Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench at Ahmedabad

REGIONAL BENCH-COURT NO. 3

Excise Appeal No. 10070 of 2024 – DB

[E/STAY/10035/2024]

[E/CROSS/10359/2024]

(Arising out of Order in Appeal RAJ-EXCUS-000-APP-059-2024 dated 05/02/2024 passed by Commissioner (Appeals) CGST, Rajkot)

Commissioner Appeals –
CGST & Central Excise Rajkot **.....Appellant**
2nd Floor, "Central GST Bhavan",
Race Course Ring Road,
Rajkot, Gujarat-360001

VERSUS

M/S. RELIANCE INDUSTRIES LTD,
UNIT OF RSEZ JAMNAGAR **.....Respondent**
Village: Meghpar Padana, Moti-Khavdi,
Taluka: Lalpur, District: Jamnagar,
Gujarat-361280

APPEARANCE:
Shri Jeetesh Nagori, Commissioner (AR) appeared for the Appellant
Shri J C Patel, Advocate, Shri Vishal Agarwal, Advocate, Ms. Silpa Balani, Advocate, Mrs. Dimple Gohil, Advocate and Shri Arvind Bhansali, Senior Ex. Vice-President appeared for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. RAJU

Final Order No.11781/2024

DATE OF HEARING: 08.04.2024
DATE OF DECISION:14.08.2024

RAMESH NAIR

The principal issue in the present appeal is whether goods manufactured and exported by the Respondent viz. Reliance Industries Limited, a unit in the Reliance Jamnagar Special Economic Zone (SEZ) were subject to the levy of the following duties:

a) Special Additional Excise Duty (SAED) levied as a Surcharge under Section 147 of the Finance Act 2002 and
b) Additional duty of Excise (AED) levied as Road and Infrastructure Cess under Section 112 of the Finance Act 2018.

1.1 The brief facts of the case are that Respondent is a SEZ unit in Reliance Jamnagar SEZ. In the said SEZ, the Respondent manufactures Motor Spirit (MS), High Speed Diesel (HSD) and Aviation Turbine Fuel (ATF) which fall under Sub-Headings 27101241, 27101944 and 27101939 respectively of the Fourth Schedule to the Central Excise Act 1944.

1.2 The said goods manufactured in a SEZ are excluded from the charge of Excise Duty (Central Value Added Tax) levied under Section 3 (1) of the Central Excise Act 1944, which reads as follows:

> *"3. (1) There shall be levied and collected in such manner as may be prescribed 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 Fourth Schedule"* (emphasis supplied)

1.3 Since goods manufactured by the Respondent in SEZ unit are excluded from the charge of the Excise duty levied under said Section 3(1), the Respondent was not paying such Excise duty on the MS, HSD and ATF manufactured by the Respondent SEZ unit and removed from the SEZ by way of export.

1.4 Further, since the Surcharge (SAED) and the Road and Infrastructure Cess (AED) levied under Section 147 of the Finance Act 2002 and Section 112 of the Finance Act 2018 respectively, are in the nature of additional duties of excise i.e. by way of increase in the basic excise duty charged under said Section 3(1), the Respondent holds the view that the goods manufactured in SEZ being excluded from the said charge of basic excise duty, the same are also outside the purview of the said Surcharge and Cess. It is the Respondent's view that the said Surcharge and Cess, which are in the nature of increment in the existing duty charged under said Section 3(1), cannot apply to goods manufactured in SEZ, since the same are excluded from the said basic charge under Section 3(1). Therefore, according to the Respondent the said Surcharge and Cess were not payable on the MS, HSD and ATF manufactured by the Respondent SEZ unit and removed from the SEZ by way of export.

1.5 The department, however, was of the view that the MS, HSD and ATF manufactured by the Respondent SEZ unit and removed from the SEZ by

way of export were liable to the said SAED (Surcharge) and AED (Cess) during the period 1-7-2022 to 19-7-2022, on the following grounds:

a) That with effect from 1-7-2022, Rule 19 of the Central Excise Rules 2017, which provided that any excisable goods may be exported without payment of duty subject to notified conditions, safeguards and procedure, was amended by Notification No.2/2022-CE (NT) dated 30-6-2022, to exclude from the scope of Rule 19, the goods viz. MS, HSD and ATF. According to the department, in view of the said amendment to Rule 19, the said goods, even when manufactured in and exported from SEZ cannot be cleared without payment of the SAED and AED.

b) That by Notification No.4/2022-CE dated 30-6-2022, partial exemption from SAED (Surcharge) in excess of Rs.5 per liter on MS and in excess of Rs.12 per liter on HSD, cleared for export, was granted with effect from 1-7-2022, in exercise of powers under Section 5A of the Central Excise Act 1944 read with Section 147 of the Finance Act 2002. Accordingly, with effect from 1-7-2022 the effective rate of SAED on MS and HSD manufactured and cleared for export was Rs.5 per liter and Rs.12 per liter respectively.

c) That by Notification No.5/2022-CE dated 30-6-2022, the SAED (Surcharge) on ATF was imposed at the rate of Rs.6/- per liter by amending the Eighth Schedule to the Finance Act 2002, by insertion of Sr. No.4 in the said Eighth Schedule. Accordingly, with effect from 1-7-2022, ATF became liable to SAED at the rate of Rs.6/- per liter.

d) That by Notification no.10/2022-CE dated 30-6-2022, partial exemption from AED (Road and Infrastructure Cess) in excess of Rs.1 per liter on MS and HSD, cleared for export, was granted with effect from 1-7-2022, in exercise of powers under Section 5A of the Central Excise Act 1944 read with Section 112 of the Finance Act 2018. Accordingly, with effect from 1-7-2022 the effective rate of AED on MS and HSD manufactured and cleared for export was Rs.1 per liter.

e) That by Notification No.19/2022-CE dated 19-7-2022, issued in exercise of powers under Section 5A of the Central Excise Act 1944 read with Section 147 of the Finance Act 2002 and Section 112 of the Finance Act 2018, SAED on MS, HSD and ATF and AED on MS and HSD, when exported from SEZ unit, were exempted with effect from 20-7-2022.

f) Based on the aforesaid provisions, the department was of the view that during the period 1-7-2022 to 19-7-2022, MS, HSD and ATF manufactured in an SEZ unit and cleared for export were liable to SAED (Surcharge) at Rs.5/- per liter, Rs.12/- per liter and Rs.6/- per liter respectively and that MS and HSD manufactured in an SEZ unit and cleared for export were liable to AED (Road and Infrastructure Cess) at Rs.1/- per liter.

1.6 In the Respondent's view, the aforesaid Notifications cannot in law, have the effect of making the MS, HSD and ATF manufactured in an SEZ unit liable to the said Surcharge and Cess levied respectively by Section 147 of the Finance Act 2002 and Section 112 of the Finance Act, 2018. The question whether the MS, HSD and ATF manufactured in SEZ are liable to the said Surcharge and Cess has to be determined with reference to the provisions of the said Sections 147 and 112 of the Finance Act, 2002 and 2018 respectively and not by reference to the said Notifications. It is evident from a plain reading of the said Sections 147 and 112 of the Finance Act, 2002 and 2018 respectively that the Surcharge and Cess levied there under are Additional Excise duties in the nature of increment in the existing Excise duty charged under Section 3(1) of the Central Excise Act 1944 and the provisions of the Central Excise Act 1944 relating to levy of Excise duty have been borrowed and applied to the levy of the said Surcharge and Cess. Consequently, when goods manufactured in SEZ are excluded from the very charge under Section 3(1), the same would also be outside the purview of the said Surcharge and Cess.

1.7 Accordingly, the Respondent by letter dated 4-7-2022 addressed to the Principal Commissioner of Central Excise, Rajkot informed him that they would be paying the said SAED (Surcharge) and AED (Road and Infrastructure Cess), UNDER PROTEST, on the MSD, HSD and ATF manufactured in their SEZ unit and cleared for export, with effect from 1-7-2022, while retaining their right to claim refund of the same. Further, by their letter dated 22-8-2022 (submitted on 23-8-2022), the Respondent informed the Assistant Commissioner of Central Excise, that the Respondent had on 6-8-2022, made such payment under protest, while retaining their right to claim refund of the same. The Respondent thereafter, on 1-8-2023 applied for refund of the said SAED (Surcharge) and AED (Road and Infrastructure Cess).

1.8 Show Cause Notice dated 3-10-2023 was issued by the Assistant Commissioner of Central Excise, Rajkot, proposing to reject the said refund application on the ground that SAED (Surcharge) and AED (Cess) were payable on MS, HSD and ATFwith effect from 1-7-2022 under the said Notification no.4/2022-CE dated 30-6-2022, Notification No.5/2022-CE dated 30-6-2022 and Notification no.10/2022-CE dated 30-6-2022 and that it was only with effect from 20-7-2022 that Notification No.19/2022-CE dated 19-7-2022 granted exemption from the SAED (Surcharge) and AED (Cess) to MS, HSD and ATF when exported from SEZ. The Show Cause Notice further contended that the SAED (Surcharge) and AED (Cess) had been self-assessed and paid by the Respondent and that the Respondent should have filed appeal against the same to the Commissioner (Appeals) and that since no such appeal was filed, the Respondent was not entitled to claim refund of the said SAED and AED.

1.9 The Respondent replied to and contested the said Show Cause Notice by their letter dated 13-10-2023, *inter alia* submitting as follows:

a) That the levies of the Surcharge and Cess by the two Finance Acts in question, if viewed in isolation on standalone basis, lack certainty and completeness in respect of the four components of Tax laid down by the Hon'ble Supreme Court in the case of *Govind Saran Ganga Saran-AIR 1985 SC 1041*and for attaining such completeness and certainty, the said two Finance Acts have expressly referred to and adopted the provisions of the Central Excise Act relating to levy of Excise duty under the said Act and made the same applicable to levy of the Surcharge and Cess under the said two Finance Acts,

b) That in view of the provisions of the Central Excise Act relating to levy of Excise duty under the said Act having been made applicable to levy of the Surcharge and Cess under the said two Finance Acts, it would follow that the exclusion of goods manufactured in SEZ from the charge/ levy under the Central Excise Act 1944 would equally apply to the levy of the Surcharge and Cess under the said two Finance Acts and consequently goods manufactured in SEZ are not liable to the said Surcharge and Cess,

c) That the SAED (Surcharge) and AED (Cess) having been levied as additional duties of excise, are in the nature of incrementing the existing duty charged under said Section 3(1), and therefore, cannot apply to goods manufactured in SEZ, since the same are excluded from the charge of the existing duty under Section 3(1),

d) That reliance placed on the purported grant of exemption, by Notification no. 19/2022-CE dated 19-7-2022, from SAED (Surcharge) and AED (Cess) on MS, HSD and ATF when exported from SEZ, is misconceived and untenable in law. It is settled law that charge of duty cannot be created by an exemption Notification and if any goods are not covered by the charging provision of the Act, any purported exemption granted to such goods by a Notification cannot result in such goods being chargeable to duty. Any exemption granted on the erroneous presumption that the goods are chargeable to duty cannot result in the goods being subject to the charge under the Act,

e) That in any event, the SEZ Act 2005, which under Section 53 deems SEZ to be a territory outside the customs territory of India and therefore treats bringing of goods from SEZ to Domestic tariff area as an import, is a complete code in itself and has overriding effect over any other law for the time being in force as provided in Section 51 thereof. When goods manufactured in SEZ and brought into Domestic Tariff Area are treated as import and thereby subjected to Customs duty, the same cannot at the same time, be treated as having been manufactured in India and be made liable to any form of Excise duty,

f) that without prejudice to the aforesaid submissions, in any event, the very issuance of Notification no. 19/2022-CE dated 19-7-2022, exempting SAED (Surcharge) and AED (Cess) on MS, HSD and ATF when exported from SEZ, is an acknowledgment and realization on the part of the Government that the said goods manufactured in a SEZ cannot be made liable to the said Surcharge and Cessand consequently the same must be considered as being clarificatory in nature,

g) that the contention that the payment under protest was in nature of self-assessment and that Respondent should have preferred appeal against the self-assessment of the SAED (Surcharge) and AED (Cess) to the Commissioner (Appeals) is totally misconceived since appeal to the Commissioner (Appeals) under Section 35 of the Central Excise Act 1944 lies only against any decision or order passed under the said Act by a Central Excise officer, lower in rank than a Principal Commissioner and that the so-called self-assessment is not such decision or order passed by such Central Excise officer.

1.10 By Order-in-Original dated 26-10-2023, the Assistant Commissioner rejected the refund claim, against which the Respondent preferred appeal to

Commissioner (Appeals), who has by Order-in-Appeal dated 5-2-2024 upheld the contentions of the Respondent and allowed the said Appeal with consequential reliefs by way of grant of refund claimed by the Respondent.

1.11 Department has preferred the present Appeal and Stay application against the said Order-in-Appeal dated 5-2-2024. In the present Appeal, the Appellant has not disputed and challenged the finding of the Commissioner (Appeals) that the refund claim was maintainable and that the Respondent was not required to file any appeal to Commissioner (Appeals) against the so-called self-assessment, since appeal to the Commissioner (Appeals) under Section 35 of the Central Excise Act 1944 lies only against any decision or order passed under the said Act by a Central Excise officer, lower in rank than a Principal Commissioner and that the so-called self-assessment is not such a decision or order passed by such Central Excise officer.

1.12 On the merits of the refund claim, the department's appeal has proceeded on the premise that it is the Respondent's case that the SAED (Surcharge) and AED (Cess) under the Finance Acts 2002 and 2018 respectively were not payable on goods manufactured by SEZ since such goods were exempt from the excise duty levied under Section 3(1) of the Central Excise Act 1944.

2. Shri Jeetesh Nagori, Learned Commissioner (AR) appearing on behalf of the Revenue reiterates the grounds of appeal. He also filed a detailed submission, wherein he has submitted that the order passed by Commissioner (Appeals) is not legal and proper and the same is bad in law. The order needs to be set aside in view of the following submission:-

2.1 The contention of the Respondent is that the SAED and AED levied on exports of Motor Spirit (Petrol), HSD and ATF appeared to be an inadvertent mistake which was corrected by way of exempting SEZ from the above duties vide Notification No. 19/2022-CE dated 19.07.2022. This appears to be the incorrect version and the argument without any merit. Here it should be appreciated that vide notification numbers 04/2022, 05/2022 and 10/2022, the government had imposed the Special Additional Excise Duty and Special Excise Duty under the provisions of export of petroleum products and the specific rate of duties were imposed on the export of these products. So, the duties were properly imposed under the notification by the Government.

2.2 It appears that after few days of the imposition of the duties on export of the petroleum products, the government had taken the stock of the situation. After analysing everything in proper manner, the government has decided to exempt the petroleum products i.e. HSD, MS and ATF from the imposition of Special Additional Excise Duty and Additional Excise Duty, when they have been exported from SEZ. The goods were exempted from these duties from 20.07.2022 and the date was clearly mentioned in the notification itself. So, the intention of the government was clear that the exemption to these duties in SEZ will be applicable from 20.07.2022. So when a specific date has been given in the notification for the implication, there cannot be taken any argument to effect that the exemption should be read as retrospectively.

2.3 In this regard, further attention is invited to Para 19 of the subject Show Cause Notice which reads as under:

"In this regard, it appears that levy of Special Additional Excise Duty is leviable thereon under Section 147 read with the Eighth Schedule to the said Finance Act, 2002, and additional duty of excise leviable thereon under Section 112 to the said Finance Act, 2018 in respect of excisable goods when exported from units located in the Special Economic Zone (SEZ). The said levy was exempted vide Notification No. 19/2022 dated 19.07.2022, with effect from 20.07.2022. Intention of legislature is clearly came out by the specific wording of the para 2 of the Notification, in as much as, 'this Notification shall come into force on the 20th day of July, 2022' and no other meaning can be drawn from the categorically mentioning in the Notification itself. Under no circumstances, the exemption can be construed retrospectively. The Central Govt. by issuing Notification No. 19/2022-Central Excise exempting SEZ from payment of export duty from 19th July 2022 onwards, in itself makes it obvious that earlier the SEZ were to be taxed for the prior period due to which this notification was necessitated."

2.4 So, the intent of the government has been clearly brought out in the subject Show Cause Notice and the departmental stand is very clear that the levy of Special Additional Excise Duty thereon under Section 147 read with the Eighth Schedule to the said Finance Act, 2002, and additional duty of excise under Section 112 to the said Finance Act, 2018 are leviable in respect of excisable goods when exported from units located in the Special Economic Zone (SEZ) and there is no case of the Adjudicating Authority having strayed beyond the scope of the Show Cause Notice or having improved upon the same in later proceedings.

2.5 The respondent has vehemently argued that Section 3 of Central Excise Act had excluded the Special economic Zones from its purview and the provisions of Central Excise Act are not applicable on SEZ units. They have also argued that the levies of SAED and AED are not independent levies, but require the clutches of Central Excise Act, so the levy fails.

2.6 The argument appears to lack of merit. It is to submit that Special Additional excise Duty was imposed under Section 147 of the Finance Act, 2002 and Additional Excise Duty was imposed under Section 112 of the Finance Act, 2018. It should be appreciated that both these finance Acts are the separate act then the Central Excise Act. The levy has been imposed by these Finance Acts is separate from the levy imposed under the Central Excise Act. These levies are independent and are not subject to Central Excise Act.

2.7 Further it is to submit that new levy can be imposed under the Finance act. Also the rates of the existing levies can be increased. Reliance is placed on the decision of Supreme Court in the case of Madurai Distt. Central Cooperative v/s The Third Income Tax Officer, Madurai dated 28.07.1975.

2.8 Further, reference is invited to the judgement of the Hon'ble High Court of Karnataka in the case of RM Dhariwal (Huf) vs Union of India dated 04.01.2022, whereby he submits that the Hon’ble court held that levy of surcharge i.e. NCCD by way of provision under the Finance Act of 2001 is not open to be questioned.

2.9 In this regard, reliance is also placed on the decision of Hon'ble High Court of Delhi in the case of Orient Papers Mills Limited Vs Deputy Director of Inspection, Customs and Central excise and others' (1982(10) ELT 247 (Del).

2.10 Attention is invited to the provisions of section 147 (3) of The Finance Act, 2002; which reads as under-

> "The provisions of the Central Excise Act, and the rules made thereunder, including those relating to refunds and exemptions from duties and imposition of penalty, shall, as far as may be, apply in relation to the levy and collection of the Special Additional Excise Duty leviable under this section in respect of the goods specified in the Eighth Schedule, as they apply in relation to the levy and collection of the duties of excise on such goods under the Act, or those rules, as the case may be"

2.11 The wordings of the section are quite clear. It categorically mentions that the provisions of the Central excise Act will be applicable 'As far as may be' for the levy and collection of SAED and AED. The phrase 'as far as may be' means to the extent possible. The literal meaning of the phrase is that the provisions of Central excise Act and rules will be applicable to the levy and collection of these duties only to the extent possible and not in entirety. So, there is no logic to argue that the provisions of Section 3 of Central Excise Act will be applicable for the levy and collection of SAED and AED. The provisions in respect of AED are at par with section 147 (3).

2.12 Reliance in this respect is placed on the decision of Hon'ble High Court of Kerala in case of British Physical Laboratories Vs AD, DRI; wherein the Hon'ble court interpreted the terms 'so far as may be' or 'as far as may be' occurring in Section 105(2) of the Customs Act.

2.13 Commissioner (A) has discussed in the impugned order that SAED and AED are the nothing, but the duties of Excise. He has further held that these duties are in addition to the Basic Excise Duty and partakes the colour of Basic Excise duty. So when the Basic Excise Duty itself is exempted, no other Excise duty can be imposed in terms of SAED and AED. These duties will also be exempted in line of BED.

2.14 Here, it should be appreciated that SAED and AED are the separate duties of Excise and cannot be clubbed with the BED. These duties are levied under the different enactments. Further, the government has given exemption to only BED on export of the petroleum products and there is no separate exemption given to either SAED or AED. In absence of any specific exemption given to SAED and AED, the exemption granted to BED cannot be extended automatically to these duties.

2.15 The issue has already been settled by the Larger Bench of Supreme Court in the case of Unicorn Industries Vs Union of India - 2019 (370) E.L.T. 3 (S.C.), where discussed the exemption to other duties of Excise in scenario where the Basic Excise Duty is exempted and held that when notification exempts basic excise duty, other duties will not be automatically eligible to the same exemption.

2.16 Similar view had been taken by Hon'ble Supreme Court earlier too in case of Union of India VsModi Rubber Ltd 1986 (25) E.L.T. 849 (S.C.)

2.17 Reliance is further placed upon decision of Hon'ble High Court of Karnataka in case of 'Ghodawat Packers LLP Vs. Union of India' {2022(382) ELT 300 Kar)}, where it was observed by the Hon'ble Court-

> *"NCCD is a surcharge and a type of excise duty which can be levied independently of the excise duty as contemplated under the provisions of Fourth schedule to the Central Excise Act, 1944. Thus levy of NCCD in the absence of levy of excise duty cannot be considered as bad in law."*

2.18 While passing the order-in-appeal, the Commissioner (Appeals) had conveniently ignored the law position settled by the Hon'ble Supreme Court of India. Here it's worth to mention the basic principle of law that the orders passed by Hon'ble Supreme Court of India are law of the land under Article 141 of Indian Constitution and any order passed in ignorance of the order passed by Supreme Court, is against the Doctrine of Judicial Discipline and can only be termed as Per in curium'. In this regard, reliance is placed on the judgement of the Hon'ble High Court of Karnataka in the case of Bharti Airtel Ltd Versus State of Karnataka reported at 2012 (25) S.T.R.514(Kar.).

2.19 The Commissioner (Appeals) has discussed the Section 26 of SEZ Act and held that the goods cleared from SEZ for export cannot be subject of any duty. He had held that the duty imposed on the export can only be termed as Customs duty. He had also mentioned that any proposal to tax the export in SEZ will be against the provisions of SEZ and in case of conflict among the provisions of SEZ Act and any other statute; Section 51 of SEZ Act will have the override effect.

2.20 In the present case, duties have been imposed vide Central Excise notifications on export of products including exports from SEZs. The relevant argument of Commissioner (Appeals) of Para 10.1 is referred.

2.21 With regard to the above, It needs not be emphasized that whenever any notification or for that matter, any legal interpretation is to be done, a neutral mindset along with a reading of the matter, giving proper justice to the punctuation marks is to be done. The Commissioner (Appeals) has wrongly interpreted that the phrase "duties of Customs" is not defined but a general meaning as understood by trade as well as government would mean duties on import and export of goods and therefore, SAED and RIC, though ostensibly labelled as "duties of excise", the said duties, having been imposed on export of goods, are nothing but duties of excise and hence squarely covered under the ambit of Section 26 of the SEZ Act.

2.22 Further the argument relied by the respondent that in absence of any charging section under the SEZ Act, no duty can be levied on the goods cleared for export from SEZ. Here, it is worth to mention that the levy is charged under the Finance Act, 2002 and Finance Act, 2018 and there is no restriction under the SEZ Act for imposing the Excise duty of export of the goods, there is no contradiction and no doubt about the leviability of the Excise duty on the goods cleared for export from SEZ.

2.23 First of all, it is very clear that a duty of Customs would be a duty that has been notified by the Customs Act, 1962 and similarly, a duty of excise would be a duty that has been notified by the Central Excise Act, 1944. Such duties, which have been passed by Legislation, cannot be interpreted to be inter-changed in a generalized manner between Customs and Central Excise. These are two totally different Acts and have to be seen as such. Duty of Excise is levied on the activity of manufacture and collected at the time when the goods are cleared. Hence, levy and collection of the duty are two different events and since the goods have been cleared to the export rather than the Domestic area, the nature of duty cannot be changed to Customs duty. Reliance is placed on the Judgment of Apex Court in case of ‘Vazir Tobbaco Company'.

2.24 Further, it appears that the Commissioner (Appeals) has mis-interpreted the reading of Section 26 (a) and 26 (b) of the SEZ Act. In Section 26(a), while interpreting the exemption from any duty of customs, it appears that shelter has been taken of 'or any other law for the time being in force'. The strict interpretation keeping in view the 'Coma' (Punctuation Mark) would mean Exemption from any duty of customs under the Customs Act, 1962, any duty of customs under the Customs Tariff Act, 1975 or any duty of customs under any other law for the time being in force. So, it is very clear, that for the exemption under Section 26(a), the duty compulsorily has to be a duty of Customs and for 'any other law', a generalized view cannot be taken to specify any duty under any other Act as a duty of Customs under the garb that any duty on exports is generally understood by the trade as well as government as duty of customs.

2.25 Further, as per Section 26 (b) of the SEZ Act, the exemption to duty of excise is clearly on goods brought from DTA to SEZ and so do not apply in the present case.

2.26 As such, if such a generalized view was to be taken while interpreting any law or notification, there would have been no need for the Hon'ble Supreme Court and the Hon'ble High Courts to waste their time in

interpretation of the same and pass detailed judgements, which are scrupulously followed by the lower courts as well as in quasi-judicial proceedings. Further, with regard to the over-riding of Section 51 of the SEZ Act, the wording is very clear that the provisions of SEZ Act shall have effect notwithstanding anything inconsistent therewith contained in any other law in the time being in force. However, in the present situation, there is no case where there is any inconsistency with the duties of excise notified and the provisions of the SEZ Act and so, the clause of over-riding effect of SEZ Act is not applicable.

2.27 Further, as per Section 53 of the SEZ Act, the SEZ is deemed to be a territory outside the customs territory of India for the purpose of undertaking the authorised operations. Here, SEZ is deemed to be a territory outside the customs territory of India for the purpose of undertaking its authorised operations. This is legal fiction which should stand confined for the purpose for which it is created. When a specific notification implies that it applies to the whole of India, it geographically applies to the whole of India, and SEZs, being an integral part of the nation, cannot claim to be separate. In this regard, the reliance is placed on the judgement of the Hon'ble High Court of Gujarat in Essar Steel Limited Versus Union of India 2010 (249) E.L.T. 3 (Guj.). The reliance is also placed on the judgement of the Hon'ble High Court of Judicature for Andhra Pradesh in Tirupati Udyog Ltd Versus Union of India 2011 (272) E.L.T. 209 (A.P.).

2.28 The Commissioner (Appeals) in his order has held that the Notification should be applied retrospectively. He had recorded that there was the continuous policy of the government not to impose any tax on the export undertaken by the SEZ. There was no intention of government to impose duty on SEZ export. That was the reason on realising, the government had issued the exemption notification and waived the duty on the goods exported by SEZ, where the goods exported by the domestic Units were continued to subject of export duty.

2.29 The argument taken by the respondent looks attractive, but fails on merit. First, it was the conscious decision of the government to impose the export duty on the petroleum goods cleared for export and Notifications number 04/2022, 05/2022 and 10/2022 were issued to give it effect. Later on, when government had issued the Exemption notification 19/2022 dated 19.07.2022, it was specifically mentioned in the Notification that it shall have effect from 20.07.2022. If the government was having any intention to give the retrospective effect to the notification, it could have done by

inserting the prior date, but rather it has been clearly mentioned that the notification is prospective and will come into effect from the later date given on.

2.30 The finding of the Commissioner (Appeals) to give the retrospective effect to the notification on the count that the government had continuous policy not to tax on the goods cleared for export from SEZ, is also fallacious. Had the government would have any such object; they could have mention specifically in the notification itself. An exemption from the tax cannot be extended on the basis of interpretations of some other provisions or any kind of assumptions or presumptions, till it has been categorically mentioned in the notification.

2.31 Reliance is placed on the judgment of High Court of Madras in case of Life Cell International (P) Ltd Vs Union of India' (2015 (40) STR 77 (Mad), the Hon'ble court had refused to give retrospective effect to the service tax exemption to the Healthcare services in absence of any specific entry.

2.32 It is the trite principle of law that the first and foremost principle of interpretation of the statute in every system of interpretation is the literal rule of interpretation. The other rule of interpretation i.e. the mischief rule, purposive interpretation etc. can only be resorted to when the plain words of a statute are ambiguous or lead to no intelligible results or if read literally would nullify the very object of the statue. Where the words of a statute are absolutely clear and unambiguous, reasons cannot be had to the principles of interpretation other than the literal rule. The language employed in the statute is the determinative factor of the legislative intent. The legislature is presumed to have made no mistake. The presumption is that it intends to say what it has said. Assuming there is a defector an omission in the words used by the legislature, the court cannot correct or make up the deficiency, especially when a literal reading thereof produces an intelligible result. Where the legislative intention is clear from the language, the court should give effect to it and the court should not seek to amend the law in garb of the interpretation. In this regard reliance is placed on the larger bench judgment of Hon'ble Supreme Court in the case of 'Commissioner of Customs, Mumbai Vs Dilip Kumar & Company' (2018 (361) ELT 577 SC).

2.33 Further it is also the settled law that the principles of 'Casus Omissus' cannot be applied by the courts while interpreting the provisions of statute. In this regard, reliance is placed on the decision of Hon’ble Supreme court in the case of 'Padmasundara Rao (dead) and ors Vs State of Tamilnadu and

ors (2002 (3) SCC 533) and on the decision of Hon'ble High Court of Madras in the case of The Commissioner of Income Tax Vs TVS Lean Logistics Ltd.

2.34 Commissioner (Appeals) has heavily relied upon the decision of the Hon'ble Supreme Court in the case of Govind Saran Ganga Saran, wherein it was held that for there to be a valid levy, four aspects viz. (i) character or nature of impost attracting the taxable event (ii) person on whom levy is imposed and is liable to discharge the levy (iii) rate of tax and (iv) the measure or value to which the rate is to be applied have to be clearly spelt out. In this regard, it is required to be mentioned that this Hon'ble Tribunal itself is a creature of statute and derives its jurisdiction and powers only from the statute creating it and not outside the same.

2.35 It was held by the Hon'ble Supreme Court in the case of Northern Plastics Ltd v/s Hindustan Photo Films Mfg Co Ltd 2002-TIOL-604-SC- CUS that The Appellate Tribunal is constituted as per Section 129 of the Act. Subsection (1) thereof lays down that, 'the Central Government shall constitute an Appellate Tribunal to be called the Customs, Excise and Gold (Control) Appellate Tribunal consisting of as many judicial and technical members as it thinks fit to exercise the powers and discharge the functions conferred on the Appellate Tribunal by this Act. It is, therefore, obvious that the Appellate Tribunal CEGAT is a creature of statute and derives its jurisdiction and powers only from the statute creating it and not outside the same. In view of the same, it is not within the jurisdiction of this Hon'ble Tribunal to take a decision regarding the validity of a levy that has been passed by the Legislature.

2.36 Further, the respondents have placed reliance on Final Order No. 10444/2024 dated 20.02.2024 passed in the case of Reliance Industries Ltd vs CCE & ST-CGST & CE-Rajkot by this Hon'ble Tribunal. In this regard, this case pertains to payment of applicable duties of Customs in terms of Section 30 of the SEZ Act, 2005 (which as a part of Additional duty of customs leviable under Section 3(1) of the Customs Tariff Act, 1975, includes the levy of SAED, RIC and AIDC). The question to be deliberated and decided upon is whether the said levy of SAED, RIC and AIDC could be once again imposed and recovered by the Central Excise field formation, as a duty of excise. Thus, the context is totally different, does not cover and cannot be relied upon in the present case.

2.37 There is settled proposition of law that in case of confusion about the imposition of tax, the benefit should go in favour of the subject. Similarly, for the exemption notification, it's the trite law that in case of any confusion or

dispute on the interpretation of the exemption notification, the benefit should go in favour of the state. In this regard reliance is placed on the larger bench judgment of Hon'ble Supreme Court in the case of 'Commissioner of Customs, Mumbai Vs Dilip Kumar & Company' (2018 (361) ELT 577 SC) (relevant paras 40, 41 & 52).

2.38 In view of the above submissions, the order passed by the Commissioner (Appeals) suffers with the legal infirmities and bad in law, where he has wrongly allowed the appeal filed by the respondent. Hence, the Hon'ble Tribunal is requested to allow the appeal filed by the department against the order-in-appeal and restore the OIO passed by the AC in this matter.

2.39 He placed reliance upon the following judgements, some of which were also discussed in foregoing paras:-

- Madurai Distt Central Cooperative Bank Ltd...vs The Third Income-Tax Officer, Madurai Passed by Hon'ble SC in appeal No 1795 of 1970
- All India Fedn. Of Tax Practitioners v UOI – 2007 (7) STR 625 (SC)
- 1983(14) ELT 2270 (Kar)- Passed by Hon'ble High Court of Karnataka in the case of British Physical Laboratories India Ltd Vs AC, DRI
- 1984(16) ELT 47(Ker)- Passed by Hon'ble High Court of Kerala in the case of Raja Lakshmi Mills Ltd Vs Uol & Others
- 2000(120) ELT 53 (SC)- Passed by Hon'ble SC in the case of Kathayee Cotton Mills Ltd Vs Uol
- 2011(267) ELT 28(Kar)- Passed by Hon'ble High Court of Karnataka in the case of Commissioner of CEx, Bangalore Vs Biocon Ltd
- 2010(20) STR 591 (Mad)- Passed by Hon'ble High Court of Madras in the case of Karvembu & Co Vs US, Department of revenue
- 2015(37) STR 6 (Bom)- Passed by Hon'ble High Court of Bombay in the case of P C Joshi Vs Uol
- M/s Snow tex Investment Ltd Vs Principal Commissioner of Income Tax-Kolkata Passed by Hon'ble SC in Civil Appeal No 4483 of 2019
- Raghunath Raj Bareja and another Vs PNB & Others-Passed by Hon'ble SC in Civil Appeal No 5634 of 2006
- (1995) 09 GUJ CK 0028-Passed by Hon'ble High Court of Gujarat in case of Commissioner of Gift Tax Vs CDRLaxmidevi
- 1992 (58) ELT 9 (Guj)- Passed by Hon'ble High Court of Gujarat in case of Maheshwari Mills Ltd Vs Uol

3. Shri J C Patel, learned counsel with Shri Vishal Agarwal, Advocate, Ms. Shilpa Balani, Advocate, Mrs. Dimple Gohil, Advocate and Shri Arvind Bhansali, Senior Ex. Vice-President of the respondent company appearing on behalf of the respondent made the following submission:-

3.1 At the outset, it is submitted that the issue whether goods manufactured in SEZ are liable to SAED (Surcharge) under Section 147 of Finance Act 2002 and AED (Road and Infrastructure Cess) under Section 112 of Finance Act 2018 stands decided by this Hon'ble Tribunal in Respondent's own case by Final Order No.10444/2024 dated 20-2-2024 in Excise Appeal No.10541 of 2023. This Hon'ble Tribunal has in the said decision held that goods manufactured in SEZ unit are not liable to the said Surcharge and Cess.

3.2 This Hon'ble Tribunal has in the said decisions upheld the following contentions:

a) that as laid down by the Hon'ble Supreme Court in the case of Govind Saran Ganga Saran v Commissioner of Sales Tax-1985 SUPP (SCC) 205, there are four components of a Tax viz. taxable event attracting the levy, clear indication of the person on whom the levy is imposed and who is liable to pay the tax, Rate at which the tax is imposed and Measure or value to which the rate will be applied for computing the tax liability. If those components are not clearly and definitely ascertainable and if there is any uncertainty or vagueness about them, levy of tax cannot exist in law.

b) If the levy of SAED (Surcharge) under Section 147 of Finance Act 2002 and AED (Cess) under Section 112 of Finance Act 2018 are viewed in isolation on standalone basis, the said levies lack the completeness and certainty in respect of three of the said four components viz. taxable event, person on whom the levy is imposed and Measure. The said Sections therefore, under sub-section (3) thereof, expressly refer to and adopt the provisions of the Central Excise Act and Rules relating to levy of Excise duty under the said Act and make the same applicable to levy of the Surcharge and Cess under the said two Finance Acts and thereby give completeness and certainty to all the said components. The provisions of the Central Excise Act relating to levy of Excise duty under the said Act having been made applicable to levy of the Surcharge and Cess under the said two Finance Acts, it would follow that the exclusion of goods manufactured in SEZ from the charge/

levy under the Central Excise Act 1944 would equally apply to the levy of the Surcharge and Cess under the said two Finance Acts and consequently goods manufactured in SEZ are not liable to the said Surcharge and Cess,

c) The taxable event in the said two Finance Acts is uncertain and vague since the charging provision therein viz. Section 147 (1) and Section 112(1) respectively, merely refer to manufacture without any reference to the taxable territory in which such manufacture should take place. The said uncertainty and vagueness is dispelled by reason of reference and adoption under Section 147 (3) and Section 112(3) of the two Finance Act respectively, of the provisions of the Central Excise Act relating to levy of excise duty, which under Section 3(1) specifies the taxable event with certainty, as production or manufacture of all excisable goods (excluding goods produced or manufactured in special economic zones) in India.

d) The taxable event cannot be said to have been specified with completeness and certainty if the taxable territory in which such event should occur, to attract the tax, is not specified. A comparison with the charging provisions of various Acts such as Central Excise Act 1944, Customs Act 1962, Finance Act 1994 relating to Service tax, CGST 2017 and IGST 2017 would show that while each of these Acts specify the taxable territory in which the taxable event should occur to attract tax, such is not the case with Section 147 (1) of the Finance Act 2002 and Section 112(1) of the Finance Act 2018 when viewed in isolation. Therefore, as mandated by Section 147 (3) and 112 (3) of the said two Finance Acts respectively, the taxable event has to be ascertained by reference to the charging provisions contained in Section 3(1) of the Central Excise Act 1944 and upon such reference it follows that manufacture of goods in SEZ are outside the scope of the taxable event which attracts the SAED (Surcharge) under Section 147 of the Finance Act 2002 and AED (Road and Infrastructure Cess) under Section 112 of the Finance Act 2018,

e) Further, the said two Finance Acts do not specify the person on whom the levy is imposed and Measure of Tax and the uncertainty about the said two components is dispelled nd made good by adopting the provisions of Central Excise Act 1944 and the Rules thereunder relating to levy of Central Excise duty. Section 3(1) of

the Central Excise Act provides that the duty levied shall be collected as prescribed under the Rules and the Rule 4 of the Central Excise Rules 2017 specifies the person on whom the levy is imposed as every person who produces or manufactures any excisable goods. Section 4 of the Central Excise Act specifies the measure of tax as the value of the goods as defined therein,

f) Accordingly, the four components of the two taxes (Surcharge and Cess) levied under Sections 147 of the Finance Act 2002 and 112 of the Finance Act 2018 become clear, definite and certain by reason of the adoption under Sections 147 (3) and 112 (3) of the provisions of the Central Excise Act and Rules made thereunder relating to levy and collection of the Excise duty thereunder and by applying the same to the levy and collection of the said Surcharge and cess respectively,

g) The result of such application of the provisions of the Central Excise Act and Rules made thereunder relating to levy of the Excise duty to the levy of the said Surcharge and cess is that the scope of levy of the said Surcharge and Cess cannot cover goods manufactured in SEZ since the same are excluded from the charge and levy under Section 3(1) of the Central Excise Act 1944,

h) Section 147 (3) of Finance Act 2002 and Section 112 (3) of Finance Act 2018 adopt and apply the provisions of the Central Excise Act and the rules thereunder relating to levy of Excise duty, as far as may be, to the levy of the said SAED (Surcharge) and AED (Cess). As laid down by the Hon'ble Supreme Court in Dr. Pratap Singh and anr v Director of Enforcement – (1985) 3 SCC 72, the expression "as far as may be" means to the extent possible. Therefore, for example, it is not possible to apply the rates of Excise duty specified in the Central Excise Act 1944 to the said two Finance Acts since these two Acts have specified the rates of SAED (Surcharge) and AED (Cess) respectively. Except for some such provision, which may not be possible to be applied, all other provisions of the Central Excise Act and Rules thereunder relating to levy of Central Excise have to be applied to the levy of the said SAED (surcharge) and AED (Cess).

i) Further, the very fact that the said SAED (Surcharge) and AED (cess) are levied as Additional duties of excise, itself means that they are levied as an increment in the existing duty charged under

Section 3(1) of the Central Excise Act 1944, and therefore, cannot apply to goods manufactured in SEZ, which are excluded from and not subject to the charge of the existing duty under said Section 3(1).

3.3 In view of the said decision of this Hon'ble Tribunal, in Respondent's own case by Final Order No.10444/2024 dated 20-2-2024 in Excise Appeal No.10541 of 2023, it would follow that SAED (Surcharge) under Section 147 of the Finance Act 2002 and AED (Road and Infrastructure Cess) under Section 112 of the Finance Act 2018 cannot and does not apply to goods manufactured by the Respondent in SEZ and removed from the SEZ for export.

3.4 Learned Authorized Representative for the department sought to distinguish the said Final Order dated 20-2-2024 on the ground that the same related to applicability of the said SAED (Surcharge) and AED (Cess) on goods manufactured in SEZ and removed into Domestic Tariff Area and not on goods removed from SEZ for export. It is submitted that the attempt to distinguish the said decision on the said ground is totally misconceived and untenable in law. If as laid down in the said decision, the goods manufactured in SEZ are excluded from the scope of levy/ charge of the said SAED (Surcharge) and AED (Cess), the same would not be payable, irrespective of whether the removal from SEZ is for Domestic Tariff Area or for export from SEZ.

3.5 As regards the further argument of learned Authorized representative that it is not open to the Tribunal to declare any provision to be ultra vires, it is submitted that the Tribunal has nowhere in the said decision declared any provision to be ultra vires and the Tribunal has merely on interpretation of the provisions of Section 147 of Finance Act 2002 and Section 112 of Finance Act 2018 held that the SAED (Surcharge) and AED (cess) levied by the said provisions do not cover within their scope, goods manufactured in SEZ.

<u>Decision of Five Judges Bench of Hon'ble Supreme Court in the case of Ujagar Prints v UOI – 1988 (38) ELT 535 (SC) clearly supports the Respondent's case</u>:

3.6 Briefly stated, the facts in this case were that the definition of "manufacture" in Section 2 (f) of the Central Excise Act 1944 was widened by Amending Act of 1980 to cover the processes of Bleaching, Dyeing, Printing, Sizing, Mercerizing, etc. Section 3(1) of the Additional Duties of Excise (Goods of Special Importance) Act 1957 levied on certain fabrics

produced or manufactured in India, Additional duty of Excise and Section 3(3) of the said Act provided that the provisions of the Central Excise Act 1944 and Rules thereunder, shall so far as may be, apply in relation to the levy and collection of additional duties as they apply in relation to the levy and collection of the Excise duty under the Central Excise Act.

3.7 One of the issues which arose for consideration of the Hon'ble Supreme Court was whether the widened/ expanded definition of "manufacture" in Section 2 (f) of the Central Excise Act 1944 which covered processes such as Bleaching, Dyeing, printing, etc, would apply to the taxable event of "manufacture" in Section 3(1) of the Additional Duties of Excise (Goods of Special Importance) Act 1957.

3.8 It was argued on behalf of the assessee that the said widened/expanded definition of "manufacture" in Section 2 (f) of the Central Excise Act 1944 cannot apply for the purpose of levy of additional duty on "manufacture" under Section 3(1) of the Additional Duties of Excise (Goods of Special Importance) Act 1957.

3.9. The ratio of the decision of the Constitution Bench squarely applies in the present case. In the instant case also, Section 147 (3) of Finance Act 2002 and Section 112 (3) of the Finance Act 2018 specifically provide that the provisions of the Central Excise Act 1944 and Rules thereunder, shall as far as may be, apply in relation to the levy and collection of additional duties as they apply in relation to the levy and collection of the Excise duty under the Central Excise Act. As held by the Hon'ble Supreme Court the term levy includes imposition of tax and therefore the provisions of Section 3 (1) of the Central Excise Act 1944, which provide for the levy/ imposition of tax, will govern the scope of levy/ imposition of tax under the said Sections 147 (1) and 112 (1) respectively of the two Finance Acts. Since the goods manufactured in SEZ are excluded from the scope of levy/ imposition under Section 3(1) of the Central Excise Act 1944, the same would also govern the scope of levy/ imposition under the said Sections 147 (1) and 112 (1) respectively of the two Finance Acts. Consequently, the said additional duties under the said two Finance Acts cannot apply to goods manufactured in SEZ.

3.10 Learned Authorized representative for department sought to rely in this behalf on the decision in Pioneer Silk Mills P. Ltd v UOI – 1995 (80) ELT 507, which has distinguished the said decision of the Hon'ble Supreme Court in Ujagar Prints v UOI. It is submitted that the reliance placed on the decision in *Pioneer Silk Mills* is totally misplaced. The issue in the said decision was whether the provisions of the Central Excise Act 1944 relating

to confiscation of goods and imposition of penalty were borrowed and made applicable by the Additional Duties Act for the purposes of additional duty of excise. It was held by the Hon'ble Court in Pioneer Silk Mills P. Ltd case that when the Additional Duties Act borrowed the provisions of the Central Excise Act 1944 relating to levy and collection, that did not make the provisions of Central Excise Act 1944 relating to confiscation of goods and imposition of penalty applicable for purposes of the Additional duty. The present case is not one relating to confiscation and penalty but relates to levy of duty to which the ratio of decision in Ujagar Prints squarely applies.

3.11. Notification No.5/2022-CE dated 30-6-2022 amended the Eighth Schedule to the Finance Act 2002, by inserting Sr. No.4 which imposed SAED (Surcharge) on ATF at the rate of Rs.6/- per liter. Clearly, the power to amend the Eighth Schedule of the Finance Act 2002 by means of a Notification issued by the Government is traceable to Section 147 (3) of the said Act read with Section 3B of the Central Excise Act 1944. The said Section 3B which gives emergency power to the Central Government to increase duty of excise under Section 3, by its very nature cannot be in respect of goods manufactured in SEZ since such goods are excluded from Section 3(1). This itself indicates that the said SAED imposed on ATF does not apply to goods manufactured in SEZ. The issuance of Notification No. 5/2022 is a clear acknowledgement or acceptance on part of the Central Government, that by virtue of Section 147(3) of the Finance Act, 2002, the provisions of the Central Excise Act are invocable for the purpose of levy under the said Finance Act.

3.12 Learned authorized representative for department contended that the said Notification does not refer to Section 3B of the Central Excise Act 1944. This, it is submitted, makes no difference, since the power of the Central Government to amend Schedule of a Parliamentary Act is traceable only to Section 3B of the Central Excise Act 1944 read with Section 147 (3) of the Finance Act 2002. Learned AR has not been able to show any other provision as to the source of that power.

SAED (Surcharge) and AED (Road and Infrastructure Cess) having been levied as Additional Duties of excise are in the nature of increment to the existing duty charged under Section 3 (1) of the Central Excise Act 1944 and therefore cannot apply to goods manufactured in SEZ which stand excluded from the Charge in said Section 3(1):

3.13 A “Surcharge” is a charge, which is super-imposed on that which is subject to a charge. It is in the nature of an increment to what is subjected to a charge. It therefore follows that, what is not subject-matter of charge cannot be subject-matter of surcharge.

3.14 The SAED under Section 147 (1) of Finance Act 2002 is levied as a Surcharge, as an Additional duty of excise. It therefore, follows that it is an increment to the excise duty levied under Section 3(1) of the Central Excise Act 1944 and therefore applies to that, which is subject-matter of the charge under Section 3(1) of the Central Excise Act 1944. Since goods manufactured in SEZ are excluded from the scope of the charge under said Section 3(1), such goods cannot be subject-matter of surcharge under Section 147 (1) of the Finance Act 2002.

3.15 In support of the submission that a Surcharge is an additional tax in the nature of an increment to what is subjected to a charge in the Principal Act, reliance is placed on the decision of the Hon’ble Supreme Court in the case of Ashok Service Centre and ors v State of Orissa – (1983) 2 SCC 82. In support of his case, he also placed reliance on the following judgments:-

- Md. Safi v State of Bengal – AIR 1951 Cal 97
- Sarojini Tea Co P. Ltd v Collector – (1992) 2 SCC 156
- Maheshwari Mills Ltd v UOI- 1992 (58) ELT 9 (Guj)

3.16 It also follows from a conjoint reading of Articles 270 and 271 of the Constitution of India, that a Surcharge is an increase in an existing duty or tax. Article 270 provides that all duties and taxes referred to in the Union List (with a few exceptions which are not relevant for our purpose) shall be levied and collected by the Government of India and shall be distributed between the Union and the States. Article 271 then provides that the duties or taxes so levied may at any time be increased by Parliament by a surcharge for purposes of the Union. It therefore follows that while the basic excise duty is levied and collected by the Union and has to be distributed between the Union and the States, such duty may be increased by way of surcharge, which shall only be for the purposes of the Union and is not to be shared with the States. It therefore follows that surcharge is in the nature of increase of that which is already levied and cannot therefore apply to that, to which the basic levy itself does not apply.

3.17 Similarly, Cess when levied as an Additional duty for some special administrative expense is in the nature of an increment to an existing tax. Reliance is placed in this behalf on the decision of the Hon’ble Supreme

Court in the case of Union of India v Mohit Mineral P. Ltd – 2018 (17) GSTL 561 (SC).

3.18 The proposition of law canvassed herein above, can be aptly illustrated, with the help of the provisions of Chapter V of the Finance Act 1994 relating to Service tax and the provisions of Section 161 of the Finance Act 2016 relating to Krishi Kalyan Cess.

3.19 The charging provision contained in Section 66B of the Finance Act 1994 provides for levy of Service tax on value of all services, other than those services specified in the negative list, provided or agreed to be provided in the taxable territory and taxable territory is defined in Section 65B (52) as the territory to which the provisions of Chapter V apply. As per Section 64, the said Chapter applies to the whole of India except the State of Jammu and Kashmir. It therefore follows that the charge of Service tax under the Principal Act i.e Chapter V of the Finance Act 1994 is on all services, other than those services specified in the negative list, which are provided in the taxable territory i.e. whole of India except the State of Jammu and Kashmir.

3.20 As regards Krishi Kalyan Cess, the same is levied under Section 161 (2) & (3) of the Finance Act 2016, as an additional Service tax, on all or any of the taxable services. Section 161 (5) then provides that provisions of Chapter V of the Finance Act, 1994 (32 of 1994) and the rules made thereunder shall, as far as may be, apply in relation to the levy and collection of the Krishi Kalyan Cess on taxable services, as they apply in relation to the levy and collection of tax on such taxable services under the said Chapter or the rules made thereunder, as the case may be.

3.21 It cannot be contended and it never has been contended by the department that since there is no restriction or exclusion in Section 161 of the Finance Act 2016 about the applicability of Krishi Kalyan cess on services provided in Jammu and Kashmir or on negative list services, it would be open to the department to levy Krishi Kalyan Cess on services provided in Jammu and Kashmir or on negative list of services. The department has never demanded Krishi Kalyan Cess on services provided in Jammu and Kashmir or on negative list of services. This is for the obvious reason that Section 161 (5) of the Finance Act 2016 has adopted and borrowed the provisions of Chapter V of the Finance Act 1994 relating to levy of service tax and made them applicable to levy of Krishi Kalyan Cess. By reason of the provisions of said Chapter V relating to levy of Service tax having been made applicable to levy of Krishi Kalyan Cess, it would follow that whatever is

excluded from the scope of the charge/ levy of service tax is equally excluded from the scope of levy of the Krishi Kalyan Cess viz. services provided in Jammu and Kashmir and negative list of services.

3.22 The aforesaid reasoning equally applies to the Additional Duties of excise levied under Section 147 of Finance Act 2002 and Section 112 of Finance Act 2018 which have borrowed and applied the provisions of Central Excise Act 1944 relating to levy of Central Excise duty to the levy of Additional duties under the said two Finance Acts. It would therefore follow that since goods manufactured in SEZ are excluded from the charge/levy of Excise duty under Section 3(1) of the Central Excise Act 1944, they would equally stand excluded from the levy of the said additional duties.

Settled law that an Exemption notification cannot create a Charge of tax when none exists in the Act:

3.23 It was contended by learned Authorized representative for department that the very fact that the Government issued Notification No.19/2022-CE dated 19-7-2022, granting exemption from SAED (Surcharge) and AED (Road and Infrastructure Cess) on MS, HSD and ATF exported from SEZ, with effect from 20-7-2022, would mean that the said goods when exported from SEZ prior to 20-7-2022 were liable to the said SAED and AED under the Finance Acts 2002 and 2018 respectively.

3.24 It is submitted that the said contention is thoroughly misconceived and totally untenable in law.

3.25 It is settled law that charge of duty cannot be created by an exemption Notification and if any goods are not covered by the charging provision of the Act, any purported exemption granted to such goods by a Notification cannot result in such goods being otherwise chargeable to duty. Any exemption granted on the erroneous presumption that the goods are chargeable to duty cannot result in the goods being subject to the charge under the Act. Exemption Notification is different from statute enacted by the Parliament and cannot create a charge or a levy, which the Parliamentary enacted statute does not provide for.

3.26 The question whether MS, HSD and ATF manufactured in SEZ are liable to the said Surcharge and Cess has to be determined with reference to the provisions of the said Sections 147 and 112 of the Finance Acts 2002 and 2018 respectively and not by reference to the said exemption Notification. Since on an analysis of the provisions of the said Sections 147 and 112, as set out herein above, it is evident and clear that the said goods

manufactured in SEZ and removed for export from SEZ are not at all subject to the levy of the said Surcharge and Cess, the question of payment of the said Surcharge and Cess on the said goods manufactured in and removed for export from SEZ does not arise at all. It is wholly material that the said exemption Notification No. 19/2022 purports to exempt the said goods from the said Surcharge and Cess from 20-7-2022. When the said goods manufactured in SEZ are not at all subject to the levy of the said Surcharge and Cess, no exemption Notification for the same is at all required.

3.27 In support of the aforesaid submissions, reliance is placed on the decision of the Hon'ble Supreme Court in the case of CCE v Larsen and Toubro Limited – 2015 (39) STR 913.

Alternate Submissions:

SEZ Act 2005 is a complete code in itself and has overriding effect on other laws:

3.28 Without prejudice to the aforesaid submissions, even if one takes a view that exception providedin Section 3(1) to goods produced or manufactured in Special Economic Zones, cannot be made applicable while interpreting the provisions of the two Finance Acts, referred to above, any levy of surcharge and cess under the said two Finance Acts cannot be justified or sustained since such an interpretation would be wholly inconsistent and contrary to the object and framework of SEZ law.

3.29 Without prejudice to the aforesaid submissions, in any event, it is submitted the SEZ Act 2005, which under Section 53 deems SEZ to be a territory outside the customs territory of India and therefore treats bringing of goods from SEZ to Domestic tariff area as an import, is a complete code in itself and has overriding effect over any other law for the time being in force as provided in Section 51 thereof. When goods manufactured in SEZ and brought into Domestic Tariff Area are treated as import and thereby subjected to Customs duty, the same cannot at the same time, be treated as having been manufactured in India and be made liable to any form of Excise duty. This position would be no different,if instead of being brought into Domestic Tariff area, the goods manufactured in a SEZ are exported therefrom.

Notification No.19/2022-CE dated 19-7-2022, if at all relevant, is to be considered as being clarificatory in nature and therefore retrospective:

3.30 Without prejudice to the aforesaid submissions, Notification no. 19/2022-CE dated 19-7-2022, if at all relevant, has to be considered as

clarificatory and therefore retrospective. The very issuance of the said Notification exempting SAED (Surcharge) and AED (Cess) on MS, HSD and ATF when exported from SEZ, though the same was not required in law, is an acknowledgment and realization on the part of the Government that the said goods manufactured in a SEZ cannot be made liable to the said Surcharge and CESS and consequently the same must be considered as being clarificatory in nature.

3.31 Learned Authorized representative placed reliance on various press reports which suggested that facility to export MS, HSD and ATF without payment of Central Excise duty under Rule 19 of the Central Excise Rules 2017 was withdrawn with effect from 1-7-2022 to overcome domestic shortage of the said goods. There is no legal basis or authority for placing reliance on Press Reports, to interpret the provisions of the statue enacted by the Parliament or for that matter deciphering the intention behind the Governmental action.In any case, there is nothing to suggest that such domestic shortage lasted only for 19 days. In fact, the said facility under Rule 19 to export without payment of duty, which is required in the case of Non-SEZ units only, continued to remain withdrawn even after 19-7-2022, which would, if any cognizance could be taken of the Press Reports, suggest that the domestic shortage in respect of the said goods continued. The very fact that despite such continued domestic shortage, the said exemption Notification was issued in respect of the said goods manufactured in and exported from SEZ, in fact is an acceptance and acknowledgement by the Government that goods manufactured in SEZ cannot be subject-matter of levy of any form of Excise duty.Therefore, the said Notification must be considered to be clarificatory in nature and therefore retrospective. It is made clear that this submission is only in alternative and without prejudice to the primary submission that the said goods manufactured in SEZ are outside the scope of the very levy of the said SAED (Surcharge) and AED (Road and Infrastructure Cess) and therefore no exemption notification is at all required.

3.32 Without prejudice to the above, since the very inception of the SEZ Act, 2005 in fact even prior thereto, no duties of excise have ever been levied or collected on goods manufactured and removed from a SEZ. The Notifications which were issued on 30.06.2022 brought about certain changes in the effective rate of excise duty under the Central Excise Act as also the two Finance Acts, referred to above, all of which were products specific, however, none of them either specifically or implicitly suggested that the same would apply to goods manufactured and removed from a SEZ.

It is only on 19.07.2022, presumably realising that any levy and collection of said surcharge and cess on goods manufactured and removed from a SEZ is not only inconsistent with the underlying object of the SEZ scheme but also with the statutory provisions of the Central Excise Act and the two Finance Acts, referred to above, that the Central Government issued Notification No. 19/2022-CE dated 19.07.2022, so as to clarify the said position.The Apex Court has in the case of *W.P.I.L. vs Commissioner of Central Excise, Meerut 2005 (181) E.L.T. 359 (S.C.),* held that exemption Notification would be considered as clarificatory and hence retrospective, if the grant of the exemption/non-levy was historically justified.

Response to submissions of and case-law relied upon by learned authorised representative for department:

3.33 As stated herein above in Para 2.14, the department's appeal (See grounds of appeal Nos. 1.1 and 2.1) has proceeded on the totally erroneous premise and assumption that it is the Respondent's case that the SAED (Surcharge) and AED (Cess) under the Finance Acts 2002 and 2018 respectively were not payable on goods manufactured by SEZ since such goods were exempt from the excise duty levied under Section 3(1) of the Central Excise Act 1944. The same stand has been repeated by learned Authorized Representative for the department in his arguments and he has argued that mere exemption from Central Excise duty does not ipso facto result in exemption from SAED (Surcharge) and AED (Road and Infrastructure Cess) levied under the Finance Acts 2002 and 2018 respectively in absence of a specific exemption granting exemption from the said SAED and AED. He has then, in support of the said argument, cited judgments which lay down that an Exemption Notification granting exemption from Central Excise duty levied under Section 3 (1) of the Central Excise Act 1944 does not ipso facto result in exemption from the said SAED and AED in absence of specific Notification granting exemption from the said SAED and AED.

3.34 It is submitted that it has never been the case of the Respondent that the goods manufactured in SEZ were exempt from the excise duty levied under said Section 3 (1). For exempting any goods from excise duty by issuance of an exemption Notification, they must first be subject to the charge/ levy of excise duty under said Section 3(1). It has been the specific case of the Respondent that goods manufactured in SEZ were excluded from the charge under said Section 3 (1) and therefore not covered by the charge under said Section 3 (1) and it has never been the case of the Respondent

that the goods manufactured in SEZ were exempted by some Notification issued under the Central Excise Act 1944. Consequently, the arguments of the department proceed on an incorrect understanding of the Respondent's case and hence the decisions relied upon by learned Authorized representative in support of such arguments are of no significance.

3.35 Had it been the Respondent's case that goods manufactured in SEZ are exempted from Central Excise duty levied under Section 3 (1) of the Central Excise Act 1944 by means of a Notification issued under that Act and that such exemption Notification would ipso facto apply to the SAED (Surcharge) and AED (Cess) since Section 147 (3) of the Finance Act 2002 and Section 112 (3) of the Finance Act 2018 had borrowed the provisions of Central Excise Act 1944 including those relating to exemption, that would have been untenable in law in view of the decision of the Hon'ble Supreme Court in *Unicorn Industries v UOI – 2019 (370) ELT 3 (SC),* relied upon by learned AR for department. As held by the Hon'ble Supreme Court in that decision when the Finance Act borrows the provisions of the Central Excise Act 1944 relating to exemption, it only means that the provisions of the Central Excise Act 1944 which empower the issuance of an exemption Notification are borrowed by the Finance Act. For exempting the duty levied under the Finance Act, an exemption Notification in respect of such duty has then to be issued in exercise of such power. The exemption Notification issued under the Central Excise Act does not *ipso facto* apply to the duty levied under the Finance Act.

3.36 That however, is not the Respondent's case. The Respondent has not relied upon any exemption Notification issued under the Central Excise Act 1944 to contend that the same would apply to and also exempt SAED (Surcharge) and AED (Cess) levied under the two Finance Acts, 2002 and 2018 respectively.

3.37 The Respondent's case is that goods manufactured in SEZ are excluded from the charge/levy under Section 3 (1) of the Central Excise Act 1944 and since Section 147 (3) of the Finance Act 2002 and Section 112 (3) of the Finance Act 2018 adopt/ borrow the provisions of the Central Excise Act relating to levy of Central excise duty and apply them to the levy under the said two Finance Acts, it would follow that goods manufactured in SEZ also stand excluded from the levy under the said two Finance Acts.

3.38 The Appeal filed by the Revenue proceeds on the presumption that the non-levy of SAED and Cess on goods manufactured in a SEZ and exported therefrom was by virtue of Rule 19 of the Central Excise Rules, 2017, which

provided for export of goods without payment of duty, against bond/LUT. According to the revenue, this facility having being withdrawn vide Notification No. 2/22-CE dated 30.06.2022, the levy stood attracted. This contention of the Revenue overlooks that the non-levy of ED/SAED/AD was on account of the exception provided for in section 3(1) from the charge of central excise duty to the goods manufactured in the SEZ, and not by virtue of Rule 19 of the CER, 2017. There has been no amendment to section 3(1) and the exception provided therein from the charge of excise duty to goods manufactured in SEZ continues. The amendment to the Rule cannot, by any stretch of imagination, imply levy on SEZ units when the provisions of section 3(1) remained unchanged

3.39 Reliance placed by learned Authorized representative on Notification No.8/2022-CE dated 30-6-2022 is totally misplaced. The said Notification has no relevance whatever to the present case. The very fact that the said Notification grants exemption from the Basic Excise duty levied under Section 3 (1) of the Central Excise Act 1944, itself means that it applies to goods which are covered by the levy/ charge under said Section 3 (1). The very fact that goods manufactured in SEZ are excluded from the levy/charge under said Section 3 (1) would mean that the said Notification has no relevance to goods manufactured in SEZ.

3.40 The contention of the Authorised Representative on behalf of the revenue that if it was the intention of the Central Government to exempt goods manufactured in a SEZ, from the surcharge and cess leviable under the two Finances Act, referred to above, then an exemption notification similar to Notification No. 8/22-CE dated 30.06.2022 would have been issued, this submission is untenable and misplaced in as much as the question of granting exemption would have arisen only in a case where the levy applies in the first instance, under a statue enacted by the Parliament. When the Act legislated by the Parliament does not create a charge and impose a levy, the intention of the Central Government being the subordinate becomes totally irrelevant and inconsequential.

3.41 Reliance placed by learned AR for department on the decision in Madurai District Central Co-operative Bank Ltd v The Third ITO-(1975) 2 SCC 454, is totally misplaced. The said decision which relates to Income tax, was not concerned with determination of scopeof Surcharge imposed by Finance Act, when the income in question was excluded from the Charge under Section 4 of the Income Tax Act. The Surcharge imposed by the Finance Act in that case was in respect of Income which was subject to charge levied

under Section 4 of the Income Tax Act. Unlike the said case, in the present case the issue is whether the surcharge applies to goods manufactured in SEZ which are excluded from the charge, for which the decision inAshok Service Centre *(supra)*is the relevant and applicable decision.

3.42 The facts of the case in Madurai District Central Co-operative Bank Ltd v ITO, were that the assessee was a co-operative Bank, whose total income comprised Banking income and Non-Banking income (residual income). The charge under Section 4 of the Income Tax Act was on Total income of previous year of every person. Section 81 (a) of the Income Tax Act, which pertained to Incomes forming part of Total income on which no tax was payable, granted exemption to the Banking income of a Co-operative Bank. Therefore, while the total income comprising Banking income and residual income was subject to the charge of income tax under Section 4, part of this total income viz. Banking income was granted exemption from payment of income tax under Section 81 (a). The Finance Act 1963 imposed Surcharge on the Residual income of the Co-operative Bank. Accordingly, the Surcharge was on income which was subject to charge under Section 4 of the Income tax and the Surcharge was not on income which was excluded from the charge. The Residual Income for the purpose of Surcharge, however, was so defined that it had the effect of levy of Surcharge on a portion of the Banking income which was exempt. This was challenged by the assessee by contending that Surcharge could not have been imposed on part of the Banking income which was exempt from Income tax. This contention was rejected by the Hon'ble Supreme Court. This decision has no application in the present case sincein the present case the goods manufactured in SEZ are not exempted from excise duty but are excluded from the very charge of excise duty and therefore cannot be liable to surcharge as held in *Ashok Service Centre.*

3.43 The decisions in Associated Cement Co Ltd v Director of Inspection and Orient Paper Mills Ltd v DyDir of Inspection- 1982 (10) ELT 247 relied upon by learned AR have no application to the facts of the present case. In those cases, Section 280ZD of the Income Tax Act 1961, provided for grant of tax credit certificate by way of incentive for increased production of Cement. The amount of tax credit to which a manufacturer of cement was entitled was calculated at a rate not exceeding 25% of the amount of duty of excise payable by him on the quantity of excess production during the financial year as compared to the production in the base year. Section 280ZD (6) (b) defined the expression "duty of excise" for the said purposeto mean duty of excise leviable under the Central Excise and Salt Act 1944. In

view of the said specific definition of duty of excise as that leviable under the Central Excise Act, it was held that for the purpose of the Tax Credit Certificate under said Section 280ZD, the Special duty of excise levied under Finance Act cannot be taken into account. The said issue arising in the said decisions has no bearing whatever on the issue arising in the present case.

3.44 The decision in R.M.Dhariwal (HUF) v UOI, relied upon by learned AR also has no application to the facts of the present case. The issue decided in this case is whether in respect of Tobacco and Tobacco Products, Duties of Excise can continue to be levied under Article 246 of the Constitution post the levy of GST on the said products under Article 246A of the Constitution. It was held that Article 246A provides that notwithstanding anything contained in Article 246, Parliament has power to make laws with respect to Goods and Service tax. It was held that Tobacco and Tobacco Products can be subjected both to levy of Duties of excise as well as GST. The further issue which was decided was whether exemption from Excise duty under Notification 11/2017 would itself result in NCCD being not applicable. The said issue has no relevance to the present case since it is not the Respondent's case that Excise duty on goods manufactured in SEZ is exempted by a Notification and therefore the SAED and AED are not payable on such goods. The Respondent's case is that goods manufactured in SEZ are excluded from the very charge/ levy of excise duty.

3.45 The reliance placed by learned AR on observations in Para 21 of the decision in *All India Fedn. Of Tax Practitioners v UOI – 2007 (7) STR 625 (SC)* do not advance the department's case in any manner. There can be no doubt that as held in the said Para 21, a Finance Act can introduce a new distinct charge. That in fact is what Chapter V of the Finance Act 1994 did by introducing Service tax, with which Supreme Court was concerned in that case. However, that is not the issue here. In the present case the SAED (Surcharge) and AED (Cess) imposed by Sections 147 and 112 of Finance Acts 2002 and 2018, respectively are in the nature of additional duties of excise (increment in the existing duty of excise) and the said Sections have borrowed and made applicable the provisions of the Central Excise Act 1944 relating to levy of Central Excise duty to the levy of the said SAED and AED. Such was not the case with Chapter V of the Finance Act 1994 by which Service tax was introduced, with which Supreme Court was concerned in the said case.

<u>Reliance placed by Learned AR for department on Proviso to Section 5A of the Central Excise Act 1944 is untenable</u>:

3.46 Learned Authorized Representative for department relied upon Clause (i) of the Proviso to Section 5A (1) of the Central Excise Act 1944, which provides that an exemption Notification issued under Section 5A (1) shall not apply to goods which are produced or manufactured in SEZ and brought to a place in India unless the Notification specifically provides that it shall apply to such goods. Based on the said Proviso, it was contended by learned AR that the very fact that the said Proviso contemplates that an exemption Notification issued under Section 5A (1) can specify that it shall apply to goods produced or manufactured in SEZ, would show that goods produced or manufactured in SEZ are liable to Central Excise duty. The said contention is untenable for reasons herein after set out.

3.47 When Section 3(1) of the Central Excise Act 1944 specifically provides that goods produced or manufactured in SEZ are excluded from the charge of excise duty levied thereunder, it would be idle to contend to the contrary based on the said Proviso to Section 5A (1). Reliance is placed in this behalf on the decision of the Hon'ble Gujarat High Court in the case of Roxul Rockwool Insulation India P. Ltd v UOI –2015 (320) ELT 554 (Guj).

3.48 The enabling provision in Proviso to Section 5A (1) of the Central Excise Act 1944, by which an exemption under Section 5A (1) can be issued in respect of goods produced or manufactured in SEZ and brought to DTA, was introduced when goods produced or manufactured in SEZ were liable to Central Excise duty. The same, no more remained necessary, when with the enactment of SEZ Act 2005, Section 3(1) of the Central Excise Act 1944 excluded goods produced or manufactured in SEZ from the charge of Excise duty. If at any time in the future, such exclusion is done away with, the said enabling provision will again become relevant.

3.49 In light of the aforesaid submissions, the present appeal has no merit and is liable to be dismissed.

4. We have carefully considered the submissions made by both the sides and perused the records. Since the appeal itself is taken for disposal, the revenue's Stay application is dismissed as infructuous. The core issue in the present appeal involved is whether the levy of special additional excise duty as surcharge under Section 147 of the Finance Act, 2002 and additional duty of excise levied as road and infrastructure cess under Section 112 of Finance Act, 2018 read with relevant Notifications Nos.04/2022-CE dated 30.06.2022, 05/2022-CE dated 30.06.2022, 10/2022-CE dated 30.06.2022 and 19/2022 dated 19.07.2022 in respect of SEZ unit is correct and if not whether the respondent are eligible for the refund of the duty which has

already been paid by the respondent. To buttress the whole issue first it is necessary to read the relevant Statutory Provisions, Notifications and Rules etc. in this regard. Accordingly, Section 147 of the Finance Act 2002 and Section 112 of the Finance Act 2018 are reproduced below:-

THE FINANCE ACT, 2002

An Act to give effect to the financial proposals of the Central Government for the

financial year 2002-2003.

BE it enacted by Parliament in the Fifty-third Year of the Republic of India as follows :—

CHAPTER I

PRELIMINARY

1. Short title and commencement. *–*

(1) This Act may be called the Finance Act, 2002.

(2) Save as otherwise provided in this Act, sections 2 to 116 shall be deemed to have come into force on the 1st day of April, 2002.

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147. Special additional excise duty. –

(1) In the case of goods specified in the Eighth Schedule, being goods manufactured, there shall be levied and collected, for purposes of the Union, by surcharge, a duty of excise, to be called the Special Additional Excise Duty, at the rates specified in the said Schedule.

(2) The Special Additional Excise Duty chargeable on goods specified in the Eighth Schedule shall be in addition to any other duties of excise chargeable on such goods under the Central Excise Act, or any other law for the time being in force.

(3) The provisions of the Central Excise Act, and the rules made thereunder, including those relating to refunds and exemptions from duties and imposition of penalty, shall, as far as may be, apply in relation to the levy and collection of the Special Additional Excise Duty leviable under this section in respect of the goods specified in the Eighth Schedule, as they apply in relation to the levy and collection of the duties of excise on such goods under that Act, or those rules, as the case may be.

THE EIGHTH SCHEDULE

(See section 147)

Item No.	***Description of goods***	***Rate of duty***
(1)	***(2)***	***(3)***
1.	*Motor spirit, commonly known as petrol*	*1[Rs. 18 per litre]*
2.	*High speed diesel oil*	*2[Rs. 12 per litre]*

[3][3.]	Petroleum crude	Rs. 23250 per tonne
4.	Aviation Turbine Fuel	[4][Rs.12 per Litre]

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NOTES:-

1. Substituted vide Finance Act, 2020 dated 27-03-2020 before it was read as "Rs. seven per litre"

2. Substituted vide Finance Act. 2020 dated 27-03-2020 before it was read as "Re. one per litre"

3. Inserted vide NOTIFICATION NO. 05/2022-Central Excise dated 30-06-2022 w.e.f. 01-07-2022

4. Substituted vide NOTIFICATION NO, 25/2022-Central Excise dated 31-08-2022 w.e.f. 01-09-2022 before it was read as, "Rs. 6 per Litre"

THE FINANCE ACT, 2018

[Act No. 13 of 2018]

[29th March, 2018]

An ACT to give effect to the financial proposals of the Central Government for the financial year 2018-2019.

BE it enacted by Parliament in the Sixty-ninth Year of the Republic of India as follows :—

CHAPTER I

PRELIMINARY

1.Short title and commencement. *—*

(1) This Act may be called the Finance Act, 2018.

(2) Save as otherwise provided in this Act, sections 2 to 55 shall come into force on the 1st day of April, 2018.

****

NOTES:-

1. As Corrected Vide CORRIGENDA THE FINANCE ACT. 2018 No. 18 OF 2018 Dated 03-04-2018, before it was read as, "[28th March, 2018.]

112.Road and Infrastructure Cess on excisable goods. *— (1)There shall be levied and collected, in accordance with the provisions of this Chapter, for the purposes of the Union, an additional duty of excise, to be called the Road and Infrastructure Cess, on the goods specified in the Sixth Schedule (hereinafter referred to as scheduled goods), being the goods manufactured or produced, at the rates specified in the said Schedule for the purpose of financing infrastructure projects.*

The (2) cess leviable under sub-section (1), chargeable on the scheduled goods shall be in addition to any other duties of excise chargeable on such goods under the Central Excise Act, 1944 (1 of 1944) or any other law for the time being in force.

The provisions of the Central Excise Act, (3) 1944 (1 of 1944) and the rules made thereunder, including those relating to assessment, non-levy, short-levy, refunds, exemptions, interest, appeals, offences and penalties shall, as far as may be, apply in relation to the levy and collection of the cess leviable under this section in respect of scheduled goods as they apply in relation to the levy and collection of the duties of excise on scheduled goods under the said Act or the rules, as the case may be.

THE SIXTH SCHEDULE

[See sections 111 and 112]

Item No.	***Description of goods***	***Rate of duty***
(1)	***(2)***	***(3)***
1.	*Motor spirit, commonly known as petrol*	*[2][Rs. 18 per litre]*
2.	*High speed diesel oil*	*[2][Rs. 18 per litre]*

****

Notes:-

1. Substituted vide FINANCE (NO. 2) ACT, 2019 w.e.f. 01-08-2019 before it was read as " 8 per litre"

2. Substituted vide Finance Act, 2020 dated 27-03-2020 before it was read as ""[10 per litre]"

From the reading of the above both Sections 147 of the Finance Act, 2002 and Section 112 of the Finance Act, 2018, it appears that the said Sections provide for levy by surcharge, duty of excise to be called the special additional excise duty at the rates specify in the said schedule and as per Section 112 it provides to levy an additional duty of excise to be called the road and infrastructure cess on the goods specified in the 6th schedule. In both Section under sub Section (2) it clearly provides that the said levies are nothing but it shall be in addition to any other duties of excise chargeable on such goods under the Central Excise Act, 1944. The above levy was only limited to the goods manufactured in India and cleared for DTA as in terms of Rule 19 of Central Excise Rules, 2017. The aforesaid duties were not required to be paid in terms of Rule 19 of Central Excise Rules, 2017 when

the goods manufactured in India is exported out of India. However, with effect from 01.07.2022 Rule 19 of Central Excise Rules,2017 was amended and as per the amended Rule vide Notification No.02/2022-CE dated 30.06.2022, the goods namely MS, HSD and ATF were excluded from the scope of Rule, 19. Accordingly, it is the contention of the revenue that the export of the said goods also liable for payment of special additional excise duty and additional excise duty on MS, HSD and ATF. By Notification No.04/2022-CE dated 30.06.2022 partial exemption was granted from SAED (surcharge) in excess of Rs.5 per litre and in excess of Rs.12 per litre on HSD cleared for export w.e.f 01.07.2022. Similarly special additional excise duty (surcharge) on ATF was imposed at the rate of Rs.6 per litre by amending the 8th Schedule to Finance Act, 2002. By inception of serial No.4, the said 8th Schedule accordingly w.e.f. 01.07.2022 ATF became liable to SAED at the rate of Rs.6 per litre. As regard the additional excise duty (road and infrastructure cess) partial exemption was granted vide Notification No.10/2022 dated 30.06.2022 in excess Rs.1 per litre on MS and HSD cleared for export. Thereafter, by Notification No.19/2022-CE dated 19.07.2022 the aforesaid duties levied under Section 147 of the Finance Act, 2002 and Section 112 of the Finance Act,2018 on MS, HSD and ATF were exempted w.e.f. 20.07.2022 when exported from SEZ unit. The respondent in view of the above statutory provisions, paid the duties on the export of the goods 'UNDER PROTEST' on the ground that the respondent's unit being a SEZ unit is not required to pay the aforesaid duties, hence they filed a refund claim which was rejected by the sanctioning authority. However, the same was sanctioned by Learned Commissioner (Appeals) in the impugned order, against which this appeal is filed by the Revenue contending that the duties of the SAED and AED were levied under an independent Finance Act, 2002 and 2018 respectively and particularly when the Notification No.19/2022-CE dated 19.07.2022 issued under Section 5(A) of Central Excise Act, 1944 exempts from the duties of SAED and AED only when cleared for export from SEZ unit.

4.1 It is the contention of the revenue that prior to this Notification dated 19.07.2022 SEZ was also required to pay SAED and AED levied under Section 147 of the Finance Act,2002 and under Section 112 of the Finance Act, 2018. We find that under both the Sections 147 and 112 of the Finance Act, 2002 and 2018 respectively, it is clear that both the duties are in addition to the duties of excise chargeable on such goods under the Central Excise Act. Therefore, these duties are in other words become a part of duties of excise chargeable on such goods in terms of Section 3 of the

Central Excise Act, 1944. Moreover, sub section (3) of both the Sections 147 of the Finance Act, 2002 and Section 112 of Finance Act, 2018 clearly provide that the provision of Central Excise Act and the Rules made there under, shall as far as may be apply in relation to levy and collection the SAED and AED on the goods in question under that Act or those rules as the case for. In view of this clear position since the levy of SAED and AED under Section 147 and 112 of the Finance Act 2002 and 2018 respectively are in addition to the duties of excise chargeable on such goods under the Central Excise Act, the provision of relevant Section 3 of Central Excise Act, 1944 shall be statutorily invoked and applied in this case. Section 3 of the Central Excise Act 1944 is reproduced below:-

> *"**Section 3. Duties specified in the First Schedule and the Second Schedule to the Central Excise Tariff Act, 1985 to be levied.-***
>
> *(1) 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(excluded 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:*
>
> *Provided that the duties of excise which shall be levied and collected on any excisable goods which are produced or manufactured,-*
>
> *[1](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.*
>
> ***Explanation 2.-**In this proviso,-*
>
> *[2](i) **Omitted***

(ii) "hundred per cent export-oriented undertaking" means an undertaking which has been approved as a hundred per cent export-oriented undertaking by the Board appointed in this behalf by the Central Government in exercise of the powers conferred by section 14 of the Industries (Development and Regulation) Act,1951 (65 of 1951), and the rules made under that Act;

(iii) "Special Economic Zone" has the meaning assigned to it in clause (za) of section 2 of the Special Economic Zones Act, 2005.

(1A) The provisions of sub-section (1) shall apply in respect of all excisable goods other than salt which are produced or manufactured in India by, or on behalf of Government, as they apply in respect of goods which are not produced or manufactured by Government.

(2) The Central Government may, by notification in the Official Gazette, fix, for the purpose of levying the said duties, tariff values of any articles enumerated, either specifically or under general headings, in the First Schedule and the Second Schedule to the Central Excise Tariff Act, 1985 (5 of 1986)] as chargeable with duty ad valorem and may alter any tariff values for the time being in force.

(3) Different tariff values may be fixed-

(a) for different classes or descriptions of the same excisable goods; or

(b) for excisable goods of the same class or description-

(i) produced or manufactured by different classes of producers or manufacturers;
or

(ii) sold to different classes of buyers:

Provided that in fixing different tariff values in respect of excisable goods falling under sub-clause (i) or sub-clause (ii), regard shall be had to the sale prices charged by the different classes of producers or manufacturers or, as the case may be, the normal practice of the wholesale trade in such goods."

From the above Section 3 which is Parent Act for levy of Excise duty clearly provides that the duties of excise to be called as central value added tax shall be levied and collected on all excisable goods which are produced or manufactured in India. However, it clearly eschewed the goods produced or manufactured in Special Economic Zone. The levy of SAED and AED cannot be made in isolation in terms of Section 147 of the Act, 2002 and Section 112 of Finance Act, 2018 without applying the provision of Section 3 of the Central Excise Act as per the mandate given in sub Section (3) of Section 147 and Section 112 of the Finance Act, 2002 and 2018 respectively. Accordingly when we do conjoint reading of Section 147 of 2002 and Section 112 of Finance Act, 2018 with Section 3 of Central Excise Act, 1944, it clearly provides that not only the levy of duty of excise as mentioned under Section 3 (1) (a) and/ or (b) but also SAED in terms of Section 147 of Finance Act, 2002 and AED in terms of Section 112 of Finance Act, 2018 will

not be levied on the goods manufactured or produced in special economic zones whether cleared for DTA or for export. Therefore, in view of the clear statutory provision as reproduced above. In respect of goods manufactured or produced in special economic zones, no excise duty as well as SAED and AED is levied.

4.2 The Revenue contended for levying these duties, that since both the levies of SAED and AED were brought by Section 147 of Finance Act, 2002 and Section 112 of Finance Act, 2018 which are independent act and enacted by the Parliament, therefore, the same is leviable on SEZ units also. In this regard, we find that both the Sections 147 and 112 of the Finance Act, 2002 and 2018 respectively do specify in terms of sub Section (2) and (3) of the both the Sections that provision of Central Excise Act and Rules, in as much as, both the duties in addition to duties of Excise, are applicable in levy of the duty under Section 147 and 112 of the Finance Act, 2002 and 2018 respectively. The contention of the Revenue may be correct only when there would not have exclusion of SEZ from levy excise duty under Section 3 (1) (a) of Central Excise Act, 1944 but when the Section 147 and 112 cannot be applied in isolation and it has to be applied with the provision of Section 3 of the Central Excise Act, 1944 whereby, the unit of SEZ was excluded from levy of the duties of Excise under Section 3, for the purpose of levies of SAED and AED the SEZ unit also shall be excluded mutatis mutandis, from such levies. Our above view is supported by the Hon'ble Supreme Court judgment in the case of Ashok Service Centre and ors v State of Orissa – (1983) 2 SCC 82. In this case, the charging provisions of the Principal Act viz. The Orissa Sales Tax Act 1947, contained in Sections 4 and 8 thereof, provided for levy of sales tax on every dealer whose gross turnover during a fiscal year exceeded Rs.50,000/- and the tax so levied was a Single Point Tax. By the Orissa Additional Sales Tax Act 1975 as amended in 1979, provision was made under Section 3(1) thereof, for levy of Additional Sales tax on "Every dealer" and there was no provision restricting the additional sales tax to single point levy. Section 3 (3) of the said Additional Sales Tax Act provided that the provisions of the Orissa Sales Tax Act 1947 (Principal Act) shall, *mutatis mutandis* apply in relation to the said additional tax as they apply in relation to the tax under the principal Act. The contention on behalf of the State was that since Section 3(1) of the said Additional Sales tax Act, mentioned "Every Dealer" and did not exclude a Dealer whose turnover in a fiscal year was Rs.50,000/- and below, the additional sales tax would be payable by every dealer irrespective of his turnover. It was also contended that since the said Additional Sales Tax Act

did not confine the levy to single point levy, it was open to the State to levy the additional sales at multi points. Both the contentions were rejected by the Hon'ble Supreme Court. In Para 17 of the judgment, the Hon'ble Supreme court held that the Additional sales tax was in the nature of a Surcharge over and above what was due and payable by an assessee under the principal Act and therefore the Additional Sales tax Act has to be read together with the principal Act to be effective. Further, in Para 18 of the judgment, the Hon'ble Supreme Court held that the word "additional" in said Section 3(1) involves the idea of joining or uniting one thing to another so as thereby to form one aggregate. It was accordingly held that the scope of the surcharge cannot take within its fold that which was not subject to the charge in the Principal Act and consequently the additional sales tax did not apply to a Dealer whose turnover was Rs.50,000/- and below and further the additional sales tax cannot be levied as multi-point tax. The ratio of the said decision squarely applies to the present case. In the present case the charge under the Principal Act i.e. Section 3(1) of the Central Excise Act 1944 does not extend to goods manufactured in SEZ and consequently the Additional duties viz. SAED (Surcharge) and AED (Cess) also cannot extend to goods manufactured in SEZ.

4.3 Learned Authorized Representative for the department sought to distinguish the said decision in Ashok Service Centre on the ground that Section 3(3) of the said Additional Sales Tax which adopted and applied the provisions of the Principal Act used the expression "shall mutatis mutandis apply" whereas the expression used in Section 147 (3) of Finance Act 2002 and Section 112 (3) of Finance Act 2018 is "shall as far as may be apply". We find that the said difference in the language makes no difference to the applicability of the ratio of the decision in Ashok Service Centre to the present case since as laid down in Md. Safi v State of Bengal – AIR 1951 Cal 97 (Para 7), the expression "so far as may be, apply" is a common expression used in legislation which is interchangeable with the expressions "mutatis mutandis", "as far as applicable" and like expressions. Significantly, the expression in the decision of Ujagar Prints referred to herein above is "so far as may be, apply" and the ratio of the decision of the Hon'ble Supreme court in Ujagar Prints is same as that of the decision in Ashok Service Centre, in which the expression "mutatis mutandis" has been used.

4.4 Further, reliance is also placed on the decision of the Hon'ble Supreme Court in the case of Sarojini Tea Co P. Ltd v Collector – (1992) 2 SCC 156,.

4.5 Further, reliance is also placed on the decision of the Hon'ble Gujarat High Court in the case of Maheshwari Mills Ltd v UOI- 1992 (58) ELT 9 (Guj), in which the Hon'ble High Court has held that the Additional Duties of Excise (Textiles and Textiles Articles) Act 1978 which imposed additional duty of excise had to be read together with the Central Excise Act 1944 in view of Section 3 (3) of the Additional Duties Act which provided that the provisions of the Central Excise Act 1944 and the rules there under, shall so far as may be apply in relation to levy and collection of the additional duty as they apply in relation to the levy of the excise duty.

4.6 The Revenue has heavily relied upon the exemption Notification No.19/2022-CE dated 19.07.2022 whereby specific exemption was granted to excisable goods when exported from the units located in special economic zone that shows that even the goods manufactured and exported from SEZ for the period of 01.07.2022 to 19.07.2022 was liable to duties of SAED and AED. In this regard we find that before applying the Notification, first the provisions of levy has to be seen which is the foundation for any levy, the foundation of any levy of duties of excise is provided under Section 3 of the Central Excise Act 1944. Once there is clearly no levy in respect of SEZ units, eventhough Notification No.19/2022-CE dated 19.07.2022 was issued the same will not alter the provision of Section 3 of the Central Excise Act 1944.

4.7 It is a settled law that the subordinate legislation cannot overrule the primary legislation. The primary legislation is enacted by parliament and under the said legislation the executive power is given to make laws in order to implement and administer the requirements of the primary legislation. Such law is the law made by a person or body other than the legislature but with the legislature's authority. Article 13(3) of the Indian Constitution includes within the definition of law forms of subordinate legislation such as order, rule, regulation, notification. Therefore, the subordinate legislation in the present case i.e. Notification No.19/2022-CE dated 19.07.2022 which was issued contrary to the provision of Section 3 of Central Excise Act read with Section 147 and 112 of Finance Act, 2002 and 2018 respectively. Hence the same cannot prevail over the primary legislation. The Revenue vehemently argued that this Tribunal being a creature under the Central Excise Act and Custom Act cannot ignore the Statutory Notification provided under 19/2022-CE. In this regard we find that as discussed above, being a creature under the Central Excise Act and Custom Act, we are legally duty bound to ensure that the primary legislation should prevail over the subordinate legislation. Therefore, even though, the Notification

No.19/2022- CE created the same is not binding for the reason that the same is not in consonance with primary legislations which is Section 3 of Central Excise Act, 1944 read with Section 147 of the Finance Act, 2002 and Section 112 of the Finance Act, 2018. This Tribunal has to give primacy to the primary legislation and not to the subordinate legislation. Some of the judgments play very crucial role in reviewing primary and subordinate legislation to ensure they conform to the Constitution and the principles of legality and reasonableness which are as under:-

- Kesavananda Bharati v. State of Kerala
  (1973) 4 SCC 225; AIR 1973 SC 1461
- Minerva Mills v. Union of India
  AIR 1980 SC 1789
- Harakchand Ratanchand Banthia v. Union of India
  1970 AIR 1453= 1970 SCR (1) 479= AIR 1970 SUPREME COURT 1453

In view of the above judgments, it is trite law that the subordinate legislation cannot traverse beyond the spirit of the primary legislation. Therefore, eventhough the Notification No.19/2022-CE dated 19.07.2022 specifically mentioned the exemption for SEZ unit from payment of SAED and AED on MS, HSD and ATF when exported from the SEZ but in the primary legislation i.e. Section 3 of the Central Excise Act read with Section 147 of Finance Act 2002 and Section 112 of Finance Act, 2018 when there is no levy on the SEZ unit as the same was excluded in Section 3 of Central Excise Act 1944, the Notification No.19/2022-CE cannot suggest that there was levy of SAED and AED in respect of MS, HSD and ATF during the period 01.07.2022 to 19.07.2022. It is settled law that when the levy itself lacks, merely by notification, the levy cannot be created. This our view is supported by the Hon'ble Supreme Court judgment in the case of CCE v Larsen and Toubro Limited – 2015 (39) STR 913. In this case the Hon'ble Supreme Court held that there was no charging provision in the Finance Act 1994 levying service tax on Works Contract prior to 1st June 2007. As regards reliance placed by revenue on Exemption Notifications in force prior to 1st June 2007, purportedly granting exemption from service tax, to suggest that works contract were liable to service tax even prior to 1st June 2007.

4.8 We find force in the submission of the respondent that levy of SAED and AED are in isolation. The levies lack the completeness and certainty in respect of four components namely the taxable event, the person to whom

levy is imposed and measure. This is the reason that Section 147 of 2002 Act and 112 of 2018 Act clearly provide that for the levy of these duties the provision of Central Excise Act and Rules made thereunder shall apply. Therefore, to arrive at the completion of the levy it is necessary that the Section 147 of Finance Act, 2002 and Section 112 of Finance Act, 2018 cannot alone be applied for the levy of SAED and AED. To give completeness, the provision of the said both the Sections to apply along with the relevant provision of Section 3 of the Central Excise Act which clearly exclude the SEZ unit, the levy of SAED (surcharge)and AED (Cess) cannot be levied on the SEZ unit. It is also undisputed that Section 147 and 112 of Finance Act, 2002 and 2018 respectively do not provide any reference to the taxable territory which otherwise provide under Section 3 (1) (a) of Central Excise Act, 1944. Therefore, for levy under Section 147 and 112 of 2002 and 2018 Act respectively the taxable territory needs to be decided on the basis of Section 3 of Central Excise Act 1944 which excludes the territory of SEZ. Therefore as regard the taxable territory such exclusion shall apply mutatis mutandis for levy of SAED and AED under Section 147 of 2002 Act and 112 of 2018 of Finance Act.

4.9 We find that similar issue has been considered in the respondent's own case by this Tribunal vide Final Order No.10444/2024 dated 20.02.2024 in Excise Appeal No.10541/2023 wherein, this Tribunal held that goods manufactured in the SEZ unit are not liable to said SAED (surcharge) AED (road and infrastructure cess) under Section 147 of Finance Act, 2002 and Section 112 of Finance Act 2018 respectively, this Tribunal in the said decision passed following order:-

> *"4. We have carefully considered the submissions made by both sides and perused the records. It is not in dispute that the Appellant in question is a unit in the Special Economic Zone and has manufactured and cleared High Speed Diesel to the DTA, interalia on payment of applicable duties of Customs in terms of Section 30 of the SEZ Act, 2005 (which as a part of Additional duty of customs leviable under Section 3(1) of the Customs Tariff Act, 1975, includes the levy of SAED, RIC and AIDC). The question that we need to deliberate and decide upon is whether the said levy of SAED, RIC & AIDC could be once again imposed and recovered by the Central Excise field formation, as a duty of excise.*
>
> *4.1 We find it surprise that the Adjudicating Authority who is an integral part of the department of Revenue has conveniently ignored the fact that any goods removed from the SEZ to the DTA are regarded to as having been imported into the DTA and accordingly in terms of Section 30 of the SEZ Act, subjected to duties of customs, including anti dumping duty, countervailing duty, and safeguard duty under the Customs Tariff Act, 1975. It is undisputed that the HSD in question has been subjected the levy of additional duty under Section*

3 (1) of the Customs Tariff Act, which is equal to the Excise duty for the time being leviable on like article, produced or manufactured in India. As a part of the said additional duty under Section 3(1) of the Customs Tariff Act, the amount leviable in respect of SAED, RIC and AIDC under respective Finance Acts, has already been levied and collected.

4.2 Faced with the challenge of justifying how a clearance which is regarded as an import into India and applicable customs duties recovered on the same could be subjected to a levy of Central Excise duty in addition to additional duty under Section 3(1) of Customs Tariff Act, the Adjudicating Authority has in para 3.4.5.1 and 3.4.5.2 concluded that "……. consequently, it is safe to conclude that the clearance from the SEZ unit to the DTA is normal clearance of manufactured goods within India i.e. domestic tariff area and all the levy duty, SEZ created under Central Law enactments in respect of clearance of manufacture goods shall apply……."

4.3 It is indeed shocking as to how the Adjudicating Authority could have concluded that the removal from the SEZ to the DTA is just a normal clearance of manufactured goods within India, when Section 30 of the SEZ Act stipulates that, any goods removed from the SEZ will be chargeable to duties of customs, as leviable on such goods when imported. Further, Rule 47 of the SEZ Rules, 2006 envisages that the DTA sale of goods manufactured by an SEZ unit shall be against submission of import license as applicable to imports of similar goods into India under the Foreign Trade Policy. Rule 48 requires a bill entry for home consumption to be filed in respect of clearances to the DTA, and further envisages that the valuation and assessment shall be made in accordance with the Customs Act and Rules made thereunder. Merely because there is a specific definition of export under the SEZ Act and clearance from SEZ to DTA does not fall within the said definition of export for the purpose of the SEZ this however is no ground for holding that the removal from the SEZ to the DTA which is normally assessed but also considered for all purposes as an import, being considered as a normal clearance of goods manufactured within India. In our view two statutes (SEZ and the Finance Acts, levy in excise duty) have to be read and construed in a harmonious manner and cannot be read an interpreter in a manner to create a conflict between the two.

4.5 In fact, a similar predicament was considered by the larger Bench of this Tribunal in the case of Kumar Architect Pvt. Ltd Vs. CCE reported in 2013 (290) ELT 372, in respect of clearances made by a 100% EOU to the DTA. The Revenue had in that case urged that education Cess and secondary and higher education cess is to be paid thrice over, when goods are cleared from EOU to the DTA. Once as a part of additional duty under Section 3 (1), the second time as a part of customs duty, since what was to be paid by an EOU was an amount equal to the duty of customs, as if the goods were imported. The third cess was sought to be levied on the premise that EOU being within India the major of the duty was the customs duty however, what was leviable was excise duty and on this Excise duty cess was required to be discharged. The Larger Bench rejected this contention of the Revenue on various counts, one of which being that the duty payable

on goods cleared from an EOU to the DTA as to be on Par with the duties payable on goods imported from abroad into the country. It was held that the interpretation suggested by the Revenue would have the effect of goods cleared from the EOU to the DTA suffering a higher duty vis-a-vis that leviable on import of goods into the country. Such an interpretation was held to be clearly at odds with the principle that duty is payable on goods cleared into DTA from 100% EOU should be on par with duty leviable on goods imported into the country from abroad.

4.6 The ratio laid down by the Larger Bench of this Tribunal applies in all force to the present factual situation also, in as much as an SEZ is deemed to be a territory outside the customs territory of India for undertaking authorized operations. It is for this reason that on clearances from the SEZ to the DTA, duties of customs as leviable on such goods when imported into India is a required to be discharged, this being the case there cannot be any logic or rational in requiring the SEZ to pay duties and taxes higher than those payable on imports of goods into the country. If the reasoning propounded by the Adjudicating Authority is accepted then on clearance from the SEZ to the DTA the goods would have to once again suffer the duties of SAED/RIC and AIDC, under the Finance Acts as a duty of excise, which already from a part of addition duty under section 3(1) of Customs Tariff Act. Such an interpretation cannot be countenanced as it would lead to an invidious situation of removal from the SEZ to DTA, being tax higher than imports of goods into the country, this is contrary to the legislative principle of regarding removal from SEZ to the DTA as an import.

4.7 It is also relevant to note here that under the EOU scheme there was no provision akin to section 53 of the SEZ Act, with these the SEZ to be a territory outside the Customs Territory of India for undertaking authorized operations. This deeming provision has been acknowledged by the CBIC even for the period prior to the enactment of the SEZ Act, 2005 vide Circular No.68/2003-CUS dated 30.07.2003 wherein it was clarified that "SEZ will be considered as a Foreign Territory for the purpose of duties and taxes.In other words supplies from DTA to SEZ will be considered as exports by the DTA unit and supply to DTA by the SEZ will be considered as import by the DTA unit." The saidCircular further clarifies that "supplies to and from the SEZ will be governed by the provisions of the Customs Act, 1962 and not by the provision of Central Excise Act, 1944." It is settled law that a deeming provision has to be given entire place i.e. if the SEZ is deemed to be a territory outside the customs territory and the good cleared to the DTA there from as imports then the removal from the SEZ to the DTA cannot be considered as a normal clearance of manufactured goods within India, especially in light of Section 51 of the SEZ Act which has the effect of the SEZ Act overriding anything in consistent in any other law for the time being in force. The law with regard to the deeming fiction is that 'in case of any deeming fiction in statute, it's full legal effect must be given, one cannot go behind such deeming fiction in law and imagine contrary.' We are therefore of the view that, removal from SEZ to the DTA being an import, the Adjudicating Authority had no justification in ignoring the fact that the removal from SEZ to the DTA had already suffered additional duty under Section 3(1), which included the duties leviable under the Finance Acts and there was no justification in once

again seeking to recover the very same amount separately as a duty of excise.

4.8. Notwithstanding the above, we also find that applying the ratio laid down by the Apex Court in the case of Govind Saran Ganga Saran Vs. Commissioner of Sales Tax 1985 SUPP (SCC) 205 the levy of SAED, RIC and AIDC under the relevant Finance Acts, cannot be given effect to without the support and reference to the provisions of the Central Excise Act, 1944 and the Rules made thereunder relating to levy and collection, as made applicable in terms of Section 147(3)/112(3)/125(4) of Finance Acts 2002/2018/2021 respectively. We will first deal with this aspect as it goes to the very fulcrum of the proceedings initiated against the Appellant. For doing so we are extracting herein below the relevant provisions of the Finance Act, 2002, 2018 and 2021.

Relevant extracts of Finance Act, 2002:

147. Special additional excise duty . - (1) In the case of goods specified in the Eighth Schedule, being goods manufactured, there shall be levied and collected, for purposes of the Union, by surcharge, a duty of excise, to be called the Special Additional Excise Duty, at the rates specified in the said Schedule.

(2) The Special Additional Excise Duty chargeable on goods specified in the Eighth Schedule shall be in addition to any other duties of excise chargeable on such goods under the Central Excise Act, or any other law for the time being in force.

(3) The provisions of the Central Excise Act, and the rules made thereunder, including those relating to refunds and exemptions from duties and imposition of penalty, shall, as far as may be, apply in relation to the levy and collection of the Special Additional Excise Duty leviable under this section in respect of the goods specified in the Eighth Schedule, as they apply in relation to the levy and collection of the duties of excise on such goods under that Act, or those rules, as the case may be.

Relevant extracts of Finance Act, 2018:

112. Road and Infrastructure Cess on excisable goods. — (1) There shall be levied and collected, in accordance with the provisions of this Chapter, for the purposes of the Union, an additional duty of excise, to be called the Road and Infrastructure Cess, on the goods specified in the Sixth Schedule (hereinafter referred to as scheduled goods), being the goods manufactured or produced, at the rates specified in the said Schedule for the purpose of financing infrastructure projects.

(2) The cessleviable under sub-section (1), chargeable on the scheduled goods shall be in addition to any other duties of excise chargeable on such goods under the Central Excise Act, 1944 (1 of 1944) or any other law for the time being in force.

(3) The provisions of the Central Excise Act, 1944 (1 of 1944) and the rules made thereunder, including those relating to assessment, non-levy, short-levy, refunds, exemptions, interest, appeals, offences and penalties shall, as far as may be, apply in relation to the levy and collection of the cessleviable under this section in respect of scheduled goods as they apply in relation to the levy and collection of the duties of excise on scheduled goods under the said Act or the rules, as the case may be.

Relevant extracts of Finance Act, 2021:

125.Agriculture Infrastructure and Development Cess on excisable goods. — (1) There shall be levied and collected, in accordance with the provisions of this section, for the purposes of the Union, an additional duty of excise, to be called Agriculture Infrastructure and Development Cess, on the goods specified in the Seventh Schedule (hereinafter referred to as scheduled goods), being the goods manufactured or

produced, at the rates specified in column (3) of the said Schedule, for the purposes of financing the agriculture infrastructure and other development expenditure.

(2) The Central Government may, after due appropriation made by Parliament by law in this behalf, utilise such sums of money of the Agriculture Infrastructure and Development Cess levied under this section for the purposes specified in sub-section (1), as it may consider necessary.

(3) The cessleviable under sub-section (1), chargeable on the scheduled goods, shall be in addition to any other duties of excise chargeable on such goods under the Central Excise Act, 1944 (1 of 1944), or any other law for the time being in force.

(4) The provisions of the Central Excise Act, 1944 (1 of 1944), and the rules and the regulations made thereunder, including those relating to assessment, non-levy, short-levy, refund, exemptions, interest, appeals, offences, and penalties shall, as far as may be, apply in relation to the levy and collection of the cessleviable under this section in respect of scheduled goods as they apply in relation to the levy and collection of duties of excise on such goods under the said Act or the rules or regulations, as the case maybe.

4.9. To recapitulate, the four components identified by the Apex Court as constituting necessary and essential elements which have to be present in the taxing statute in a clear, unambiguous, and a definitive manner for the levy of tax to sustain are the following:-

a) enunciation of the taxable event;
b) indication of the person on whom the levy is imposed and is obliged to pay the tax;
c) rate at which the tax is imposed;
d) the measure and value to which the rate will be applied.

Of the above four components, clearly the provisions of the three Finance Acts under which SAED, AIDC and RIC have been levied, when read on a standalone basis without reference to the levy and collection provisions in the Central Excise Act do not specify either the person liable to pay tax which is component No.2 or the measure and the value to which the rate is to be applied, which is component No.4. The three Finance Acts are therefore, in our view, not self-contained and therefore do not by themselves constitute a complete code to levy and collect the duties leviable thereunder.

4.10. Even in respect of the first component viz., the taxable event, the provisions of the Finance Act are not by themselves sufficient to sustain the levies. It can be seen that while Section 147 of the Finance Act, 2002 prescribes that the duty being levied is on goods manufactured and Section 112 of the Finance Act, 2018 as also Section 125 of the Finance Act, 2021 prescribes that the duty being levied is on goods manufactured or produced. It appears to us that by merely prescribing that the tax is on manufacture, the first component that enters into the concept of tax is not achieved. The charging provision needs to provide the event attracting the levy to tax for example, manufacture or production of goods in a given geographical location or territory. In our view, if the Finance Acts, in question are read on a standalone basis the taxable event has been prescribed in an incomplete manner, inasmuch as, merely specifying that the levy is on manufacture or production is not enough, it also needs to be specified that the levy would be attracted when the production or manufacture takes place at a particular location, territory, etc., failing which the nature of levy is vague and uncertain and falls foul of the

criteria laid down by the Apex Court in the case of Govind Saran Ganga Saran (supra).

4.11. It will be relevant to compare the charging provision of the aforesaid Finance Acts vis-à-vis the charging provision under the Central Excise Act, 1944, the Customs Act, 1962, Service Tax law as provided for in Chapter V of the Finance Act, 1994, as also the provisions of the levy of Goods and Services Tax under the Central Goods and Services Tax Act, 2017 and as also the Integrated Goods and Services Tax Act, 2017 and see if they define the taxable event with reference to the location/territory. For ease of comparison we are extracting the charging provision under the Central Excise Act, 1944, the Customs Act, 1962, Service Tax law as provided for in Chapter V of the Finance Act, 1994, as also Central Goods and Services Tax Act, 2017 and the Integrated Goods and Services Tax Act, 2017:

Central Excise Act, 1944

[SECTION 3. Duty specified in the Fourth Schedule to be levied. — (1) There shall be levied and collected in such manner as may be prescribed 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 Fourth Schedule :

Provided that the duty of excise which shall be levied and collected on any excisable goods which are produced or manufactured 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 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.

Explanation 2. — For the purposes of this sub-section, —

(i) "hundred per cent. export-oriented undertaking" means an undertaking which has been approved as a hundred per cent. export-oriented undertaking by the Board appointed in this behalf by the Central Government in exercise of the powers conferred by section 14 of the Industries (Development and Regulation) Act, 1951 (65 of 1951), and the rules made under that Act;

(ii) "Special Economic Zone" shall have the meaning assigned to it in clause (za) of section 2 of the Special Economic Zones Act, 2005 (28 of 2005).

Customs Act, 1962

SECTION 12. Dutiable goods. — (1) Except as otherwise provided in this Act, or any other law for the time being in force, duties of customs shall be levied at such rates as may be specified under [the Customs Tariff Act, 1975 (51 of 1975)], or any other law for the time being in force, on goods imported into, or exported from, India.

[(2) The provisions of sub-section (1) shall apply in respect of all goods belonging to Government as they apply in respect of goods not belonging to Government.]

Service Tax-Chapter V of Finance Act, 1994

SECTION [66B. Charge of service tax on and after Finance Act, 2012. —There shall be levied a tax (hereinafter referred to as the service tax) at the rate of [fourteen per cent.] on the value of all services, other than those services specified in the negative list, provided or agreed to be provided in the taxable territory by one person to another and collected in such manner as may be prescribed.]

(52) "taxable territory" means the territory to which the provisions of this Chapter apply;

SECTION 64. Extent, commencement and application. — (1) This Chapter extends to the whole of India except the State of Jammu and Kashmir.

(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

(3) It shall apply to taxable services provided on or after the commencement of this Chapter.

Central Goods & Services Tax Act, 2017

SECTION 9. Levy and collection. — (1) Subject to the provisions of sub-section (2), there shall be levied a tax called the central goods and services tax on all intra-State supplies of goods or services or both, except on the supply of alcoholic liquor for human consumption, on the value determined under section 15 and at such rates, not exceeding twenty per cent., as may be notified by the Government on the recommendations of the Council and collected in such manner as may be prescribed and shall be paid by the taxable person.

SECTION 8. Intra-State supply. — (1) Subject to the provisions of section 10, supply of goods where the location of the supplier and the place of supply of goods are in the same State or same Union territory shall be treated as intra-State supply :

Provided that the following supply of goods shall not be treated as intra-State supply, namely :-

(i) supply of goods to or by a Special Economic Zone developer or a Special Economic Zone unit;

(ii) goods imported into the territory of India till they cross the customs frontiers of India; or

(iii) supplies made to a tourist referred to in section 15.

(2) Subject to the provisions of section 12, supply of services where the location of the supplier and the place of supply of services are in the same State or same Union territory shall be treated as intra-State supply :

Provided that the intra-State supply of services shall not include supply of services to or by a Special Economic Zone developer or a Special Economic Zone unit.

Explanation 1. - For the purposes of this Act, where a person has, -

(i) an establishment in India and any other establishment outside India;

(ii) an establishment in a State or Union territory and any other establishment outside that State or Union territory; or

(iii) an establishment in a State or Union territory and any other establishment [* *] registered within that State or Union territory,*

then such establishments shall be treated as establishments of distinct persons.

Explanation 2. - A person carrying on a business through a branch or an agency or a representational office in any territory shall be treated as having an establishment in that territory.

Integrated Goods & Services Tax Act, 2017

SECTION 5. Levy and collection. — (1) Subject to the provisions of sub-section (2), there shall be levied a tax called the integrated goods and services tax on all inter-State supplies of goods or services or both, except on the supply of alcoholic liquor for human consumption, on the value determined under section 15 of the Central Goods and Services Tax Act and at such rates, not exceeding forty per cent., as may be notified by the Government on the recommendations of the Council and collected in such manner as may be prescribed and shall be paid by the taxable person :

Provided that the integrated tax on goods [other than the goods as may be notified by the Government on the recommendations of the Council] imported into India shall be levied and collected in accordance with the provisions of section 3 of the Customs Tariff Act, 1975 (51 of 1975) on the value as determined under the said Act at the point when duties of customs are levied on the said goods under section 12 of the Customs Act, 1962 (52 of 1962).

SECTION 7. Inter-State supply. — (1) Subject to the provisions of section 10, supply of goods, where the location of the supplier and the place of supply are in -
(a) two different States;
(b) two different Union territories; or
(c) a State and a Union territory,
shall be treated as a supply of goods in the course of inter-State trade or commerce.
(2) Supply of goods imported into the territory of India, till they cross the customs frontiers of India, shall be treated to be a supply of goods in the course of inter-State trade or commerce.
(3) Subject to the provisions of section 12, supply of services, where the location of the supplier and the place of supply are in -
(a) two different States;
(b) two different Union territories; or
(c) a State and a Union territory,
shall be treated as a supply of services in the course of inter-State trade or commerce.
(4) Supply of services imported into the territory of India shall be treated to be a supply of services in the course of inter-State trade or commerce.
(5) Supply of goods or services or both, -
(a) when the supplier is located in India and the place of supply is outside India;
(b) to or by a Special Economic Zone developer or a Special Economic Zone unit; or
(c) in the taxable territory, not being an intra-State supply and not covered elsewhere in this section,
shall be treated to be a supply of goods or services or both in the course of inter-State trade or commerce.

4.12. It is evident from a perusal of the charging provisions of the Central Excise Act, Customs Act, Chapter V of Finance Act, etc that they intertwine categorically the taxable event attracting the levy with reference to its territorial coverage. For instance, the Central Excise Act, provides that the Central Excise duty shall be levied and collected on all excisable goods produced or manufactured in India (excluding goods produced or manufactured in Special Economic Zones). Likewise, the Customs Act stipulates that the duty of customs is leviable on goods imported into or exported from, India. On the other hand, Chapter V of the Finance Act 1994 which governed the levy of Service tax provided that tax shall be levied on services provided or agreed to be provided in the taxable territory, the said expression has been defined to mean the whole of India except the State of Jammu and Kashmir. Similarly, the CGST and IGST Act also prescribe the levy is on intra-state/inter-state supply of goods or services or both. As to what constitutes intra-state/inter-state has been stipulated in Section 7 and 8 of the IGST Act. It is thus evident and elementary that every Act has to stipulate the taxable event attracting the levy. If Section 147(1) of the Finance Act, 2002, Section 112(1) of the Finance Act 2018 and Section 125(1) of the Finance Act, 2021 are read on a

standalone basis, they will fall foul of the requirement of prescribing the taxable event as they do not prescribe that the production or manufacture has to happen in any particular location. In the absence of such a prescription the levy cannot be given effect to, as the taxable event itself is uncertain and vague.

4.13. It appears to us that to obviate any challenge to the levy being vague and uncertain the legislature has consciously in sub-section 3 of Section 147 of the Finance Act, 2002, Sub-section 3 of Section 112 of Finance Act 2018 and Sub-section 4 of Section 125 of the Finance Act, 2021 stipulated that the provision of the Central Excise Act 1944 and the Rules made thereunder shall, as far as may be apply in relation to levy and collection of the duties under the Finance Acts, as they apply in relation to levy and collection of duties under the Central Excise Act, 1944 or the Rules made thereunder. In our view this statutory prescription has to be given a meaning and effect. If the provision for levy in sub-section (1) of Section 147/Section 112/Section 125 of the Finance Act 2002, 2018 and 2021 were enough to sustain the levy, then there would have been no need to provide that the provisions of the Central Excise Act, 1944 and the Rules made thereunder to be made applicable as far as may be, to levy and collection of duties under the relevant Finance Acts.

4.14. The expression "as far as may be" has been explained by the Apex Court in the case of Dr.Pratap Singh vs the Directorate of Enforcement reported in AIR 1985 SC 989 to mean that the provisions of the Act being referred to have to be followed to the extent possible. Applying the ratio laid down by the Apex Court in the case of Dr.Pratap Singh, it is imperative on the Central Excise authorities to give effect to the provision regarding levy and collection of Central Excise duty under the Central Excise Act, 1944 and the Rules made there under, to the extent the same is possible and that only if necessary a deviation from the same can be undertaken to give effect to the purpose of the Finance Act. In other words, subject to there being no inconsistency or conflict, between the provisions of the Central Excise Act, and the Rules made thereunder vis-à-vis the Finance Acts, referred to above, the provisions relating to levy and collection of Central Excise duty under the Central Excise Act 1944 and the Rules made thereunder would equally apply to the levy under the relevant Finance Act. In case there is any inconsistency or conflict between the two, the provisions of the Central Excise Act 1944 or the Rules made thereunder would not apply.

4.15. It now needs to be seen whether the provisions of the Finance Act levying SAED, RIC and AIDC under Section 147(1)/112(1)/125(1) would cease to be uncertain and vague with respect to the taxable event if the provisions of the Central Excise Act, 1944 and the Rules made thereunder are applied to the levy and collection to the said duties under the respective Finance Act and further whether there is any inconsistency between the Central Excise Act vis-à-vis the Finance Act, so as to rule out the application of the provision of the Central Excise Act and the Rules made thereunder.

4.16. To us it appears that if the taxing event provided under the Central Excise Act, being production or manufacture in India, excluding the production or manufacture in Special Economic Zone is applied to the charging provisions under Section 147(1)/112(1)/125(1) of the Finance Act, 2002, 2018 and 2021 respectively, then, the taxable event under the said Finance Acts would not be vague and unascertainable and would not fall foul of the test laid down in the case of Govind Saran Ganga Saran (supra).

4.17. In our view the levy under Section 147(1)/112(1)/125(1) of the Finance Act, 2002, 2018 and 2021 respectively, applies to goods manufactured or produced in India, excluding goods produced or manufactured in the Special Economic Zones. This is the only way that the said charging sections can be made operational and effective, by reading in the provisions relating to levy and collection provided for under the Central Excise Act, 1944 and the Rules made thereunder.

4.18. We find that the adjudicating authority has not assigned any reason in the impugned order for rejecting the appellant's contention regarding levy under the Finance Acts being inapplicable to goods manufactured or produced in the Special Economic Zone. According to the Respondent since the levy under the Finance Acts was over and above the levy under the Central Excise Act, the provisions of the later Act could not have been invoked. This finding in our view is at odds with the specific provision under the Finance Acts providing for the provisions of the Central Excise Act and the Rules, made thereunder relating to levy and collection being applicable, as far as they may be, apply to levy and collection under the Finance Acts.

4.19. We also find force in the appellant's submission that had it not been for invocation of the provisions of the Central Excise Act, 1944 particularly Section 3B thereof, which, stipulates that in cases where circumstances exist, the Central Government can amend the rate schedule so as to increase the rate of duty, that the amendment to the 8th Schedule to the Finance Act, 2002 by Notification No.25/2022-CE dated 31-8-2022, so as to increase the rate of duty of SAED from Rs.6/- per litre to Rs.12/- per litre on aviation turbine fuel would not have been possible. The text of Section 3B of the Central Excise Act, 1944 is extracted herein below:-

> *"SECTION 3B. Emergency power of Central Government to increase duty of excise. — (1) Where, in respect of any goods, the Central Government is satisfied that the duty leviable thereon under section 3 should be increased and that circumstances exist which render it necessary to take immediate action, the Central Government may, by notification in the Official Gazette, amend the Fourth Schedule to substitute the rate of duty specified therein in respect of such goods in the following manner, namely :—*
>
> *(a) in a case where the rate of duty as specified in the Fourth Schedule as in force immediately before the issue of such notification is nil, a rate of duty not exceeding fifty per cent. ad valorem expressed in any form or method;*
>
> *(b) in any other case, a rate of duty which shall not be more than twice the rate of duty specified in respect of such goods in the Fourth Schedule as in force immediately before the issue of the said notification :*

4.20. It is relevant to note here that normally to amend the tariff is vested only with the Parliament. In the normal course the 8th Schedule to the Finance Act could not have been amended by the Central Government by issuing a Notification. There is also no provision to this effect directly under Section 147 of Finance Act, 2002/Section 112 of Finance Act, 2018 and Section 125 of Finance Act, 2021. It is only by virtue of the provision relating to levy and collection under the Central Excise Act and the Rules made thereunder, which have been made applicable to levy and collection under the Finance Act that the Central Government has been able to by virtue of Section 3B of the Central Excise Act, 1944 amend the 8th Schedule to the Finance Act, 2002 and increase the rate of SAED on ATF. There is absolutely no answer that the Revenue has to this submission.

4.21. We find that the Respondent has in the impugned order proceeded on a tangent by referring to Central Excise Laws (Amendment and Validation) Act, 1982 to contend that if under any Central Law, the levy and collection of the duty of excise is in terms of the provision of the Central Excise Act, 1944, then the exemption provided for in the Central Excise Act, 1944 would not ipso facto apply to the levy of duty of excise under the other Central Acts. In support of this proposition, reliance is also being placed on the judgement of the Apex Court in the case of Unicorn Industries vs UOI reported in 2019 (370) ELT 3. We find that in the case of Unicorn Industries the issue in dispute was whether the exemption from levy of Central Excise duty provided for under the Central Excise Act, 1944 would ipso facto result in exemption being extended from the levy of Education cess under the Finance Act, 2004 as also NCCD under the Finance Act, 2001 and Additional Excise duty (Pan Masala and Tobacco Products) under Finance Act, 2005. The Apex Court did not agree with the assessee's contention therein that an exemption granted from the levy of Central Excise duty under the Central Excise Act, 1944 would ipso facto apply to the levy of other excise duties under the other Finance Acts. It is, however relevant to note here that there is no dispute therein that the Central Government could have in exercise of powers under Section 5A of the Central Excise Act, granted exemption from the levy of excise duty by way of Education cess under the Finance Act, 2004 as also NCCD under the Finance Act, 2001 and Additional Excise duty (Pan Masala and Tobacco Products) under Finance Act, 2005.

4.22. The dispute in the present case is whether the provisions of the Central Excise Act, 1944 can be resorted to while construing the provisions governing levy and collection of duty under the three Finance Acts viz: SAED under the Finance Act 2002; RIC under the Finance Act 2018 and AIDC under the Finance Act, 2021. In our view the judgement in the case of Unicorn infact supports the case of the appellant inasmuch as the Apex Court held that while construing the levy and collection provisions with respect to Education cess under the Finance Act, 2004 as also NCCD under the Finance Act, 2001 and Additional Excise duty (Pan Masala and Tobacco Products) under Finance Act, 2005, to which also the provision regarding levy and collection under the Central Excise Act, 1944 and the Rules made thereunder has been made applicable, that provision of Section 5A of the Central Excise Act, 1944 providing for exemption from the levy could have been applied if the Central Government so choose.

4.23. In the case of Unicorn, since there was no exemption issue qua the levy of Education cess, NCCD as also Additional Excise duty (Pan Masala and Tobacco Products) that the exemption issued under the Central Excise Act, was only in respect of Central Excise duty and accordingly it was held that the said exemption could not ipsofacto extendable to other levies. In the facts of the present case there are no exemptions issued under the Central Excise Act, 1944 which the Appellant seeks to apply to the levy under the Finance Acts in question. The fact situation covered under the Central Excise Laws (Amendment and Validation) Act, 1982 and Unicorn Industries (supra) being completely different and poles apart, the principle laid down therein does not further the case of the Respondent in the present case.

4.24. We are therefore of the view that the appellant was completely justified in contending that the provisions of the Central Excise Act, 1944 with regard to levy and collection of Central Excise duty, to the extent they are not inconsistent, apply equally to the provisions of the Finance Act and accordingly the levy under the Finance Act will apply to goods manufactured or produced in India, other than the goods produced or manufactured in SEZ.

4.25. We also find substance in the appellant's contention to the effect that the duties under the concerned Finance Acts, being in addition to any other duty of excise, chargeable on such goods under the Central Excise Act, is a clear indication that the levy under the relevant Finance Acts is in itself in the nature of a duty of excise chargeable on goods under Section 3 of the Central Excise Act, 1944. Further the use of the expression 'in addition to any other duties of excise' makes it clear that when no other duty of excise can be levied on goods manufactured in an SEZ by virtue of Section 3 of the Central Excise Act, the levy under the respective Finance Acts, being in addition to a nil excise duty is not contemplated or permitted under the respective Finance Acts.

5. In light of the above discussions, we hold that the impugned order is not sustainable and accordingly set aside the same. The appeal is allowed with consequential relief, if any, in accordance with law."

From the above order, it can be seen that the fact though was slight different that in the above case the Revenue sought to demand SAED and AED in respect of goods manufactured and cleared in DTA by the same SEZ unit. However, in the present case the goods though manufactured in the same SEZ unit but cleared for export but the basic issue remained same in as much as that whether the levy of SAED and AED can be made on the SEZ unit. Therefore the ratio of the above decision is applicable in the facts and issue involved in the present case.

4.10 Without prejudice to the above, we find that the respondent is governed by the SEZ Act, 2005. As per Section 26 of the SEZ Act, 2005, the SEZ unit is entitled for various exemptions. The SEZ unit in India is a

territory deemed to be out of India, therefore any goods manufactured in SEZ is not liable for any duty of excise by virtue of exclusion provided under Section 3 (1) (a) of Central Excise Act, 1944. Therefore, if at all any duty is leviable it is custom duty either for clearance in DTA or for export. The said Section 26 is reproduced below:-

> *"SECTION 26. Exemptions, drawbacks and concessions to every Developer and entrepreneur. (1) Subject to provisions of sub-section (2), every Developer and the entrepreneur shall be entitled to the following exemptions drawbacks and concessions, namely*
>
> *(a) exemption from any duty of customs, under the Customs Act 1952 (52 of 1962) or the Customs Tariff Act, 1975 (51 of 1975) or any other law for the time being in force on goods imported into, or services provided in a Special Economic Zone or a Unit, to carry on the authorised operations by the Developer or entrepreneur*
>
> *(b) exemption from any duty of customs under the Customs Act, 1962 (52 of 1962) or the Customs Tariff Act, 1975 (51 of 1975) or any other law for the time being in force, on goods exported from or services provided from a Special Economic Zone or from a Unit, to any place outside India,*
>
> *c) exemption from any duty of excise, under the Central Excise Act, 1944 (1 of 1944) or the Central Excise Tariff Act, 1985 (5 of 1986) or any other law for the time being in force, on goods brought from Domestic Tariff Area to a Special Economic Zone or Unit to carry on the authorised operations by the Developer or entrepreneur*
>
> *(d) drawback or such other benefits as may be admissible from time to time on goods brought or services provided from the Domestic Tariff Area into a Special Economic Zone or Unit or services provided in a Special Economic Zone or Unit by the service providers located outside India to carry on the authorised operations by the Developer or entrepreneur*
>
> *(e) exemption from service tax under Chapter V of the Finance Act, 1994 (32 of 1994) on taxable services provided to a Developer or Unit to carry on the authorised operations in a Special Economic Zone:*
>
> *(f) exemption from the securities transaction tax leviable under section 98 of the Finance (No. 2) Act, 2004 (23 of 2004) in case the taxable securities transactions are entered into by a non-resident through the International Financial Services Centre,*
>
> *(g) exemption from the levy of taxes on the sale or purchase of goods other than newspapers under the Central Sales Tax Act, 1956 (74 of 1956) if such goods are meant to carry on the authorised operations by the Developer or entrepreneur*
>
> *(2) The Central Government may prescribe the manner in which and, the terms and conditions subject to which the exemptions, concessions, drawback or other benefits shall be granted to the Developer or entrepreneur under sub-section (1).*

As per Clause (b) of Section 26 (1), any duty of customs under the Customs Act, 1962 or the Custom Tariff Act 1975 or in other law for the time being in force on goods exported from an special economic zone or from the unit to

place outside India, the exemption is granted. Therefore, even if it is assumed that the goods cleared from the SEZ is liable to any duty which is equal to the custom duty, these duties of SAED and AED on export of goods from SEZ are exempted in view of the above section 26 read with Section 30 of SEZ Act, 2005. The provision of Section 147 of Finance Act, 2002 and Section 112 of the Finance Act, 2018 shall not have effect over the SEZ Act. The relevant Section 51 of the SEZ Act, 2005 reads as under:-

> *"SECTION 51. Act to have overriding effect. (1) The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act."*

4.11 From the plain reading of the above Section 51 of SEZ Act, 2005, it makes clear that the provision of SEZ Act shall have overriding effect on any law or Act in respect of the provision which is inconsistent with the provision of SEZ Act. In the present case, the SEZ Act exempts all duties in respect of the goods manufactured in the SEZ whereas the Revenue contented that Section 147 of Finance Act 2002 and Section 112 of Finance Act, 2018 are independent Act under which the levy of SAED and AED are applicable on SEZ unit also. In this position, since the Section 147 of the Finance Act, 2002 and 112 of Finance Act, 2018 creating an inconsistency with the provision of SEZ Act then the provision of SEZ Act overrides the provision of Finance Act, 2002 and 2018. For this reason also, the Revenue's proposal for levy of SAED and AED on the respondent's SEZ unit is illegal and incorrect.

4.12 We find that learned AR heavily relied upon the Hon'ble Supreme Court judgment in the case of Unicorn Industries and Modi Rubber Ltd(supra) to submit that duty of excise and additional duty imposed under Finance Act are different and as per the Supreme Court judgment when exemption is granted to basic excise duty same shall not apply to the additional excise duty. Therefore, SAED and AED levied through independent Section 147 of Finance Act, 2002 and Section 112 of the Finance Act, 2018 should be treated separately and the exemption of the basic excise duty to SEZ unit shall not apply to SAED and AED. In this regard, we find that the Hon'ble Apex Court in the Unicorn Industries decided the interpretation of the Notification exempting the basic excise duty in that context it was held that since the Notification does not specify the exemption in respect of additional duty of excise the exemption is not available to said additional Excise duty. However, in the present case, since we are taking a firm view that there is no levy of SAED and AED on SEZ unit, the question of applicability of the notification is not the issue herein. This is a case of levy or non levy of SAED

and AED on SEZ unit. Since by virtue of Section 3 (1) of the Central Excise Act, 1944 the provision of the same is applicable to the levy of SAED and AED under Section 147 and 112, and Section 3 excludes the SEZ unit for levying excise duty there cannot be levy of SAED and AED on the SEZ unit. Therefore, the fact of the present case is altogether different from the issue and the fact involved in the Hon'ble Supreme Court judgment in the case of Unicorn Industries and Modi Rubber Ltd hence the same are not applicable in the present case.

4.13 Learned AR also heavily relied upon the judgment of the Hon'ble Supreme Court in the case of Madurai Distt. Central Cooperative (supra) and Hon'ble High Court of Karnataka judgment in the case of RM Dhariwal to submit that the legality of levy of any duty under the Finance Act cannot be questioned and the said levy is correct and legal. We find that in this regard as per our observation we do not object the aforesaid judgment on the issue of legality of levy of additional duties under the Finance Act. The Parliament has legislative power to legislate an Act whereby, levy of duty can be brought in the statute. In the present case we only interpret the provision for the levy of duty under the provision of Section 3 and Section 147 and 112 of the Finance Act, 2002 and 2018 respectively. On the conjoint reading of the above provisions since the SEZ unit has been excluded from the levy of the duty of excise the same exclusion shall apply in respect of levy of SAED and AED. It is also pertinent to mention that since there is no specific mention about SEZ unit in Section 147 and 112 of the Finance Act, 2002 and 2018 respectively and in view of the provision of sub Section (3), the provision of Section 3 has to be applied which exclude SEZ from levy of duty, for this reason levy of SAED and AED is not applicable on SEZ unit which is not the fact in the case of Madurai Distt. Central Cooperative and RM Dhariwal (supra). Therefore, these judgments are of no any help to the Revenue. Likewise the Learned Commissioner (AR) relied upon various other judgments. On going through the said judgments, we find that in none of the case the similar fact particularly like exclusion of SEZ from levy is involved therefore, the ratio of the said judgments are neither relevant nor applicable in the facts of this case.

4.14 Learned Commissioner (Appeals) and both the sides discussed / submitted many other issues. However since we confined our order on our above discussions and findings, we do not feel to deal with other issues, which are left open.

5. In view of above, we are of the opinion that respondent was not liable for payment of SAED and AED being an SEZ unit. Hence the said duties so paid are refundable to the respondent along with interest, in accordance with law. As a result the revenue's appeal is dismissed. CO also stands disposed of.

(Pronounced in the open court on 14.08.2024)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Bharvi