REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 3358 OF 2020

SANDOZ PRIVATE LIMITED .....APPELLANT

VERSUS

UNION OF INDIA & OTHERS .....RESPONDENT(S)

with

CIVIL APPEAL NO. 3359 OF 2020

CIVIL APPEAL NO. 3360 OF 2020

CIVIL APPEAL NO. 3705 OF 2020

J U D G M E N T

A.M. Khanwilkar, J.

1. From amongst these four appeals, first two appeals[1] emanate from the common judgment and order dated 01.08.2016[2] passed by the High Court of Judicature at Bombay[3] in Writ Petition

1 Civil Appeal Nos. 3358 and 3359 of 2020
2 2016 (341) ELT 22 (Bom.)
3 for short, "Bombay High Court"

No.2927 of 2015 and Writ Petition No.2926 of 2015, whereas, third appeal[4] arises from the judgment and order dated 08.10.2018[5] passed by the High Court of Delhi at New Delhi in Writ Petition (C) No.10526 of 2017 and the fourth appeal[6] assails the judgment and order dated 09.12.2019[7] passed by the High Court of Karnataka at Bengaluru in Writ Appeal No.286 of 2019 (T-TAR).

CIVIL APPEAL NO. 3358 OF 2020

2a. The appellant in Civil Appeal No.3358 of 2020 claims to be hundred per cent Export Oriented Unit[8] engaged in the manufacture of goods falling under Chapter 30 of the Schedule to the Central Excise Tariff Act, 1985 and for that purpose, the appellant has a factory, *inter alia*, at Plot No.8A/2, 8B/2, 8-8A/1/1, Kalwe, MIDC, Dighe, Navi Mumbai – 400708. Besides, the appellant has another factory situated at Plot No. L-1, MIDC, Mahad, Raigad, within the Domestic Tariff Area Unit[9]. The appellant had applied for refund of Terminal Excise Duty[10] in

4 Civil Appeal No.3360 of 2020
5 2020 (373) ELT 217 (Del.)
6 Civil Appeal No.3705 of 2020
7 2020 (371) ELT 658 (Kar.)
8 for short, "EOU"
9 for short, "DTA Unit"
10 for short, "TED"

respect of excisable goods procured from its unit in DTA, as it did in the past and was granted refund from time to time between 2006 and 2012. The instant refund application, however, came to be disallowed, which decision is the subject matter of appeal before this Court. It had been asserted that TED was paid by the DTA Unit from where the goods in question were procured or supplied to the appellant for its EOU during the relevant period. The application for refund dated 20.04.2012 was accompanied by a declaration given by the appellant that the appellant's DTA Unit did not claim benefit of TED refund supported by the disclaimer certificate given by DTA Unit in that regard. The refund application was required to be decided within 30 days of receipt of complete application. As it was not so disposed of, the appellant requested the Development Commissioner to intervene and do the needful. The refund claim for the period between July 2012 and September 2012 was around Rs.1,90,47,437/- (Rupees One Crore Ninety Lakh Forty-Seven Thousand Four Hundred and Thirty-Seven only) and for the period between October 2012 and December 2012, it was Rs.1,36,04,814/- (Rupees One Crore Thirty-Six Lakh Four Thousand Eight Hundred and Fourteen only).

2b. In the meantime, a circular purported to be a policy circular bearing No.16 (RE-2012/2009-14) dated 15.03.2013[11] came to be issued by the Director General of Foreign Trade[12] to clarify that no refund of TED should be provided by the Office of DGFT/Development Commissioners, as supplies made by DTA Unit to EOU are *ab initio* exempted from payment of excise duty. The Development Commissioner eventually rejected the refund claim set forth by the appellant and informed the appellant in that regard vide letter dated 01.04.2013.

2c. Resultantly, the appellant filed Writ Petition No.9312 of 2013 before the Bombay High Court challenging the legality and validity of the stated policy circular issued by DGFT and two communications of the Development Commissioner rejecting the refund application submitted by the appellant.

2d. In the meantime, a notification bearing No.4(RE-2013)/2009-2014 came to be issued by DGFT on 18.04.2013[13], notifying the amendments made by the Central Government in Foreign Trade

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11 for short, "impugned circular"
12 for short, "DGFT"
13 for short, "said notification"

Policy, 2009-2014[14] in exercise of powers conferred by Section 5 of the Foreign Trade (Development and Regulation) Act, 1992[15].

2e. The stated writ petition preferred by the appellant came to be disposed of on 23.09.2014 whilst directing the competent authority to consider the refund claim of the appellant afresh after taking into account all aspects of the matter and give fair opportunity to the appellant.

2f. Pursuant to the remand order, the Development Commissioner granted personal hearing, but eventually rejected the TED refund claim of the appellant vide order bearing No. SEEPZ-SEZ/W.P./TED/SANDOZ/314/2013-14 dated 06.01.2015.

2g. Feeling aggrieved by this decision, the appellant filed fresh Writ Petition No.2927 of 2015 before the Bombay High Court assailing the policy circular dated 15.03.2013 and order dated 06.01.2015 passed by the Development Commissioner. The Bombay High Court negatived the challenge to the stated policy circular as well as the order passed by the Development Commissioner and thus, dismissed the writ petition vide impugned

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14 for short, "FTP"
15 for short, "1992 Act"

judgment and order dated 01.08.2016. This judgment is subject matter of challenge in Civil Appeal No.3358 of 2020. By the same judgment, the Bombay High Court dismissed the writ petition filed by the appellant in Civil Appeal No.3359 of 2020 involving the self-same issue.

CIVIL APPEAL NO. 3359 OF 2020

3a. Reverting to the factual matrix in Civil Appeal No.3359 of 2020, the appellant claims to be identically placed as in the companion appeal being hundred per cent EOU engaged in manufacturing of goods falling under Chapter 30 of the Schedule to the Central Excise Tariff Act, 1985 and for that purpose, the appellant has a factory at B-15, Phase 1-A, Verna, Salcette, Goa - 403772. The appellant's DTA Unit has been supplying goods on payment of CENVAT duty under claim for rebate to the appellant's EOU. The appellant's EOU uses the said goods in the manufacture of goods cleared for export. The appellant asserted that its DTA Unit did not claim benefit of TED refund and produced disclaimer certificate in that regard to enable the appellant's EOU to claim the

refund of TED on the goods procured by it or supplied by its DTA Unit. The appellant asserts that even in the past it had claimed refund of TED paid by its DTA Unit on the goods supplied to the appellant's EOU and was so granted by the Development Commissioner. However, on this occasion, a different view had been taken in respect of subject application dated 08.08.2012 submitted by the appellant for TED refund for the month of November 2011 being Rs.6,87,89,737/- (Rupees Six Crore Eighty-Seven Lakh Eighty-Nine Thousand Seven Hundred and Thirty-Seven only). The claim came to be rejected in light of the policy (impugned) circular issued by DGFT, without giving any opportunity to the appellant.

3b. Feeling aggrieved, the appellant filed Writ Petition No.9607 of 2013 before the Bombay High Court challenging the legality and validity of the policy circular dated 15.03.2013. That petition was disposed of by directing the competent authority to pass a speaking order on the refund application submitted by the appellant. Pursuant to the remand order, the competent authority gave personal hearing to the appellant and once again rejected the TED refund claim vide order dated 12.01.2015 on the ground that the

appellant had received supplies of the concerned goods from their DTA Unit to EOU, which were *ab initio* exempted from payment of duty under para 6.11(c)(ii) of Foreign Trade Policy, 2009-2014. Thus, refund was not admissible to the appellant.

3c. This decision was challenged by the appellant before the Bombay High Court by way of fresh Writ Petition No.2926 of 2015 wherein the policy circular dated 15.03.2013 issued by DGFT was also challenged. This writ petition was heard and decided by the Bombay High Court, along with another writ petition (which is subject matter in the companion appeal filed by Sandoz Private Limited) vide common judgment and order dated 01.08.2016, rejecting the assail to the policy circular and order passed by the competent authority referred to above. This judgment is subject matter of challenge in Civil Appeal No. 3359 of 2020.

4. As the factual matrix in both the writ petitions was similar, the High Court vide common impugned judgment dated 01.08.2016 considered the grounds of challenge to the decision of the Development Commissioner; and eventually opined that in light of paras 6.2(b) and 6.11(c)(ii) of the FTP, no refund of TED could be

given by the regional authority of DGFT or the Office of the Development Commissioners because procurement of excisable goods by the appellants–EOUs was *ab initio* exempted from payment of excise duty. It went on to observe that there was a clear stipulation in the FTP itself in that regard. The High Court noted that the purport of the impugned circular was only to clarify the obvious position. There was no obligation on the EOU to pay duty at the time of procurement of excisable goods. For, FTP plainly predicates that the procurement of excisable goods should be done by EOU without payment of excise duty. As there is reverse obligation on EOU to procure excisable goods without payment of duty, there is no question of claiming refund. Thus, it held that the conclusion reached by the Development Commissioner was in conformity with the dispensation provided in the FTP and is not in any manner contrary thereto or to the mandate of Section 5 of the 1992 Act. Further, the impugned circular was only to place on record the correct perspective of the dispensation provided in the FTP. The argument that the impugned circular can have prospective effect only, cannot be countenanced in law. In that, the circular was only to clarify the

purport of paras 6.2(b), 6.11(c)(ii) and 8.3(c) of the FTP; and if these provisions were read harmoniously and conjointly, leave no manner of doubt that refund request before DGFT under para 8.3(c) in relation to excisable goods, even though procured by EOU upon payment of duty, would be inadmissible in law.

5. The Bombay High Court also noted that although in the past the regional authority had accepted refund request of EOUs, that cannot bestow any right much less vested right in EOUs so as to issue mandamus to the concerned statutory authorities to act contrary to the provisions of the FTP. As a matter of fact, to dispel the doubt entertained by EOUs if any, the position was restated by the Government vide notification dated 18.04.2013 issued in exercise of power conferred under Section 5 of the 1992 Act. In substance, the Bombay High Court observed that the impugned circular was only to restate and clarify that the regional authority of DGFT was not competent to entertain the refund application; and if EOU or the supplier so desired, were free to pursue refund claim before the competent excise authorities where amount towards duty had been deposited or paid.

CIVIL APPEAL NO.3360 OF 2020

6a. This appeal by the Union of India assails the judgment and order dated 08.10.2018 passed by the Division Bench of the High Court of Delhi in Writ Petition (C) No.10526 of 2017. By that writ petition, the respondent claiming to be a "supplier" of excisable goods to various EOUs, who in turn exported their final product outside India, sought direction against DGFT to grant TED refund in the sum of Rs.46,54,295 (Rupees Forty-Six Lakh Fifty-Four Thousand Two Hundred and Ninety-Five only), towards deemed exports made to EOUs (Vimal Agro Products Pvt. Ltd. and TATA Coffee Ltd.). These supplies were made between January 2012 and March 2013 and admittedly, before issue of the impugned circular.

6b. The respondent-Company (DTA Unit) had filed refund application before the Joint Director General of Foreign Trade, which was returned to it in light of the impugned circular. The appellant then pursued the refund application on 11.03.2014 to the Deputy Commissioner of Central Excise Department, which came to be rejected on 29.05.2015. Against this decision, the matter was carried in appeal up to the Customs Excise and Service

Tax Appellate Tribunal[16] unsuccessfully. After exhausting that remedy and allowing decision of the statutory authorities under the Central Excise Act, 1944[17] as final, the respondent-Company chose to file writ petition before the High Court of Delhi seeking direction against DGFT to consider the refund application regarding TED amount under FTP. It was urged that the primary responsibility to refund TED amount paid by the respondent-Company (DTA Unit) being supplier of excisable goods to EOU, was that of DGFT. The High Court of Delhi vide impugned judgment dated 08.10.2018 allowed the writ petition and issued directions to DGFT to consider the refund application filed by the respondent-Company and if found in order, directed refund of TED amount to the respondent with interest at the rate of 9 % per annum. The High Court of Delhi essentially relied upon its earlier decision in ***Kandoi Metal Powders Manufacturing Company Private Limited vs. Union of India***[18] which in turn had adverted to the decision of the Calcutta High Court in the case of ***Joint Director General of Foreign Trade vs. IFGL Refractories Limited***[19], to reinforce the view

16 for short, "the CESTAT"
17 for short, "1944 Act"
18 (2014) 302 ELT 209 (Del.)
19 2002 (143) ELT 294 (Cal.)

taken by it that the impugned circular invoked by the Department had prospective effect only. It also noted that ***Kandoi Metal Powders Manufacturing Company Private Limited***[20] was concerned with the clarification issued by the Policy Interpretation Committee vide its decision dated 04.12.2012 to the effect that refund of CENVAT credit provisions were available under the Central Excise Act and the Rules framed thereunder. The same should be availed instead of claiming refund. It was held that the view taken by DGFT that the respondent could avail of the refund under the provisions of the 1944 Act and the Rules framed thereunder, was untenable in law. On facts, it noted that since the supply of excisable goods was prior to 15.03.2013, the question of invoking circular against the respondent-Company did not arise. Instead, the High Court held that refund application ought to have been processed by the DGFT in terms of para 8.3(c) of the FTP, as it stood prior to 15.03.2013. Accordingly, while allowing the writ petition, the High Court of Delhi issued direction to the appellant (DGFT) to consider the respondent's refund application and to refund the due amount with interest at the rate of 9 % per annum.

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20 supra at Footnote No.18

CIVIL APPEAL NO.3705 OF 2020

7. This appeal by Union of India is against the decision dated 09.12.2019 of the Division Bench of the High Court of Karnataka in Writ Appeal No.286 of 2019 (T-TAR). The stated appeal was filed by the appellant-Union of India by way of intra-court appeal against the decision dated 20.3.2018[21] of the learned Single Judge of the same High Court in ***Acer India Pvt. Ltd. vs. Union of India*** [Writ Petition No.64539 of 2016 (T-TAR)] whereby the respondent-Company — claiming to be engaged in the business of manufacture and sale of computer systems and supply of goods to hundred per cent EOUs on payment of TED, had sought a declaration that it was eligible for refund of TED amount in respect of goods supplied to EOUs during the period from June 2009 to October 2009 in terms of para 8.3 of the FTP. Learned Single Judge of the High Court of Karnataka adverted to the decision of the learned Single Judge of the Calcutta High Court in ***IFGL Refractories Limited vs. Joint Director General of Foreign Trade***[22] (later confirmed by the Division Bench of the same High Court in ***Joint Director***

21 2018 (361) ELT 44 (Kar.)
22 2001 (132) ELT 545 (Cal.)

General of Foreign Trade[23]) and of the High Court of Delhi in ***Kandoi Metal Powders Manufacturing Company Private Limited***[24] wherein it had been held that once the supply of goods fall within the category of deemed exports, the unit would be entitled to refund of TED. Learned Single Judge also adverted to the decision of the Madras High Court in ***Lenovo (India) Pvt. Ltd. vs. Union of India***[25] and to the decision of the Bombay High Court in case of ***Sandoz Private Limited*** which is impugned in the cognate appeals referred to above. Learned Single Judge, however, noted that the decision of the Bombay High Court has been distinguished by the Madras High Court, but then went on to observe that it did not agree with the view taken by the Bombay High Court in view of the amendment to the FTP. Instead, learned Single Judge opined that the policy circular dated 15.03.2013, by no standard, was clarificatory in nature. Resultantly, learned Single Judge allowed the writ petition and was pleased to set aside the communication dated 31.03.2016 issued by the Deputy Director of Foreign Trade, disallowing the refund claim of the

23 supra at Footnote No.19
24 supra at Footnote No.18
25 (2017) 346 ELT 12 (Mad.)

respondent-Company (DTA Unit). Learned Single Judge while setting aside that order relegated the respondent-Company before the competent authority under the FTP to consider the refund claim of the respondent-Company in accordance with the policy. The Division Bench whilst dealing with the appeal filed by the Department, vide impugned judgment noted that the respondent-Company had supplied computer systems to EOU on payment of TED from June 2009 till October 2009, which in terms of the FTP, in particular para 8.2(b), was deemed export — entitling the respondent-Company to claim refund of TED from the regional authority of DGFT in terms of para 8.3(c) of the FTP. The Division Bench of the High Court of Karnataka opined that there was no infirmity in the view taken by the learned Single Judge holding that the appellant cannot be heard to retain the amount which was not payable by way of tax being a case of deemed export. As the amount of Rs.1,04,36,945 (Rupees One Crore Four Lakh Thirty-Six Thousand Nine Hundred and Forty-Five only) was wrongly paid by the respondent-Company, the same needed to be refunded and, therefore, learned Single Judge was justified in relegating the

respondent-Company before the competent authority under the FTP to consider the refund claim.

8. We have heard Shri Arvind Datar, Shri Jay Savla, learned senior counsel and Shri Prakash Shah, learned counsel appearing for the appellants in the appeals by the Assessee, Shri Balbir Singh, learned Additional Solicitor General of India for the Department; and Shri G. Shivadass, learned senior counsel for the respondent-Assessee (writ petitioner), in the appeals by the Department.

CONSIDERATION

9. From the factual matrix delineated above in the respective appeals, it is obvious that Civil Appeal Nos.3358 and 3359 of 2020 pertain to EOUs, who had "procured" goods from its unit in Domestic Tariff Area (DTA), which transactions were in the nature of deemed export by the DTA Unit to EOU within the meaning of the applicable FTP. On the other hand, the appeals against the decision of the High Court of Delhi and the High Court of Karnataka pertain to the refund claim set up by the DTA Unit —

"suppliers" of goods to concerned EOU, also in reference to self-same Foreign Trade Policy (FTP).

10. The moot question is: whether the entities herein are entitled to refund of amount purportedly towards TED in respect of specified goods procured or supplied, as the case may be, being deemed exports and from which authority, either under applicable Foreign Trade Policy (FTP) or the 1944 Act? Further, whether Circular No.16 (RE-2012/2009-14) dated 15.03.2013 is merely clarificatory regarding TED refund and exemption and the efficacy thereof?

11. The claim for refund of TED amount of the concerned entities being the recipient or the supplier of specified goods, as the case may be, needs to be understood and analysed in two broad silos and in the context of nature of transaction and the applicability of the provisions of the concerned laws, namely, FTP propounded under the 1992 Act and the 1944 Act. We will dilate on this aspect at appropriate place. Be it noted that the refund claim in the respective appeals varies between June 2009 and March 2013 (i.e., Civil Appeal No.3358 of 2020 — July 2012 and December 2012;

Civil Appeal No.3359 of 2020 — November 2011; Civil Appeal No.3360 of 2020 — January 2012 and March 2013; and Civil Appeal No.3705 of 2020 — June 2009 and October 2009).

12. At the outset, it needs to be borne in mind that the entities in all these cases are claiming refund founded on the FTP and not in reference to the provisions of the 1944 Act or the rules framed thereunder, in particular, the Central Excise Rules, 2002[26] and the CENVAT Credit Rules, 2004[27].

13. Had it been a claim for refund of duty under the 1944 Act, the same would be governed by the regime predicated in Section 11B of that Act. The expression "duty" has been defined in Rule 2(e) of the 2002 Rules to mean the duty payable under Section 3 of the 1944 Act. Section 3 of the 1944 Act envisages that there shall be levied and collected in such manner as may be prescribed a duty of excise as may 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. It may

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26 for short, "2002 Rules"

27 for short, "2004 Rules"

be apposite to refer to Section 5A[28] of the 1944 Act. It empowers the Central Government to grant exemption from duty of excise in respect of specified excisable goods. The exercise of power to exempt is a beneficial power — which enables the Central Government to reduce or waive duty on specified goods on such conditions as may be prescribed. The exemption notification has statutory force. However, the manufacturers (including DTA Unit) of specified goods are free to disregard, the benefit of exemption so provided when it is laced with fulfilment of pre-conditions by third party (EOU). However, sub-section (1A) of Section 5A came to be

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28 **5A. Power to grant exemption from duty of excise**.— (1) If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by notification in the Official Gazette, **exempt generally either absolutely or subject to such conditions (to be fulfilled before or after removal) as may be specified in the notification**, excisable goods of any specified description **from the whole or any part of the duty of excise leviable thereon**:

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

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

(*ii*) by a hundred per cent. export-oriented undertaking and brought to any other place in India.

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

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

.....

(emphasis supplied)

inserted by way of an amendment w.e.f. 13.05.2005. It was for removal of doubts. It declared that where an exemption under sub-section (1) in respect of any excisable good from the whole of the duty of excise leviable thereon has been granted absolutely, the manufacturer of such excisable goods "shall not pay the duty of excise on such goods". This stipulation ordains that the excise duty is not payable on the specified goods. However, this stipulation will be attracted if the excise duty is exempted *ab initio* (without any pre-condition). Be that as it may, the governing FTP regime ought to prevail being a special dispensation under the 1992 Act.

14. The authorities propounding the FTP were obviously conscious of the purport of the provisions of the 1944 Act and the rules framed thereunder. Despite that, the subject policy had been propounded with the sole objective of promoting exports and earning foreign exchange. At the relevant time, the goal set forth by the policy makers was to achieve the target of at least one per cent of the global trade by promoting exports. It is thus clear that the concessions or so to say, benefits and entitlements provided

under the FTP cannot be constricted by the provisions of the taxing statute of 1944 and the rules framed thereunder. To put it tersely, the dispensation provided under the 1992 Act and the FTP must operate independently and is thus mutually exclusive in this regard. Taking any other view would be counter-productive and whittle down the intent behind formulation of a liberal FTP for promoting exports.

15. Under the subject FTP, Chapter 6 deals with EOUs, Electronics Hardware Technology Parks (EHTPs), Software Technology Parks (STPs) and Bio-Technology Parks (BTPs). Para 6.1 provides for the eligibility criterion. It envisages that units undertaking to export their entire production of goods and services (except permissible sales in DTA) may be set up under the EOU Scheme. Similar provision is made regarding other Parks referred to therein. It is, however, made clear that trading units are not covered under these schemes. Para 6.1 (Eligibility) reads thus: -

> "**6.1 Eligibility**
>
> Units undertaking to export their entire production of goods and services (except permissible sales in DTA), may be set up under the Export Oriented Unit (EOU) Scheme, Electronics Hardware Technology Park (EHTP) Scheme, Software Technology Park (STP) Scheme or Bio-

> Technology Park (BTP) Scheme for manufacture of goods, including repair, re-making, reconditioning, re-engineering and rendering of services. Trading units are not covered under these schemes."

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) .....
> (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**.
> ....."
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> (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**
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> (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.
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> (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.
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> (c) **In addition, EOU**/EHTP/STP/BTP **units shall be entitled to following**:-
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> (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).
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> **(ii) Exemption from payment of Central Excise Duty on goods procured from DTA on goods manufactured in India.**
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> (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."
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> (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.

19. Needless to observe that there is marked distinction between the expression "benefit"[29] and "entitlement"[30]. "Benefit", by its very nature, is an advantage, help or aid, while "entitlement" is right to have something. Under Chapter 6, the EOU is entitled to import specified goods from DTA without payment of duty, subject to fulfilling other requirements including of actual user condition and to be utilised for export production, being a case of *ab initio*

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29 In Black's Law Dictionary (11th Edition): **benefit,** *n.* (14c) **1.** The advantage or privilege something gives; the helpful or useful effect something has <the benefit of owning a car>. **2.** Profit or gain; esp., the consideration that moves to the promise <a benefit received from the sale>. — Also termed *legal benefit; legal value.*

30 In Black's Law Dictionary (11th Edition): **entitlement.** (19c) An absolute right to a (usu. monetary) benefit, such as social security, granted immediately upon meeting a legal requirement.

exemption *qua* EOU. The provision in the form of para 6.11(a) merely enables EOU to set up a claim "in respect of" entitlements of DTA supplier under Chapter 8 of FTP. There is no separate entitlement for EOU under Chapter 8 of FTP. To put it differently, although the heading of para 6.11 is "Entitlement for supplies from the DTA" and clause (a) thereof envisages that EOU shall on production of a suitable disclaimer from DTA supplier be eligible for obtaining entitlements specified in Chapter 8 of FTP, it does not follow that it is the entitlement of EOU. It is, however, only a case of benefit transferred to EOU concerning the entitlement of DTA supplier under Chapter 8 of FTP.

20. That brings us to Chapter 8 of FTP. The heading of Chapter 8 is "Deemed Exports". The original para 8.1 specified that deemed exports refer to those transactions in which goods supplied do not leave country and payment for such supplies is received either in Indian rupees or in free foreign exchange. By way of amendment, it further provided that the supply of specified goods (noted in para 8.2) shall be regarded as deemed exports provided goods are manufactured in India. The original para 8.1 reads thus: -

"**8.1. Deemed Exports**

"Deemed Exports" refer to those transactions in which goods supplied do not leave country, and payment for such supplies is received either in Indian rupees or in free foreign exchange."

[Para 8.1, after amendment, in 2012-2013 reads thus: -

"**8.1. Deemed Exports**

Deemed Exports" refer to those transactions in which goods supplied do not leave country, and payment for such supplies is received either in Indian rupees or in free foreign exchange. **Supply of goods as mentioned in Paragraph 8.2 below shall be regarded as "Deemed Exports" provided goods are manufactured in India**."]

(amendment highlighted)

Para 8.2 of Chapter 8 specifies the categories of supplies which can be regarded as deemed exports. Clause (b) thereof is applicable to the present appeals. Relevant extract of original para 8.2 is as under: -

"**8.2. Categories of Supply**

Following categories of supply of goods by main/sub-contractors shall be regarded as "Deemed Exports" under FTP, provided goods are manufactured in India:

(a) xxx xxx xxx

(b) Supply of goods to EOU/STP/EHTP/BTP;

....."

[Para 8.2, after amendment, in 2012-2013 reads thus: -

"**8.2. Categories of Supply**

Following categories of supply of goods by main/sub-contractors shall be regarded as "Deemed Exports":

(c) xxx xxx xxx

(d) Supply of goods to EOU/STP/EHTP/BTP;

….."]

In other words, only the specified categories of supplies are regarded as deemed exports. In that, import of goods, as specified in para 8.2(b) from DTA supplier to the EOU is regarded as deemed exports. To put it differently, the supply of goods by DTA Unit to EOU with actual user condition and utilised for export production, are regarded as deemed exports. To such transactions, certain benefits have been extended, as provided in para 8.3 of the FTP applicable at the relevant time, which reads thus:

"**8.3 Benefits for Deemed Exports**

Deemed exports shall be eligible for any/all of following benefits in respect of manufacture and supply of goods qualifying as deemed exports subject to terms and conditions as in HBP v1:-

(a) Advance Authorisation/Advance Authorisation for annual requirement/DFIA.

(b) Deemed Export Drawback.

(c) Exemption from terminal excise duty where supplies are made against ICB. **In other cases, refund of terminal excise duty will be given**. Exemption from TED shall also be available for supplies made by an Advance Authorisation holder to a manufacturer holding another Advance Authorization if such manufacturer, in turn, supplies the product(s) to an ultimate exporter."

And original para 8.4 of the FTP providing benefits to the suppliers, as applicable at the relevant time, reads thus: -

"**8.4 Benefits to the Supplier**

8.4.1 (i) In respect of supplies made against Advance Authorisation / DFIA in terms of paragraph 8.2(a) of FTP, supplier shall be entitled to Advance Authorisation / DFIA for intermediate supplies.

(ii) If supplies are made against Advance Release Order (ARO) or Back to Back Letter of Credit issued against Advance Authorisation / DFIA in terms of paragraphs 4.1.11 and 4.1.12 of FTP, suppliers shall be entitled to benefits listed in paragraphs 8.3(b) and (c) of FTP, whichever is applicable.

8.4.2 **In respect of supply of goods to EOU / EHTP / STP / BTP in terms of paragraph 8.2(b) of FTP, supplier shall be entitled to benefits listed in paragraphs 8.3(a), (b) and (c) of FTP, whichever is applicable**.

8.4.3 In respect of supplies made under paragraph 8.2(c) of FTP, supplier shall be entitled to the benefits listed in paragraphs 8.3(a), (b) and (c) of the Policy, whichever is applicable.

8.4.4 (i) In respect of supplies made under paragraphs 8.2(d), (f) and (g) of FTP, supplier shall be entitled to benefits listed in paragraphs 8.3(a), (b) and (c), whichever is applicable.

(ii) In respect of supplies mentioned in paragraph 8.2(d), supplies to projects funded by such Agencies alone, as may be notified by DEA, MoF, shall be eligible for deemed export benefits. A list of such Agencies / Funds is given in Appendix 13 of HBP v1.

(iii) Benefits of deemed exports under para 8.2(f) of FTP shall be applicable in respect of items,

import of which is allowed by DoR at zero customs duty, subject to fulfillment of conditions specified under Notification No. 21/2002-Customs dated 1.3.2002, as amended from time to time.

(iv) Supply of Capital goods and spares upto 10% of FOR value of capital goods to power projects in terms of paragraph 8.2(g), shall be entitled for deemed export benefits provided the ICB procedures have been followed at Independent Power Producer (IPP) / Engineering and Procurement Contract (EPC) stage. Benefit of deemed exports shall also be available for renovation/modernization of power plants. Supplier shall be eligible for benefits listed in paragraph 8.3(a) and (b) of FTP, whichever is applicable. However, supply of goods required for setting up of any mega power project as specified in S.No. 400 of DoR Notification No. 21/2002- Customs dated 1.3.2002, as amended, shall be eligible for deemed export benefits as mentioned in paragraph 8.3(a), (b) and (c) of FTP, whichever is applicable, if such mega power project complies with the threshold generation capacity specified therein, in Customs Notification.

[Para 8.4.4(iv), after amendment, in 2010-2011 reads thus: -

"(iv) Supply of Capital goods and spares upto 10% of FOR value of capital goods to power projects in terms of paragraph 8.2(g), shall be entitled for deemed export benefits provided the ICB procedures have been followed at Independent Power Producer (IPP) / Engineering and Procurement Contract (EPC) stage. **However, in regard to mega power projects, the requirement of ICB would not be mandatory, if the requisite quantum of power has been tied up through tariff based competitive bidding or if the project has been awarded through tariff based competitive bidding**. Benefit of deemed exports shall also be

available for renovation / modernization of power plants. Supplier shall be eligible for benefits listed in paragraph 8.3(a) and (b) of FTP, whichever is applicable. However, supply of goods required for setting up of any mega power project as specified in S.No. 400 of DoR Notification No. 21/2002- Customs dated 1.3.2002, as amended, shall be 88 eligible for deemed export benefits as mentioned in paragraph 8.3(a), (b) and (c) of FTP, whichever is applicable, if such mega power project complies with the threshold generation capacity specified therein, in Customs Notification. **Further, supply of goods required for the expansion of existing mega power project as specified in Sl. no 400A of DoR Notification 21/2002-Customs dated 1.3.2002, as amended shall also be eligible for deemed export benefits as mentioned in paragraph 8.3 (a), (b) and (c) of FTP, whichever is applicable**."]

(amendments highlighted)

(v) Supplies under paragraph 8.2(g) of FTP to new refineries being set up during Ninth Plan period and spilled over to Tenth Plan period, shall be entitled for deemed export benefits in respect of goods mentioned in list 17 specified in S.No. 228 of Notification No. 21/2002-Customs dated 1.3.2002, as amended from time to time. Supplier shall be eligible for benefits listed in paragraphs 8.3(a) and (b) of FTP, whichever is applicable.

8.4.5 In respect of supplies made under paragraph 8.2(e) of FTP, supplier shall be eligible for benefits listed in paragraph 8.3(a) and (b) of FTP, whichever is applicable. Benefit of deemed exports shall be available in respect of supplies of capital goods and spares to Fertilizer Plants which are set up or expanded / revamped / retrofitted / modernized during Ninth Plan period. Benefit of deemed exports shall also be available on supplies made to Fertilizers Plants,

> which have started in the 8th / 9th Plan periods and spilled over to 10th Plan period.
>
> 8.4.6 Supplies of goods to projects funded by UN Agencies covered under para 8.2(i) of FTP are eligible for benefits listed in paragraph 8.3(a) and (b) of FTP, whichever is applicable.
>
> 8.4.7 In respect of supplies made to Nuclear Power Projects under para 8.2(j) of FTP, the supplier would be eligible for benefits given in para 8.3(a), (b) and (c) of FTP, whichever is applicable. Supply of only those goods required for setting up any Nuclear Power Project specified in list 43 at S.No. 401 of Notification No. 21/2002-Customs dated 1.3.2002, as amended from time to time, having a capacity of 440MW or more as certified by an officer not below rank of Joint Secretary to Government of India in Department of Atomic Energy, shall be entitled for deemed export benefits in cases where procedure of competitive bidding (and not ICB) has been followed.
>
> (emphasis supplied)

Though couched as benefits, these are essentially entitlements, to be availed by DTA supplier in terms of para 8.4.2. As noted earlier, in terms of para 6.11(a), the EOU can also avail of those entitlements of DTA as specified in Chapter 8 of FTP, as had been earmarked for DTA supplier. That does not mean that EOU is eligible for those entitlements, on its own accord as, amongst other, it is obliged to obtain disclaimer from DTA supplier as a precondition.

21. As aforementioned, para 8.2 lists the categories of supply of goods which are regarded as deemed exports including supply of goods to EOU [para 8.2 (b)]. The specified transactions are provided certain benefits mentioned in para 8.3, subject to terms and conditions in the handbook procedures, volume I, published under FTP. Para 8.3(c), *inter alia*, envisages that exemption from TED is available for supplies made against International Competitive Bidding[31] and also to Advance Authorisation Holder to a manufacturer holding another advance authorisation if such manufacturer supplies the products to an ultimate exporter. In other cases, (would include other DTA suppliers of goods to EOU), however, refund of TED will be given. Further, the expression "will" is to be construed as a mandate to give refund to such DTA suppliers, being its entitlement under FTP. This does not whittle down the *ab initio* exemption of payment of duty given to EOU in respect of supply from DTA.

22. Notably, para 8.3(c) of FTP does not provide in-built eligibility "category" unlike specified in sub-paras (a) and (b) for ICB and Advance Authorisation Holder. The expression "in other cases" in

31 for short, "ICB"

sub-para (c) needs to be understood in proper perspective. Concededly, paras 8.4.1 to 8.4.7 provide for benefits to the supplier of goods to EOU as being deemed export. It is essentially an entitlement of DTA supplier — as listed in para 8.3(a), (b) and (c) of FTP, as may be applicable. It is seen that para 8.4.2 was substituted by the revised FTP of 2012, wherein a table was inserted[32]. As per that table, benefits available under para 8.2 to

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32 Para 8.4, after amendment, in 2012-2013 reads thus:-

"8.4 Benefits to the Supplier

Following table shows the benefits available to different categories of supplies as mentioned in Para 8.2 above. In respect of such supplies supplier shall be entitled to the benefits listed in paragraphs 8.3 (a), (b) & (c) of the Policy, whichever is applicable.

32 Relevant sub-para of 8.2		
32 (a)	32 Yes (for intermediate supplies)	32 Yes (against ARO or Back to Back letter of credit)
32 Benefit available as given in Para 8.3,		32 Yes (Against

8.4.1 This paragraph is deleted because the contents of this paragraph reflected in table given in paragraph 8.4 above.

specified categories of supplies including supply to EOU in para 8.2(b) had been extended benefits under para 8.3, as applicable.

23. The eligibility for refund of TED/drawback in terms of para 8.3(c) of FTP is made dependent on the non-availment of CENVAT credit/rebate on such goods by the recipient thereof, as is envisaged in original para 8.5. The same reads thus:

> "**8.5 Eligibility for refund of terminal excise duty/drawback**
>
> Supply of goods will be eligible for refund of terminal excise duty in terms of para 8.3(c) of FTP, provided recipient of goods does not avail CENVAT credit / rebate on such goods. Similarly, supplies will be eligible for deemed export drawback in terms of para 8.3(b) of FTP on Central Excise paid on inputs/components, provided CENVAT credit

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8.4.2 This paragraph is deleted because the contents of this paragraph reflected in table given in paragraph 8.4 above.

8.4.3 This paragraph is deleted because the contents of this paragraph reflected in table given in paragraph 8.4 above.

8.4.4 (i) This paragraph is deleted because the contents of this paragraph reflected in table given in paragraph 8.4 above.

(ii) This paragraph is deleted because the contents of this paragraph reflected in paragraphs 8.2(d) and 8.4 above.

(iii) This paragraph is deleted because the contents of this paragraph reflected in paragraph 8.2 (f) above.

(iv) This paragraph is deleted because the contents of this paragraph reflected in paragraphs 8.2 and 8.4 above.

(v) Deleted

8.4.5 Deleted.

8.4.6 This paragraph is deleted because the contents of this paragraph reflected in table given in paragraph 8.4 above.

8.4.7 This paragraph is deleted because the contents of this paragraph reflected in paragraphs 8.2 and 8.4 above."

facility/rebate has not been availed by applicant. Such supplies will however be eligible for deemed export drawback on customs duty paid on inputs/components.

[Para 8.5, after amendment, in 2012-2013 reads thus:-

"**8.5 Eligibility for refund of terminal excise duty/drawback**

Supply of goods will be eligible for refund of terminal excise duty in terms of Para 8.3(c) of FTP, provided recipient of goods does not avail CENVAT credit/rebate on such goods. **A declaration to this effect, in Annexure II of ANF 8, from recipient of goods, shall be submitted by applicant.** Similarly, supplies will be eligible for deemed export drawback in terms of para 8.3 (b) of FTP of Central Excise duty paid on inputs/components, provided **CENVAT credit /rebate** has not been availed **of such duty paid by supplier of goods**. **A declaration to this effect, in Annexure III of ANF 8, from supplier of goods, shall be submitted by applicant**. Such supplies **shall** however be eligible for deemed export drawback on customs duty paid on inputs/components.

(amendments highlighted)

8.5.1 Simple interest @ 6% per annum will be payable on delay in refund of duty drawback and terminal excise duty under deemed export scheme, if the case is not settled within 30 days of receipt of complete application (as in paragraph 9.10.1 of HBP v1)."

24. Similarly, benefit under para 8.3(b) of FTP regarding deemed export drawback can be availed, provided CENVAT credit/rebate has not been availed by DTA supplier and subject to complying other formalities. Para 8.4.2 as originally stood, is indicative of

option given only to supplier (DTA) in connection with supply of goods to EOU, as specified in para 8.3 (a), (b) and (c) of FTP. That has remained intact despite the amendment of 2012, until March 2013. Be it noted that the purport of para 8.5 states that supply of goods will be eligible for TED refund only if CENVAT credit/rebate has not been availed on such goods. 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.

25. Going by the scheme of FTP applicable at the relevant period, it is crystal clear that EOUs were entitled to *ab initio* exemption from payment of Central Excise duty on goods procured from DTA on goods manufactured in India, as the import of such goods was to be made without payment of duty. No more and no less. That, however, did not preclude the EOU from availing of the entitlement of DTA supplier under Chapter 8 upon obtaining a suitable disclaimer from DTA supplier, as provided in para 6.11(a). That

availment by EOU had been linked to entitlement of DTA supplier, as specified in Chapter 8. The DTA supplier could (entitled to) take refund of TED in respect of goods supplied by it to EOU being exempted from TED, in light of para 8.3(c). The eligibility for refund of TED, however, has been circumscribed by formalities and requirements to be adhered to, including as noted in para 8.5. In that, recipient of goods (EOU) does not avail CENVAT credit or rebate. Similarly, DTA supplier would be eligible for deemed export drawback in terms of para 8.3(b) of FTP on Central Excise paid on inputs/components, provided CENVAT credit facility/rebate has not been availed.

26. Upon conjoint reading of the relevant para and its clauses, it leaves no manner of doubt that the intent of the subject FTP was to encourage DTA suppliers by providing refund of TED in terms of para 8.3(c), subject to fulfilment of formalities and stipulations in Chapter 8 of FTP. This was also to generate foreign exchange as a consequence of goods supplied as inputs or otherwise, were finally exported by the EOU. The EOU, on the other hand, could only avail of the entitlement of the DTA supplier if the DTA supplier had not taken rebate or CENVAT credit facility (as per para 8.5) treating

it as deemed export. This dispensation was uniformly followed until the issue of policy circular dated 15.3.2013. That circular reads thus:-

"Government of India
Ministry of Commerce and Industry
Directorate General of Foreign Trade
Udyog Bhawan, New Delhi

Policy Circular No. 16 (RE-2012/2009-14)
Dated: 15th March, 2013

To,
All Regional Authorities
All Development Commissioners, SEZ.

Subject: Clarification regarding TED Refund where TED exemption is available.

It has come to the notice of this Directorate that some RAs of DGFT and the Officers of Development Commissioners of SEZ are providing refund of TED even in those cases where supplies of goods, under deemed exports, is ab-initio exempted.

2. There are three categories of supplies where supply of goods, under deemed exports, are ab-initio exempted from payment of excise duties. These are as follows:

(i) Supply of goods under Invalidation letter issued against Advance Authorisation [Para 8.3(c) of FTP];

(ii) Supply of goods under ICB [Para 8.3(c) of FTP]; and

(iii) Supply of goods to EOUs [Para 6.11(c)(ii) of FTP]

3. Prudent financial management and adherence to discipline of budget would be compromised if refund is provided, in cases, where exemption is mandated. In fact, in such cases the relevant taxes should not have been collected to begin with. **And if, there has been an error/oversight committed, then the agency collecting the tax would refund it**, rather than seeking reimbursement from another agency. Accordingly, it is clarified that in respect of supplies, as stated at Para 2 above, no refund of TED should be provided by RAs of DGFT/Office of Development Commissioners, because such supplies are ab-initio exempted from payment of excise duty.

4. This issue with the approval of DGFT.

(Jay Karan Singh)
Joint Director of Foreign Trade
....."
(emphasis supplied)

33 Section 5, as it existed before amendment in 2010:

5. Export and import policy. — The Central Government may, from time to time formulate and announce, by notification in the Official Gazette, the export and import policy and may also, in the like manner, amend that policy.

Section 5, as substituted by Act 25 of 2010 w.e.f. 27.8.2010:

5. Foreign Trade Policy. — The Central Government may, from time to time, formulate and announce, by notification in the Official Gazette, the **foreign trade policy** and may also, in like manner, amend that policy:

Provided that the Central Government may direct that, in respect of the Special Economic Zones, the foreign trade policy shall apply to the goods, services and technology with such exceptions, modifications and adaptations, as may be specified by it by notification in the Official Gazette.

27. As regards the claim for refund of TED by EOU, therefore, need to be governed by the dispensation provided in para 6.11(a) read with entitlement of DTA supplier under Chapter 8 of FTP. However, it may have to be processed by the authorities under the FTP keeping in mind the principle underlying the refund of CENVAT credit granted under Rule 5 of the 2004 Rules and in the manner provided therefor, though not covered by Rule 5. That is because in law it is a case of deemed export by virtue of applicable FTP.

28. If the refund claim is by the EOU, the same needs to be processed by the authorities under the FTP by reckoning the entitlement of DTA supplier specified in Chapter 8 of the FTP concerning the goods supplied to it, being a case of deemed exports. The EOU on its own, however, is not entitled for refund of TED, as the mandate to EOU is to procure or import goods from DTA supplier, without payment of duty in view of the express *ab initio* exemption provided in terms of para 6.2(b) read with para

6.11(c)(ii). However, despite such express obligation on the EOU, if the EOU has had imported goods from DTA supplier by paying TED, it can only claim the benefit of refund provided to DTA supplier under para 8.4.2 read with paras 8.3(c) and 8.5 subject to

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Ministry of Commerce and Industry
Department of Commerce
Udyog Bhawan

Notification No. 4 (RE-2013)/2009-2014

Dated: the 18th April, 2013

Subject: Amendments in Paragraph 8.3(c) and Paragraph 8.4 of FTP pertaining to deemed exports scheme – Regarding.

S.O (E): In exercise of the powers conferred by Section 5 of the Foreign Trade (Development & Regulation) Act, 1992, as amended, read with paragraph 1.3 of the Foreign Trade Policy, 2009-2014, the Central Government hereby makes the following amendments in Foreign Trade Policy, 2009-2014.

2. The existing paragraphs 8.3 (c) and 8.4 in the FTP are substituted by amended paragraphs 8.3(c) and 8.4 as given below:

(i) Existing Paragraph 8.3 (c)

"Exemption from terminal excise duty where supplies are made against ICB. In other cases, refund of terminal excise duty will be given. Exemption from TED shall also be available for supplies made by an Advance Authorisation holder to a manufacturer holding another Advance Authorisation if such manufacturer, in turn, supplies the product(s) to an ultimate exporter."

Amended Paragraph 8.3 (c)

"Refund of terminal excise duty will be given if exemption is not available. Exemption from TED is available to the following categories of supplies:

(i) Supplies against ICB;

(ii) Supplies of intermediate goods, against invalidation letter, made by an Advance Authorisation holder to another Advance Authorisation holder; and

(iii) Supplies of goods by DTA unit to EOU / EHTP / STP / BTP unit

Thus such categories of supply which are exempt ab initio will not be eligible to receive refund of TED".

(ii) Existing Paragraph 8.4

"Following table shows the benefits available to different categories of supplies as mentioned in Para 8.2 above. In respect of such supplies supplier shall be entitled to the benefits listed in paragraphs 8.3 (a), (b) & (c) of the Policy, whichever is applicable.

Relevant	

obtaining disclaimer from DTA supplier in that regard and complying with other formalities and requirements.

29. We thus agree with the conclusion reached by the Bombay High Court that the EOU is not entitled to claim refund of TED on its own. However, we add a caveat that EOU may avail of the entitlements of DTA supplier specified in Chapter 8 of FTP on condition that it will not pass on that benefit back to DTA supplier later on. In any case, the refund claim needs to be processed by keeping in mind the procedure underlying the refund of CENVAT credit/rebate of excise duty obligations. If CENVAT credit utilised by DTA supplier or EOU, as the case may be, cannot be encashed, there is no question of refunding the amount in cash. In that case, the commensurate amount must be reversed to the CENVAT credit account of the concerned entity instead of paying cash.

30. If, the claim for refund by DTA supplier under the scheme of FTP is allowed, it can be in cash if TED had been paid in cash. Else, it can be in the form of reversal of commensurate CENVAT credit amount to the concerned account of DTA supplier.

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sub-para of 8.2

31. As regards the refund claim of DTA supplier, as noted earlier, it needs to be processed by the authorities under the FTP keeping in mind the purport of stipulations spelt out in Chapter 8 of subject FTP, such as the goods imported or supplied to EOU shall be with actual user condition and shall be utilised for export production and that the EOU did not avail CENVAT credit or rebate in relation to the goods supplied to EOU. Similarly, if the DTA supplier has utilised the CENVAT credit, commensurate amount needs to be reversed to its CENVAT credit account, in which case, there is no question of refunding the amount in cash to the DTA supplier.

32. We shall now revert to the judicial pronouncements dealing with the subject FTP. Except the decision of the Bombay High Court commended to us, which is under challenge in the first two appeals pertaining to refund claim by EOU, all other reported decisions are in respect of DTA supplier of specified goods/services.

33. The earliest decision is that of the learned Single Judge of the Calcutta High Court in ***IFGL Refractories Limited***[35]. The High

35 supra at Footnote No.22

Court noted that the Export and Import Policy for the relevant years was adopted amongst other to promote export of Indian products to foreign countries aiming at to earn foreign exchange and to increase global market. The scheme was propounded to encourage indigenous supplier by providing certain benefits and entitlements, either by way of exemption from payment of excise duty or to get refund of excise duty, if already paid. The object of the scheme was to provide exporters duty-free input for production of export materials and for that reason, it exempted supplier from payment of any excise duty and, if paid, to provide for refund of TED. The High Court further noted that merely because such refund was not permissible to the DTA supplier under the 1944 Act and the rules framed thereunder, that would not deprive the DTA supplier to avail of the entitlements and benefits under the FTP. It held that it is open to the assessee to take advantage of any law, particularly which is more beneficial. Accordingly, learned Single Judge issued directions to pay the refundable amount along with interest at the rate of 12 % per annum. The appeal filed by the Department against the said decision was rejected by the Division

Bench of the Calcutta High Court in ***Joint Director General of Foreign Trade***[36]. The Division Bench, however, directed the DGFT to refund TED amount as it was the concerned Authority under the FTP, subject to assessee completing necessary formalities as provided for in the FTP. This decision was then affirmed by this Court consequent to dismissal of special leave petition being S.L.P. (C) No.5368 of 2002, on 7.10.2002.

34. The next decision is of the High Court of Gujarat in the case of ***Commissioner of Central Excise and Customs vs. NBM Industries***[37]. The Division Bench of the High Court considered the question whether DTA supplier of goods to EOU is entitled for refund of the CENVAT credit despite Rule 5 of the 2004 Rules, dealing with refund of CENVAT credit. The Authorities had held that not being a case of export of goods out of India, the assessee was not entitled for refund of CENVAT credit amount utilised in respect of subject goods supplied to EOU. The High Court relying

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36 supra at Footnote No.19

37 2012 (276) ELT 9 (Guj.)

on its earlier decision in ***Commissioner of Central Excise vs. Shilpa Copper Wire Industries***[38], negatived that stand of the Department. Instead, the High Court held that the claim for refund was in reference to the applicable FTP and not on the basis of the provisions of the 1944 Act and the rules framed thereunder. The entitlement of DTA supplier was specified in the applicable FTP being deemed exports which in law are regarded as physical exports for the purpose of entitling refund of unutilised CENVAT credit.

35. Then came the decision of the High Court of Delhi in ***Kandoi Metal Powders Manufacturing Company Private Limited***[39]. Even, this was a case of supplier manufacturing goods supplied to EOU in reference to the applicable FTP. The High Court not only relied on the decision of the Division Bench of the Calcutta High Court in ***Joint Director General of Foreign Trade***[40], but

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38 2011 (269) ELT 17 (Guj.)

39 supra at Footnote No.18

40 supra at Footnote No.19

independently opined that DGFT having formulated the FTP, the claim of the assessee was governed by the entitlements specified therein in paras 8.2, 8.3, 8.4 and 8.5 as applicable at the relevant time. Accordingly, the High Court allowed the writ petition and relegated the writ petitioner before the Authority concerned for deciding the refund claim of the petitioner. This judgment has been followed in subsequent decisions, not only by the coordinate Benches of the High Court of Delhi, but also by other High Courts.

36. The Madras High Court in the case of ***Raja Crowns and Cans Pvt. Limited vs. Union of India***[41] dealt with similar claim of the DTA supplier of goods to EOU and whilst following the decisions of the High Court of Delhi and Calcutta High Court referred to above, opined that the assessee was entitled to maintain an application for refund of TED. The High Court, accordingly, directed the Authorities concerned to consider the refund application of the writ petitioner. Later on, the Madras High Court

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41 2015 (317) ELT 40 (Mad.)

took the same view in ***Lenovo (India) Pvt. Ltd.***[42] and ***Manali Petrochemical Limited vs. Additional Director General of Foreign Trade, New Delhi & Anr.***[43].

37. As aforesaid, the decision in ***Kandoi Metal Powders Manufacturing Company Private Limited***[44] has been subsequently followed by the High Court of Delhi in ***Union of India vs. Alstom India Limited***[45], ***Commissioner of Central Excise, Delhi II vs. Welspring Universal***[46], ***Deepak Enterprises vs. Union of India***[47], ***Alstom Transport India Ltd. vs. Union of***

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42 supra at Footnote No.25

43 W.P. No.23194 of 2009, decided on 16.9.2019

44 supra at Footnote No.18

45 2015 (325) ELT 72 (Del.)

46 2018 (359) ELT 635 (Del.)

47 2018 (360) ELT 905 (Del.)

***India*[48], *Motherson Sumi Electric Wires vs. Union of India*[49], *Multitex Filtration Engineers Limited vs. Union of India*[50]** and ***Hindustan Tin Works Limited vs. Union of India*[51].**

38. The view taken by the Calcutta High Court and followed by the High Court of Delhi commended even to the High Court of Karnataka in ***Acer India Pvt. Ltd.*[52]**.

39. The view taken in these decisions at the instance of the DTA supplier of specified goods to EOU is in consonance with the view taken by us in this judgment. To that extent, we affirm these decisions and hold that the DTA supplier of goods to EOU would be entitled for refund of TED on the basis of applicable para 6.11(a)

48 2018 (363) ELT 69 (Del.)

49 2018 (364) ELT 91 (Del.)

50 2020 (373) ELT 68 (Del.)

51 2020 (373) ELT 217 (Del.)

52 supra at Footnote No.21

read with paras 8.3(c), 8.4.2 and 8.5 of the FTP under consideration. The modality of refund, however, ought to be in the form of reversal of commensurate amount in the CENVAT credit account of the DTA supplier, if the DTA supplier had utilized CENVAT credit account in respect of goods supplied to EOU; and if it had paid the amount in cash, the DTA supplier would be entitled for refund of cash with simple interest at the rate of 6% per annum as provided in para 8.5.1 of the applicable FTP on delay in refund of duty drawback and TED under deemed exports scheme.

40. Reverting to the case of EOU considered by the Bombay High Court in the impugned judgment, we hold that EOU is entitled only for *ab initio* exemption from payment of central excise duty in terms of para 6.11(c)(ii) of the FTP; and obliged to import the goods from DTA supplier without payment of duty in terms of para 6.2(b) of the FTP. The arrangement provided in para 6.11(a) is, however, in the nature of "benefit" given to EOU in the event it had paid the amount towards TED in relation to goods procured by it to DTA supplier. In that case, EOU will be eligible only for obtaining entitlements of DTA supplier as specified in Chapter 8 of the FTP

upon obtaining a suitable disclaimer from DTA supplier. Accordingly, in addition to *ab initio* exemption, the EOU is additionally eligible to receive entitlements of DTA supplier as specified in Chapter 8 of the FTP subject to complying with necessary requirements and formalities. In other words, EOU is not entitled for refund of TED on its own accord, but can avail of the entitlements of DTA supplier on complying essential procedure. As mentioned earlier, the interest on the refundable amount, if paid in cash ought to be refunded with simple interest at the rate of 6% per annum as provided in para 8.5.1 of the applicable FTP, even in the case of application for refund by EOU.

41. The next question is: the refund claim should be set up before which Authority? As noted earlier, since the entitlement of exemption and refund of TED flows from the provisions of 1992 Act and FTP framed thereunder by the Central Government, which is an independent dispensation than the one provided in the 1944 Act and the rules framed thereunder, with the avowed purpose of promoting export and earning foreign exchange, it is the obligation of Authority responsible to implement the subject FTP, to deal with

refund claim of the concerned entities. For, it is not a case of refund under the 1944 Act or 2002 Rules or 2004 Rules as such, but under the applicable FTP.

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).

43. Besides, if the DTA supplier as well as EOU had utilized its CENVAT credit for importing goods in question, the refund would be in the form of reversal of commensurate amount of CENVAT credit to the account of the concerned entity. However, if TED has been paid in cash by the EOU, the EOU may get refund of that amount from Authority implementing the applicable FTP in cash with simple interest at the rate of 6% per annum for the delayed refund of duty (para 8.5.1) on condition that it would not pass on that benefit to the DTA supplier owing to such refund/rebate.

44. As regards DTA supplier of goods to EOU, it is entitled to receive the refund of TED in terms of para 8.3(c) read with paras 8.4.2 and 8.5 of the applicable FTP subject to complying necessary formalities and stipulations provided therein, being a case of deemed exports. Even, in the case of DTA supplier of goods to EOU, if TED has been paid by utilizing CENVAT credit, the refund would be in the form of reversal of commensurate amount in its CENVAT credit account. And if the amount towards TED has been paid in cash by the DTA supplier to the Authorities under the 1944 Act, the refund of TED amount would be made by the Authority

implementing the applicable FTP in cash with simple interest at the rate of 6% per annum for the delay in refund of TED as per para 8.5.1.

45. In both cases, as aforesaid, responsibility of refund of TED in reference to applicable FTP would be that of the Authority responsible to implement the FTP under the 1992 Act, which has had consciously accorded such entitlements/benefits for promoting export and earning foreign exchange. Further, the fact that the concerned entity had unsuccessfully applied for refund to the Authorities under the 1944 Act and the rules made thereunder, that would not denude it of its entitlement to get refund of TED under the FTP, as may be applicable being mutually exclusive remedies. It is so because it is well settled that the assessee is free to take benefit of more beneficial regime.

46. Learned counsel for the parties had referred to other decisions, which in our opinion need not be dealt with as the same are not directly dealing with the issue(s) answered in these cases, in particular dispensation provided under the applicable FTP.

47. In view of the above, the appeals filed by the assessee (EOU) against the decision of the Bombay High Court partly succeed in the above terms; and the appeals filed by the Department against the decision of the High Court of Delhi and High Court of Karnataka are also partly allowed in the aforementioned terms. There shall be no order as to costs.

Pending application(s), if any, are disposed of accordingly.

.....J.
(A.M. Khanwilkar)

.....J.
(Dinesh Maheshwari)

.....J.
(Krishna Murari)

New Delhi;
January 4, 2022.