioner is that the Court should make a distinction between a condition precedent and a condition subsequent, before finding out whether the benefit of the exemption notification is available to an importer or not. In other words, his contention is that if the exemption notification imposes a condition that can be complied with only at the pre-production stage by the domestic

manufacturer, such a condition precedent cannot be expected to be complied with by an importer. On the contrary, if the exemption notification prescribes a condition that could be complied post-production by the domestic manufacturer, as it happened in the case of Aidek Tourism, then an importer can be expected to comply with such a condition. A condition which is impossible of being complied with by an importer, such as the conditions that arise at the pre-production stage, cannot be put against the importers.

76. Though the aforesaid argument has a sound logical basis, it does not have a legal basis. This can be seen, if we take a relook at the nature of the exemptions contemplated under Section 5A . We have given in a previous paragraph, a chart. It can be found from the chart that certain exemptions could be absolute and unconditional. If an exemption notification is absolute and unconditional, all domestic manufacturers, will be entitled to the benefit of the same. As a consequence, the importers will also be entitled to the benefit of the same.

77. But in cases where the exemption is only conditional, it is only those domestic manufacturers who fulfill the conditions, who will be entitled to the benefit of the exemption notification. A domestic manufacturer who does not fulfill the condition prescribed in the exemption notification, will not be entitled to the benefit of exemption.

78. Let us go by the very logical premise on which the Supreme Court decided Thermax or Hyderabad Industries. If we do so, we have to imagine the writ petitioners herein or all importers for that matter, as if they are domestic manufacturers. To this extent there is no difficulty. But after we imagine an importer to be a domestic manufacturer of a like product, the next question that we should address ourselves is as to whether he would be entitled to the benefit of the exemption notification, after or without fulfilling the conditions stipulated in the notification.

79. So far, the Courts were not confronted with a situation where some domestic manufacturers are entitled to the benefit of the exemption notification and some domestic manufacturers are not. If by virtue of the conditions imposed in the exemption notification, some domestic manufacturers will be left without the benefit of the exemption notification, then the question arises whether the importer would be placed along with those domestic manufacturers who got the benefit or whether they will be placed along with the domestic manufacturers who do not get the benefit.

80. An answer to the above question can be found out by taking a very interesting example provided by Mr. S. Murugappan, learned counsel for the petitioner in the course of his submissions. The learned counsel gave the example of a domestic manufacturer who has suffered a Duty of Excise to the extent of Rs. 100/- on the inputs, with which he manufactured another product. Assuming that the Duty of Excise leviable on the product manufactured by him is Rs. 200/- and assuming such Duty of Excise is exempt by virtue of a notification

subject to the condition that the manufacturer has not taken CENVAT credit, he would have two options. The first option for him would be not to take CENVAT credit but to claim the benefit of the exemption notification. In such an event, he need not pay Rs. 200/- as Duty of Excise on the product manufactured by him. But he would have used inputs which had already suffered a Duty of Excise to the extent of Rs. 100/-. In other words, he is a person who gets the benefit of an exemption from payment of Rs. 200/-, due to his refusal to claim CENVAT credit to the extent of Rs. 100/-.

81. The second option open to him is to claim CENVAT credit. In which case, he will not be entitled to the benefit of the exemption notification. As a consequence, he has to pay Rs. 200/- as Excise Duty on the goods manufactured by him. But due to his claim for CENVAT credit, he will end up paying Rs. 100/-.

82. An importer, if the argument of the petitioners are accepted, will have the benefit of the best of both the options. Since he is manufacturing goods outside the country, he would not have paid Duty of Excise to the Government of India on the inputs used in his product. Nevertheless he would equate himself with a person who has not claimed CENVAT credit and avail the benefit of the exemption notification. The result is that a domestic manufacturer pays an extra amount of Rs. 100/-, in the example given above, while the importer does not pay anything. Neither Section 3 of the Customs Tariff Act, 1975, nor Article III of GATT required that an importer should be placed in a more advantageous position than the domestic manufacturer. The only requirement under GATT and even under Section 3 of the Customs Tariff Act is that the importer should not be put to a disadvantageous position than the domestic manufacturer. But what the petitioners want is to place the importer in an advantageous position. This is not permissible.

83. As we have indicated earlier, a challenge to a condition prescribed in an exemption notification can be tested only on very limited parameters. None of the parameters is satisfied in this case. The exemption notifications dated 17.07.2015 and 21.07.2015 are issued in exercise of the power conferred by Section 5A . Section 5A(1) itself empowers the Central Government to grant exemption either absolutely or subject to such conditions as they may stipulate. If the Central Government has the power to grant exemption subject to certain conditions, they have the power even to modify the conditions. This is why neither the source of power nor the method of exercise of such power is questioned by the writ petitioners. The impugned amendments are not in excess of the delegated power conferred under Section 5A(1) . Therefore, at the outset, the amendments are not ultra vires Section 5A(1) .

84. The amendments are not ultra vires Section 3 since the importers are not placed in a more disadvantageous position than that of the domestic manufacturers. By prescribing certain conditions for availing the benefit of exemption, the impugned amendments treat even the domestic manufacturers differently. Placing the importers on par with those domestic manufacturers who

do not get the benefit of the exemption notification, does not strike at the root of Section 3 . Therefore, the notifications do not offend Section 3 .

85. The petitioners cannot even assail the impugned notifications on the strength of Article 14 of the Constitution. If the domestic manufacturers themselves are classified into two categories depending upon the nature of the conditions imposed, the classification is reasonable and it has a nexus with the object sought to be achieved by the notification. It must be remembered that the notifications do not seek to differentiate between the importers and domestic manufacturers. They actually seek to discriminate one set of domestic manufacturers from another set of domestic manufacturers. A decision as to the category into which an importer will fall cannot therefore be taken to be discriminatory offending Article 14 of the Constitution.

86. Once it is found that the impugned notifications do not offend Section 5A(1) of the Central Excise Act or Section 3 of the Customs Tariff Act or even Article 14 of the Constitution, the petitioners cannot successfully maintain the challenge.

87. One last argument advanced is that the petitioners are importers of some material that are manufactured by the use of some raw-material which attract zero rate of Duty under the Schedules to the Central Excise Tariff Act. Therefore, it is contended that at least in so far as the case of the petitioners are concerned, the distinction between domestic manufacturers who could comply with the conditions and those who cannot comply with the conditions is a myth.

88. But, there is a fallacy in the said argument. It may be true that the raw material, out of which the goods imported by the writ petitioners are manufactured, attract zero rate of duty. But, it need not follow as a corollary that no duty of excise could have been paid on the inputs. The expressions "raw materials" and "inputs" have different connotations. The raw materials, such as raw silk, etc. used for manufacturing the fabrics imported by the petitioner, may attract zero rate of duty as per the Schedules to the Act. But, it is not as though the producers of goods are entitled only to CENVAT credit on the raw materials used for the manufacture of the finished products. The expression "input" as defined in Rule 2(k) of the CENVAT Credit Rules, 2004, is as follows:

(k) "input" means-

(i) all goods, except light diesel oil, high speed diesel oil and motor spirit, commonly known as petrol, used in or in relation to the manufacture of final products whether directly or indirectly and whether contained in the final product or not and includes lubricating oils, greases, cutting oils, coolants, accessories of the final products cleared along with the final product, goods used as paint, or as packing material, or as fuel, or for generation of electricity or steam used in or in relation to manufacture of final products or for any other purpose, within the factory of production;

(ii) all goods, except light diesel oil, high speed diesel oil, motor spirit, commonly known as petrol and motor vehicles, used for providing any output service;

Explanation 1. - The light diesel oil, high speed diesel oil or motor spirit, commonly known as petrol, shall not be treated as an input for any purpose whatsoever.

Explanation 2. - Input include goods used in the manufacture of capital goods which are further used in the factory of the manufacturer; but shall not include cement, angles, channels, Centrally Twisted Deform bar (CTD) or Thermo Mechanically Treated bar (TMT) and other items used for construction of factory shed, building or laying of foundation or making of structures for support of capital goods;"

It can be seen from the above definition that even those goods (i) used in relation to the manufacture of final products, (ii) used directly or indirectly, and (iii) whether contained in the final product or not, are deemed to be inputs. Even lubricating greases, cutting oils, coolants, accessories of the final products and goods used as paints or packing material or as fuel or for generation of electricity in relation to the manufacture of final products are deemed to be inputs.

89. It may be of interest to note that in the case of silk itself, the process of manufacturing of silk fabric from raw silk, involves the following steps: (i) sorting and softening the cocoons, (ii) reeling the filament, (iii) packaging the skeins into bundles, (iv) forming silk yarn by twisting the reeled silk, (v) degumming the thrown yarn (to achieve softness and shine), (vi) dyeing wherever necessary. In these processes, a solution known as degumming solution is used. Sometimes, reeling the filament could happen mechanically, for which capital goods in the form of machinery may be used. Therefore, some of the items that are used in these processes, which naturally attract duty of excise, are treated as inputs. Once they are treated as inputs within the meaning of Rule 2(k) of the CENVAT Credit Rules, a credit can be claimed on the duty of excise duty on those inputs. Therefore, the fact that the raw materials do not attract a duty of excise is hardly a matter of concern. It would be a different matter if all the inputs which come within the definition of the expression "input" under Rule 2(k) of the CENVAT Credit Rules attract only zero rate of duty. Hence, the last argument is also rejected.

90. As we have pointed out earlier, we are supposed to take an importer to be a domestic manufacturer of a like product by a deeming fiction. To this extent, the law is very clear and all the learned counsel for the petitioners are correct. Thereafter, the next question that we should ask is as to whether all domestic manufacturers would automatically be entitled to the benefit of the exemption notification. In respect of the exemption notifications that are absolute and unconditional, all domestic manufacturers will be entitled to the benefit of the exemption notification. Therefore, the importers will also be entitled. But, insofar as exemption notifications that are conditional in nature, the respondents will have to see whether all domestic manufacturers will automatically get exemption

or some of them may not get exemption due to non fulfillment of the conditions prescribed in the notification. If some of them are not entitled, due to non fulfillment of the conditions, the importers, for whom it is impossible of complying with those conditions, are also not entitled to the benefit. It is this position that is sought to be clarified by the impugned amendment notifications dated 17.7.2015 and 21.7.2015. Hence, there are no merits in the writ petitions. Consequently, they are dismissed. Contempt Petition is also dismissed. Connected M.Ps. are also dismissed. No costs.

