

2013 (290) E.L.T. 514 (H.P.)

IN THE HIGH COURT OF HIMACHAL PRADESH AT SHIMLA
R.B. Misra, J.

SATYA METALS
Versus
UNION OF INDIA

CWP No. 3095 of 2011-D, decided on 31-5-2012

EXIM - CVD on DTA clearances by EOU located in backward area in Himachal Pradesh, specified for entitlement to 'Nil' rate of duty under Notification No. 50/2003-C.E. - HELD : CVD under Section 3(1) of Customs Tariff Act, 1975 has to be determined as if EOU produced goods in Himachal Pradesh - For calculation of excise duty payable by such EOU, Section 5A of Central Excise Act, 1944 had been so enacted so that Section 3 ibid does not become redundant - It is for this reason that expression "specifically provided" was introduced in proviso to Section 5A(1) ibid - As assessee had complied with all conditions of Notification ibid, they were entitled to its benefit - Concept of two rates of duties under Explanation 1 to proviso to Section 3(1) ibid was not applicable, as it applied where impugned goods were not produced in India - In that view, effective rate of CVD was NIL - Allowing this benefit to EOU would not create disparity vis-à-vis other manufacturers who were not EOU, as benefits to EOU were provided under Foreign Trade Policy, subject to earning of Net Foreign Exchange (NFE) unlike other manufacturers - Also, EOU was paying basic Customs duty under Section 12 of Customs Act, 1962, whereas, other manufacturers in Himachal Pradesh claiming benefits of area based exemption were not paying it. [paras 22, 24, 27, 28, 29]

EXIM - DTA clearances of EOU - CVD payable - It is to be computed at effective rate of duty applicable to goods cleared by domestic unit - While calculating CVD, it has to be assumed that goods were manufactured in India and applicable rate of duty applied to imported goods. [para 20(b)]

EXIM - DTA clearances of EOU located in area specified in Notification No. 50/2003-C.E. - Since effective rate of duty is Nil, it is this rate which has to be applied for calculating 'CVD'. [para 20(b)]

EXIM - DTA clearances of EOU - It is liable to aggregate of import duties leviable under Customs Act, 1962 - Section 3 of Central Excise Act, 1944. [para 20(d)]

EXIM - DTA clearances of EOU - Proviso to Section 5A of Central Excise Act, 1944 is not a bar for calculating 'CVD' on such clearances. [para 20(a)]

Petition allowed

CASES CITED

- Goodyear India Ltd. v. Collector — 1997 (90) E.L.T. 7 (S.C.) — *Relied on*..... [Paras 18, 28]
Hyderabad Industries Ltd. v. UOI — 1999 (108) E.L.T. 321 (S.C.) — *Followed* [Paras 18, 20, 21, 22, 30]
Lucky Star International v. UOI — 2001 (134) E.L.T. 26 (Guj.) — *Relied on*..... [Paras 18, 26]
Motilal Padampat Sugar Mills Co. Ltd. v. State of UP — (1979) 2 SCC 409 — *Referred*... [Para 19]
Oswal Agro Mills Ltd. v. Collector — 1993 (66) E.L.T. 37 (S.C.) — *Relied on*..... [Paras 19, 20]
Plastic Processors v. UOI — 2002 (143) E.L.T. 521 (Del.) — *Relied on*..... [Paras 18, 20, 26]
Satya Metals v. UOI — C.W.P. No. 5 of 2011, decided on 4-1-2011 by H.P. High Court — *Referred* [Para 14]
Thermax Pvt. Ltd. v. Collector — 1992 (61) E.L.T. 352 (S.C.) — *Followed*..... [Paras 20, 21, 30]
UOI v. Lucky Star International — 2002 (141) E.L.T. A90 (S.C.) — *Referred*..... [Paras 18, 26]
UOI v. Plastic Processors — 2005 (186) E.L.T. A27 (S.C.) — *Referred*..... [Paras 18, 20]

REPRESENTED BY : S/Shri Naveen Mullick with Vishal Mohan and Sushan Kaprate, Advocates, for the Petitioner.
S/Shri Sandeep Sharma, ASG with Vivek Attri, Advocates, R.K. Sharma, Senior Advocate/Sr. Addl. Advocate General with J.K. Verma, Deputy Advocate General, for the Respondent.

[Judgment]. - The petitioners have preferred the present writ petition under Article 226 of the Constitution of India, mainly seeking relief for issuance of writ of certiorari or any other writ, order or direction, quashing order dated 17-3-2011 of 'DGE' and all connecting proceedings thereto or in relation thereto and for issuance of a writ of Mandamus directing the respondents to allow benefit of exemption Notification No. 50/2003-C.E., dated 10-6-2003 and to direct the Commissioner of Central Excise, Chandigarh not to demand differential excise duty and thereby to drop all the proceedings initiated in relation to non extending benefit of Notification No. 50/2003-C.E., dated 10-6-2003 to the petitioners.

2. The petitioner No. 1 i.e. M/s. Satya Metals a partnership firm is engaged in the manufacture of copper wire/strips, copper ingots including alloy ingots and is a 100% Export Oriented Unit (in short called as "EOU"), as such, has

set up its unit at Nalagarh, District Solan, Himachal Pradesh having been issued 'EOU' licence on 14-7-2009 as per 100% 'EOU' Scheme in reference to Notification No. 23/2003 dated 31-3-2003. The petitioner No. 1 was also granted Central Excise registration for operating 100% 'EOU' and the Development Commissioner, Special Economic Zone, 'NOIDA' has also issued letter of permission ('LOP') on 31-8-2006 to the petitioners for its unit established at Jammu (J & K) for manufacturing the same items as indicated above and further vide its letter dated 23-6-2009 has also included additional location of work at village Rakh Ram Singh, Tehsil Nalagarh, District Solan, Himachal Pradesh, in reference to the provisions of Foreign Trade Policy (in short called as FTC). In the above mentioned 'LOP', undisputedly, the petitioners were procuring duty free raw material against CT-3 certificates for manufacturing the above mentioned final products and the petitioners had been clearing goods in Domestic Tariff Area ('DTA'). As such, the petitioners were permitted both on the import of capital goods as well as raw materials without payment of excise as well as customs duty. By virtue of setting up of its unit in specified area, the petitioner No. 1 was entitled to various incentives by the Central as well as the State Government.

3. Chapter 6 of the Foreign Trade Policy ('FTP') issued under Section 5 of the Foreign Trade (Development and Regulation) Act, 1992, contains the policy in relation to 100% 'EOU' units etc. While a 100% 'EOU' unit is a manufacturing entity engaged in the export of goods, whereas, STP or Software Technology Park, is a unit engaged in the development and export of software but both 'EOU' unit and STP are governed by a common policy contained in Chapter 6 of the FTP. A 100% 'EOU' unit has the following features :-

- (a) 'EOU' unit is required to export its entire production except permissible sales in 'DTA' as per 'FTP'. As regards, the exports, there is no excise duty incidence on the export goods. However, for the purpose of making domestic clearances which are referred to as DTA clearances, the 100% 'EOU' unit is required to pay excise duties under the proviso to Section 3 of the Central Excise Act, 1944 (in short called 'Act') equivalent to the rates of customs duties. The goods cleared into the 'DTA' are virtually treated at par with imported goods and are charged duties equivalent to customs duties.
- (b) For sales to the 'DTA', the following duties equivalent to customs duties as per the proviso to Section 3 of the 'Act' are payable :
 - (i) Basic customs duty ("BCD") which is chargeable under Section 12 at rates chargeable specified under the 1st Schedule of the Customs Tariff Act, 1975.
 - (ii) Additional Customs Duty - which, is equivalent to the Excise duty payable by other domestic units on the same products (known as Countervailing Duty i.e. 'CVD'). The duty equivalent to 'CVD' chargeable on 'DTA' clearances is equal to the excise duty that similar domestic units have to pay on their clearances. Therefore, if there is an exemption for excise duty which is applicable to a domestic unit, that exemption also applies for the purpose of calculating 'CVD'. The 'CVD' is intended to countervail the Indian taxes and is ordinarily levied on imported goods in order to allow a level playing field to the Indian industry. But 'CVD' levied on imported goods cannot exceed the excise duty leviable on similar goods manufactured or to be manufactured in India.
- (c) It is allowed income tax exemptions on its profits relatable to exports.
- (d) It is allowed 100% duty exemptions (customs duty and central excise) on the import of capital goods, raw materials etc.

4. The 'EOU' scheme is implemented by the Central Government by the issuance of appropriate exemptions of Custom and Excise which gives effect to the provisions of the 'FTP', mentioned above. The New Industrial Policy for the State of Himachal Pradesh was published by the Ministry of Commerce & Industry, Department of Industrial Policy & Promotion by way of an office memorandum (O.M.), dated 7-1-2003.

5. As per para 3.1 of the said O.M., these units had to be set up in Growth Centres, Industrial infrastructure Development Centres (IIDCs), Industrial Estates, Export Processing Zones, Theme Parks (Food Processing Parks, Software Technology Parks, etc.) set up in areas notified. As such, scheme is applicable to the various export oriented units 'EOUs' including the units set up in export processing zones and software technology parks which also operate under Chapter 6 of the 'FTP' as does the petitioner's 100% 'EOU' unit. Annexure-1 to the said memorandum lists the areas where incentives could be available. Therefore, the policy specifically contemplates that if the new industrial unit was located in a specified backward area, the incentives would be available. Since the place i.e. Nalagarh in Solan District, where the petitioner has decided to set up its unit is included in this list, therefore, it satisfies the condition in relation to the location of the unit.

As per 3.1(1)(a) of the O.M., the industries in these areas are entitled to 100% outright excise duty exemption for a period of 10 years from the date of commencement of commercial production.

Para 3.4 of the said O.M. contains a list of ineligible industries which were excluded from the purview of proposed concessions. It is clear from the New Industrial Policy, the benefits of the Policy were available to Export Processing Zones, S.T.P etc. which operate under the 100% 'EOU' Scheme under the EXIM policy. Since the petitioners have set up 100% 'EOU' unit for manufacturing copper wire/strips, copper ingots including alloy ingots and appears to have fulfilled all the conditions for availing benefits, as such, the petitioner No. 1 as a unit, was not covered by the list of ineligible industries specified in Para 3.4 of the New Industrial Policy. Pursuant to the New Industrial Policy announced by the Central Government and on the basis of the above office memorandum, the Ministry of Finance issued an another Notification No. 50/2003-C.E., dated 10-6-2003 giving effect to the incentives announced under the policy. The relevant part of the above Notification is extracted as below :-

"In exercise of the powers conferred by sub-section (1) of Section 5A of the Central Excise Act, 1944 (1 of 1944) read with sub-section (3) of Section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957) and sub-section (3) of section 3 of the Additional Duties of Excise (Textiles and Textile Articles) Act, 1978 (40 of 1978), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the goods specified in the First Schedule and the Second Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), other than the goods specified in Annexure-1 appended hereto, and cleared from a unit located in the Industrial Growth Centre or Industrial Estate or Industrial Area or Commercial Estate or Scheme Area, as the case may be, specified in Annexure-II appended hereto, from the whole of the duty of excise or additional duty of excise, as the case may be, leviable thereon

under any of the said Acts.....

"2. The exemption contained in this notification shall apply only to the following kinds of units, namely :-

- (i) new industrial units which have commenced their commercial production on or after the 7th day of January, 2003, but not later than the 31st day of March, 2010;
- (ii) Industrial units existing before the 7th day of January, 2003, but which have undertaken substantial expansion by way of increase capacity by not less than twenty five per cent, on or after the 7th day of January, 2003, but have commenced commercial production from such expanded capacity, not later than the 31st day of March, 2010."

6. From the perusal of the above exemption notification, it appears that 100% Central Excise exemption is available if the following conditions are satisfied :-

- (a) The goods are cleared from a unit located in the Industrial Growth Centre or Industrial Infrastructure Development Centre or Export Promotion Industrial Park or Industrial Estate or Industrial Area or Commercial Estate or Scheme Area.
- (b) Such industrial units if new, have to be set up in the specified areas and should have commenced commercial production on or after 7-1-2003. If they are existing industrial units then they should have undertaken substantial expansion by way of increase in installed capacity by not less than twenty five per cent, on or after the 7-1-2003.
- (c) The manufacturer who intends to avail of the said exemption shall exercise his option in writing before effecting the first clearance.

7. The State Government of H.P. also announced an Industrial Policy, 2004 for setting up new units in the pre-existing industrial areas already set up by the Government to attract investments in the State to develop industrially backward areas. The policy also gave special priority for setting up 100% 'EOU's. Para 8.2 of the policy underlined the fact that respondent No. 2 would supplement the concessions announced by the Central Government on 7-1-2003. The State of Himachal Pradesh also notified on 31-12-2004 "Rules Regarding Grant of Incentives, Concessions and Facilities to Industrial Units in Himachal Pradesh, 2004" (in short called 'Rules, 2004'). One of the objectives of the 'Rules 2004' is that it was issued to supplement and support the special package of incentives and concessions announced by the Government of India vide its memorandum dated 7-1-2003. As such, the exemption Notification No. 50/2003-C.E., dated 10-6-2003 and the Industrial Policy announced by the State Government were part of a common package of incentives to attract investment and provide additional employment in the State of Himachal Pradesh for the economic development of the State. It appears some doubts arose on the part of the respondents regarding availability of Central Excise Exemptions to a 100% 'EOU' for making DTA clearances, under the New Industrial Policy indicating that no Central Excise exemption would apply to a 100% 'EOU' unit unless it was specifically mentioned in the notification in terms of the proviso to Section 5(1) of the 'Act'. Since Notification No. 50/2003-C.E., did not contain any specific reference to a 100% 'EOU', the benefit of the exemption notification would not be available to the 100% 'EOU' units, however, to overcome such doubts, the respondent No. 3 [(The Central Board of Excise & Customs (in short called 'C.B.E. & C.')] through Director General of Export Promotion (in short 'DGEP')] issued a clarification on 18-1-2008, indicating that the area based exemptions would also apply to a 100% 'EOU' making 'DTA' clearances followed by subsequent clarificatory letter dated 6-4-2008 indicating that goods produced by a 100% 'EOU' unit in an exempted area and cleared to any other place in India, shall also be exempted while making 'DTA' clearances and there is no bar to apply the exemption notification issued under Section 5A of the 'Act' for the purpose of calculating the 'CVD' on imported goods under Section 3 of the Customs Tariff Act, 1975.

8. The provisions of Section 5A of the Central Excise Act, 1944 are reproduced herein as below :-

"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 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 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 or a special economic zone and brought to any other place in India : or
- (ii) by a hundred percent export-oriented undertaking and brought to any place of India.

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

[(1A) For the removal of doubts, it is hereby declared that where an exemption under sub-section (1) in respect of any excisable goods from the whole of the duty of excise leviable thereon has been granted absolutely, the manufacturer of such excisable goods shall not pay the duty of excise on such goods.]

[(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 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.]

[(2) The Central Government may, if it considers it necessary or expedient so to do for the purpose of clarifying the scope or applicability of any notification issued under sub-section (1) or order issued under sub-section (2) insert an explanation in such notification or order, as the case may be, by notification in the Official Gazette at any time within one year of issue of the notification under sub-section (1) or order under sub-section (2), and every such explanation shall have effect as if it has always been the part of the first such notification or order, as the case may be.]

(3) An exemption under sub-section (1) or sub-section (2) in respect of any excisable goods from any part of the duty of excise leviable thereon (the duty of excise leviable thereon being hereinafter referred to as the statutory duty) may be granted by providing for the levy of a duty on such goods at a rate expressed in a form or method different from the form or method in which the statutory duty is leviable and any exemption granted in relation to any excisable goods in the manner provided in this sub-section shall have effect subject to the condition that the duty of excise chargeable on such goods shall in no case exceed the statutory duty.

Explanation. - "Form or method", in relation to a rate of duty of excise means the basis, namely, valuation, weight, number, length, area, volume or other measure with reference to which the duty is leviable.

9. The Domestic Tariff Area (DTA) clearances of 100% Export Oriented Units ('EOU's) are governed by Section 3 of the Central Excise Act, 1944. Section 3 of the 'Act' is reproduced herein below :-

"(i) There shall be levied and collected in such manner as may be prescribed,

(a) a duty of excise to be called "the Central Value Added Tax (CENVAT) on all excisable goods" (excluding 'goods produced or manufactured in special economic zones') which are produced or manufactured in India as, and at the rates, set forth in the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986);

(b) a special duty of excise, in addition to the duty of excise specified in clause (a) above on excisable goods [(excluding goods produced or manufactured in special economic zones)] specified in the Second Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) which are produced or manufactured in India, as and at the rates, set forth in the said Second Schedule,-

(i) omitted.

(ii) by a hundred per cent export-oriented undertaking and brought to any other place in India shall be an amount equal to the aggregate of the duties of customs which would be leviable under the Customs Act, 1962 (52 of 1962) or any other law for the time being in force] on like goods produced or manufactured outside India if imported into India, and where the said duties of customs are chargeable by reference to their value; the value of such excisable goods shall notwithstanding anything contained in any other provision of this Act, be determined in accordance with the provisions of the Customs Act, 1962 (52 of 1962) and the Customs Tariff Act, 1975 (51 of 1975).

Explanation 1. - Where in respect of any such like goods any duty of customs leviable for the time being in force is leviable at different rates then such duty shall, for the purposes of this proviso, be deemed to be leviable at the highest of those rates."

10. The issue involved in this case relates to determination of Additional Duty of Customs (CVD) which is chargeable under Section 3 of the Customs Tariff Act, 1975. Section 3 is reproduced as below :-

"3. (1) Any article which is imported into India shall, in addition, be liable to a duty (hereafter in this section referred to as the additional duty) equal to the excise duty for the time being leviable on a like article if produced or manufactured in India and if such excise duty on a like article is leviable at any percentage of its value, the additional duty to which the imported article shall be so liable shall be calculated at that percentage of the value of the imported article :

Provided that in case of any alcoholic liquor for human consumption imported into India, the Central Government may, by notification in the Official Gazette, specify the rate of additional duty having regard to the excise duty for the time being leviable on a like alcoholic liquor produced or manufactured in different States or, if a like alcoholic liquor is not produced or manufactured in any State, then, having regard to the excise duty which would be leviable for the time being in different States on the class or description of alcoholic liquor to which such imported alcoholic liquor belongs.

Explanation. - In this sub-section, the expression "the excise duty for the time being leviable on a like article if produced or manufactured in India" means the excise duty for the time being in force which would be leviable on a like article if produced or manufactured in India or, if a like article is not so produced or manufactured, which would be leviable on the class or description of articles to which the imported article belongs, and where such duty is leviable at different rates, the highest duty."

11. From the clarification so issued on 18-1-2008, it appears that 100% 'EOU' (i.e. the petitioner No. 1) if makes sales, it would pay duty equivalent to the 'BCD' only and not the 'CVD', which was equivalent to the excise duty payable by domestic units, as the unit was located in a backward area and was entitled to central excise exemption on account of its location.

12. The above clarification issued on 18-1-2008, was validated by the subsequent clarification dated 6-4-2009 of 'DGEP', that area based exemption issued under Section 5A of the 'Act' would be available on the goods cleared into the DTA by 100% 'EOU' unit. It was further clarified that there was no bar under the proviso to Section 5A of the 'Act' for granting of central excise exemptions while calculating the 'CVD' that is imposed under Section 3(1) of the Customs Tariff Act, 1975. The 'DGEP' also clarified that for the purpose of calculating 'CVD' liability on imported goods, any central excise exemption as well as conditional central excise exemption, if the conditions are satisfied, would be applicable. The petitioners have set up its 100% 'EOU' unit in the State of Himachal Pradesh, besides its set up in Jammu (J & K). The petitioners were allowed to include in the letter of permission ("LOP") of Jammu unit, an another 100% 'EOU' unit at Nalagarh in Solan District. Accordingly, on 23-6-2009 the 'LOP' was amended. On 14-7-2009, the petitioner No. 1 was permitted by the Office of the Assistant Commissioner of Customs and Central Excise, Shimla, for manufacturing of copper wire/strips, copper ingots including alloy ingots and lead ingots in the bonded warehouse under Section 65 of the Customs Act, 1962 and the petitioner No. 1 was granted registration by the Central Excise Authorities for operating a 100% 'EOU' unit at Solan.

13. According to the petitioners, the aggregate amount of Customs duties under the Customs Act involves 'Basic Customs Duty' under Section 12 of the Customs Act, 1962, Additional Duty of Customs ('CVD') under Section 3(1) of the Customs Tariff Act, 1975 and also Special Additional Duty ('SAD') under Section 3(5) of the Customs Tariff Act, 1975. Since as per Notification No. 23/2003-C.E., dated 31-3-2003 as amended, there was an exemption from payment of Special Additional Duty ('SAD') amount which the petitioners enjoyed, however, according to the petitioners, for calculating of Additional Duty of Customs (CVD) under Section 3(1) of the Customs Tariff Act, 1975 which is equal to excise duty leviable for the time being, the effective rate of excise duty in terms of Notification No. 50/2003-C.E., dated 10-6-2003 was 'NIL' or exempted. The petitioner unit considered the same accordingly while effecting clearances of its excisable products to 'DTA' and in calculating the Central Excise duty being discharged for only payment of basic Customs duty under Section 12 of the Customs Act, 1962.

While there has been no dispute with regard to considering discharge of 'SAD' amount under Section 3(5) of the Customs Tariff Act, 1975 at Nil rate in terms of Notification No. 23/2003-C.E., dated 31-3-2003 as amended, however, the Superintendent of Central Excise, Baddi through his correspondence intimated the petitioner that the benefit of Notification

No. 50/2003-C.E., dated 10-6-2003 providing exemption on excise duty could not be made applicable, as the notification issued under Section 5A of 'Act' did not specifically include 100% 'EOU' unit.

The petitioners however have maintained and tried to justify their action by relying on the contents and spirit of clarificatory letters No. DGEP/EOU/221/2007 dated 18-1-2008 and 6-4-2009, as from both these letters, the field formation was intimated that for calculating aggregated amount of Customs Duty under Customs Act, 1962 specially Additional Duty of Customs of Section 3(1) of the Customs Tariff Act, 1975, any exemption notification of Central Excise, whether unconditional or condition, on fulfilment of the conditions, shall be considered for arriving at the effective rate of duty, on clearances effected to DTA by 100% 'EOU'. The clarification dated 6-4-2009 also clarified that the conditions for Area Based Exemption notification get satisfied, the same shall be considered for calculating Additional Duty of Customs (CVD) under Section 3(1) of the Customs Tariff Act, 1975.

Following the Circular dated 6-4-2009, the petitioners have continued to calculate the Additional Duty of Customs, for payment towards the clearances effected in 'DTA'. It appears, at the instance of Chief Commissioner of Central Excise, Chandigarh an another clarificatory letter dated 24-9-2010 was issued by 'DGEP' withdrawing its earlier clarificatory letter/circular dated 6-4-2009.

A show cause notice dated 17-9-2010, was accordingly issued to the petitioners proposing to deny considering effective rate of Additional duty of Customs under Section 3(1) of the Customs Tariff Act as Nil under Notification No. 50/2003-C.E., dated 10-6-2003 on the ground that such exemption notification is not applicable to 100% 'EOU', as such, for the clearance effected to 'DTA', differential amount of Central Excise Duty, for the period July, 2009 to June 2010 was demanded along with interest, thereby, proposing to penalize the petitioners.

14. The petitioners challenged the clarificatory letter/circular dated 24-9-2010 by way of filing a Writ Petition No. 5/2011 (*M/s. Satya Metals & Another v. Union of India & Others*) and the same was disposed of by this Court (D.B.) at the admission stage vide order dated 4-1-2011 with following directions :-

"In the event of petitioners making an appropriate representation before the third respondent within a period of 2 weeks from today, the same shall be duly considered by the third respondent. In case, the petitioners request for opportunity for hearing, the same shall also be granted. Thereafter, the third respondent shall pass a reasoned order adverting to the submissions made in the representation, within another two months. We make it clear that in the nature of the order we have passed, as above, we have not adverted to the contentions taken by the petitioners before us and all those contentions are left open. We also make it clear that it will be open to the petitioners to move the Directorate General of Export Promotion for appropriate interim arrangement in the meanwhile, in which case appropriate orders in this regard be also passed during the pendency of the matter before the Directorate General of Export Promotion."

15. In reference to the above directions of this Court, a representation was preferred before 'DGEP', *inter alia* on many other grounds contending mainly as follows :-

- (a) Benefits of Notification No. 50/2003-C.E., shall apply qua DTA clearances made by 100% EOU units.
- (b) Proviso to Section 5A of 'Act' cannot operate as a bar for availing exemptions for 'DTA' clearances by 100% EOU.
- (c) Letter/circular dated 24-9-2010 is contrary to judgments of Hon'ble Supreme Court.
- (d) Calculation of 'CVD' could only be at the effective rate applicable to a domestic unit.
- (e) Power to issue clarifications is beneficial power and can be exercised only to mitigate the rigour of law and cannot be used to direct adjudication against the petitioners.
- (f) Basis of letter dated 24-9-2010 is incorrect as same has been issued by way of change in opinion which does not detract from the reasoning given in the earlier clarifications, namely, 18-1-2008 and 6-4-2009.
- (g) Benefit of Central Excise notifications which contain end-use conditions apply to a 100% EOU.
- (h) Area Based exemption has to be read with the industrial policies of the centre & state.

However, vide order No. 1/2011, dated 17-3-2011 the 'DGEP', rejected the representation of the petitioners thereby upholding the clarificatory letter dated 24-9-2010 as valid. Such order dated 17-3-2011 of 'DGEP' is under challenge in the writ petition.

16. Following submissions have mainly been advanced for and on behalf of respondents for denying the benefit of Notification No. 50/2003-C.E., dated 10-6-2003 in DGEP Order No. 1/2011, dated 17-3-2011 in respect of calculating - Additional Duty of Customs under Section 3(1) of the Customs Tariff Act, 1975 :-

- A. The duty of Central Excise, for the clearances effected in DTA by 100% 'EOU', only has to be calculated on the basis of aggregate duty of Customs which would be leviable under the Customs Act, 1962 or any other law for the time being in force on like goods produced or manufactured outside India, if imported into India.
- B. As per Section 3(1) of the Customs Tariff Act, 1975 the Additional Duty of Customs required to be taken into consideration, should be equal to the excise duty for the time being leviable on a like articles if produced or manufactured in India.
- C. Any exemption notification under Section 5A of the 'Act', would not be applicable to an 'EOU' unless it is specifically provided in the notification. The proviso to Section 5A of the 'Act', states so in view of the fact that 'DTA' clearances from 'EOU' are charged to duties of excise under Section 3 of 'Act'. The proviso to Section 5A has been added so as to bar the direct applicability of Central Excise notification of 'EOU', unless specifically provided, through such exemptions, subject to fulfilment of prescribed conditions need to be considered while computing 'CVD'.
- D. The wording "like articles produced or manufactured in India" appearing in Section 3(1) of Customs Tariff Act, 1975 are therefore, not with reference to articles manufactured by the 100% 'EOU' because Section 3(1) of Customs Tariff Act, 1975, does not apply directly to goods manufactured by a 100% 'EOU'. Section 3(1) of Customs Tariff Act, 1975, applies to 100% 'EOU' only through the proviso to Section 3 of the 'Act'. Recourse has to be made to Section 3(1) of Customs Tariff Act because Additional Duty is one of the duties of Customs leviable on like goods when imported into India. The quantification of duty is therefore to be done with reference to like goods manufactured outside India and not with reference to goods manufactured by the 100% 'EOU'. The benefit of area based exemption cannot be extended in such cases.

- E. Even assuming that the benefit of the general exemptions, subject to fulfilment of the conditions can be extended, the area based exemptions area totally different, as these are not general exemption but are of a limited nature applicable only to a limited area. Such exemption cannot be allowed while computing 'CVD' on any imported goods. Explanation 1 to the proviso to Section 3 of 'Act', in case the duty of Customs is leviable at two rates, it shall be deemed to be leviable at higher of the two rates. Therefore, even if it is accepted that there are two rates of 'CVD' leviable, one is the exemption rate in case like goods are manufactured in the specified areas entitled for area based exemption and the second rate is the rate applicable on the like goods manufactured elsewhere in the country, as such, the higher rate would be applicable under explanation 1 to the proviso to Section 3 of the 'Act' read with the provisions of Section 3(1) of the Customs Tariff Act, 1975, while discharging 'CVD' on 'DTA' clearances.
 - F. Being a 100% 'EOU', the petitioner unit is entitled to bring the raw material and capital goods without payment of customs and excise duties. Extending further benefit of Notification No. 50/2003-C.E. would create the disparity in reference to other manufacturers and importers in areas outside specified exempted areas.
 - G. The clarification issued by 'DGEP' on 24-9-2010 is explanatory in nature indicating correct legal position and the judgments referred for and on behalf of the petitioners are not applicable in the present case.
 - H. While calculating the duty liability on clearances made by 100% 'EOU', located in areas entitled for area based exemptions, the benefit of such exemptions are not available for the purpose of calculation of 'CVD'.
 - I. The 'EOU' scheme permits the unit to clear its own manufactured goods in the Domestic Tariff Area on payment of duty which is the aggregate of duties of Customs and Central Excise leviable on same goods as if these are being imported into India.
 - J. New industrial policy for the State of H.P. was introduced by the Ministry of Commerce in January, 2003 and the basic objective of the scheme has been to promise industrialization in the State of H.P. The scheme provides for full exemption from duties of Central Excise to the industrial units established in the specified areas of the State after introduction of such policy. This scheme has been notified by Notification No. 50/2003-C.E., dated 10-6-2003 and this exemption scheme is distinct from the 'EOU' scheme.
 - K. The Central Excise duty as per Section 3 of the 'Act', read with Section 3 of the Customs Act, is the aggregate of Customs and Central Excise duties that are leviable on like goods if they were to be imported into India. The applicable rate of duty will be determined on the basis of the rates specified in the Central Excise Tariff and in any notification, if applicable in the specified situation.
 - L. A plain reading of Notification No. 50/2003-C.E., dated 10-6-2003 clearly shows that the same is not applicable to the 'EOU'.
 - M. The principle of promissory estoppel does not apply in the present case.
 - N. The expression "specifically provided" incorporated in the proviso of Section 5A(1) of the 'Act', indicates that any exemption granted by way of any notification under Section 5A(1) shall not automatically apply to the 'DTA' clearances effected by the petitioners by taking benefit of Notification No. 50/2003-C.E., dated 10-6-2003 as amended from time to time.
 - O. In addition to the above submissions Sh. Sandeep Sharma, learned Assistant Solicitor General, Sh. Manoj Arora, Addl. DGEP, Delhi also submitted that although any Central Excise notification issued under Section 5A of the 'Act', granting exemption, whether unconditionally or conditionally, subject to compliance of the conditions laid down, therein, the notification could be considered for finding effective rate of duty for calculating Additional Duty of Customs under Section 3(1) of the Customs Tariff Act, 1975 but Area based exemption notification (whether Notification No. 50/2003-C.E. or like such notification) could not be made applicable and further, it was never intended to extend such benefit to 100% EOU units clearing their products to 'DTA'. According to him the 100% EOU was otherwise availing several other benefits granted under the Foreign Trade Policy (FTP). Extending any benefit of area based exemption to the petitioner unit may create disparity vis-à-vis other units in as much as 100% EOU i.e. petitioner unit becomes entitled for double benefits.
17. On behalf of State of Himachal Pradesh/respondent No. 2, it has been fairly submitted that the State of H.P. has no objection in extending benefit of Notification No. 50/2003-C.E. to the petitioners being 100% EOU.
18. On the other hand following submissions have been made by the petitioners :-
- (a) Section 3 of the 'Act', is the main provision for levy and collection of Central Excise duty on excisable goods, manufactured or produced in India excluding special economic zone. This means that except for special economic zones, specified by Government of India, all other areas are considered as part of India to which Section 3 of the Central Excise applies.
 - (b) For collection and levy of Central Excise duty, the clearances effected by 100% 'EOU' unit, based in India has also to pay the Central Excise duty but the yardstick of such calculation of Central Excise duty is based on working out of the amount aggregated duties of Customs under the Customs Act, 1962, for the time being leviable under such Act and by considering deeming as if like goods have been produced outside India, and imported into India.
- There is an explanation annexed to the said provisions which lays down that where any duty of customs leviable in respect of any such like goods, is at different rates, then such duty shall for the purposes of proviso to section 3 shall be deemed to be leviable at the highest of those rates.
- The above provisions for the purpose of levying customs duty under the Customs Act, 1962 deeming considered that rate of customs duty/duties have to be arrived at as if the goods have been produced outside India and brought from such place to India.
- (c) From the order dated 17-3-2011 of DGEP and para 23.1.2 of the same, it appears that aggregate duties of customs involve and include only the following duties :-
 - (a) Basic customs duty under Section 12 of the Customs Act, 1962
 - (b) Additional duty of customs under Section 3(1) of the Customs Tariff Act, 1975.

- (c) Other customs duties like SAD, Special Customs duty etc.

Thus, the Central Excise duty payable or paid by 100% 'EOU' only becomes complete and proper where the total of element of basic customs duty, Additional Customs duty (CVD) under Section 3(1) of the Customs Tariff Act, 1975 and other customs duties are taken. In the present case, there is no dispute that out of the three components of customs duty, referred, the petitioners have duly complied with payment of Basic Customs duty and other duties of customs including Additional duties of customs, however, the case of the department is that one of the components i.e. the additional duty of customs under section 3(1) of the Customs Tariff Act, 1975 has not been properly calculated for working out the aggregate duties of customs. It is on such account that the show cause notice was issued for differential duty and the demand.

- (d) Section 3(1) of the Customs Tariff uses the terms and becomes applicable where the article is imported into India. However, when it comes to charging Additional Duty (CVD) equal to the excise duty for the time being leviable on a like articles it only considers as if like articles produced or manufactured in India. The expression "the excise duty for the time being leviable on a like article if produced or manufactured in India" as per the explanation to Section 3(1) of the Customs Tariff Act, 1975 means the excise duty for the time being enforce which would be leviable on a like article if produced or manufactured in India. Since the goods in question as cleared in 'DTA' by the petitioner undisputedly has been manufactured in India, it is only required to be seen as to what would be the effective rate of duty on the goods in question if produced or manufactured in India and not with regard to the status and category of the manufacturer or importer.

- (e) The Constitution Bench of Hon'ble Supreme Court in case of *Hyderabad Industries Ltd. v. Union of India*, (1999) 5 SCC 15 = 1999 (108) E.L.T. 321 (S.C.) while determining the scope of the provision of Section 3(1) of the Customs Tariff Act, 1975 i.e. additional customs duty (CVD) leviable read with explanation "if produced and manufactured in India" has observed as under :

"10. Section 3(1) of the Customs Tariff Act, 1975 provides for levy of an additional duty. The duty is, in other words, in addition to the customs duty leviable under Section 12 of the Customs Act read with Section 2 of the Customs Tariff Act. Secondly this duty is leviable at a rate equal to the excise duty for the time being leviable on a like article to the one which is imported if produced or manufactured in India. The explanation to this sub-section expands the meaning of the expression "the excise duty for the time being leviable on a like article if produced or manufactured in India". The explanation to Section 3 has two limbs. The first limb clarifies that the duty chargeable under sub-section (1) would be the excise duty for the time being leviable on a like article if produced or manufactured in India. The condition precedent for levy of additional duty thus contemplated by the explanation is that the article is produced or manufactured in India. The second limb to the explanation deals with a situation where "a like article is not so produced or manufactured". (Emphasis supplied). The use of word "so" implies that the production or manufacture referred to in the second limb is relatable to the use of that expression in the first limb which is of a like article being produced or manufactured in India.

"11. The words "if produced or manufactured in India" does not mean that the like article should be actually produced or manufactured in India. As per the explanation if an imported article is one which has been manufactured or produced then it must be presumed, for the purpose of Section 3(1), that such article can likewise be manufactured or produced in India. For the purpose of attracting Additional duty under Section 3 on the import of a manufactured or produced article the actual manufacture or production of a like article in India is not necessary. As observed by this Court in *Thermax Private Limited v. Collector of Customs, Bombay* [1992 (61) E.L.T 352 (S.C.) - (1992) 4 SCC 440] at page 452-453 that Section 3(1) of the Customs Tariff Act "Specifically mandates that the CVD will be equal to the Excise -Duty for the time being leviable on a like article if produced or manufactured in India. In other words, we have to forget that the goods are imported, imagine that the importer had manufactured the goods in India and determine the amount of Excise Duty that he would have been called upon to pay in that event." To our mind the genesis of Section 3(1) of Customs Tariff Act has been brought out in the aforesaid observations of this Court, namely, for the purpose of saying what amount, if any, of additional duty is leviable under Section 3(1) of the Customs Tariff Act, it has to be imagined that the articles imported had been manufactured or produced in India and then to see what amount of Excise-duty was leviable thereon."

"Para 15 even though the impost under Section 3 is not called a countervailing duty there can be little doubt that this levy under Section 3 is with a view to levy additional duty on an imported article so as to counter balance the excise duty leviable on the like article indigenously made. In other words Section 3 of the Customs Tariff Act has been in active to prove for a level playing field to present or future manufacturers of the like articles in India.

- (f) In another case of *Plastic Processors v. Union of India*, 2002 (143) E.L.T. 521 (Delhi), Delhi High Court while deciding the issue regarding levy of Additional Duty of Customs on Domestic Tariff Area (DTA) for sale of reprocessed plastic granules (reprocessed out of plastic scrap) by 100% 'EOU', has referred and relied upon the decision of Hon'ble Supreme Court in *Hyderabad Industries Ltd.* (supra) and High Court of Delhi has further observed that what has to be imagined is that the importer has manufactured the goods in India and then an amount of excise duty that he would have been called upon to pay in that event has to be determined. In this case there existed notification from Central Excise which laid down the plastic materials reprocessed in India out of scrap were exempted, such notification did not by name include 100% 'EOU'. The provisions of Section 5A of 'Act' were also considered in relation to 100% 'EOU' provision appearing in respect of exemption notification issued under 'Act'. The High Court considered that for 100% 'EOU' effecting clearance to 'DTA', the calculation of amount of Customs duty under Section 3(1) of the Customs Tariff Act, 1975 was in the nature of liability to pay 'CVD' equal to excise duty leviable on like article manufactured in India, therefore, where the effective rate of excise duty on the product is 'Nil' rate in any notification issued under the provisions of Central Excise, the same has to be adopted for calculation of 'CVD' vis-à-vis duty liability under Section 3(1) of the Customs Tariff Act, 1975. The decision of Delhi High Court in *Plastic Processors* (supra) was affirmed by Hon'ble Supreme Court in the matter reported as *Union of India & Others v. Plastic Processors & Others* (2009) 12 SCC 747 = 2005 (186) E.L.T. A27 (S.C.).

- (g) In another case of *Lucky Star International v. Union of India*, reported in 2001 (134) E.L.T. 26 (Gujarat) as affirmed by Hon'ble Supreme Court in the matter of *Union of India v. Lucky Star International* - 2002 (141) E.L.T. A90 (S.C.), the goods manufactured in the Export Processing Zone or 100% 'EOU' towards 'DTA' were liable to duties of excise equivalent to aggregate duties of customs, whereby, resolving the doubt arising regarding levy of Additional Duty of Customs (CVD) on 'DTA' sales as in terms of Notification No. 5/98-C.E. issued under the provisions of Central Excise thereby exempting such goods.

On behalf of Union of India it was mainly contended that the exemption could not be claimed in view of the provisions contained in Section 5A of the 'Act', whereas, on behalf of M/s. Lucky Star International it was contended that they were being denied their liability to pay countervailing duty under Section 3(1) of the Customs Tariff Act in view of the fact that such goods were manufactured in India and were not liable to pay any excise duty. Relying on its earlier decision in *Hyderabad Industries Ltd.* (supra), Hon'ble Court approved that one has to assume that the importer has actually manufactured the goods in India and thereby to see the amount of excise duty which he would have paid, since the products involved in such case were exempted under an excise notification, as such, the benefit of the same was allowed for calculating the amount of customs duty under Section 3(1) of the Customs Tariff Act, 1975.

- (h) The petitioners have manufactured the goods in the specified area of Himachal Pradesh, where, the provisions of Notification No. 50/2003-C.E., dated 10-6-2003 grants absolute exemption from payment of Central Excise duty and where such notification has been issued under Section 5A of the 'Act', applying the principle laid down by Supreme Court in *Hyderabad Industries Ltd.* (supra) and other decision *Plastic Processors* (supra) and *Lucky Star International* (supra), the amount of Customs duty under Section 3(1) of the Customs Tariff Act, 1975 has only to be calculated by taking into consideration as to what would be the effective rate of excise duty where the importer has manufactured the goods in specified area of Himachal Pradesh, which indeed, is an integral part of India and the petitioners otherwise qualify all the conditions of the Notification No. 50/2003-C.E. and therefore, the effective rate would be 'NIL' rate as Additional Duty of Customs under Section 3(1) of the Customs Tariff Act, 1975. Not only the exemptions granted under various excise notifications, in relation to 'DTA' clearance by 100% 'EOU', but also even the clarificatory letters of DGEP, dated 18-1-2008 and 6-4-2009 at least confirm the view of the Board that there is no bar in applying effective rate of Central Excise duty of various exemption notifications of Central Excise issued under Section 5A of 'Act' either unconditionally or conditionally, subject to compliance of the conditions, on clearances effected to DTA by 100% 'EOU' under Section 3(1) of the Customs Tariff Act, 1975. There is no provision under the 'Act' and the Rules framed therein, which restricts applicability of exemption granted through Central Excise notifications for calculation of amount of Customs duty under Section 3(1) of the Customs Tariff Act, 1975. More so, even the impugned order dated 17-3-2011 also accepts that 'CVD' under section 3(1) of the Customs Tariff Act needs to be calculating by taking into account any exemption notification applicable to such goods when manufactured in India.
- (i) The clarification as appearing in clarificatory letters dated 6-4-2009 and 18-1-2008, have not been diluted by any finding in the impugned order dated 17-3-2011 of 'DGEP'. So much so, no reasoning has been given in the said impugned order to differ clarifications earlier appearing in both letters dated 18-1-2008 and 6-4-2009, meaning thereby, clarifications highlighted through letter dated 6-4-2009 of DGEP, explaining the intention of using the expressions "specifically provided" in Section 5A of 'Act' is valid.
- (j) The Notification No. 50/2003-C.E., dated 10-6-2003, has been issued in reference to O.M. dated 7-1-2003 which contains the type of industry and the negative list in respect of the products besides indicating the specified areas which were eligible for providing tax incentives including 100% Excise duty exemption where any unit undertakes manufacturing, as such, the scope of Notification No. 50/2003-C.E., in providing negative list has not to bar the entry of 100% 'EOU' for obtaining its benefits under the provisions of law, more so, when petitioner unit squarely meets all the conditions laid down in the said notification for seeking the benefits.
- (k) On the issue that there exists no, two rates of customs duty for goods manufactured in the specified area of Himachal Pradesh, the decision of *Goodyear India Ltd. v. Collector of Customs, Bombay* (1997) 2 SCC 582 = 1997 (90) E.L.T. 7 (S.C.) is referable where Hon'ble Supreme Court while interpreting Section 3(1) of the Customs Tariff Act read with the explanation to such provision has observed that where commodity/goods are in fact manufactured in India, then there is no sanction under the said provision to adopt highest rate of duty. In the State of Himachal Pradesh where any unit complies with all the conditions of Notification No. 50/2003-C.E., dated 10-6-2003, there exists only one rate of excise duty which as per Section 3(1) of the Customs Tariff Act, 1975 would only be the Additional Duty of Customs. As per section 5(1A) of the 'Act', there is no option provided to the manufacturer to come out of exemption when all conditions of Notification No. 50/2003-C.E. have duly been complied on record.
- (l) As regards the assertion of the respondents that by applicability of Notification No. 50/2003-C.E. to the petitioners, disparity would result in a non level playing field against other manufacturers. It is pertinent to mention that the benefits granted under 'FTP' cannot become a ground for such disparity and even Hon'ble Supreme Court in *Hyderabad Industries* case (supra) has not observed so, more so, the observations of Supreme Court are only limited to payment of excise duty. In fact in the impugned order dated 17-3-2011, the 'DGEP' has failed to appreciate that the petitioners are paying basic Customs duty on their clearance to 'DTA' while other manufacturers in the State of Himachal Pradesh complying with Notification No. 50/2003-C.E. are not paying any such Basic Customs duty and rather clearing the goods at NIL rate of excise duty. Further, as per the provisions of FTP a 100% 'EOU' unit has to earn net foreign exchange for the country while such condition does not apply to other manufacturers.

19. Following submissions have also been made for and on behalf of the respondents :-

- (i) The impugned final order fails to appreciate that the petitioner unit has two independent status, one as a 100% EOU and the other as a unit set up in a specified area mentioned in Notification 50/2003-C.E.

- (ii) The petitioners have independently fulfilled the conditions of eligibility of both the 100% EOU Scheme as well as the conditions of eligibility specified in Notification 50/2003-C.E.
- (iii) The purpose of the 100% EOU Scheme is to encourage exports and the purpose of the New Industrial Policy pursuant to which Notification 50/2003-C.E. has been issued to attract investment and employment in backward areas of State of Himachal Pradesh. The petitioners have independently fulfilled both these objectives and the benefits of the two schemes independently are to be made available to the petitioners.
- (iv) Notification 50/2003-C.E. has been issued pursuant to the New Industrial Policy issued on 7-1-2003. The state industrial policy includes in its ambit, the excise concessions even to 100% EOU, this means that the very intention for issuance of Notification No. 50/2003 of the government is to include and cover 100% EOU in Notification No. 50/2003.
- (v) The intention of the government cannot be overlooked while interpreting the fiscal statute/exemption notifications in reference to the decision in *Oswal Agro Mills Ltd. v. Collector of Central Excise* (1999) Suppl. (3) SCC 716 = 1993 (66) E.L.T. 37 (S.C.).
- (vi) The respondents have failed to appreciate that in terms of Notification 50/2003-C.E., it applied to "any" unit which was set up in the specified area, if the unit fulfilled the conditions specified in the notification, as such, there could be no question of denying the benefit of that notification to the unit. The use of the word "any" unit would cover within its ambit a 100% EOU unit also and the assumption that the exemption notification does not contain a reference to 100% EOU-unit is erroneous.
- (vii) The doctrines of promissory estoppels and legitimate expectations fully apply to the facts of the present case as the petitioners' unit had already affected the position by setting up its 100% EOU unit by relying on the representation of the respondents and after having incurred such huge investments, the petitioners' rights cannot be defeated by withdrawal of the clarification dated 6-4-2009 in view of the settled law that in order to invoke the doctrine of promissory estoppel it was enough to show that in reliance to the promise of the Government the petitioners have altered their position (*Motilal Padampat Sugar Mills Co. Ltd. v. State of UP & Ors.*, (1979) 2 SCC 409).

20. After hearing learned counsel for the parties and analyzing the pleadings of the petitioners and rival contentions of the respondents, following aspects are being noted :-

- (a) The proviso to Section 5A of 'Act' cannot be taken as a bar in calculating 'CVD' for the purpose of computing the duties payable by a 100% EOU unit while making DTA clearances, stands settled by the judgment of the Delhi High Court in the case of *Plastic Processors v. Union of India* - 2002 (143) E.L.T. 521 (Del.) which has expressly been upheld by the Hon'ble Supreme Court in *Union of India & Others v. Plastic Processors & Others* - (2009) 12 SCC 747 = 2005 (186) E.L.T. A27 (S.C.).
- (b) Only the effective rate of duty applicable to the goods cleared by the domestic unit can be applied for computing the CVD payable. The respondent's impugned actions are contrary to the settled position of law on the issue by the Supreme Court in *Hyderabad Industries Limited* (supra) and *Thermax Private Limited* (supra), where the Hon'ble Supreme Court has observed that while calculating CVD it has to be assumed that the goods were manufactured in India and the applicable rate of duty to such manufactured goods has to be applied to the imported goods. The effective rate of excise duties for a unit located in the specified area mentioned in 50/2003-C.E. is Nil and it is this rate alone which can be applied for the purpose of calculating 'CVD' in terms of the observations of the Hon'ble Supreme Court. The impugned order dated 17-3-2011, therefore, being contrary to the law laid down by the Hon'ble Supreme Court is liable to be quashed.
- (c) Both sides have heavily referred to the provisions of Section 5A of 'the Act' for projecting their case. The petitioners have all along been submitting that for calculating Additional Duty of Customs under Section 3(1) of the Customs Tariff Act, 1975, there is no bar to consider benefit of Notification No. 50/2003-C.E., whereas, contrary to this, the respondents have drawn the attention of this Court to the expression "specifically provided" appearing in the proviso to the Section 5A(1) of the 'Act' and has submitted that Area based Central Excise Exemption notification does not specifically include 100% 'EOU' unit.
- (d) On analyzing of Section 3 of the 'Act' and which is the basic provision for levy and collection of the Central Excise duty on the goods, other than Special Economic Zones, produced or manufactured in India following aspects appear :-
 - (i) Towards the goods manufactured or produced, other than 100% EOU, attract the rate of duty set forth the first schedule of the Central Excise Tariff Act, 1985 (5 of 1986) and also special duty of excise at the rate set forth in the second schedule to the Central Excise Tariff, 1985.
 - (ii) Specific provision for levy and collection of excise has been laid down for 100% 'EOU' when brought the excisable goods to any other place in India and thereby indicates that such amount of excise duty should be equal to aggregate duty of Customs which would be leviable under the Customs Act, 1962 or any other law for the time being in force on like goods produced or manufactured outside India if imported into India. Explanation 1, states that where any duty of Customs for the time being is leviable at different rates than such duty, for the purpose of the proviso of Section 3 of the 'Act' shall be deemed to be leviable at the highest of those rates.
 Reading of Section 3 of 'Act' it appears that for 100% 'EOU' effecting clearances to DTA, it requires only to work out the aggregate of the duties of Customs which would be leviable under the Customs Act, 1962 or any other law for the time being in force as becomes applicable on the goods produced outside India and imported therefrom. It is such collection of aggregate duty of Customs leviable under the Customs Act, 1962 which would be considered appropriate for payment as excise duty by 100% 'EOU'.
 - (iii) It is also evident from the impugned order dated 17-3-2011 of 'DGEP' that the duties of customs leviable on the goods imported into India are as under :-
 - (a) Customs duty under Section 12 of the Customs Act, 1962

- (b) Additional duty of customs under Section 3(1) of the Customs Tariff Act, 1975.
- (c) Special Additional Duty etc.

The basic Customs duty under Section 12 of the Customs Act, 1962 have already been paid by the petitioners on effecting clearances to DTA and thereby discharging one of the their liabilities required for working out the aggregate duties of Customs under Section 3 of the 'Act'.

The provisions of Section 3(1) of the Customs Tariff Act, 1975 requires that for determining the said duties of Customs, it has to be equal to the excise duty for the time being leviable on a like article if produced or manufactured in India. The expression "the excise duty for time being leviable on a like article if produced or manufactured in India" means the excise duty for the time being in force which would be leviable on a like article if produced or manufactured in India. Therefore, it is only for the purpose of calculation of Additional Duty of Customs under Section 3(1) of the Customs Tariff Act, 1975 that one is required to look and consider as to what would be the quantum of excise duty which the goods might have discharged by the importer.

In fact the provisions of Section 3(1) of the Customs Tariff Act, 1975 have already been considered including the scope of the said provision by Hon'ble Supreme Court in the matter of *M/s. Thermax Pvt. Ltd.* (supra).

21. In *Hyderabad Industries Ltd.* (supra), Hon'ble Supreme Court while affirming the observations regarding explanation of the scope of Section 3(1) of the Customs Tariff Act, 1975, made in *Thermax Pvt. Ltd.* (supra), thereby, para 11 of *Hyderabad Industries Ltd.* (supra) answers for working out the Additional Duty of Customs under Section 3(1) of the Customs Tariff Act.

22. During the course of hearing it was argued for and on behalf of the respondents, representing Union of India that the above decisions including the principle laid down for interpreting Section 3(1) of the Customs Tariff Act, are not applicable to the case of the petitioners, however, such bare assertion is not sufficient. Neither the impugned order dated 17-3-2011 of 'DGEP', nor during hearing the above decisions, have not distinguished in respect of the principle laid down by Hon'ble Supreme Court. The finding in the order dated 17-3-2011, by referring the case of *Hyderabad Industries* (supra) being more towards extending benefits of Area based exemption to the petitioners would create disparity and thereby shall hit the local industry. Therefore, the Additional Duty of Customs under Section 3(1) of the Customs Tariff Act, 1975 needs only to be determined as if the petitioner produced the goods in Himachal Pradesh and his unit, being covered well within in India and thereby to work out the excise duty which he would have paid. Such duty paid would only be the Customs duty under Section 3(1) of the Customs Tariff Act. It is only for the purpose of calculation of Additional Duty of Customs that they have to consider, the element of excise duty leviable on like goods produced or manufactured in India. Therefore, the liability to discharge only Additional Duty of Customs i.e. one of the component of aggregate duty of Customs under Section 3 of the 'Act', by considering the excise duty for the time being in force on a like article if produced or manufactured in India.

23. After analyzing the provisions of Section 3 of the 'Act', and Section 3(1) of the Customs Tariff Act, 1975, the next issue for dispute is as to what would be the effective rate of excise duty leviable on a like kind of goods, if produced in India. The whole debate here requires consideration of Section 3(1) of the Customs Tariff Act, 1975. It is undisputed that Notification No. 50/2003-C.E., dated 10-6-2003 for the State of Himachal Pradesh, like Notification No. 56/2002-C.E., dated 14-3-2002 for the State of Jammu & Kashmir, both known as Area Based Exemption Notifications under Central Excise issued by the Central Government under the provisions of Section 5A of the 'Act'. The claim of the petitioners that their unit squarely falls within the specified area of Notification No. 50/2003-C.E., dated 10-6-2003 is not disputed. The petitioners further claim that the excisable goods manufactured by them even do not fall in the negative list annexed to the said notification and further the petitioner unit is a new industrial unit started after 7-1-2003. The petitioners also filled their declaration with the Assistant Commissioner of Central Excise, Shimla and thereby complying with the conditions of the notification for claiming exemption for the purpose of calculating Additional Duty of Customs under Section 3(1) of the Customs Tariff Act, 1975. This notification is applicable to any unit because of use of expression "a unit" appearing in main para of the notification and the scope of extending the benefit is therefore applicable for discharging their liability to pay Additional Duty of Customs under Section 3(1) of the Customs Tariff Act for clearances effected to 'DTA' by a 100% 'EOU'.

To support their above claim, the petitioners relied on the O.M. dated 7-1-2003. In the said O.M. it was declared by the Government of India to grant 100% excise duty exemption for a period of 10 years from the date of commencement of commercial production to the new industries and thereby also declaring state of Himachal Pradesh being the special category state including State of 'Uttanchal'. In view of such background of the said declaration, the respondents have also not denied that Notification No. 50/2003-C.E., dated 10-6-2003 has been issued to serve the basic objective of the new industrial policy for the State of Himachal Pradesh introduced by the Ministry of Commerce on 7-1-2003. The petitioners in support of their claim that 100% 'EOU' are included in New Industrial Policy of Ministry of Commerce, Government of India has also relied on the state industrial policy of Government of Himachal Pradesh and the Rules regarding grant of incentives, concessions and facilities to industrial units in Himachal Pradesh, 2004. Undisputedly, such policy of state and the Rules framed by the state in the year 2004 were in compliance of O.M. dated 7-1-2003.

24. For calculation of excise duty payable by a 100% 'EOU', the provisions of Section 5A of the Central Excise Act had been so enacted so that the provisions of Section 3 of the 'Act' do not become redundant. It is for such reason that the expression "specifically provided" was introduced in the Proviso to Section 5A(1) of the 'Act'. Quite obviously any exclusive benefit of Central Excise exemption notification for a 100% 'EOU' cannot be made applicable particularly when the duties have to be determined by way of aggregate duty of Customs leviable under the Customs Act, 1962.

25. The 'DGEP' in their Circular No. DGEP/EOU/221/2007, dated 18-1-2008 and in circular of even no. dated 6-4-2009, while providing their clarifications in extending even benefit of area based exemption notification to 100% 'EOU' in calculating the additional Customs duty under Section 3(1) of the Customs Tariff Act, 1975 (CVD), considered the provisions of Section 5A of the 'Act', Section 3(1) of the Customs Tariff Act, 1975, and thereby explained the scope of the expression "SPECIFICALLY PROVIDED" in Section 5A of the Central Excise Act, 1944.

26. There is otherwise no bar in Area based exemption notification, referred above for 100% 'EOU' for calculation the Additional Duty of Customs under Section 3(1) of the Customs Tariff Act, 1975. It is only by discharging the liability to pay the Additional Duty of Customs and which is equal to excise duty leviable on like goods when produced in India that such exemption notification has been considered. It is by way of specific provision of Section 3(1) of the Customs Tariff Act,

1975 that Area based exemption can be considered for finding about the excise duty on like goods chargeable when produced in India. Moreover, the order dated 17-3-2011 of DGEP while upholding DGEP clarification dated 24-9-2010 does not dispute the reasoning appearing for the expression "specifically provided" in Section 5A of the 'Act', as appearing in letters dated 18-1-2008 and 6-4-2009. In fact the judgments of Hon'ble Delhi High Court in the case of *Plastic Processors*, as well as judgments of Gujarat High Court in the case of *Lucky Star International* (supra), were confirmed by Hon'ble Supreme Court, showing that for extending benefit of Central Excise exemption notification, the provisions of Section 5A(1) and its Proviso under the 'Act', were duly considered, hence the objection raised by the Government of India towards the expression "specifically provided" does not carry any force as a 100% 'EOU' unit only discharges his liability for payment of Additional Duty of Customs under Section 3(1) of the Customs Tariff Act by considering effective rate of excise duty provided under the Central Excise exemption notification and by doing so it is only discharging his liability for payment of Customs duty.

27. The plea of the respondent/Union of India that excise exemption notification is not applicable for calculating the Additional Duty of Customs, otherwise cannot be sustained particularly when the clarification letters dated 18-1-2008, 6-4-2009, 24-9-2010 and even order dated 17-3-2011 does not dispute that for calculating Additional Duty of Customs under Section 3(1) of the Customs Tariff Act, 1975, Central Excise exemption notification, unconditionally or conditionally, on satisfaction of the conditions can be considered for calculating Additional Duty of Customs. In the present case the petitioners undisputedly comply with all the conditions laid down in Area based exemption notification of Central Excise and therefore, where there is no bar in such notification for 100% 'EOU' to take benefit. There is no justification or logic to stop such free flow, so long, as it is not disputed that State of Himachal Pradesh is integral part of India, wherein the specified areas are located, where petitioner unit is established, as such, the applicability of such notification in question to the petitioners is also justifiable.

The petitioners have drawn my attention to Section 5A(1A) of the 'Act' to justify that where the effective rate of excise duty, for the units located in the specified areas of Himachal Pradesh manufacturing the goods other than the negative list is absolutely exempted, such rate is binding. The provisions of Section 5A(1A) does not allow the manufacturer complying with the conditions of the area based exemption notification and claiming thereto to opt out. There thus exist only one rate i.e. NIL rate of duty. In fact the circulars of 'DGEP' and impugned order dated 17-3-2011 does not bar the applicability of Central Excise exemption notification for calculating Additional Duty of Customs under Section 3(1) of the Customs Tariff Act, 1975, as such, the impugned order dated 17-3-2011 is legally not sustainable.

28. The order dated 17-3-2011 refers to there being two rates of duties under Section 3(1) of the Customs Tariff Act, 1975. The concept of two rate of duties under Section 3(1) of the Customs Tariff Act applies where the goods are not being produced in India in the State of Himachal Pradesh, whereas, the issue of charging highest rate of duties when chargeable has already been settled by Hon'ble Supreme Court in the case of *Good Year India Limited v. Collector of Customs, Bombay*, (1997) 2 SCC 582 = 1997 (90) E.L.T. 7 (S.C.). Relying on the said decision, the effective rate of duty would be NIL rate for calculating the Additional Duty of Customs.

29. Regarding contention of the respondent/Union of India that extending benefits of Area base Central Excise notification to the petitioners may create disparity vis-à-vis other manufacturers who are not 100% 'EOU', it may be seen that when the benefits are provided under Foreign Trade Policy to the 100% 'EOU', can bring raw material and capital goods without payment of Customs and excise duty. As such the petitioner unit cannot be compared with other manufacturers regarding granting of benefit. In this connection it can't be ignored that by benefit granted under FTP, a 100% 'EOU'/the petitioner unit is accountable for the earning of net foreign exchange (NFE) for the country unlike other manufacturers. Moreover, the petitioners are paying basic Customs duty under Section 12 of the Customs Act, 1962, whereas, other manufacturers while functioning in the State of H.P. though are claiming benefits of area base exemption but are not paying such Customs duty. The Central Government has consciously and intentionally provided the tax incentive benefit including 100% excise duty exemption to the special category State of Himachal Pradesh, as such, any disparity with other manufacturer of India, located in different parts, shall not be created.

30. In view of aforesaid analysis and reasoning, in my considered view, the submissions advanced for and on behalf of the petitioners is full of force and since the issue in question relating to determination of Additional Duty of Customs (CVD), chargeable under Section 3 of the Customs Tariff Act, 1975 and applicability of exemption Notification No. 50/2003-C.E., regarding goods clearances in DTA by 100% EOU unit i.e. the petitioners, is already settled by Hon'ble Supreme Court in *Hyderabad Industries Ltd.* (supra) by following and affirming its earlier verdict in *Thermax Pvt. Ltd.* (supra). In my considered view the issue is no more *res integra* in view of the verdict of the Constitution Bench of the Hon'ble Supreme Court in *Hyderabad Industries Ltd.* (supra), as such, the impugned order dated 17-3-2011 passed by 'DGEP'/i.e. respondent No. 3 is set aside and writ of mandamus is being issued directing the respondents to allow benefit of exemption Notification No. 50/2003-C.E., dated 10-6-2003 to be given to the petitioners and further direction is being issued not to demand differential excise duty from the petitioners consequent upon setting aside the order dated 17-3-2011 of DGEP and all connecting proceedings initiated against the petitioners shall also stand set aside. As such, the petitioners are entitled to the benefit of exemption Notification No. 50/2003-C.E., dated 10-6-2003 and also entitled for making goods by way of DTA clearances from the petitioner unit in reference to the aforesaid exemption notification.

31. Therefore, the writ petition is allowed, however, without any cost. Accordingly, the pending application(s) are also disposed off.