



सीमा शुल्क आयुक्त का कार्यालय
 तब सीमा शुल्क गृह : पणंबूर : मंगलूर - १०
OFFICE OF THE COMMISSIONER OF CUSTOMS
NEW CUSTOM HOUSE: PANAMBUR: MANGALORE-10

C.No.VIII/10/13/2009अधिर्णिया/Adjn
 क्रम सं./Sl.No.3/2010 (Commr)

Passed on:30.3.2010
 Issued on :30.3..2010

मूल आदेश

ORDER-IN-ORIGINAL

Passed by Shri M.Ajit Kumar, Commissioner of
 Customs, New Custom House, Mangalore, 575 010.

उद्देशिका

P R E A M B L E

१. यह प्रति उस व्यक्ति के व्यक्तिगत उपयोग के लिए बेशुल्क दी जाती है, जिसके लिए जारी की जाती है।

1. This copy is granted free of charge for the private use of the person to whom it is issued.

२. कोई भी व्यक्ति जो इस आदेश से व्यथित है, वे इस आदेश के विरुद्ध, सीमा शुल्क और केंद्रीय उत्पाद शुल्क (अपील्स) नियम 1982 के साथ संलग्न प्रपत्र फार्म सी.ए.-3 (चार प्रतियों में) में सीमा शुल्क अधिनियम 1962 की धारा 129(1) के अधीन संगठित अपलेट ट्रीब्यूल, जो पहली मंज़िल, डब्ल्यू.टी.सी. भवा, एफ.के.सी.सी.आई. कॉम्प्लेक्स, के.जी. रोड, बंगलूर-560 009 में स्थित है, उाको अपील कर सकते हैं । इस आदेश के पावती के 3 महीनों के अंदर अपील दायर कराा चाहिए। इस अपील में यायालय शुल्क स्टॉप रु.4/- (रुपये चार मात्र) लगााा चाहिए ।

2. Any person deeming himself aggrieved by this order may appeal against the order in Form C.A-3 (in quadruplicate) appended to the Customs and Central Excise (Appeals) Rules, 1982 to Appellate Tribunal constituted under Section 129(1) of the Customs Act 1962, situated at 1st Floor, WTC Building, FKCCI Complex, K.G. Road, Bangalore-560009. The appeal must be filed within 3 months from the date of communication of this order. An appeal should bear a Court Fee Stamp of Rs.4/- (Rupees Four only).

जिसके साथ मिलिखित ज़रुरी है:

It must be accompanied by:

a) आदेश (मूल) के दो प्रतियाँ, जिसमें एक प्रमाणित प्रति होना चाहिए और जिसपर यायालय शुल्क नियम, 1870 के खंड मुद्दे सं. 6 में विनिर्दिष्ट के अनुसार 0.5 रुपये (पचास पैसे मात्र) की यायालय शुल्क स्टॉप होना चाहिए ।

a) Four copies of order in original (one copy of which shall be a certified copy) and must bear a court fee stamp of 0.50 paise only as prescribed under Schedule I, Item 6 of the Court Fees Act 1870.

b) रु.1,000/- की क्रॉस की गई बैंक ड्राफ्ट, जहाँ बेंच स्थित है, उस स्था के कोई भी राष्ट्रीय बैंक में ट्रिब्यूनल के सहायक रजिस्ट्रार के नाम हों और डिमांड ड्राफ्ट के साथ अपील प्रपत्र होना चाहिए।

b) A crossed Bank draft of Rs.1000/- drawn in favour of the Assistant Registrar of the tribunal on a branch of any Nationalised Bank located at the place where the Bench is situated and the demand draft shall be attached with the form of Appeal.

३. इस आदेश के विरुद्ध अगर कोई व्यक्ति अपील कराना चाहते हैं तो वे अपील करके पहले लगाये गये दंड तथा माँगे गये शुल्क को भुगतान करें और अपील के साथ ऐसे भुगतान के साक्ष्य प्रस्तुत करें, नहीं तो सीमा शुल्क अधिनियम, 1962 की धारा 129 ई के उल्लंघन के कारण अपील अस्वीकृत किया जा सकता है।

3. Any person desirous of appealing against this order shall pending the appeal, deposit the duty demanded or penalty levied therein and produce proof of such payment along with the appeal, failing which the appeal is liable to be rejected for non-compliance of the provisions of Sec 129 E of the Customs Act 1962.

BRIEF FACTS OF THE CASE

1. M/s.KIOCL (formerly called as M/s.Kudremukh Iron Company Limited Panambur, Mangalore) a Government of India Enterprise is a **100% EOU**, having LOI No. 269 (82) dated 3.9.1982 as amended holding Central Excise Registration No. AAACK8438 MXM003 and are engaged in manufacture of iron ore pellets falling under CETH No.26011210 and clearing the same from time to time (i) for export and (ii) to Domestic Tariff Area. They are paying Central Excise duty on their DTA clearances of Iron Ore Pellets, which is being accounted under the Mangalore Central Excise Commissionerate.

2. In terms of CBEC Circular Nos. 72/2000-Customs, dated 31-8-2000 and 87/2000-Customs, dated 2-11-2000 read with CBEC Circular No. 31/2003-Customs dt.7.4.2003 as amended by Circular No.03/2006 Customs dated 10.01.2006 the said unit is falling under the administrative control of Commissioner of Customs, Mangalore. Further, as per Notification No.32/2002 C.E.(N.T.), dated 17.9.2002 for the purpose of handling matters relating to the provisions of Central Excise law, the officers of Customs have been designated as officers of Central Excise. Accordingly they are filing ER2 returns with Customs. Whereas, it appears that on verification of the monthly ER-2 Returns filed by KIOCL on their DTA clearances, they are not making payment of Education Cess @2% levied under Section 93 of Finance Act 2004 and Higher Education Cess @1% levied under Section 138 of Finance Act 2007 on the Basic Excise duty which is equal to the amount of aggregate Customs duty. That is while computing total Central Excise duty payable on their DTA clearances. They were taking education cess only on two occasions i.e., first as a component of CVD and second as a component of Customs duty. They have not paid the Education Cess & Higher Education Cess for the third time on the excise duty portion for the month of July 2009.

3. Whereas, it appears from the above that KIOCL are discharging the Central Excise Duty on their DTA sales without paying Education Cess and Higher Education Cess on the Excise duty portion resulting to short payment. Cenvat Duty under Section 3 of Central Excise Act

(popularly called Basic Excise Duty) is equal to the aggregate of the duties of Customs which would be leviable under the Customs Act, 1962 (52 of 1962) or any other law for the time being in force, on like goods produced or manufactured outside India if imported into India. Department of Revenue vide its clarification letter F.No.345/2/2004-TRU(Pt.) dated 10.08.2004 read with letter D.O. No. 605/54/2004-DBK, dated 21st July, 2004 clarified that Education Cess is calculated on the aggregate duties of excise/customs (excluding certain duties of customs like anti dumping duty, safe guard duty etc.) levied and collected by the Department of Revenue. Only such duties, which are (a) levied and collected as duties of excise/customs and (b) are both levied and collected by the Department of Revenue should be taken into account for calculating Education Cess. i.e. total customs duty payable on the like goods when imported into India constitutes the aggregate duty of customs plus education cess payable thereon. This total Customs duty becomes the aggregate Excise duty for DTA clearance and total excise duty constitutes the aggregate duty of excise plus education cess etc payable thereon as shown in detail in the table at para 4 of the SCN dated 10/08/2009.

4. On verification of the ER2 returns and related documents filed by KIOCL, it appears that they have not paid the differential duty and education cess on DTA sales for different period as mentioned below

(i) For the month of March 2006 to June 2008 -
Rs.2,81,60,612/-

(ii) For the period July 208 to June 2009 -
Rs.84,40,710/-

(iii) For the month of July 2009 - Rs.5,16,191/-

5. M/s. KIOCL have executed B-17 bond for Rs. 125 Crores valid up to 25.06.2010 (Copy enclosed) along with bank guarantee for Rs.6.25 Cores valid up to 31.12.2010.

6. Accordingly, the following show cause notices issued from C.No.S-15/15/2009 EOU dt.10.8.09, 7.9.09 & 22.10.09 were issued for the period mentioned

(i) For the month of March 2006 to June 2008 -
Rs.2,81,60,612/-

(ii) For the period July 2008 to June 2009 -
Rs.84,40,710/-

(iii) For the month of July 2009 - Rs.5,16,191/-
Total : Rs.3,71,17,513/-

asking them to show cause to Commissioner of Customs, Mangalore as to why,

(i) The total differential Education Cess on DTA sales amounting to Rs. 3,71,17,513/- (Rupees Three Crores seventy one lakh seventeen thousand five hundred thirteen Only) should not be demanded and recovered from KIOCL under the provisions of Section 11-A of Central Excise Act, 1944 read with para 12 of B-17 bond executed by them for the periods stated in the SCN.

(ii) Penalty under Rule 25 of Central Excise Rules, 2002 should not be imposed on the persons concerned.

(iii) Why the differential education cess on DTA sales along with penalty should not be appropriated by the Department from the undertaking given in the form of bank Guarantee furnished by M/s. KIOCL along with B-17 Bond.

DEFENCE :

7. M/s. KIOCL vide their reply dated 29.9.09 & 5.10.09 have stated that the basis for the demand is that under proviso to Sec. 3 of the Central Excise Act, the duty of excise leviable on excisable goods manufactured and cleared by a 100% EOU in the DTA is the aggregate of the duties of customs leviable under the Customs Act or any other law for the time being in force on like goods manufactured or produced in India, if imported into India; that in terms of Sec. 93 of the Finance Act 2004 read with Sec 138 of the Finance Act 2007 education Cess of 2% and higher education Cess of 1% is leviable/payable

on the excise duty computed as the aggregate of the Customs duties on such DTA clearance, which has not been paid by them whereas we they paid education Cess only on the CVD component and the customs duty component while computing the aggregate duty of customs.

8. They also submit that the issue of payment of Cess on the excise duty computed on the basis of the aggregate of the customs duties in terms of the proviso to Sec 3 of the Central Excise Act read with notification 23/2003 Central Excise dt 31-3-2003 in respect of the DTA clearance by an EOU has been under dispute. The matter went up before the Tribunal in the case of **Sarla Polysters vs CCE 2008 (226) ELT 238 Trib Ahm.** In that case education Cess of 2% on the excise duty computed on the basis of the aggregate of the customs duties was demanded from the appellant - an EOU on the clearances effected by them in the DTA and confirmed by the Commissioner Appeals. The appellants in appeal before the Tribunal contended that since education cess has already been paid while calculating the aggregate of the customs duties which is the excise duty payable in terms of the proviso to Sec 3 read with notification 23/2003 in respect of such clearances, there is no warrant for payment of education cess again on the excise duty as it would be against the proviso to Sec 3. This contention was rejected by the Tribunal. (This summary of the appeal by Sarala Polymers, as stated by M/s KIOCL above, does not appear to be accurate. The facts as gleaned from the CESTAT order is that the appellants (Sarala Polymers) claim that in as much as the Customs Education Cess stands paid by them at the time of import of the goods, further confirmation of education Cess at the time of DTA clearances is not in accordance with the law.) The appellant took up the matter to the Bombay High Court which set aside the Tribunal's order with the following observations:

"3. We have heard the learned Counsel appearing for both sides. It, prima facie, appears that under proviso to Section 3 of the Central Excise Act the goods, which are manufactured in E.O.U., when they are brought to any other place in India, for the purpose of calculating excise duty they are treated as imported goods. Therefore, it appears that by proviso to Section 3 of the Central Excise Act statutory fiction is created that the goods though actually manufactured in India are treated as imported goods for the purpose of calculating and levying the excise duty. Perusal of Section 93 of

the Finance Act prima facie shows that for the purpose of levying the Education Cess on excisable goods the Education Cess is treated as part of excise duty. We, therefore, find prima facie substance in the submission made on behalf of the Appellant that when the goods manufactured by E.O.U., which are brought to any other place in India are to be treated as imported goods for the purpose of levying excise duty, the same fiction will have to be extended while calculating and levying the Education Cess. We are not expressing any final opinion on this question. We find from the order of the tribunal that the tribunal has not approached the question from this perspective. In our opinion, the tribunal should have considered the purpose for which the statutory fiction has been created by the legislature and whether considering that purpose the fiction can be extended while levying Education Cess under Section 93 of the Finance Act also."

9. Pursuant to the High Court's order the Tribunal took up the matter and vide Misc. Order No. M/1391/2008-WZB/AHD, dated 2-12-2008 in Application No. E/Ors/1083/2008 in Appeal No. E/1093/2007 2009 (234) E.L.T. 77 (Tri. - Ahmd.). As the issue is open and no final order has been passed by the Tribunal and considering the importance and far reaching effect of the issue as observed by both the Court and Tribunal, they requested that the present proceedings may be kept in abeyance till issue is decided by the Tribunal.

10. They stated that the demand for the period from March 2006 to June 2008 is hit by limitation of time and also the extended period has not been invoked under sub Sec(1) of Sec 11A..

11. Shri.S.K.Choudhury, IRS (Retd) appeared for the Personal hearing on 22.3.2010 on behalf of M/.s. KIOCL. He reiterated the points given in the written submissions made. They stated that the entire demand under SCN dated 07.09.09 was hit by time bar under Section 11A of Central Excise Act, 1944 and also on merits. As regards the merits of the case they have stated that the law does not envisage levying Cess again for the third time under Section 93 of the Finance Act, '04 or under 138 of the Finance Act,'07 on imported goods as has been sought to be demanded in the SCNs. Accordingly in terms of the mandate of proviso to Section 3 of the Central Excise

Act, Cess cannot be levied for the third time. Further they stated that similar matter had since been decided by the Hon'ble CESTAT, West Zone Bench, Ahmedabad in the case of **Sarla Performance Fibers Ltd. Vs. CCE,, Vapi Order No. A/138/WZB/AHD/2010 dated 04/12/2009** which is in their favour. They also requested that further proceedings may be dropped.

12. In their written submission submitted during the PH, they have stated that as submitted earlier, for all practical purposes the excise duty on DTA clearances by an EOU has to be worked out assuming them to be imported goods by virtue of the proviso to Section 3 of the Central Excise Act.

12.1 They have stated that Section 12 of the Customs Act is a charging section for the levy of duties of Customs on goods imported into, or exported from India at the rate specified under the Customs Tariff Act, 1975 referred to generally as Basic Customs Duty (BCD). In addition to such BCD, under Section 3 of the Customs Tariff Act, 1975 additional duty of Customs equal to excise duty is also levied on imported goods - generally called CV duty.

12.2. Therefore while working out the aggregate of Customs duties in terms of proviso to Section 3 of the Central Excise Act, such duties have to be worked out as under:-

- Stage-1 - BCD (under Section 12 of the Customs Act)*
- 2. CVD (equal to excise duty u/s 3 of Customs Tariff Act)+*
- 3. Education Cess under Section 93 of Finance Act, '04 & higher education cess under Section 138 of Finance Act, '07.*
- 4. Total Customs duties payable (aggregate duties of Customs within the meaning of Section 139 of Finance Act, '07 = 1+2+3*
- 5. + Education Cess under Section 94 of Finance Act, '04 & Higher education cess u/s 139 of Finance Act on the total Customs duties payable.*
- 6. Total duties of Customs payable 4+5 = aggregate of all duties of Customs within the meaning of proviso to Section 3 of the Central Excise Act.*

12.3 They added that while calculating CVD, Education Cess leviable under Sections 93 of FA, '04 and secondary and higher education Cess leviable under Section 138 of

Finance Act, '07 being duties of excise have already been taken into account. Similarly both type of Cess have again been taken into account in terms of Section 94 of Finance Act, '04 and Section 139 of Finance Act, '08.

13. Finally it was stated that the law does not envisage levying Cess again for the third time either u/s 93 of FA, '04 or u/s 138 of Finance Act, '07 on imported goods as has been sought to be demanded in these Show cause notices. Accordingly, in terms of the mandate of proviso to Section 3 of the Central excise Act, Cess cannot be levied for the third time. If on imported goods, Cess can be levied only at two stages as illustrated above, there is no legal warrant for an EOU to pay the same for the third time as this would be contrary to the said proviso according to which excise duties payable on DTA clearances by an EOU should be equal to the aggregate duties of Customs leviable on imported goods. Therefore according to them duties payable on DTA clearances by an EOU is what is payable on imports of like goods-nothing more or nothing less.

FINDINGS:

14. I have carefully gone through the records of the case, reply to the Show Cause Notice and reply made during personal hearing. The issue involved is it appears that KIOCL who are a 100% EOU, are discharging the Central Excise Duty on their DTA sales without paying Education Cess and Higher Education Cess on the Excise duty portion resulting to short payment of duty. Cenvat Duty under Section 3 of Central Excise Act (popularly called Basic Excise Duty) is equal to the aggregate of the duties of Customs which would be leviable under the Customs Act, 1962 (52 of 1962) or any other law for the time being in force, on like goods produced or manufactured outside India if imported into India. Department of Revenue vide its clarification letter F.No.345/2/2004-TRU(Pt.) dated 10.08.2004 read with letter D.O. No. 605/54/2004-DBK, dated 21st July, 2004 clarified that Education Cess is calculated on the aggregate duties of excise/customs (excluding certain duties of customs like anti dumping duty, safe guard duty etc.) levied and collected by the Department of Revenue. Only such duties, which are (a) levied and collected as duties of excise/customs and (b) are both levied and collected by the Department of Revenue should be taken into account for calculating Education Cess. i.e. total customs duty payable on the like goods when imported into India constitutes the aggregate duty of customs plus education cess payable thereon. This total Customs duty

becomes the aggregate Excise duty for DTA clearance and total excise duty constitutes the aggregate duty of excise plus education cess payable thereon.

15. The assessee on the other hand have stated that Cess is leviable on the aggregate of all duties of Customs or Excise as the case may be. That while calculating CVD, Education Cess leviable under sections 93 of the Finance Act 2004 and secondary and higher education Cess leviable under section 138 of Finance Act being duties of excise have already been taken into account. Similarly both types of cess have again been taken into account in terms of section 94 of the Finance Act 2004 and section 139 of the Finance Act 2008. The law does not permit levying cess again for the third time as has been sought in the SCN. They have referred to the Hon'ble CESTAT judgment in the case of **Sarla Performance Fibers Ltd CCE, Vapi, Order No. A/138/WZB/AHD/2010 dated 04/12/2009** in their favour.

16. I find that two issues emerge for consideration, from the submissions made by M/s KIOCL, namely;

(a) What is the correct method of computing Education Cess and Higher Education Cess when an EOU clears goods for DTA sales?

(b) Whether the entire demand under SCN dated 07.09.09 is hit by time bar under Section 11A of Central Excise Act, 1944?

The issues can be dealt with sequentially.

17. What is the correct method of computing Education Cess and Higher Education Cess when an EOU clears goods for DTA sales?

17.1 Before entering into the arguments for and against any particular method of calculating the tax, it may be beneficial to understand the elements that constitute a tax and the method of its calculation and payment. As per the Apex Courts judgment in **M/s. Chhotabhai Jethabhai Patel & Co. vs. Union of India & Another : AIR 1962 SC 1006**

"Classically, a tax is seen as composed of two elements: the person, thing or activity on which the tax is imposed and the incidence of tax. Thus every tax may be levied on an object or an event of taxation. The distinction between the two may not, ultimately, be material in the context of the Indian Constitution as we will find later. But for the time being we may note that both these elements are distinct from the incidence of taxation. For example the tax may be imposed on goods on the event of

their manufacture, sales, import etc. The law imposing the tax may also prescribe the incidence or the manner in which the burden of the tax would fall on any person and would take within itself the amount and measure of tax. The importance of this distinction lies in the fact that in India, the first two have been given a Constitutional status, whereas the incidence of tax would be a matter of statutory detail. The incidence of tax would be relevant in construing whether a tax is a direct or an indirect one. But it would be irrelevant in determining the subject matter of the tax."

In **Commissioner of Central Excise, Belgaum v. Akay Cosmetics Pvt. Ltd.**, (2005) Civil Appeal Nos. 3792-3803 of 2000, D/- 1-4-2005 (Supreme Court) it was held;

"We do not find any merit in the above argument advanced on behalf of the assessee. As held by this Court in **Union of India & others v. Bombay Tyre International Ltd.** reported in AIR 1984 SC 420, there is a difference between the nature of levy and the measure of the levy. The method of collection does not affect the essence of the duty. While the nature of excise duty was indicated by the fact that it was imposed in respect of the manufacture, the point at which it was collected was when the article left the factory gate. Therefore, the article became an object of assessment when it was sold by the manufacturer.

It has now been recognized that the measure employed for assessing a tax must not be confused with the nature of tax. The factors such as volume, quantity, weight and price which enter into the measure of the tax have nexus with the manufacturing activity."

In **Somaiya Organics Versus State Of Uttar Pradesh** [2001 (130) E.L.T. 3 (S.C.)] a 5 judge Constitutional Bench clarified on 'levy' and 'collection' as under.

28.. .The words used in Article 265 are 'levy' and 'collect'. In taxing statute the words 'levy' and 'collect' are not synonymous terms, (refer to **Assistant Collector of Central Excise, Calcutta Division v. National Tobacco Co. of India Ltd.** - 1978 (2) E.L.T. (J 416) (S.C.)= (1972) 2 SCC 560 at page 572, while 'levy' would mean the assessment or charging or imposing tax, 'collect' in Article 265 would mean the physical realisation of the tax which

is levied or imposed. Collection of tax is normally a stage subsequent to the levy of the same. The enforcement of levy could only mean realisation of the tax imposed or demanded. . ."

In **State of West Bengal v. Kesoram Industries Ltd.** [AIR 2005 SC 1646], the 'nature of the tax' was differentiated from the 'measure of the tax'

"135. The relevant principles culled out from the preceding discussion are summarized as under:-

(1) . . .

(2) . . .

(3) The nature of tax levied is different from the measure of tax. While the subject of tax is clear and well defined, the amount of tax is capable of being measured in many ways for the purpose of quantification. Defining the subject of tax is a simple task; devising the measure of taxation is a far more complex exercise and therefore the legislature has to be given much more flexibility in the latter field. The mechanism and method chosen by Legislature for quantification of tax is not decisive of the nature of tax though it may constitute one relevant factor out of many for throwing light on determining the general character of the tax."

Finally in **Collector Of C. Ex., Hyderabad Versus Vazir Sultan Tobacco Co. Ltd** [1996 (83) E.L.T. 3 (S.C.)] a 3 judge bench of the Apex Court held

"5. . . . The provisions of the Central Excise Act and the Rules, in our opinion, do not say otherwise. Section 3(1) of the Central Excise Act says :

"(1) There shall be levied and collected in such manner as may be prescribed duties of excise on all excisable goods other than salt which are produced or manufactured in India and a duty on salt manufactured in, or imported by land into, any part of India as, and at the rates, set forth in the First Schedule."

6. The expression "prescribed" is defined in clause (g) of Section 2 to mean prescribed by Rules made under the Act.

7. It is evident that the words "in such manner as may be prescribed" qualify the word "collected" and not the word "levied". While the levy is created by Section 3 itself, the collection of the duty is left to be regulated by the Rules made under the Act."

17.2 What emerges from these learned judgments of the Hon'ble Apex Court is that a tax is seen as composed of two elements: the person, thing or activity on which the tax is imposed and the incidence of tax. The importance of this distinction lies in the fact that in India, the first two have been given a Constitutional status, whereas the incidence of tax would be a matter of statutory detail. Further there is a difference between the nature of levy and the measure of the levy. The method of collection does not affect the essence of the duty. It has been recognized that the measure employed for assessing a tax must not be confused with the nature of tax. In taxing statute the words 'levy' and 'collect' are not synonymous terms. While 'levy' would mean the assessment or charging or imposing tax, 'collect' in Article 265 would mean the physical realisation of the tax which is levied or imposed. Collection of tax is normally a stage subsequent to the levy of the same. The enforcement of levy could only mean realisation of the tax imposed or demanded. The nature of tax levied is different from the measure of tax. While the subject of tax is clear and well defined, the amount of tax is capable of being measured in many ways for the purpose of quantification. Defining the subject of tax is a simple task; devising the measure of taxation is a far more complex exercise and therefore the legislature has to be given much more flexibility in the latter field. The mechanism and method chosen by Legislature for quantification of tax is not decisive of the nature of tax though it may constitute one relevant factor out of many for throwing light on determining the general character of the tax. The words "in such manner as may be prescribed" found in Section 3(1) of the Central Excise Act qualify the word "collected" and not the word "levied". While the levy is created by Section 3 itself, the collection of the duty is left to be regulated by the Rules made under the Act.

17.3 The duty of excise leviable on excisable goods manufactured and cleared by a 100% EOU into the DTA is determined by the provisions of Section 3(1)(ii) of the Central Excise Act, 1944, the relevant portion of which is reproduced below;

3. Duties specified in the First Schedule and the Second Schedule] to the Central Excise Tariff Act, 1985 to be levied

(1) *There shall be levied and collected in such manner as may be prescribed, -*

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

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

Provided that the duties of excise which shall be levied and collected on any excisable goods which are produced or manufactured, -

(i)

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

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

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

Section 3 of the Central Excise Act, 1944 has been amended since the Apex Courts judgment in **Collector Of C. Ex., Hyderabad Versus Vazir Sultan Tobacco Co. Ltd [1996 (83) E.L.T. 3 (S.C.)]**. It has however not affected the legal situation stated therein, ie levy and collection

are two different things, as things stand now in the case of an EOU while the 'levy' is created by Section 3 itself, the 'collection' of the duty is left to be determined by an amount equal to the aggregate of the duties of customs which would shall be leviable under the Customs Act, 1962 or any other law for the time being in force, on like goods produced or manufactured outside India if imported into India. It is to be noted that liability to pay tax chargeable under Section 3 of the Act is different from quantification of tax payable on assessment. Liability to pay tax and actual payment of tax are conceptually different. As stated earlier defining the subject of tax is a simple task; devising the measure of taxation is a far more complex exercise and therefore the legislature has to be given much more flexibility in the latter field. The mechanism and method chosen by Legislature in the case of EOU's is to equate the Central Excise leviable with the aggregate of the duties of customs which would shall be leviable under the Customs Act, 1962 or any other law for the time being in force. At this point it has to be borne in mind that the mechanism and method chosen by Legislature to collect the tax does not change the character of the levy. The tax being collected in the case of EOU's continues to remain a duty of excise.

17.4 Having found clarity in the difference between 'levy' and 'collection' from a number of judgments cited above, it would be time to explore the validity of the submissions made by M/s KIOCL. M/s KIOCL in para 4 of their written submission made during the PH have felt that the department has issued the SCN based on an erroneous understanding of the proviso to section 3 of the Central Excise Act. They have stated that the said proviso carves out an exception and treats the goods cleared from an EOU to DTA units on par with imported goods for the purpose of determining such EOU's duty liability in respect of their DTA clearance by creating a legal fiction - a deliberate legislative intent to treat EOUs differently from the non-EOU's manufacturing/producing entities with regard to the measure of determining their excise duty liability. I would like to begin examining the submission from the last line mentioned. They admit that duty being discharged by them is excise duty. Hence in the issue between 'levy' and 'collection', there is no challenge to the 'levy' and on this both the department and M/s KIOCL are on the same footing. The next issue which arises is the submission made by M/s KIOCL that 'the said proviso carves out an exception and treats the goods cleared from an EOU to DTA units on par with imported goods for the purpose of

determining such EOU's duty liability in respect of their DTA clearance by creating a legal fiction'. It is the understanding of M/s KIOCL that collection of excise duty is sought to be made by enacting a legal fiction that the goods manufactured in India in an EOU are treated as imported goods for the purpose of determining their excise duty liability. I have to disagree with this averment. No where in Section 3 of the Central Excise Act has manufacture of goods in a DTA been deemed to be import of goods for the purpose of determining their excise duty liability. The Apex Court in its judgment in **The Additional Income-Tax Officer, Salem Vs. E. Alfred** [1962 AIR 663 / 1962 SCR Supl. (1) 143] held that "When a thing is deemed to be something else it is to be treated as if it is that thing, though, in fact, it is not." No such situation has arisen here, nothing has been deemed to be something else which it is not. All that has been stated is that the excise duty shall be an amount equal to the aggregate of the duties of customs. What Section 3 seeks to do for EOU goods being sold in the DTA is to device a separate measure for the collection of the excise duty. Ordinarily for collection of duty there has to be two elements the rate of tax (ad valorem or specific) and the measure on which the rate will be applied, such as volume, quantity, weight and price etc through which the tax can be quantified and collected. As per Section 3 of the Central Excise Act, for goods manufactured in India the rate, is as set forth in the First Schedule to the Central Excise Tariff Act, 1985. In the case of goods manufactured by an EOU and cleared in the DTA the rate shall be shall be an amount equal to the aggregate of the duties of customs.

17.5 Having waded through the 'theory' of taxation it is time to address the question raised at the beginning. What is the correct method of computing Education Cess and Higher Education Cess when an EOU clears goods for DTA sales? We have discussed in the para above that the rate at which excise duty is to be collected from EOU's clearing to the DTA is the aggregate of the duties of customs. Hence all that we do by determining the 'aggregate of the duties of customs' is to discover the rate. The individual components of what constituted the rate should not confuse or detain us once this rate is discovered. If Cess is a component in determining the aggregate duties of Customs, so be it, it at that stage merges and its identity is lost when the aggregate rate is determined. The only purpose of determining the 'aggregate of the duties of customs' is to find the rate. Period. With this rate at hand we have to apply it to the measure such as volume, quantity, weight and price etc,

as ordained by the Act, so that the tax can be quantified and collected. No other role can be assigned to the individual components that determined the aggregate duty, by importing extraneous factors in our mind which does not form a part of section 3 as it can be ordinarily read and understood. As held by the Apex Court in **J.P. Bansal v. State of Rajasthan (2003 (5) SCC 134]**, "When the words of a Statute are clear, plain or unambiguous, i.e. they are reasonably susceptible to only one meaning, the courts are bound to give effect to that meaning irrespective of consequences. The intention of the Legislature is primarily to be gathered from the language used, which means that attention should be paid to what has been said as also to what has not been said." (emphasis added) In the context of this issue it would mean that the word "equal to" has to be read in its ordinary meaning, no attempt should be made to see in it a deeming function which does not exist, or to import the identities of the components that go into the making of 'aggregate custom duties' and then trying to use those identities to arrive at a conclusion that disturbs the ordinary meaning of words used in the section. It is seen that /s KIOCL rightly have no problem when Cess figures twice in their calculation of total duties of Customs payable/ aggregate of all duties of Customs within the meaning of proviso to Section 3 of the Central Excise Act, it is only when the Cess is calculated on basic excise duty payable that they object to the levying of Cess 'again for the third time'. This is only because they have permitted their reasoning to be coloured by extraneous factors like the identity of individual components that together constitute the rate at which excise duty has to be charged on EOU goods cleared to DTA.

17.6 Having given definite shape to the determination of the 'rate' at which excise duty has to applied to the 'measure' such as volume, quantity, weight and price etc no difficulty should be felt in the quantification of excise duty. Having determined the excise duty it is the next step to determine the Cess that is payable on this duty. For if there is one thing that has not been disputed it is that what is being sought to be collected from the EOU clearing goods to the DTA is excise duty. Coming to the example given by M/s KIOCL as reproduced below;

Stage-1 - BCD (under Section 12 of the Customs Act)
+
2. *CVD (equal to excise duty u/s 3 of Customs Tariff Act)+*

3. Education Cess under Section 93 of Finance Act, '04 & higher education Cess under Section 138 of Finance Act, '07.

4. Total Customs duties payable (aggregate duties of Customs within the meaning of Section 139 of Finance Act, '07 = **1+2+3**

5. + Education Cess under Section 94 of Finance Act, '04 & Higher education cess u/s 139 of Finance Act on the total Customs duties payable.

6. Total duties of Customs payable **4+5 =** aggregate of all duties of Customs within the meaning of proviso to Section 3 of the Central Excise Act.

It is seen that at the end of stage 6 we have arrived at the aggregate of all duties of Customs within the meaning of proviso to Section 3 of the Central Excise Act. This is the understanding of M/s KIOCL also. Stage 6 thus helps determine the rate at which excise duty has to be charged and collected. This in itself will not complete the levy and collection of Education Cess @2% levied under Section 93 of Finance Act 2004 and Higher Education Cess @1% levied under Section 138 of Finance Act 2007, as applicable to excisable goods. After adopting the rate as per stage 6 and applying it to the measure of the tax the basic central excise duty payable is determined. Onto this basic excise duty, the applicable rates of Education Cess and Higher Education Cess etc has to be applied and determined. It is only then that the total excise duty which constitutes the aggregate duty of excise plus education Cess payable thereon can be determined. This has correctly been the stand of the department as has been shown in detail in the table at para 4 of the SCN dated 10/08/2009.

17.7 M/s KIOCL have sought to strengthen their arguments by relying on the judgment of the Hon'ble CESTAT, West Zone Bench, Ahmedabad in the case of **Sarla Performance Fibers Ltd. Vs.CCE,, Vapi Order No. A/138/WZB/AHD/2010 dated 04/12/2009** which they have claimed is in their favour. I find that issue addressed originally by the Tribunal in **Sarla Performance Fibers Ltd. Vs.CCE,, Vapi [2008 (226)ELT238 (Tri-Ahmd)**, was the appellants claim that in as much as the Customs Education Cess stands paid by them at the time of import of the goods, further confirmation of education Cess at the time of DTA clearances is not in accordance with the law. This is not the issue raised by M/s KIOCL in reply to the SCN. They are aggrieved by the levy of Cess on the excise duty payable on the goods cleared by them as an EOU to the DTA for a third time. Further in the light of the issues in

the CESTAT order the remand made by the Hon'ble High Court was for de novo consideration, based on the issues before them, since it prima facie appeared that when the goods manufactured by EOU which are brought to any other place in India are to be treated as imported goods for the purpose of levying excise duty, the same fiction will have to be extended while calculating and levying the Education Cess. The issue in de novo proceedings before the Hon'ble Tribunal in the '**Sarla Performance Fibers**' case is hence different and is distinguished from the facts in issue in this matter. As discussed earlier the department has sought to examine whether the total Customs duty becomes the aggregate Excise duty for DTA clearance and total excise duty constitutes the aggregate duty of excise plus education Cess payable thereon.

(b) Whether the entire demand under SCN dated 07.09.09 is hit by time bar under Section 11A of Central Excise Act, 1944?

18. M/s KIOCL have in their reply to the SCN dated 05/10/2009 at para 3 stated that the entire demand in SCN dated 07/09/2009 is time barred as the same has been issued after expiry of one year from the relevant date ie the date of filing of monthly return as per section 11A. I find that M/s KIOCL have executed B-17 bond for Rs.125 crores valid upto 25.06.2010 along with bank guarantee for Rs.6.25 crores valid up to 31.12.2010. At the time of furnishing the B-17 bond, an undertaking was furnished relevant portions of which reads as follows:

"NOW THE CONDITION OF THE ABOVE WRITTEN BOND ARE THAT:

.

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

.

12. We, the obligors, shall if the articles so manufactured are and are allowed to be sold in India in such quantity and subject to such limitations and conditions as may be specified in this behalf by the Director General Foreign Trade, pay the duty of the Excise leviable on such articles under section 3 of Central Excise Act, 1944 and duty of Customs and Central Excise leviable on raw materials/component parts used in the manufacture of such articles as

are not allowed to be sold in India in accordance with the provisions of Foreign Trade Policy."

Further in the para 3 of the declaration made by the obligor, it is declared as follows:

"The Government through the Commissioner of Customs/Central Excise or any other officer of Customs/Central Excise 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 Central Excise Act, 1944."

It is seen that in the light of the Bond executed by M/s KIOCL the department on being satisfied that all relevant duties have not been discharged, can enforce realization of duty from them by issue of notice under Section 11A and the time bar would not apply. It has been discussed above that liability to pay tax chargeable under Section 3 of the Act is different from quantification of tax payable on assessment. Liability to pay tax and actual payment of tax are conceptually different. The former depends on a charge created by the Statute and the latter on computation in accordance with the provisions of the Statute and rules framed there under if any. Since the charge of Cess created by the relevant Statutes are found not to have been paid by M/s KIOCL on goods cleared to DTA the demand is sought to be realized under the provisions of Section 11A of the Central Excise Act, 1944 read with the B-17 Bond executed by M/s KIOCL and the demand is not time barred.

19. Having regard to the facts and circumstances of the matter as discussed above, I pass the following order

ORDER

(i) I demand the total differential Education Cess and higher education cess on DTA sales totally amounting to Rs. 3,71,17,513/- (Rupees Three Crores seventy one lakh seventeen thousand five hundred thirteen Only) (Rs. 2,81,60,612/- + Rs.84,40,710/- + Rs.5,16,191/-) as worked out in the three show cause notices ref C.No.S-15/15/2009 EOU dt.10.8.09, 7.9.09 & 22.10.09 from M/s KIOCL under the provisions of Section 11-A of Central Excise Act, 1944 read with para 12 of B-17 bond executed by them.

(ii) Considering the complexity of the legal issue involved I impose a token penalty of Rs 10,000/- (Ten thousand) only on M/s KIOCL under Rule 25 of the Central Excise Rules, 2002.

(iii) If M/s KIOCL fail to pay the dues as quantified above within ninety days of receipt of this order, the same should be appropriated by the Department from the bank Guarantee furnished by M/s. KIOCL along with B-17 Bond. The same is however subject to the outcome of proceedings before the Hon'ble CESTAT if any.

(M Ajit Kumar)
COMMISSIONER OF CUSTOMS

To
M/s.KIOCL Limited,
Panambur,
Mangalore-575010.

Copy submitted to The Chief Commissioner of
Customs, (Review Section), Hqrs. Office, Bangalore
Copy to Deputy Commissioner of Central Excise, Mangalore
II Division, Mangalore.
Copy to Supdt. Of Central Excise, West Range, Mangalore.
Copy to Supdt. Of Customs EOU), NCH, Mangalore
Copy to Master file.