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**GOVERNMENT OF INDIA
MINISTRY OF FINANCE
DEPARTMENT OF REVENUE**

**Office of the Principal Commissioner RA and
Ex-Officio Additional Secretary to the Government of India**
8th Floor, World Trade Centre, Cuffe Parade,
Mumbai- 400 005

F. No. 371/526 to 529/DBK/2019/4494 Date of Issue: 05.09.2023

ORDER NO. ⁵⁰⁴⁻⁵⁰⁷ /2023-CUS (WZ) /ASRA/Mumbai DATED 30.06.2023 OF
THE GOVERNMENT OF INDIA PASSED BY SHRI SHRAWAN KUMAR,
PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO
THE GOVERNMENT OF INDIA, UNDER SECTION 129DD OF THE
CUSTOMS ACT, 1962.

- Applicants : 1. M/s The Design Sangrah,
D-119, Hosiery Complex, Noida Phase - II,
Uttar Pradesh - 201 305.
2. Shri Rakesh Baboo Sadh,
Prop. M/s The Design Sangrah,
M-22A, Lajpat Nagar II, New Delhi - 110024.
- Respondents : 1. Commissioner of Customs, Nhava Sheva - II,
JNCH, Nhava Sheva, Uran, Raigad - 400 707.
2. Commissioner of Customs (Export),
ACC, Sahar, Andheri (E), Mumbai - 400 099.
- Subject : Revision Applications filed under Section 129DD of the
Customs Act, 1962 against the Orders-in-Appeal No.MUM-
CUSTM-AXP-APP-569 & 570/19-20 dated 27.09.2019 and
No.184 & 185 (Drawback)/2019 (JNCH)/Appeal-I dated
15.10.2019 passed by the Commissioner of Customs
(Appeals), Mumbai - III and Commissioner of Customs
(Appeals), Mumbai - II, respectively.

ORDER

The subject Revision Applications have been filed M/s The Design Sangrah, Uttar Pradesh and Shri Rakesh Baboo Sadh (Prop. of M/s The Design Sangrah) (here-in-after referred to as 'the applicants') against the Orders-in-Appeal No.MUM-CUSTOMS-APP-569 & 570/19-20 dated 27.09.2019 and No.184 & 185 (Drawback)/2019 (JNCH)/Appeal-I dated 15.10.2019 passed by the Commissioner of Customs (Appeals), Mumbai - III and Commissioner of Customs (Appeals), Mumbai - II, respectively. The Order-in-Appeal dated 27.09.2019 decided appeals filed by the applicants against the Order-in-Original dated 19.04.2017 passed by Additional Commissioner of Customs (Export), Air Cargo Complex, Mumbai and the Order-in-Appeal dated 15.10.2019 decided appeals filed by the applicants against the Order-in-Original dated 27.02.2017 passed by the Additional Commissioner of Customs (Drawback), NS-II, JNCH, Nhava Sheva. Government finds that the issue involved in these cases is the same and hence takes up the cases for decision together.

2. Brief facts of the case are that the applicant firm, engaged in the manufacture and export of Readymade Garments, Made Ups and accessories, converted itself from a DTA unit into a 100% EOU (Export Oriented Unit) on the basis of a Letter of Permission (LOP) dated 18.06.2006 issued by the Assistant Development Commissioner, Noida SEZ. The applicant was also granted permission for a Private Bonded Warehouse vide letter dated 26.03.2010 by the Assistant Commissioner, Central Excise, Division IV, Noida. Investigations conducted by the DRI indicated that the applicant firm had availed Drawback on the goods exported by them without declaring themselves to be an EOU to the Customs Authorities, and, had at the same time declared themselves to be an operational 100% EOU to the Income Tax Authorities and claimed income tax deduction under Section 10B of the Income Tax Act, 1961 towards the profit and gains derived from the export of goods for the Financial Years 2005-06, 2006-07, 2007-08 and 2009-10. It was the contention of the Department that Drawback was not available to an EOU in view of the specific bar contained in notification no.68/97-Customs (NT) dated 01.09.1998 and provisions of the Foreign Trade Policy. Show Cause Notices were issued to recover the Drawback so availed by the applicant firm in respect of the exports made by them from different ports across the country and the impugned Orders-in-Original

decided two such Show Cause Notices dated 22.12.2016 and 30.03.2016, demanding drawback of Rs.1,50,21,192/- and Rs.5,27,000/- for exports made by the applicant through Nhava Sheva Port, Raigad and Air Cargo Complex, Sahar, Mumbai, respectively. The said Show Cause Notices also proposed to impose penalty on Shri Rakesh Baboo Sadh, proprietor of the applicant firm. The details of the Show Cause Notices, corresponding Orders-in-Original and Orders-in-Appeal are as per the Table below:-

Sr. No.	Date of SCN	Date of Order-in-Original	Order-in-Appeal No. & Date
1	30.03.2016	19.04.2017	MUM-CUSTOM-AXP-APP-569 & 570/19-20 dated 27.09.2019
2	22.12.2016	27.02.2017	184 & 185 (Drawback)/2019 (JNCH)/Appeal-I dated 15.10.2019

The original authorities upheld the charges in the Show Cause Notices, confirmed the demand raised and imposed penalty on the applicant firm as well as on its proprietor under Section 114(iii) and Section 114AA of the Customs Act, 1962. The original authority vide Order-in-Original dated 19.04.2017 imposed penalty of Rs.5,27,000/- on the applicant firm and Rs.5,27,000/- on its proprietor. Similarly, the Order-in-Original dated 27.02.2017 imposed penalty of Rs.1,00,00,000/- on the applicant firm and Rs.60,00,000/- on its proprietor. The applicant firm and its proprietor preferred appeals before the Commissioner (Appeals) against the said Orders-in-Original. The Commissioner (Appeals) upheld the Orders-in-Original and rejected the appeals in both cases.

3. Aggrieved, the applicant firm and its Proprietor, have filed the subject Revision Applications against the impugned Orders-in-Appeal. The grounds on which the applications have been preferred by the applicant firm against the subject Orders-in-Appeal is are under: -

(a) The lower authorities failed to discuss the case laws cited by the applicant viz. the decision of Hon'ble Karnataka High Court on an identical issue in the case of Karle International Vs. CC, Bangalore [2012 (281) E.L.T. 486 (Kar.)]; that this was one of their main arguments and that the Commissioner (Appeals) had not applied it to the evidence relied upon by the department and given any findings on the same and hence was not a speaking order;

(b) That the Hon'ble High Court of Karnataka in the case of Karle International (Supra) held that for being eligible to claim Duty Drawback under Section 75 of Customs Act, 1962, the exporter had to satisfy that goods have been manufactured, processed or any operation has been carried out on them in India, it is immaterial where the manufacturing process took place; it may be in the Unit of exporter or in another EOU Unit; that the court also observed that all that has to be seen in such cases is, whether exporter/manufacturer has paid duty on raw material for producing finished product, manufacturing activity took place in India, goods so manufactured were exported and consequent foreign exchange was earned; hence it was submitted that since the applicant in the instant case has paid duty on raw material for manufacturing finished product and since the goods so manufactured were exported and consequent foreign exchange has been received they were legally eligible for Duty Drawback under Section 75 of Customs Act, 1962;

(c) That the aforesaid decision of Karnataka High Court had been appealed by the Department before Hon'ble Supreme Court and the SLP filed by the department had been dismissed as reported in the case of Commissioner Vs. Karle International - Reported in [2015 (323) ELT A74 (SC)]; that the Review Petition filed by the Department against aforesaid decision before the Supreme Court had also been dismissed by the Supreme Court reported as Commissioner Vs. Karle International Reported in 2017 (348) ELT A27 (SC); hence the decision of the Hon'ble Karnataka High Court in the matter of Karle International Vs. Commissioner of Customs. Bangalore has now attained finality and become law of the land;

(d) That the clarification given vide F No. DGEP/EOU/01/2014 dated 01.05.2014 by the Directorate General of Export Promotion (DGEP) and relied upon by the Commissioner (Appeals), had become infructuous in view of aforesaid reported decision of the Hon'ble Supreme Court held in the matter of Commissioner Vs. Karle International; that consequently, the Directorate of Drawback vide letter F. No. 609/68/2018 - DBK dated 30.11.2018 had, in response to their query, stated that "*You may place the same before relevant Adjudicating Authority who will take them in consideration on merits while deciding the pending cases*"; that similar issue had been decided by the Hon'ble Tribunal Delhi (2017-TIOL-410-CESTAT-DEL). It is brought on record that the Hon'ble Tribunal Order was further

followed by the Hon'ble Commissioner (Appeals), NCH, New Delhi while allowing the appeal of exporter in similar matter vide its Order-in-Appeal No.CC(A)CUS/D-ICD TKD (Exp)/88,89,90/2017 dated 10.03.2017;

(c) The Commissioner (Appeals) had incorrectly held that the Hon'ble Tribunal lacked jurisdiction in passing the order reported as 2017-TIOL-410- CESTAT-DEL in similar matter, as in that case the issue had arisen out of the Order-in-Original passed by the Commissioner of Customs (Exports) and not out of an order passed by the Commissioner (Appeals);

(f) That the case before the Hon'ble CESTAT cited by them [2017-TIOL-410- CESTAT-DEL] was similar to their case and in that case too, the issue pertained to a 100% EOU engaged in the manufacture of readymade garments who were procuring duty paid inputs from indigenous manufacturers which were being used by them in the manufacture of their final products without claiming any CENVAT credit and that subsequently, the drawback claim of EOU was denied to them by adopting notification no.26/03-Cus (NT) dated 10.04.03 which debars drawback in case of exports made by 100% EOU; that the Hon'ble Tribunal held that since the goods stood manufactured by the applicant themselves and since there was no dispute that the materials used by them were duty paid, the denial of drawback by the Revenue on the sole ground that the same would not be available to 100% EOU could not be accepted; and hence the benefit of drawback was extended even in respect of goods manufactured and exported through 100% EOU; therefore the Commissioner (Appeals) had erred in holding that the said case which followed the ratio of Karle International (supra) was not applicable to the instant case; they also sought to place reliance on the decision of the JS Review MINISTRY OF FINANCE in case of IN RE: JRE VALVES AND PUMPS PVT. LTD. [2011 (270) E.L.T. 450 (G.O.I.)] wherein under similar circumstances it was held that where the DTA unit have not taken any benefit under 100% EOU Scheme, they were entitled to rebate of duty;

(g) That the Commissioner (Appeals) failed to appreciate their submission that they held no Central Excise Registration and had never imported any machinery/raw material/input duty free either under EOU Scheme or any other Scheme and had never procured any material from the local market on duty free basis; that no Cenvat credit was availed by them; and that as they did not avail any exemption on inputs, therefore, they were

admissible to avail duty drawback; they sought to place reliance on the decision of SAMRAT HOUSE WARE P. LTD [2007 (210) E.L.T. 637 (Commr. Appl.)] wherein it was clearly laid down that where no Cenvat credit was availed, the benefit of duty drawback could not be denied; that the reliance placed by the lower authorities on the earlier Circular No.39/2001, dated 6-7-2001 was no longer relevant in the current scenario;

(h) That the Commissioner (Appeals) had arbitrarily come to the conclusion that they exported goods which were manufactured under Bonded Warehouse which were duty free; that their submissions that the Bonding Permission was valid for only six days was not considered; that letters from the jurisdictional officers regarding non receipt of duty free inputs was not considered; that during the said period they had never imported any machinery/raw material duty free either under EOU Scheme or any other Scheme or procured from another EOU; that they also never procured any material from local market on duty-free basis and always bore the incidence of duty on their indigenous domestic procured inputs; that they never availed any CENVAT facility either as they were not holder of Central Excise Registration;

(i) That the Commissioner (Appeals) failed to take into account the submissions of the applicant that the CBEC vide Circular No. 63/98-DBK-Cus dated 01.09.1998 had also clarified that All Industry Rate of Drawback is available for export of garments exported from EOU/EPZ; that the CBEC vide circular No. 828/5/2006-CX dated 20.04.2006 have clarified admissibility of refund/rebate to all EOU in respect of unutilized input/input service credit with them; that refund/rebate was pari-materia to drawback;

(j) That the statutory provision of Section 75 of Customs Act over rides the import-Export Policy and MOF Circular relied upon by the Commissioner (Appeals) and that the Commissioner (Appeals) had failed to appreciate their submission that Section 75 read with Rule 2 and 3 of DBK Rules, 1995 stipulates disbursement of duty drawback if goods are manufactured and exported out of duty paid raw material; that it was immaterial where the goods had been manufactured; that the only material question is whether the exporter had paid duty on raw-material and utilized the said raw- material for manufacture of goods exported;

(k) That the Commissioner (Appeals) had erred in denying the recovery of drawback already disbursed on the ground that the applicant availed benefit of exemption under Income Tax Act and failed to bring anything legal on record to support the finding that availing Income Tax exemption debars admissibility of drawback; that a bare perusal of Section 75 of Customs Act and Rule 2 and 3 of DBK Rules, 1995 reveals that there are no provisions debarring admissibility of drawback in case exemption from payment of Income Tax claimed by 100% EOU; that the provisions debarring drawback as provided in second proviso to Rule 3 of DBK Rules 1995 also do not cover the instant case; thus the Commissioner (Appeals) finding that "records reveal that the Appellants did not give the details to the Department while claiming drawback. Hence, action on part of the Appellant is clearly in violation of the prevalent instructions" was erroneous and based on conjecture and surmise; that there were no prevalent instructions that prescribe that the details of income tax exemption have to be given to the Department while claiming drawback; that their claiming drawback was very much in the knowledge of the Department during various scrutiny's carried by the Jurisdictional Central Excise Officers who never objected to such claim;

(l) That the findings of the lower authorities were wrong and inappropriate inasmuch as it was settled law held by Hon'ble Apex Court that once goods are manufactured out of duty paid raw material and exported then as per Section 75 read with Rule 2 & 3, they are eligible for duty drawback; hence the lower authorities erred in placing credence on Para 9.17(b) of Exim policy (1997-2000) and CBEC Circular no.49/2000 dated 12.05.2000 when there was no dispute as to admissibility of drawback under statutory provisions of Section 75 of Customs Act 1962 and Rules there under;

(m) That the Commissioner (Appeals) failed to appreciate the judgment in the case of M/s Padmini Exports Vs. UOI [2012 (284) E.L.T. 490 (Guj.)] and erroneously held that it is not applicable to the present case that in this case the Hon'ble Gujarat High Court held that though Rule 16 of Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 did not prescribe any period, a reasonable period has to be read into it; that in light of the above judgment, it was submitted that the Commissioner (Appeals) had erred in observing that the Drawback Rules being self-contained provisions did not provide for any limitation for recovering the amount of

drawback erroneously paid; that the Commissioner (Appeals) had wrongly held that Section 28 was regarding recovery of duty not paid/short paid whereas Section 75 read with Rule 16 of the DBK Rules deals with recovery of drawback and that since both operate in different spheres, there is no question of applying time limit of 5 years under Section 28 of the Customs Act, 1962 for recovery of Drawback; that the Show Cause Notice dated 22.12.2016 demanding drawback disbursed during the period 2005-06 to 2009-10 was issued beyond a period of 10 years of alleged cause of action which in no way can be said to be reasonable period and hence the Commissioner (Appeals) erred in demanding drawback beyond a period of 10 years under Rule 16 of DBK Rules, 1995 read with Section 75A (2) of Customs Act, 1962;

(n) That the DBK Rules, 1995 had been notified in exercise of power conferred under Section 75 of Customs Act, 1962; that the DBK Rule 1995 being subordinate legislation could not have indefinite period; reliance was placed on the decision of the Hon'ble Gujarat High Court in the case of Padmini Exports Vs. UOI (supra) and the Hon'ble High Court of Calcutta in the case of Rashmi Metaliks Ltd. Vs. UOI [reported in 2015 (316) ELT 455 (Cal)];

(o) That the Commissioner (Appeals) had erred in upholding the penalty imposed under Section 114(i) of Customs Act read with Section 11 of Foreign Trade (Development & Regulation) Act, 1992 on the applicant firm and under Section 114AA of Customs Act on Shri Rakesh Baboo Sadh, its proprietor, as there was no reason to believe that impugned goods were liable for confiscation, as drawback were claimed on goods manufactured and exported out of duty paid raw material and capital goods;

(p) The Hon'ble Delhi High Court in the case of Anil Kumar Mahensaria Vs. CC [2008 (228) ELT 166 (Del)] held that penalty can be imposed either on the sole proprietor or on the proprietorship firm; that the Hon'ble Tribunal in the case of A. R. Shah Vs. CCE held that penalty on both proprietor and proprietary firm cannot be imposed; that the Tribunal held in the case of Gita Times Vs. CC Kandla [1999 (109) ELT 598 (T)] held that simultaneous penalties on proprietary concern and proprietor not permissible under law.

In view of the above, the applicant firm prayed that the impugned Orders-in-Appeal be set aside and the demands of Rs.5,27,000/- and Rs. 1,50,21,192/- be dropped and penalties of Rs.5,27,000/- and Rs.1,00,00,000/- imposed on the them be dropped.

3.1 The second applicant, Shri Rakesh Baboo Sadh, Director of the applicant firm filed Revision Applications against the impugned Orders-in-Appeal on the following grounds: -

a. That the applicant firm had never imported any raw material or capital goods duty free; that the applicant firm were exporters of readymade garments and had got the Letter of Practice (LOP) for 100% EOU on 18.07.2006; that they applied for issue of Private Bonded License to the jurisdictional Central Excise office on 16.04.2009 on the basis of the said LOP initially valid for 3 years, which was further extended up to 31.03.2010; that the license for the said Private Customs Bonded Warehouse was granted on 26.03.2010, the validity of which expired on 31.03.2010 along with the expiry of LOP; that the license for Private Customs Bonded Warehouse was valid for only 6 days; that the jurisdictional authorities had clarified that during this period no CT-3 or Procurement Certificate (PC) was issued by the jurisdictional Range officer to the applicant for procurement of Customs duty free raw material or capital goods for the manufacture of goods; that at no point of time did they avail duty free facility - neither Central Excise or Customs nor any CENVAT credit; that they never imported any machinery/raw material/ inputs duty free either under the EOU Scheme or any other scheme; thus they operated as an EOU using all duty paid inputs and exported 100% of their production, thereby suffering both the duty of Central Excise as well as Customs on the inputs purchased from local markets and hence drawback was their natural and legitimate right; that the Commissioner (Appeals) failed to into account their submission that since they had not violated any provision of the Customs Act, 1962 by claiming exemption from Income Tax under IT Act, penalty on the applicant was not sustainable in law;

b. That penalty had been proposed and upheld without discussing his role; that his role has not been discussed in the entire Show Cause Notice, the Order-in-Original or the impugned Order-in-Appeal; that without specifically discussing the role or commissions or omissions on his part,

penal action against him had been upheld by the Commissioner (Appeals) in a causal routine manner and hence the same was not sustainable and bad in law; reliance was placed on the case of Hitesh Kumar Patel vs. CCE, Mumbai [2009 (245) ELT 858 (Tri. - Ahmd)], The Park (park hotel) vs. CCE vs Vishakhapatnam [2009 (239) ELT 136 (Tri. Bang.)], Vaiyapuri vs. CC (Seaport), Chennai [2015 (325) ELT 403 (Tri. - Chennai)]; Precitech Turning Pvt. Ltd. (GOI, RA) [2014 (312) ELT 921 (GOI)]; CCE, Chennai-III vs. Supreme Industries Ltd. [2014 (303) ELT 513 (Mad)];

c. That the Show Cause Notice dated 10.10.2021 had no specific allegation so as to hold the applicant guilty of having committed fraud, collusion or suppression of facts or made any wilful misstatement with an intent to evade payment of duty; that in terms of the provision of Section 11AC of the Act, the authority was bound to record a prima facie finding that there was an intent to evade payment of duty by suppressing the material facts or by making wilful misstatement or by committing fraud or collusion; and hence, in the absence of any such specific allegation in the show cause notice, the authorities could not mechanically impose penalty under Section 11AC of the Act and hence the Commissioner (Appeals) had failed to appreciate his submission that the penalty imposed on him was not sustainable in law since no specific allegations were made against him in the Show Cause Notice;

d. That statement recorded under pressure/threat/coercion, hence of no evidentiary value; that the Department had relied upon his statements dated 04.02.2016 taken under Section 108 of Customs Act, 1962 to drive home the allegation that the applicant firm was not eligible for the All India drawback benefit and that the firm had availed undue Duty Drawback against export made by his proprietary firm and period when the same was declared as 100% EOU before the Income Tax authorities and had availed Income Tax exemption due to lack of his knowledge unintentionally and that he had suppressed the claim of exemption under Income Tax Act as a 100% EOU from the Customs and Central Excise authorities in order to claim Duty Drawback on export of goods;

e. That the Customs Act, the Central Excise Act or any other law for the time being in force does not prescribe for him to inform the Customs and Central Excise about the exemptions claimed under Income Tax Act, hence

the Commissioner (Appeals) had failed to appreciate the fact that since there was no requirement in shipping bill and other export documents for providing such information, the allegation of suppression was ruled out; that he had specifically stated that the duty drawback claimed was in respect of those exported goods which were manufactured from domestic raw material which were duty paid; that he had deposed that the firm had taken bonding license from Central Excise authorities only for six days, during this period no CT-3 or PC was issued to him...they had not availed any CENVAT credit...they had not availed any CENVAT credit his firm and had never imported any machinery/raw materials/ imports duty free either under EOU scheme or any other scheme; his firm had never procured any raw materials from the local market and duty was paid for all the imported materials;

f. That the Hon'ble High Court in the case of Karle International had held that notification no.67/98-CUS (NT) stipulating in Clause 2(c) of General Notes that rates of Drawback prescribed therein are not available if finished goods are exported by EOU/EPZ units was counter to Section 75 of the Customs Act, 1962 and could not take away the right conferred therein to claim Duty Drawback; that it was a settled law that a right vested under statutory provisions could not be taken away by virtue of Circulars issued from time to time, if they are contrary to statutory provisions and hence Section 75 of the Customs Act overrides the Exim Policy 1997-2000 and CBEC Circular relied upon by the Commissioner (Appeals) and reliance was sought to be place on the decision of the Hon'ble Supreme Court in the case of UOI vs Amalgamated Plantations (P) Limited [2017 (349) ELT A89 (S.C.)];

g. That the Commissioner (Appeals) had erred in upholding the order of the Additional Commissioner wherein confiscation of goods under Section 113(ii) read with Section 11 of the Foreign Trade (Development & Regulation) Act, 1992 and Rules 11 and 14(2) of the Foreign Trade (Regulation) Rules, 1992 was ordered inasmuch as they had not contravened any provision of the Customs Act, 1962 or the other Acts/Rules; that the goods having been already exported they were not available for confiscation and hence redemption fine was not imposable; that confiscation and penalty under Section 113 and Section 114 of the Customs Act, 1962 was not sustainable on goods already exported;

h. That their claim of drawback was very much in the knowledge of the Department during scrutiny carried by the jurisdictional Central Excise

Officers who never objected to such claim; that the Commissioner (Appeals) had failed to appreciate that this proved that he had not suppressed any material fact from the Department and that the Department was fully aware of the fact of availment of drawback by the Applicant; that it was further well-settled law that any statement made under pressure/threat/ coercion has no evidentiary value and hence no evidentiary value could be attached to the statements made by him under Section 108 under pressure/thread/coercion;

i. That penalty under section 114AA was imposable only in those situations where exports benefits were claimed without exporting the goods and by presenting forged documents and he sought to place reliance on the Twenty Seventh Report of the Standing Committee of Finance wherein insertion of Section 114AA was discussed; that section 114AA was inserted to penalize in circumstances where export benefits are availed without exporting any goods and hence penalty under Section 114AA was imposable only in those circumstances where export benefits were availed without exporting any goods; that in the present case was not relating to availing any export benefit without exporting the goods and hence penalty was not imposable under Section , therefore, is that penalty under Section 114AA and sought to rely on *Suketu Jhaveri vs. CC (Import), Nhava Sheva* [2014 (314) ELT 828 (Tri.-Mumbai)];

j. That additional penalty could not be imposed upon the Proprietor if penalty was imposed on the firm and relied upon the decision in the case of *Pravin N. Shah vs. CESTAT* [2014 (305) ELT 480 (Guj.)] and *Classic vs. Commissioner of Customs, New Delhi* [2013 (294) ELT 492 (Tri.-Del.)], *M.K.Jain vs. CCE, Indore* [2013 (291) ELT 217 (Tri.-Del.)]; *Solly Perumal vs. CC, Kandla* [2013 (291) ELT 66 (Tri.-Ahmd.)], *G.M. Enterprises vs. CC (exports), Nhava Sheva* [2010 (262) ELT 796 (Tri.-Mumbai)] and *Metal Recycling Industry vs. CCE, Surat-I* [2009 (246) ELT 281 (Tri.-Ahmd.)]; that the above judgements lay down the principle that for the purpose of imposing penalties, partnership and partners cannot be separately considered; and hence the penalty of Rs.60,00,000/- imposed on him was bad in law and not sustainable.

In view of the above, the applicant Shri Rakesh Baboo Sadh prayed that the impugned Orders-in-Appeal be set aside and the penalties of Rs.5,27,000/- and Rs.60,00,000/- imposed on him be dropped.

4. Personal hearing in the matter was granted to the applicants on 01.12.2022. Shri Alok Agarwal, Advocate appeared on behalf of the applicants. He gave a written submission and also submitted a copy of the Order dated 13.09.2021 of the Revision Authority, Delhi in the case of M/s Churchit International, New Delhi.

4.1 The applicants vide the written submissions made during the personal hearing sought to submit the following additional grounds of appeal: -

(a) That the present issue stood settled in view of the Order No.175-176/21 dated 10.09.2021 of the Revisionary Authority, New Delhi in the case of The Design Sangrah, Noida vs The Commissioner of Customs (Noida) wherein it was held that the AIR drawback under Section 75 could not be denied only because these goods were manufactured and exported by a 100% EOU; that the facts and circumstances of the aforesaid matter was identical to the present case and that the said Order was not appealed against and hence the matter had attained finality; that the benefit of drawback extended by Section 75 of the Customs Act, could not be taken away by virtue of notification no.68/2007-CUS(NT) dated 16.07.2007 or DGFT clarification dated 01.05.2014 issued vide F. No.DGEP/EOU /01/2014; they sought to place reliance on the decision of the Hon'ble High Court in the case of Karle International (cite supra);

(b) That since the goods exported were manufactured by utilizing duty paid raw material the drawback claimed was legally correct in terms of the provisions of Section 75 of the Customs Act, 1962; that in view of the above judgments cited, the impugned Orders-in-Appeal be set aside.

5. Government has carefully gone through the relevant case records, the written and oral submissions and also perused the impugned Orders-in-Original and the Orders-in-Appeal.

6. Government finds that the issue involved is whether the applicant firm as a 100% Export Oriented Unit (EOU) was eligible to claim duty

Drawback on the goods exported by them. Government finds that it is not in dispute that the applicant had claimed Drawback during the period 2005-06 to 2009-10. It is undisputed that during the same period the applicant had declared themselves as a functional EOU to the Income Tax authorities for availing exemption under Section 10B of the Income Tax Act, 1961. Government also finds that the applicant, during this period, had not declared them as an EOU to the Customs Authorities at the ports from where they exported their products. Government notes that the above facts came to light after an investigation was conducted by the Directorate of Revenue Intelligence, resulting in Show Cause Notices being issued to the applicants seeking to recover the Drawback claimed by them, on the grounds that in terms of notification no.68/2007-CUS(NT) dated 16.07.2007 and the provisions of the Foreign Trade Policy (FTP) effective during the material period, drawback was not admissible to the products manufactured and exported by an EOU. Government finds that the applicants have not contested the facts narrated above; their entire argument is to the effect that they had procured duty paid inputs for the manufacture of goods exported by them and were hence eligible to the drawback, as the same was provided for by Section 75 of the Customs Act, 1962. They have further contended that the benefit provided by a Section cannot be taken away by a subordinate legislation and hence the bar placed by notification no.68/2007-CUS(NT) cannot be grounds enough to deny the drawback claimed by them.

7.1 Given the above, Government proceeds to examine the legal provisions applicable to the instant case. The same are reproduced below.

Relevant portion of notification no.68/2007-CUS(NT) dated 16.07.2007: -

" In exercise of the powers conferred by sub-section (2) and (3) of section 75 of the Customs Act, 1962 (52 of 1962), sub-section (2) and (2A) of section 37 of the Central Excise Act, 1944 (1 of 1944), and section 93A, and sub-section (2) and (3) of section 94 of the Finance Act, 1994 (32 of 1994) read with rules 3, 4 and 5 of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 (hereinafter referred to as the said rules) the Central Government hereby determines the rates of drawback as specified in the Schedule annexed hereto (hereinafter referred to as the said Schedule) subject to the conditions specified hereunder, namely:-

Conditions:

(1)

.....
(7) The rates of drawback specified in the said Schedule shall not be applicable to export of a commodity or product if such commodity or product is-

(a)

.....
(c) manufactured or exported by a unit licensed as hundred per cent. Export Oriented Unit in terms of the provisions of the relevant Export and Import Policy and the Foreign Trade Policy;"

A reading of the above brings out that the said notification determined the rate of drawback as specified in the Schedule subject to the conditions specified therein. The condition at Clause 7(c) unambiguously states that the rate of drawback specified in the said Schedule shall not be applicable to export of commodity or product manufactured or exported by a unit licensed as a 100% EOU in terms of the FTP. Thus, Government finds that the said notification which was in force during the material period clearly precludes the applicant firm, a 100% EOU, from claiming drawback. The notification leaves absolutely no doubt that the applicant was not eligible to claim drawback.

7.2 Government notes that the applicant has placed a great amount of reliance on the maxim that a benefit bestowed by a Section cannot be taken away by a subordinate legislation inasmuch as Section 75 provided for them to avail drawback and the same could not be taken away by notification no. 68/2007-CUS(NT). In this connection, Government notes that the said notification was issued in exercise of, amongst others, the power conferred by sub-section (2) and (3) of Section 75 of the Customs Act, 1962.

The relevant portion of sub-section (2) of Section 75 reads as follows: -

(2) The Central Government may make rules for the purpose of carrying out the provisions of sub-section (1) and, in particular, such rules may provide

—
[(a) for the payment of drawback equal to the amount of duty actually paid on the imported materials used in the manufacture or processing of the goods or carrying out any operation on the goods or as is specified in the rules as the average amount of duty paid on the materials of that class or description used in the manufacture or processing of export goods or carrying out any operation on export goods of that class or description either by manufacturers generally or by persons processing or carrying on any operation generally or by any particular manufacturer or particular person carrying on any process or other operation, and interest if any payable thereon;]

[(aa) for specifying the goods in respect of which no drawback shall be allowed;]

[emphasis supplied]

A reading of the above does indicate that sub-section (2) of Section 75 while providing for payment of Drawback also provides for rules to be made for specifying goods in respect of which no drawback shall be allowed. Hence, Government finds that it is not the case that Section 75 provides for unconditional payment of drawback on goods exported as suggested by the applicant, but it also provides for Rules to be made to specify goods where drawback would not be allowed. Thus, Government finds that the condition imposed by notification no.68/2004-CUS(NT) was within the scope of the authority provided by Section 75 of the Customs Act, 1962 and was for furthering the same and cannot be said to be *ultra vires*. Given the above, the submission of the applicant that the said notification takes away a benefit granted by a Section is incorrect as and will not hold good.

8.1 Further, Government notes that the Foreign Trade Policy effective during the said period laid down the contours of the benefits available to an EOU and the conditions applicable therein. Government finds that the Hon'ble Supreme Court had dealt with the very same issue, albeit in connection with the refund of TED, in great detail in the case of Sandoz Pvt. Ltd vs UOI [2022 (379) ELT 279 (SC)]. Relevant portions of the same are reproduced below: -

" 16. Para 6.2 of the FTP specifies the stipulations for the EOU to conduct its activities such as export and import of goods. Amongst others, the clause relevant for considering the present appeals is para 6.2(b), which reads thus :-

"6.2 Export and Import of Goods

(a) xx xx xx

*(b) An EOU/EHTP/STP/BTP unit may **import** and/or **procure**, from DTA or bonded warehouses in DTA/international exhibition held in India, **without payment of duty**, all types of goods, including capital goods, required for its activities, provided they are not prohibited items of import in the ITC (HS). Any permission required for import under any other law shall be applicable. Units shall also be permitted to import goods including capital goods required for approved activity, free of cost or on loan/lease from clients. Import of capital goods will be on a self-certification basis. **Goods imported by a unit shall be with actual user condition and shall be utilized for export production.***

xx

xx

xx"

(Emphasis supplied)

From the opening part of this provision itself, it is amply clear that it governs specified entities/units, who are engaged in import and/or procurement of goods from DTA or bonded warehouses etc., and that they must do so without payment of duty. Besides, the specified entities are obliged to utilise the goods imported with actual user condition and to be used or utilised for export production. This twin condition must be complied by the specified entities without any exception for deriving benefit or availing of entitlements under FTP. Chapter 6 of the FTP postulates that supply of goods from DTA Units to EOU must be regarded as deemed exports, as is evident from para 6.11 of the FTP. The same reads thus :-

"6.11 Entitlement for supplies from the DTA

(a) **Supplies from DTA to EOU/EHTP/STP/BTP units will be regarded as "deemed exports" and DTA supplier shall be eligible for relevant entitlements under chapter 8 of FTP, besides discharge of export obligation, if any, on the supplier. Notwithstanding the above, EOU/EHTP/STP/BTP units shall, on production of a suitable disclaimer from DTA supplier, be eligible for obtaining entitlements specified in chapter 8 of FTP. For claiming deemed export duty drawback, they shall get brand rates fixed by DC wherever All Industry Rates of Drawback are not available.**

(b) Suppliers of precious and semi-precious stones, synthetic stones and processed pearls from DTA to EOU shall be eligible for grant of Replenishment Authorisations at rates and for items mentioned in HBP v1.

(c) **In addition, EOU/EHTP/STP/BTP units shall be entitled to following :-**

(i) Reimbursement of Central Sales Tax (CST) on goods manufactured in India.

Simple interest @ 6% per annum will be payable on delay in refund of CST, if the case is not settled within 30 days of receipt of complete application (as in paragraph 9.10.1 of HBP v1).

(ii) **Exemption from payment of Central Excise Duty on goods procured from DTA on goods manufactured in India.**

(iii) Reimbursement of duty paid on fuel procured from domestic oil companies/Depots of domestic oil Public Sector Undertakings as per drawback rate notified by DGFT from time to time. Reimbursement of additional duty of excise levied on fuel under the Finance Acts would also be admissible.

(iv) CENVAT Credit on service tax paid."

(Emphasis supplied)

The opening part of clause (a) concerns the supplier as it refers to supplies from DTA Unit to EOU to be regarded as deemed exports. Further, as a consequence of deemed exports, DTA supplier becomes eligible for entitlements specified under Chapter 8 of the FTP. To put it differently, in the same Chapter 6, the entitlement of DTA supplier under Chapter 8 of FTP has also been adverted to. This provision also deals with the manner of availing the entitlements specified under Chapter 8 of FTP - either by the DTA Unit itself or the EOU, the recipient of the goods and services. For, in

terms of this stipulation even the EOU can set up a refund claim in respect of stated transaction, in lieu of the entitlement of DTA Unit after obtaining suitable disclaimer from DTA supplier. In other words, clause 6.11 [clause (a) thereof in particular] deals with entitlement of DTA supplier, which can be availed by the DTA supplier itself or by the EOU to whom the goods were supplied by it upon giving suitable disclaimer in that regard. The entitlements of the DTA supplier have been delineated in Chapter 8 of FTP, to which we will advert to a little later. Clause (a) of Chapter 6.11 also provides that DTA supplier and EOU may claim deemed export duty drawback as well, as per the rates fixed by DC wherever All Industry Rates of Drawback are not available.

17. Clause (c) of para 6.11 is a provision which spells out the entitlement of EOU. It includes reimbursement of Central Sales Tax (CST) on goods manufactured in India; exemption from payment of Central Excise Duty on goods produced from DTA on goods manufactured in India; reimbursement of duty paid on fuel procured from domestic oil companies/depots of domestic oil public sector undertakings as per drawback rate notified by DGFT from time to time; and lastly, Cenvat credit on service tax paid. As regards the Central Excise Duty, para 6.11(c)(ii) postulates exemption from payment of Central Excise Duty on goods procured by the EOU from DTA on goods manufactured in India. This is in consonance with the stipulation in para 6.2(b), which predicates that the EOU may import goods from DTA without payment of duty.

18. From the scheme of Chapter 6 of FTP, it is thus clear that the EOU can import goods from DTA supplier, which transaction *de jure* is treated as deemed export; and it can do so without payment of duty, as it has been exempted *vide* para 6.11(c)(ii) of the FTP. On its own, the EOU is not eligible for any other entitlement.

.....

42. In conclusion, we hold that the EOU entities, who had procured and imported specified goods from DTA supplier, are entitled to do so without payment of duty [as in para 6.2(b)] having been *ab initio* exempted from such liability under para 6.11(c)(ii) of the FTP, being deemed exports. Besides this, there is no other entitlement of EOU under the applicable FTP. Indeed, under para 6.11(a) of the FTP, EOU is additionally eligible merely to avail of entitlements of DTA supplier as specified in Chapter 8 of the FTP upon production of a suitable disclaimer from the DTA supplier and subject to compliance of necessary formalities and stipulations. It would not be a case of entitlement of EOU, but only a benefit passed on to EOU for having paid such amount to the DTA supplier, which was otherwise *ab initio* exempted in terms of para 6.11(c)(ii) of the FTP coupled with the obligation to import the same without payment of duty under para 6.2(b).

8.2 It can be seen from the above that the Hon'ble Supreme Court while analyzing the FTP in vogue during the material period held that :-

- (i) Para 6.11(c)(ii) of the FTP postulated exemption from payment of Central Excise Duty on goods procured by the EOU from DTA on goods manufactured in India and that the same was in consonance with the stipulation in para 6.2(b), which predicated that the EOU may import goods from DTA without payment of duty; that the goods supplied by a DTA unit to an EOU is *ab initio* exempted and the EOU must procure such goods without payment of duty;
- (ii) That with respect to Central Excise duty, the EOU on its own, is not eligible for any other entitlement apart from the eligibility to procure goods without payment of duty;
- (iii) That under para 6.11(a) of the FTP, an EOU was additionally eligible merely to avail of entitlements of DTA supplier as specified in Chapter 8 of the FTP upon production of a suitable disclaimer from the DTA supplier and subject to compliance of necessary formalities and stipulations; that it would not be a case of entitlement of EOU, but only a benefit passed on to EOU for having paid such amount to the DTA supplier, which was otherwise *ab initio* exempted in terms of para 6.11(c)(ii) of the FTP coupled with the obligation to import the same without payment of duty under para 6.2(b).

8.3 Government finds that the Hon'ble Supreme Court in the above case has clearly held that the DTA units in this case did not have an option and should have necessarily availed of the exemption and not paid Central Excise duty, if any, and the applicant themselves were not entitled to procure goods from the DTA without payment of duty. The Hon'ble Court further clarifies that after having followed the above procedure, if the DTA unit was still eligible to certain benefits, then the EOU would require to produce a suitable disclaimer from the supplier in the DTA and comply with the necessary formalities and stipulations. Government finds that in this case the applicant has not produced or furnished any evidence indicating the duty paid nature of the inputs procured by them from the units in the DTA nor have they produced any disclaimer from the suppliers in the DTA indicating payment of duty on inputs supplied to the applicant and their renouncing their claim of Drawback on such supplies to the applicant. Government finds that in the present case the applicant deliberately suppressed the facts that they were an EOU and claimed drawback as

applicable to units in the DTA. Government finds that the applicant not only violated the condition stipulated in the notification no. 68/2007-CUS(NT) as discussed earlier, but their action of claiming drawback was in total disregard of the stipulations laid down in the FTP. The Hon'ble Supreme Court in the same case had held –

"These stipulations demonstrate that the scheme of FTP is explicit and not ambiguous nor silent in respect of benefits and entitlements of the concerned entities. It needs no elaboration. Thus, an argument having potential of defeating the intent of the applicable FTP, in any manner, ought to be negated."

8.4 Thus, in light of the above observations of the Hon'ble Supreme Court, Government finds that the conduct of the applicant in having claimed drawback by suppressing the fact that they were an EOU defeats the very purpose of the FTP and also the conditions imposed by notification no.68/2007-CUS(NT). The arguments put forth by the applicant on this count is in absolute contradiction to the observations of the Hon'ble Supreme Court on this issue. Accepting the same would also render not only the condition at clause 7(c) of notification no. 68/2007-CUS(NT), but also the entire Chapter in FTP pertaining to EOU's, otiose. Government notes that such interpretation cannot be the intent of the legislation governing the operation of EOU which have been discussed above.

9.1 Government finds that in the present case the applicant chose to wear two different hats while presenting themselves to the Government authorities during the period in question. They chose to be an EOU before the Income Tax authorities, which actually they were, and claimed the income tax benefits that accrued to an EOU. However, when it came to the Customs Authorities, they suppressed this fact and by default became a unit in the DTA and claimed the benefit of Drawback available to the units in the DTA. On these facts coming to light after an investigation by the Directorate of Revenue Intelligence, Government finds that the applicant has desperately post facto tried to justify their actions, which as discussed above, were in contravention of several laws governing the grant of drawback and has been held to be illegal by the Hon'ble Supreme Court in its decision cited supra. Government finds that the action of the applicant has resulted in them claiming drawback, which they were not legally entitled to and in the process has caused a loss to the Government exchequer. Government

finds that the Hon'ble High Court of Madras in the case of Irbaz Shoe Co. vs CCE & Central Tax, Chennai [2019 (365) ELT 263 (Mad.)], wherein it decided a case where procedures laid down by a notification were not followed by the applicant, had held -

16. The principle contention of the appellant is that when the Tribunal had come to the conclusion that all the leather uppers manufactured by the appellant and sold to M/s. Metro & Metro had been exported and that there is no finding that these goods were sold in the local market, the appellant should not be made to pay duty on the goods. It was contended that failure to adhere to the procedures, which enable them to avail benefit from payment of duty, is only a procedural lapse and that since the goods have been exported, no excise duty is payable by them.

17.

18.

19. Perusal of Notification No. 43 of 2001, dated 26th June, 2001, would show that in order to get exemption from paying excise duty, the manufacturer or processor has to follow the following conditions :-

(a) the manufacturer has to register himself under Rule 9 of Central Excise Rules.

(b) the manufacturer, while filing declaration under the Central Excise (Removal of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 2001, has also to declare ratio of input and output and rate of duty payable on excisable goods to be procured without payment of duty.

20. Conditions have been laid in the Notification to ensure that only such goods are exempted from duty which are actually exported. The authorities have to satisfy themselves of the claim for exemption and it is only after such satisfaction by the authorities that the manufacturer or processor can remove the excisable goods to a place outside the factory in order to avail the benefit of exemption from paying excise duty.

21. In the present case, the appellant was not registered under Rule 9 of the Central Excise Rules, 2001. The appellant has also not informed the department about the clearance of the goods. Complete non-observance of procedure cannot be said to be a mere procedural lapse. The appellant has not fulfilled any of the conditions. Merely stating that they have not paid the Central Excise Duty as they felt that they would be used by M/s. Metro & Metro for export purposes would not be sufficient. The authorities have to get satisfied that the goods cleared were the one, which were actually used for export.

22. It is well settled that the stringency and the mandatory nature of any notification is decided on the basis of the purpose it seeks to achieve. The purpose of Notification No. 43 of 2001, dated 26-6-2001 is to ensure that excise duty should not be evaded under the garb of export sales. The Hon'ble Apex Court in Indian Aluminium Company Limited v. Thane

Municipal Corporation reported in 1992 Supp (1) SCC 480 in Paragraph No. 6 at Page No. 488 and Paragraph No. 3 at Page No. 485, has observed as under :-

"6..... There is an understandable reason for the stringency of the provisions. The object of S. 5(2) (a) (ii) of the Act and the rules made thereunder is self-evident. While they are obviously intended to give exemption to a dealer in respect of sales to registered dealers' of specified classes of goods, it seeks also to prevent fraud and collusion in an attempt to evade tax. In the nature of things, in view of innumerable transactions that may be entered into between dealers, it will wellnigh be impossible for the taxing authorities to ascertain in each case whether a dealer has sold the specified goods to another for the purposes mentioned in the section. Therefore, presumably to achieve the two-fold object, namely, prevention of fraud and facilitating administrative efficiency, the exemption given is made subject to a condition that the person claiming the exemption shall furnish a declaration form in the manner prescribed under the section. The liberal construction suggested will facilitate the commission of fraud and introduce administrative inconveniences, both of which the provisions of the said clause seek to avoid....."

3.....The declaration contemplated in Form 14 is to the effect that the goods imported shall not be used for any other purpose for sale or otherwise etc. It can thus be seen that an incentive is sought to be given to such entrepreneurs by such concession if the raw material which is imported is also utilised in the industrial undertaking without selling or disposing of otherwise. That being the object a verification at the relevant time by the octroi authorities becomes very much necessary before a concession can be given. In the absence of filing such a declaration in the required Form 14, there is no opportunity for the authorities to verify. Therefore the petitioner Company has definitely failed to fulfil an important obligation under the law though procedural. The Learned Counsel, however, submitted that even now the authorities can verify the necessary records which are audited and submitted to the authorities and find out whether the material was used in its own undertaking or not. We do not think we can accede to this contention. Having failed to file the necessary declaration he cannot now turnaround and ask the authorities to make a verification of some records. The verification at the time when the raw material was still there is entirely different from a verification at a belated stage after it has ceased to be there. May be that the raw-material was used in the industrial undertaking as claimed by the petitioner Company or it may not be. In any event the failure to file the necessary declaration has necessarily prevented the authorities to have a proper verification."

The Hon'ble Apex Court in *Kedarnath Jute Manufacturing Co. v. CTO* reported in (1965) 3 SCR 626 at page No. 630 has observed as under :-

It can thus be seen that the submission namely that the dealer, even without filing a declaration, can later prove his case by producing other evidence, is also rejected. This ratio applies on all fours to the case before us. As already mentioned the concession can be granted only if the raw material is used in the industrial undertaking seeking such concession. For that a verification was necessary and that is why in the rule itself it is mentioned that a declaration has to be filed in Form 14 facilitating verification. Failure to file the same would automatically disentitle the Company from claiming any such concession.

23. The Learned Counsel appearing for the appellant has placed reliance on a judgment dated 12-6-2017 passed by the Division Bench of this Court

in C.M.A. No. 3044 of 2011 [2017 (355) E.L.T. 45 (Mad.)], wherein, this Court observed 'as under :-

13. Therefore, what emanates from the facts obtaining in the present case is that, there was a non-disclosure of information by the Assessee. The Assessee has taken a stand that, since, it was always below the monetary limit fixed for clearances qua SSI Units, it never had an occasion to make any disclosure via a classification list.

13.1 In our view, this cannot be construed as suppression of fact, within the meaning of Section 11A (1) of the 1944 Act. Mere non-disclosure of facts, in such like circumstances, cannot constitute suppression of facts. Given the way the Section is framed, the expression "suppression of fact", appears in the company of words and expressions, such as, fraud, collusion, willful misstatement. Therefore, the expression "suppression of facts", has to take colour from the words whose company, it appears in. A mere non-disclosure of information, when there is no obligation in law to furnish the same, will not amount to, in our opinion, fraud or collusion or even, willful misstatement and, hence, trigger the extended period of limitation [See Collector of Central Excise, Hyderabad v. M/s. Chemphar Drugs and Liniments, Hyderabad, 1989 (40) E.L.T. 276 (S.C.); Padmini Products v. Collector of C. Ex., 1989 (43) E.L.T. 195 (S.C.) and Pushpam Pharmaceuticals Company v. Collector of Central Excise, Bombay, 1995 (78) E.L.T. 401 (S.C.)].

24. The ratio of the said judgment, cannot be applied to the facts of the case for availing benefit of Rule 19 of the Central Excise Rule. The purpose of Notification No. 43 of 2001, dated 26th June, 2001, is to ensure prevention of evasion of duty under the garb of export sales. Keeping the purpose in mind, it is not sufficient for a manufacture to come up and say that all the goods manufactured by him have been exported and therefore, he is entitled to the benefit of Rule 19 of Central Excise Rules. If such a view is taken that the conditions prescribed in Notification No. 43 of 2001, is only procedural then the entire purpose of issuing the said Notification, would be defeated.

25. The appellant has removed the goods without informing the Department. The appellant has also not registered under Rule 9 of the Central Excise Rules. The contention, even if the appellant is not registered under Rule 9, still the appellant can avail exemption from paying excise duty cannot be accepted. The removal of goods came to light only after the visit of the officers to the factory and perusal of the documents. Complete non-adherence to the procedure, which has been prescribed to avail exemption from payment of excise duty leads to a presumption that this was done with intend to evade payment of duty and therefore, the authorities were justified in invoking Section 11-A for recovery of excise duty.

26. None of the conditions prescribed in Notification No. 43 of 2001 have been followed, the appellants are not entitled to exemption from payment of duty under Rule 19 of Central Excise Rules. The order of the Customs, Excise and Service Tax Appellate Tribunal in confirming the levy of duty by invoking extended period of limitation, does not requires any interference."

9.2 The Hon'ble High Court in the above decision, while relying on the decisions of the Hon'ble Apex Court has made it abundantly clear that while interpreting a statute, even that involving a notification, stringency

and mandatory nature of the notification has to be decided on the basis of purpose it seeks to achieve. In this present case, the notification no.68/2007-CUS (NT), issued under the powers granted by Section 75 of the Customs Act, 1962, clearly states that an EOU is not entitled to claim drawback. This condition, as explained by the Supreme Court in the case of Sandoz P. Ltd., discussed above, is a corollary to the fact that the clearances by a unit in the DTA to a EOU is ab initio exempted, a principle further expounded by the Foreign Trade Policy. Hence, here the desired objective of the Government was to ensure that the units in the DTA are not required to pay duty when they cleared goods to an EOU and it became incumbent upon the EOU to ensure that it received goods from the DTA without payment of duty. Thus, in this case it follows that for achieving the desired objective of the Government, the goods received from the DTA by the applicant, an EOU, have to be deemed to be cleared without payment of duty. It needs to be appreciated that legal provisions in the nature of Acts, Rules and notifications enacted by the Government is to ensure that the policies framed by it fulfil the desired objectives. Government notes that a construction which permits one to take advantage of one's own wrong or to impair one's own objections under a Statute should be disregarded. The interpretation should as far as possible be beneficial in the sense that it should suppress the mischief and advance the remedy without doing violence to the language. The conduct of the applicant in this particular case has been in total disregard of the legal provisions and as held by the Hon'ble High Court in the case cited, if the arguments put forth by the applicant are accepted, the entire purpose of clause 7(c) of notification no.68/2007-CUS(NT) and of almost the entire Chapter pertaining to EOU's in the Foreign Trade Policy would be defeated.

9.3 Further, Government notes that the Hon'ble Supreme Court in its judgment in the case of Sandoz P. Ltd., cited supra, had clearly held that an EOU was not entitled to any benefit other than receiving goods from without payment of duty from the DTA. Further, Government also notes that the applicant has not adduced any evidence during these proceedings or before the lower authorities to indicate that the goods received by them were duty paid. It is a settled legal principle that the onus of producing evidence in support of the claim made by an applicant is always on the applicant. As stated earlier, the applicant having failed to do so at any stage, including the present proceedings, this claim of the applicant rings hollow

and cannot be accepted. In fact, this point is irrelevant in view of the specific exclusion of 100% EOUs from the Drawback Scheme. In light of the above, Government finds that the applicant will not be eligible to claim drawback. In the event, Government finds that the drawback claimed by them by suppressing the fact that they were an EOU, needs to be recovered and accordingly holds so.

10.1 Government finds that the applicant has placed a great deal of reliance on the decision of the Hon'ble High Court of Karnataka in the case of Karle International vs Commissioner of Customs, Bangalore [2012 (281) ELT 486 (Kar)] in support of their contention that drawback was admissible to them despite being an EOU. Government finds that in this case the drawback was claimed by a unit in the DTA who had got part of their process carried out by an EOU and thereafter exported the finished goods from the premises of the EOU itself. This case is entirely different from the present case as in this case applicant was not an EOU, thus not excluded by clause 7(c) of notification no.68/2007-CUS(NT). In the case of Karle International, the applicant was a normal DTA unit which had procured inputs on payment of duty and got job work done from an EOU. In the instant case the applicant, an EOU themselves, have claimed drawback. Thus, Government finds that the issue involved in the case before the Hon'ble High Court is different from the case on hand and hence will not have any application here. Government notes that the applicant has also sought to place reliance on the decision of the Hon'ble Tribunal in the case of M/s Fancy Images vs Commissioner of Customs, New Delhi [2017-TIOL-410-CESTAT-DEL] in support of their case. Government finds that the Hon'ble Tribunal in this case solely relied upon the decision of the Hon'ble High Court of Karnataka in the case of M/s Karle International, cited above, to decide the case in favour of the EOU. As discussed above, the case pertaining to M/s Karle International before the High Court was different from the case on hand and hence, the Government respectfully disagrees with the Hon'ble Tribunal on this count and finds that the ratio of the decision of M/s Karle International cannot be made applicable to the case on hand.

10.2 Further, Government notes that the applicant has placed reliance on the decisions of the Revisionary Authority vide Order No.175-176/21-CUS dated 10.09.2021 in their case and Order No.178/21 dated 10.09.2021 in

the case of M/s Churchit International. Government finds that in these cases the Revisionary Authority, Delhi has placed reliance on the decisions of either M/s Karle International (cited supra) or the decision of the Hon'ble High Court of Madras in the case of CBEC vs KG Denim Ltd. [2020 (371) ELT 646 (Mad)]. In light of the discussions above indicating that the issue involved in the case of M/s Karle International and the instant one being entirely different, Government respectfully disagrees with the decisions given as they relied on judgments/orders which stand distinguished from the case on hand. Government notes that the Revisionary Authority in Order No.178/21 dated 10.09.2021 has admitted to this fact, but has sought to rely on an observation made by the Hon'ble High Court to hold that the EOU would be eligible to the drawback. Government once again respectfully disagrees with this decision of the Revisionary Authority, Delhi as it finds that the observations of the Hon'ble High Court cited and relied upon by the Revisionary Authority are in the nature of '*orbita dicta*' and hence the same will not have precedent value and cannot be held to prevail over the notification and the Foreign Trade Policy which lay down the conditions and regulations applicable to the present case, which have been elaborately discussed above. Government finds that in the case K.G. Denim too, it was the DTA unit which had claimed drawback in respect of goods manufactured on job work basis by an EOU and exported from the premises of the EOU. As stated earlier, this case differs from the instant one inasmuch as here it is the EOU themselves who claimed drawback on goods manufactured and exported by them and the DTA units were nowhere in the picture. Further, the Revisionary Authority, Delhi while deciding the matter did not have the benefit of the decision of the Hon'ble Supreme Court in the case of Sandoz Pvt. Ltd. cite supra. Hence, Government finds that the decisions of the Revisionary Authority cited by the applicant were based on decisions in cases that stand distinguished from the present one and hence the same will not be applicable here.

10.3 Further, Government finds that the applicant has placed reliance on the decision of the Revisionary Authority in the case of JRE Valves [2011 (270) ELT 450 (GOI)]; Government finds that the issue involved in this case was the eligibility of a unit to claim drawback during the interim period when they were converting themselves from a DTA unit to an EOU and hence is different from the instant case. Further, the applicant has also sought to rely on the case of Anvil Investments Pvt. Ltd. vs UOI [2004 (173) ELT 122 (Cal)], however, Government finds that the issue therein pertained

to duty payable on goods imported under Advance Licence and hence will not be applicable to the instant case. In light of the above, Government notes that all case laws of the higher authorities cited by the applicant stand distinguished. Government notes that in an identical case of Narendra Tea Company Pvt. Ltd. [2020 (373) ELT 564 (GOI)], the Revisionary Authority had held that an EOU was ineligible to drawback and had upheld the Order confirming the demand issued to recover the same paid to them erroneously. In any case, Government finds that none of the cases cited by the applicant will come to their rescue in light of the judgment of the Hon'ble Supreme Court in the case of Sandoz P. Ltd., cited supra, as the same will prevail over all of them. At the cost of repetition, it needs to be said that the Hon'ble Apex Court in the said judgment had unambiguously held that an EOU is not entitled to any other benefit other than receipt of goods without payment of duty. In light of the above, Government finds the portions of the impugned Orders-in-Appeal wherein it upheld the order of the original authority confirming the demands raised on the applicant firm to be proper and legal and accordingly holds so.

11.1 Next, Government finds that the applicant has submitted that the demands raised were hit by limitation of time. On a perusal of the Customs, Central Excise Duties & Service Tax Drawback Rules, 1995, ("the Drawback Rules") which have been framed in exercise of the powers conferred under Section 75 of the Customs Act, 1962, Government finds that the said Rules do not provide for any limitation of time for recovering drawback erroneously paid. Having observed so, Government also finds that there have been various judicial pronouncements wherein the higher Courts have held that a reasonable time limit needs to be adhered to for recovering erroneously sanctioned drawback. The applicants have sought to rely on one such decision and the same has been discussed later in this order. At this juncture, Government finds that, even at the cost of repetition, it needs to be mentioned that the fact that the applicant firm was a 100% EOU during the material period is not in dispute. As discussed earlier, a 100% EOU unit is *ab initio* not eligible to claim Drawback. The Duty drawback scheme and the 100% EOU scheme are mutually exclusive. The legal provisions, as discussed above, do not provide for any unit to avail the benefits of both these schemes at the same time. The applicant in the instant case deliberately concealed the fact of them being a 100% EOU and fraudulently presented themselves as a regular DTA unit to the Drawback sanctioning authorities leading to inadmissible drawback being sanctioned to them.

Government finds that the present case differs from those wherein drawback was found to have been erroneously sanctioned due to disputes of classification, valuation and other similar issues between the exporter and the Department. In the present case there is no dispute regarding the ineligibility of the applicant to claim drawback, as stated earlier no legal provisions exist for a 100 % EOU to claim drawback. The applicant clearly was aware of this fact and hence deliberately perpetuated a fraud and deceived the Department by declaring themselves to be a regular DTA unit to claim the benefit of drawback. On close scrutiny of the judgements which seek to prescribe a reasonable time limit for recovery of erroneously sanctioned drawback, Government finds that these are in the context of the cases wherein there was a dispute between the exporter and the Department and Government agrees that enforcing recovery in such cases even beyond a reasonable period would be detrimental to the business of a genuine exporter. However, Government finds that the present case does not fall in this category. The present case is one of total fraud; the applicant in this case by virtue of the deceit carried out by them have cheated the exchequer to the extent of drawback claimed and received by them. Government finds that no time limit can be prescribed for recovery of such amounts which have been fraudulently appropriated from the Government treasury. Government finds support in the judgment of the Hon'ble Supreme Court in the case of Commissioner of Customs vs Candid Enterprises [2001 (130) ELT 404 (SC)], wherein it was held that the cardinal principle enshrined in Section 17 of the Limitation Act is that *fraud nullifies everything*. Government finds that the present case, being one of an absolute fraud, will not be hit by the limitation of time. There is no gainsaying the fact that the Government has liberalized the procedures for disbursing incentives, including drawback to exporters, making it easier for exporters to conduct their business, however, unscrupulous units such as the applicant who are found to the take advantage of such liberalized procedures require to be stopped in their tracks and all pecuniary gains so availed by them need to be recovered without any time limit.

11.2 Further, Government notes that every EOU is required to execute a B-17 Bond - a *General Bond (with Surety/Security)*, for availing the benefit of special procedures available to an EOU, which would also be applicable to the applicant firm, as there were admittedly an EOU during the material

period. The relevant conditions prescribed by the said Bond, which the applicant as an EOU agreed to abide by, are reproduced below: -

* 1. We, the obligators shall observe all the provisions of the Customs Act, 1962, Central Excise Act, 1944 and the rules and regulations made thereunder in respect of the said goods.

2. We, the obligators shall, pay on or before a date specified in a notice of demand all duties, and rent and charges claimable on account of the said goods under the Customs Act, 1962, Central Excise Act, 1944 and rules/regulations made thereunder together with interest on the same from the date so specified at the rate applicable.

.....

13.

It is hereby declared by us, the obligators and the Government as follows: -

(1)

(2)

(3) The Government through the Commissioner of Customs or Central Excise or any other officer of Customs or Central Excise shall recover the sums due from the obligors in the manner laid down in sub-section (1) of Section 142 of the Customs Act, 1962 or sub-section (1) of Section 11A of the Central Excise Act, 1944; *

A reading of the above conditions of the Bond entered into by the applicant as an EOU clearly indicate that they are under obligation to not only follow all the provisions of the Customs Act, 1962, but they are also under obligation to pay all duties, rent and charges demanded by a notice issued under the Customs Act, 1962. Further, the applicant, vide the condition at Sr.no.13(3) have agreed that such sums due shall be recoverable from them in the manner laid down under Section 142 of the Customs Act, 1962. Government notes that the said Bond does not specify a time limit for recovery of sums demanded by a notice. Government finds that in this case notices seeking to recover fraudulently availed drawback had been issued to the applicant and the same was confirmed by the proper officer. Thus, given the conditions imposed by the B-17 Bond, the applicant is duty bound to pay the amounts demanded by the Notices and cannot seek shelter under the guise of them being time barred. Thus, Government finds that even in this context, the contention of the applicant that the demand was hit by limitation will not hold good and hence rejects the same.

11.3 Government notes that the applicant has sought to place in reliance on the decision of the Hon'ble Gujarat High Court in the case of M/s Padmini Exports Vs. UOI [2012 (284) E.L.T. 490 (Guj.)] in support of their contention that the demand is time barred. Government finds that the issue involved in case cited was the rate at which drawback was to be paid and there was a certain amount of ambiguity about the whole issue inasmuch as the clarification issue by the Board initially indicated that the same would only be applicable to the pending drawback claims, which was later revised by a subsequent clarification to the effect that the earlier clarification was not only prospective and was also applicable retrospectively. Further, in this case the Hon'ble Court noted that though the Customs authorities were well aware of the facts of the case and despite the directions of the Board, no action was taken by the concerned authorities at the relevant time; that it was only after a period more than three years that Show Cause Notices were issued to the petitioner. Government finds that it was in these circumstances the Hon'ble High Court had held that the Show Cause Notices should have been issued within a reasonable time. Further, Government finds that the Hon'ble High Court in this case had not held that there is a time limit prescribed for recovery of erroneously sanctioned Drawback, instead the Hon'ble High Court had held that it would depend on the facts of each case. In the instant case, the conduct of the applicant as discussed above leaves little doubt about their malafide intention to claim Drawback for which they were ineligible. Government finds that the applicant clearly perpetuated a fraud by obtaining the benefits of EOU from the Income Tax authorities and during the same period suppressed this fact and kept claiming Drawback by declaring themselves to be a DTA to the Customs Authorities. Government finds that the case cited supra by the applicant will not be applicable here as fraud vitiates everything. Government finds that the facts of the instant case is different from the case cited by the applicant as in this case the demand on the applicant has not arisen as a result of any ambiguity or interpretation of law, it is clearly because of the fraud committed by the applicant, which was laid bare only after the Department became aware of the same and carried out investigations to unearth the extent to which the Government was defrauded. Thus, Government finds that the case cited will not be of any help to the applicant and in fact confirms the view taken that the drawback claimed by them needs to be recovered. As stated earlier, Government finds that the Hon'ble Supreme Court in the case of Commissioner of Customs vs Candid Enterprises [2001 (130) ELT 404 (SC)], which has been relied upon by the original authority in the Order-in-

Original dated 27.02.2017, had held that the cardinal principle enshrined in Section 17 of the Limitation Act is that *fraud nullifies everything*. In this case, it has been proved beyond doubt that the applicant fraudulently claimed Drawback and hence their claim that demand and recovery of the same is hit by limitation will not hold good in light of the said judgment of the Hon'ble Supreme Court. In view of the above, Government finds that the submission of the applicant that the demands raised are time barred will not hold good and rejects the same.

11.4 Further, Government notes that in the present case the fraud perpetuated by the applicant went unnoticed during the material period and the same could be unearthed only on the basis of intelligence collected and developed by the Department. Government notes that in this case, as a part of the investigations being carried out, the statement of the proprietor of the applicant firm was first recorded on 04.02.2016, wherein he admitted to the fraudulent practice adopted by his firm. Government further notes that thereafter the Department completed the investigations and issued Show Cause Notices seeking to recover such erroneous Drawback on 30.03.2016 and 27.05.2016. Given these facts, Government finds that the Show Cause Notices demanding the erroneous drawback had been issued within a few months, which is reasonable time limit, from the time such fraud was unearthed by the Department. Even, on this count, Government finds the submission of the applicant that the demands raised are time barred will not hold good and hence rejects the same.

12. Government notes that the applicant has contended that the Orders of the Revisionary Authority viz. Order No.175-176/21-CUS dated 10.09.2021 in their case and Order No.178/21 dated 10.09.2021 in the case of M/s Churchit International have not been appealed against and hence the decisions given therein is the settled legal position. Government finds this submission of the applicant to be erroneous as there is no appeal process provided for Orders passed by the Revisionary Authority. Further, in Revenue matters such as these where the facts of the case and the legal position differ in each case, the Orders passed will be relevant to only that case/issue and cannot be said to have precedent value and hence cannot operate as estoppel to consider the factual position established by the investigation carried out by the Department. Further, as stated earlier, the

Revisionary Authority at that material time did not have the benefit of the decision of the Hon'ble Supreme Court in the case of Sandoz Pvt. Limited which was pronounced later. Thus, this submission of the applicant will not hold good and Government rejects the same.

13. Government finds that the applicants have submitted that their goods were not liable for confiscation and hence redemption fine was not imposable on them. In this context, Government finds that in both the cases the lower authorities have held that though the goods exported were liable for confiscation, the same not being available for confiscation and redemption fine on the same was not imposable. No redemption fine was imposed on the applicant in both the cases. Thus, Government finds these submissions of the applicant to be irrelevant and refrains from delving into it.

14. Lastly, Government finds that both the applicants have submitted that the penalties imposed on them by the original authorities and upheld by the Commissioner (Appeals) is improper and deserves to be set aside. Government finds that the original authorities vide the Orders-in-Original dated 19.04.2017 and 27.02.2017 which were upheld by Orders-in-Appeal dated 27.09.2019 and 15.10.2019, respectively, had imposed a penalty of Rs.5,27,000/- and Rs.1,00,00,000/- under Section 114(iii) of the Customs Act, 1962 on the applicant firm viz. M/s The Design Sangrah. Government finds that the applicant firm clearly violated the provisions of notification no.68/2007-CUS(NT) dated 16.07.2007 issued under Section 75 of the Customs Act, 1962 by availing drawback by suppressing the fact that they were an operational EOU. Section 114 provides for penalty to be imposed in cases where goods were exported improperly, etc. In this case it is not in doubt that the applicant attempted and successfully exported goods improperly by suppressing the fact they were an EOU and in the process availed drawback which they were not entitled to and resultantly caused a loss to the Government exchequer. Such action of the applicant deserves to be penalized and hence Government finds that the penalties imposed on the applicant firm to be proper and upholds the same.

15. Government finds that penalties were also imposed on the second applicant, viz. Shri Rakesh Baboo Sadh, proprietor of the applicant firm. A penalty of Rs.5,27,000/- was imposed under Section 114(iii) of the Customs Act, 1965 vide Order-in-Original dated 19.04.2012 and a penalty of Rs.60,00,000/- under Section 114AA was imposed vide Order-in-Original dated 27.02.2012 on the proprietor, both of which were upheld by the Commissioner (Appeals). In this connection Government finds that penalty was already imposed on the applicant firm under Section 114(iii) vide Order-in-Original dated 19.04.2012 and imposing penalty on the exporting firm as well as its proprietor under the same Section amounts to double jeopardy. In view of the above, Government sets aside the penalty of Rs.5,27,000/- imposed under Section 114(iii) on Shri Rakesh Baboo Sadh, the proprietor, vide the Order-in-Original dated 19.04.2012 and modifies the Order-in-Appeal dated 27.09.2019 to that extent. As regards the penalty imposed on the Shri Rakesh Baboo Sadh, the proprietor, by the Order-in-Original dated 27.02.2017, Government finds that the same was imposed under Section 114AA of the Customs Act, 1965 by the original authority as he found that the proprietor had committed this act on purpose and had suppressed the relevant facts. Government finds that Section 114AA provides that if a person knowingly or intentionally makes, signs or uses, or causes to be made, signed or used, any declaration, statement or document which is false or incorrect in any material particular, in the transaction of any business for the purposes of the Customs Act, 1965, he shall be liable to a penalty not exceeding five time the value of goods. Government agrees with the finding of the Commissioner (Appeals) in this case, wherein it was found that Shri Rakesh Baboo Sadh, the proprietor of the applicant firm, had suppressed the fact of claim of Income Tax exemption and that they were a EOU at the time of claim of duty drawback and has hence rendered himself liable for penalty under Section 114AA if the Customs Act, 1965. Thus, Government finds that penalty of Rs.60,00,000/- imposed under Section 114AA on Shri Rakesh Baboo Sadh vide Order-in-Original dated 27.02.2017 has been correctly upheld by the Order-in-Appeal dated 15.10.2012, held accordingly.

16. To summarize, Government does not find any need to modify the impugned Order-in-Appeal dated 15.10.2019 which upheld the order of the original authority confirming the demand of Rs.1,50,21,192/- and imposing penalties of Rs.1,00,00,000/- on the applicant firm and Rs.60,00,000/- on

its proprietor. As regards the impugned Order-in-Appeal dated 27.09.2019, Government upholds the portion wherein it upheld the decision of the original authority to confirm the demand of Rs.5,27,000/- and impose penalty of Rs.5,27,000/- on the applicant firm; however, Government sets aside the penalty of Rs.5,27,000/- imposed on the proprietor of the applicant firm, the Order-in-Appeal dated 27.09.2019 stands modified to this extent.

17. The subject Revision Applications stand disposed of in the above terms.

Shrawan
20/6/23
(SHRAWAN KUMAR)

Principal Commissioner & Ex-Officio
Additional Secretary to Government of India

ORDER No. ^{SC4-507} /2023-CUS (WZ) /ASRA/Mumbai dated 30.06.2023

To,

1. M/s The Design Sangrah,
D-119, Hosiery Complex, Noida Phase - II,
Uttar Pradesh - 201 305.
2. Shri Rakesh Baboo Sadh,
Prop. M/s The Design Sangrah,
M-22A, Lajpat Nagar II,
New Delhi - 110024.

Copy to: -

1. Commissioner of Customs (Export), Mumbai - II, JNCH, Nhava Sheva, Uran, Raigad, Maharashtra - 400 707.
2. Commissioner of Customs (Export), Air Cargo Complex, Sahar, Andheri (E), Mumbai - 400 099.
3. Commissioner of Customs (Appeals) Mumbai - II, JNCH, Nhava Sheva, Taluka Uran, Dist. Raigad, Maharashtra - 400 707.
4. Commissioner of Customs (Appeals), Mumbai - III, Awas Corporate Point, 5th floor, Makwana Lane, Behind S.M. Centre, Andheri - Kurla Road, Marol, Mumbai - 400 059.
5. M/s CTS Law Firm, A-3/31, Sri Sai Kunj, Sector D-2, Vasant Kunj, Delhi - 110020.
6. Sr. P.S. to AS (RA), Mumbai.
7. Notice Board.