

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
KOLKATA**

REGIONAL BENCH – COURT NO.1

1. Customs Appeal No.75431 of 2020

(Arising out of Order-in-Appeal No.Kol/Cus/Port/AKR/367/2020 dated 01.07.2020 passed by Commissioner of Customs (Appeals), Kolkata)

M/s Emami Agrotech Limited

(JL-149, HPL Link Road, Debhog, Bhabanipur, Haldia, Purba Medinipur, West Bengal-721657)

Appellant

VERSUS

Commissioner of Customs (Port), Kolkata

15/1, Strand Road, Kolkata-700001

Respondent

WITH

2. Customs Appeal No.75432 of 2020

**(Emami Agrotech Limited Vs. Commissioner of Customs (Port),
Kolkata)**

(Arising out of Order-in-Appeal No.Kol/Cus/Port/AKR/368/2020 dated 01.07.2020 passed by Commissioner of Customs (Appeals), Kolkata)

3-4. Customs Appeal No.75267,75268 of 2020

**(Emami Agrotech Limited Vs. Commissioner of Customs (Port),
Kolkata)**

(Arising out of Order-in-Appeal No.Kol/Cus/Port/AKR/195-196/2020 dated 02.03.2020 passed by Commissioner of Customs (Appeals), Kolkata)

5-15. Customs Appeal No.75269 to 75279 of 2020

**(Emami Agrotech Limited Vs. Commissioner of Customs (Port),
Kolkata)**

(Arising out of Order-in-Appeal No.Kol/Cus/Port/AKR/199-209/2020 dated 02.03.2020 passed by Commissioner of Customs (Appeals), Kolkata)

16-35. Customs Appeal No.75295 to 75314 of 2020

**(Emami Agrotech Limited Vs. Commissioner of Customs (Port),
Kolkata)**

(Arising out of Order-in-Appeal No.Kol/Cus/Port/AKR/246-265/2020 dated 05.06.2020 passed by Commissioner of Customs (Appeals), Kolkata)

**Customs Appeal Nos.75431,75432,75267-75268,
75269-75279, 75295-75314, 75315-74334,
75280 -75294, 75352-75364, 75335-75351,
75433-75440/2020,75849/2023,75151/2024
75835-75846/2023, 76145/2024, 75821,75823-75827,
75829-75834, 75847-75848/2023, 76146,76147/2024,
75134-75146,75159, 75161 -75174,75177-75192,75253-
75266/2020**

36-55. Customs Appeal No.75315 to 75334 of 2020

**(Emami Agrotech Limited Vs. Commissioner of Customs (Port),
Kolkata)**

(Arising out of Order-in-Appeal No.Kol/Cus/Port/AKR/273-292/2020 dated 08.06.2020
passed by Commissioner of Customs (Appeals), Kolkata)

56-70. Customs Appeal No.75280 to 75294 of 2020

**(Emami Agrotech Limited Vs. Commissioner of Customs (Port),
Kolkata)**

(Arising out of Order-in-Appeal No.Kol/Cus/Port/AKR/315-329/2020 dated 12.06.2020
passed by Commissioner of Customs (Appeals), Kolkata)

71-83. Customs Appeal No.75352 to 75364 of 2020

**(Emami Agrotech Limited Vs. Commissioner of Customs (Port),
Kolkata)**

(Arising out of Order-in-Appeal No.Kol/Cus/Port/AKR/336-348/2020 dated 18.06.2020
passed by Commissioner of Customs (Appeals), Kolkata)

84-100. Customs Appeal No.75335 to 75351 of 2020

**(Emami Agrotech Limited Vs. Commissioner of Customs (Port),
Kolkata)**

(Arising out of Order-in-Appeal No.Kol/Cus/Port/AKR/350-366/2020 dated 01.07.2020
passed by Commissioner of Customs (Appeals), Kolkata)

101-108. Customs Appeal No.75433 to 75440 of 2020

**(Emami Agrotech Limited Vs. Commissioner of Customs (Port),
Kolkata)**

(Arising out of Order-in-Appeal No.Kol/Cus/Port/AKR/379-386/2020 dated 07.07.2020
passed by Commissioner of Customs (Appeals), Kolkata)

**Customs Appeal Nos.75431,75432,75267-75268,
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75280 -75294, 75352-75364, 75335-75351,
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**109-110. Customs Appeal No.75849 of 2023 &
Customs Appeal No.75151 of 2024**

**(Emami Agrotech Limited Vs. Commissioner of Customs (Port),
Kolkata)**

(Arising out of Order-in-Appeal No.Kol/Cus/Port/AKR/119-120/2020 dated 07.02.2023
passed by Commissioner of Customs (Appeals), Kolkata)

**111-123. Customs Appeal No.75835 to 75846 of 2023
& Customs Appeal No.76145 of 2024**

**(Emami Agrotech Limited Vs. Commissioner of Customs (Port),
Kolkata)**

(Arising out of Order-in-Appeal No.Kol/Cus/Port/AKR/139-151/2020 dated 14.02.2020
passed by Commissioner of Customs (Appeals), Kolkata)

**124-139. Customs Appeal No.75821 of 2023
Customs Appeal Nos.75823 to 75827 of 2023
Customs Appeal Nos.75829 to 75834 of 2023
Customs Appeal Nos.75847 to 75848 of 2023
Customs Appeal Nos.76146 to 76147 of 2024**

**(Emami Agrotech Limited Vs. Commissioner of Customs (Port),
Kolkata)**

(Arising out of Order-in-Appeal No.Kol/Cus/Port/AKR/152-167/2020 dated 14.02.2020
passed by Commissioner of Customs (Appeals), Kolkata)

140-152. Customs Appeal Nos.75134 to 75146 of 2020

**(Emami Agrotech Limited Vs. Commissioner of Customs (Port),
Kolkata)**

(Arising out of Order-in-Appeal No.Kol/Cus/Port/AKR/39-51/2020 dated 29.01.2020
passed by Commissioner of Customs (Appeals), Kolkata)

**Customs Appeal Nos.75431,75432,75267-75268,
75269-75279, 75295-75314, 75315-74334,
75280 -75294, 75352-75364, 75335-75351,
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75266/2020**

**153-167. Customs Appeal Nos.75159/2020 & 75161 to
75174 of 2020**

**(Emami Agrotech Limited Vs. Commissioner of Customs (Port),
Kolkata)**

(Arising out of Order-in-Appeal No.Kol/Cus/Port/AKR/52-66/2020 dated 29.01.2020
passed by Commissioner of Customs (Appeals), Kolkata)

168-183. Customs Appeal Nos.75177 to 75192 of 2020

**(Emami Agrotech Limited Vs. Commissioner of Customs (Port),
Kolkata)**

(Arising out of Order-in-Appeal No.Kol/Cus/Port/AKR/67-82/2020 dated 29.01.2020
passed by Commissioner of Customs (Appeals), Kolkata)

184-197. Customs Appeal Nos.75253 to 75266 of 2020

**(Emami Agrotech Limited Vs. Commissioner of Customs (Port),
Kolkata)**

(Arising out of Order-in-Appeal No.Kol/Cus/Port/AKR/98-111/2020 dated 04.02.2020
passed by Commissioner of Customs (Appeals), Kolkata)

APPERANCE :

Shri Arvind Baheti, Chartered Accountant for the Appellant
Shri Subrata Debnath, Authorized Representative for the Respondent

CORAM:

**HON'BLE MR.ASHOK JINDAL, MEMBER (JUDICIAL)
HON'BLE MR.K.ANPAZHAKAN, MEMBER (TECHNICAL)**

FINAL ORDER NOS.77304-77500/2024

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DATE OF HEARING : 24 OCTOBER 2024

DATE OF PRONOUNCEMENT : 14.11.2024

Per Ashok Jindal :

All these appeals are in a common issue. Therefore, all are being disposed off by a common order.

2. The facts of the case are that M/s. Emami Agrotech Limited, the appellant herein, is engaged in the business of refining and selling edible oils. For the said purpose, the Appellant imports Crude Edible Oil from various countries and carries out refining thereof at its manufacturing facility located at Haldia, West Bengal.

2.1 During the relevant period, the Appellant had filed 197 Bills of Entry on the EDI Portal for the import of 197 consignments of crude palm oil by availing benefit of Exemption Notification Nos. 24/2015 – Cus and 25/2015 - Cus. both dated 08.04.2015 issued under MEIS and SEIS schemes, which are export promotion schemes. It is not in dispute that the Appellant's claim for exemption from BCD under these notifications was allowed while processing these BOEs and the BCD foregone was duly debited to the MEIS/SEIS license as required under these notifications. However, in addition to BCD, the EDI portal also auto debited the levy of SWS computed at the rate of 10% with reference to the BCD foregone in respect of 205 BOEs. With respect to 4 BOEs bearing Nos. 6371294, 6372649, 6370136, 6365972 covered in

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Order-in-Appeal No.Kol/Cus/Port/AKR/379-386/2020 dated 07.07.2020, the Appellant was constrained to pay the SWS in cash for causing the clearances of the said consignments. The debit of SWS to the scrips and the payment thereof in cash was made by the Appellant under protest by duly intimating the authorities. The Appellant was of the view that since BCD stood specifically exempted under these notifications, no liability for SWS could have been determined with reference to the notional BCD. It is ex-facie evident from the impugned BOE that the BCD was "Zero".

2.2 Consequently, the Appellant challenged the assessments in each of these BOEs by filing as many appeals before the Ld. Appellate Commissioner and seeking refund of SWS debited to the scrips on multifarious grounds. These appeals were rejected vide 18 verbatim OIAs by justifying the liability to pay SWS and the debit thereof from the scrips with an inconsistent finding in so far as 4 OIAs bearing Nos.Kol/Cus/Port/AKR/39-51/2020, Kol/Cus/Port/AKR/52-66/2020, Kol/Cus/Port/AKR/67-82/2020 all dated 29.01.2020 and Kol/Cus/Port/AKR/98-111/2020 dated 04.02.2020 are concerned, by permitting recredit of SWS to the scrips subject to the payment in cash.

2.3 Hence the instant Appeals before the Tribunal.

3. The Id.Counsel for the appellants submitted that the issue involved herein stands decided by multiple decisions of the Division Bench of the

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Hon'ble Bombay High Court and the Tribunal, including the ones passed in the Appellant's own case.

3.1 He also submitted that in terms of Section 110(3) of the Finance Act, 2018, SWS is required to be computed at the rate of 10% on the aggregate of duties levied and collected under Section 12 of the Customs Act, 1962. Further, in terms of the judgement of the Hon'ble Supreme Court in the case of Somaiya Organics Limited Vs. State of Uttar Pradesh [2001 (130) E.L.T. 3] "collection" in the context of tax laws means "physical realization of tax". Since, no BCD is collected in view of the exemption conferred under Notifications 24/2015 and 25/2015, the SWS computed at the rate of 10% on "zero" shall also be "zero". The CBIC in its later Circular No. 03/2022 - dated 01.02.2022 has also clarified the said position at Para 4 set out hereunder:

"4. Thus, it is clarified that the amount of Social Welfare Surcharge payable would be 'Nil' in cases where the aggregate of customs duties (which form the base for computation of SWS) is zero even though SWS has not been exempted."

3.2 He also stated that the aforesaid Circular, being a beneficial one shall be retrospectively applicable to the facts of the current case in terms of the judgement of the Hon'ble Supreme Court in the case of Suchitra Components Vs. Commissioner of Central Excise, Guntur [2007 (208) E.L.T. 321].

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3.3 He further submitted that the issue of leviability of SWS in case of import of goods against MEIS/SEIS scrips had fallen for consideration before the Division Bench of the Hon'ble Bombay High Court in the Appellant's own case in Writ Petition bearing No. 1447 of 2021. The Hon'ble Court after considering the Circular dated 01.02.2022 and the judgement of the Hon'ble Court in the case of La Tim Sourcing (India) Private Limited Vs. The Union of India [Writ Petition Bearing No. 8677 of 2019], decided the issue in favour of the Appellant vide its order dated 27.09.2022. Pursuant to the said order, refund of SWS amount has also been sanctioned to the Appellant vide refund sanction order dated 13.04.2022. The Department preferred a Review Petition against the aforesaid judgement of the Division bench of the Hon'ble Bombay High Court which was also rejected on 21 June 2024 based on the finding that an identical issue has already been dealt with by the Hon'ble Bombay High Court in the case of La Tim Metal & Industries Limited Vs. The Union of India [2022 (11) TMI 1099].

3.4 He further submitted that the Hon'ble Bombay High Court in the case of La Tim Metal & Industries Limited (supra) held that when the BCD is "nil", SWS, being computed at the rate of 10% of BCD, shall also be "nil". The said judgement was passed after considering the earlier Circular No. 2/2020 – Cus. dated 10.01.2020 as also the contrary

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judgement of the Ld. Single Judge of the Hon'ble Madras High Court in the case of M/s. Gemini Edibles and Fats India Pvt. Ltd. as also the decision of the Hon'ble Supreme Court in the case of Unicorn Industries.

3.5 The Id.Counsel further submitted that the said issue has also been settled by various decisions of the Tribunal, in the favour of the Appellant including decisions in Appellant's own case. Reliance in this regard is being placed on the following judgements of the Hon'ble Tribunal:

- (1) Emami Agrotech Limited Vs. Commissioner of Customs (Port), Kolkata [2023 (10) TMI 1223 (Tri. Kol.)] ;
- (2) Emami Agrotech Limited Vs. Commissioner of Customs, Vijayawada [2024 (3) TMI 86 (Tri. – Hyd.)] ;
- (3) Emami Agrotech Limited Vs._Commissioner of Customs (Port), Kolkata [Final Order No. 76834-76915/2024 (Tri. – Kol.)] ;
- (4) Reliance Industries Limited Vs. Commissioner of Customs (Import) [2024 (2) TMI 1321 (Tri. – Bom.)] ;
- (5) Dalmia Cement (Bharat) Limited Vs. Commissioner of Customs, Preventive [2024 (5) TMI 632 (Tri. – Hyd.)] ;
- (6) M/s.Tata Motors Limited Vs. Commissioner of Customs, Maharashtra [2023 (9) TMI 463 (Tri. – Bom.)] ;

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3.6 It is his further submission that the jurisprudence available in the context of quantification Education Cess (EC) and Secondary and Higher Education Cess (SHEC) (which are also in the nature of surcharges) in case of imports against other duty credit scrips (DEPB and Target Plus) fully supports the case of the Appellant.

3.7 He also submitted that the Education Cess (EC) and Secondary and Higher Education Cess (SHEC), introduced vide the Finance Act, 2004 and Finance Act, 2007 respectively, are also in the nature of surcharges, akin to SWS and are calculated at a certain percentage of the aggregate of duties of Customs levied and collected under Section 12 of the Customs Act, 1962. Apropos the said surcharges, the Board vide its Circular No.345/2/2004 – TRU dated 10.08.2004 had clarified in response to Issue No. 2 that duties which are both “levied and collected” shall be taken into account for the purpose of calculation of the surcharges and as such when the duties/cesses are themselves not collected owing to an exemption or clearance under a specified procedure, there would be no leviability of education cess. It is being reiterated that similar Circular dated 01.02.2022 was also issued with reference to the SWS whereby it was stated that when the aggregate of duties of customs is zero, the SWS shall also be computed as nil.

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3.8 Further, it is submission that in the context of goods imported against Notifications operationalizing DEPB and Target Plus Scheme, dealing with a similar question of quantification of EC and SHEC, a consistent view has been taken by various High Courts and the Hon'ble Apex court. Reliance in this regard is being placed on the following judgements:

(1) Gujarat Ambuja Exports Vs. Government of India [2013 (289) E.L.T. 273 (Guj.)] ;

(2) Commissioner of Customs Vs. Pasupati Acrylon Limited [2014 (1) TMI 169 (Guj.)] ;

SLP dismissed by the Hon'ble Supreme Court in [2015 (9) TMI 666]

(3) Commissioner of Customs (Export) Vs. Reliance Industries Limited [2015 (322) E.L.T. 121 (Bom.)] ;

(4) Commissioner of Central Excise, Vishakhapatnam Vs. Kedia Overseas Limited [2014 (305) E.L.T. 268 (AP)] ;

SLP dismissed by the Hon'ble Supreme Court in [2015 (326) E.L.T. A134] ;

Review Petition dismissed by the Hon'ble Supreme Court RP(C) No. 743 of 2012 ;

(5) Commissioner of Central Excise, Tuticorin Vs. DCW Limited [2014 (306) E.L.T. 398 (Mad.)] ;

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(6) Commissioner of Customs, Kandla Vs. Bhushan Steel & Strips Limited [2010 (259) E.L.T. 155].

It has been held in the said judgements that the condition of debit of the exempted duties to the Scrips is merely procedural as the Scrip has value and would not change the nature of benefit from one being of exemption having been issued in exercise of powers conferred under Section 25 of the Customs Act thereby waiving actual collection. It has also been held that the condition as regards availability of drawback or CENVAT Credit against the amount debited from the said scrips does not alter the factum of exemption. In any event, eligibility to drawback is contingent upon the inputs imported against the scrips only when used for manufacturing export goods. In so far as the CENVAT credit of additional duties is concerned, since the goods imported are not subject to additional duties but IGST (which is not exempted) this condition is not applicable in the instant case and cannot be used against the Appellant. All these aspects have also been gone into by the Hon'ble Tribunal in great details in the decisions referred as above.

3.9 The Appellant in the instant appeals, is not seeking an exemption from the payment of SWS. Instead, the leviability of SWS is itself being challenged. In this regard, the Appellant would like to state that exemption presupposes a liability, and it can only operate when there is a valid levy/liability. Reliance in this regard is being placed on the

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judgement of the Hon'ble Supreme Court in the case of Associated Cement Companies Limited Vs. State of Bihar [(2004) 7 SCC 642] (Para 17) and in the case of Peekay Re-Rolling Mills Private Limited Vs. Assistant Commissioner [2009 (13) S.T.R. 305]. Be that as it may, the action of department in debiting the scrips with the SWS amount has the effect of providing exemption to SWS although the same was not specifically exempted vide the aforesaid exemption notifications which runs contrary to the ratio laid down in Unicorn Industries (supra). The judgement of the Hon'ble Madras High Court in the case of Gemini Edibles does not lay any binding precedence. The Hon'ble Madras High Court's decision rendered on 10 May 2024 does not lay down any binding precedence on account of the reasons that the Hon'ble High Court of Gujarat, Maharashtra and Andhra Pradesh have expressed a contrary view by holding that an exemption which is subject to the condition of debiting the scrips must be understood and treated as exempted goods as such adjustment is procedural in nature and an exercise meant for administrative convenience in the following cases:

- (1) Gujarat Ambuja Exports Vs. Government of India
[2013 (289) ELT 273 (Guj.)].
- (2) Commissioner of Customs Vs. Pusupati Acrylon Ltd.
[2014 (1) TMI 169 (Guj.)] maintained in the Hon'ble Supreme Court in 2015 (9) TMI 666 (SC).

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- (3) CC Vs. Reliance Industries [2015 (322) ELT 121 (Bom.)]
- (4) CCE Vs. Kedia Overseas [2014 (305) ELT 268 (AP)] maintained by the Hon’ble Supreme Court in 2015 (326) E.L.T. A134 (SC) including the dismissal of a review petition.

3.10 He further submitted that the findings and observations of the Ld. Appellate Commissioner are unsustainable and inconsistent.

3.16 It is his further submission that the impugned orders fail to consider the Circular of the Board dated 01.02.2022 as also the jurisprudence available in the context of SWS and as such suffers from perversity. The order of the Ld. Appellate Commissioner is unsustainable and inconsistent. The counter contentions of the Appellant against each of the findings/observations made by the Ld. Appellate Commissioner in the 17 OIAs which upheld the liability of the Petitioner to pay SWS has been tabulated hereunder:

Sl. No	Relevant Para	Observation/Finding of the Ld. Appellate Commissioner	Contentions of the Appellant
1.	16,18,20,25,26	Although, it has been observed by the Ld. Appellate Commissioner that the DEPB is akin to MEIS/SEIS and provisions with respect to EC and SHEC are on the same	a) Notification No. 24 and 25 are issued by exercising the powers conferred under Section 25 of the Customs Act, 1962 which confers the Government to grant exemption absolutely or subject to conditions as may be

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	footing as that of SWS, yet, by relying upon the conditions stipulated under Notification No. 96/2004 dated 17.09.2004 and the provisions of the FTP, it has been held by the Ld. Appellate Commissioner that there is no factual exemption from the payment of BCD.	specified. The provisions/conditions contained in the said notifications are unambiguous as such the same deserves a strict literal interpretation in terms of the judgement of the Hon’ble Supreme Court in the case Commissioner of Customs (Import), Mumbai Vs. Dilip Kumar and Company [(2018) 9 SCC 1]. Further, Customs exemption notification should be construed on its own terms without any intendment of the provisions of FTP. Reliance in this regard is being placed on the judgement of the Hon’ble Supreme Court in the case of Commissioner of Customs, Hyderabad Vs. Pennar Industries Limited [2015 (322) E.L.T. 402]. b) The Hon’ble Supreme Court in the case of Somaiya Organics Limited Vs. State of Uttar Pradesh reported 2001 (130) E.L.T. 3 has held in no uncertain terms that the expression “collection” in the context of tax laws would mean “physical realization of tax”. On the other hand, the Ld. Appellate Commissioner in the impugned order has himself accepted at Para 28 that in effect no money representing the duty goes to the government exchequer under Notification 24 and 25
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			which essentially would imply that no BCD is physically collected and the debit to the scrips is only a matter of procedure not vitiating the factum of exemption from BCD as held in the case Gujarat Ambuja Exports Limited (supra). c) There was no change in the legal position as regards non leviability of EC in case of goods imported against DEPB scrips despite the introduction of Notification No. 96/2004 – Cus. dated 17.09.2004 as also the Circular dated 31.01.2005 as is evident from the judgement of the Hon’ble Madras High Court in the case of DCW Limited (supra). Further, the conditions as regards entitlement of drawback and CENVAT Credit of duties debited to the scrips had also fallen before consideration before the Hon’ble Tribunal in the case of Bhushan Steel & Strips Limited (supra) in the context of goods imported against Target Plus Scrips and the Hon’ble Tribunal held that the said conditions did not alter the factum of BCD having been exempted under the said Notification No. 32/2005 dated 08.04.2005. Therefore, there is no basis for the Ld. Appellate Commissioner to hold the view that BCD in fact was not exempted.
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			d) In any event, eligibility to drawback is contingent upon the inputs imported against the scrips only when used for manufacturing export goods. In so far as the CENVAT credit of additional duties is concerned, since the goods imported are not subject to additional duties but IGST (which is not exempted) this condition is not applicable in the instant case and cannot be used against the Appellant.
2.	19,21,22	The Ld. Appellate Commissioner placed its reliance upon Circular No. 05/2005 – Cus. dated 31.01.2005 to hold that education cess at the rate of 2% can be debited from the scrips under the DEPB scheme and the same is applicable to the facts of the instant case as the said Circular has not been rescinded till date. The Ld. Appellate Authority has held that debit of the duty credit scrips by treating it as an additional duty of Customs is well justified.	a) Circular no. 05/2005 – Cus. dated 31.01.2005 has been held to be contrary to the provisions of the law and was set aside vide the judgement in the case of Gujarat Ambuja Exports Limited (supra). Therefore, the observation of the Ld. Appellate Commissioner in so far as it seeks to apply the said circular to the facts of the present case is unsustainable and arbitrary. b) Further, the said observation runs contrary to the ratio as laid down in the case of Unicorn Industries (supra) whereby it was held that when only specified duties are exempted vide an exemption notification, other duties which are not specified therein are not automatically exempted.

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4. On the other hand, the Id.A.R. for the Revenue, reiterated the findings of the impugned orders.
5. Heard both the parties and considered the submissions.
6. We find that the issue arises in these cases whether the appellant is liable to pay Social Welfare Surcharge (SWS) in case when the Basic Customs duty is exempted in terms of Notification Nos.24/2015-Cus & 25/2015-Cus both dated 08.04.2015, or not ?
7. We find that this issue has been settled by the appellant's own case by this Tribunal vide Final Order Nos.76834-76915/2024 dated 05.09.2024, wherein it has been held as under :

"12. We also take note of the fact that in the appellant's own case, the co-ordinate Bench of the Tribunal sitting in Calcutta reported in 2023 (10) TMI 1223 - CESTAT, Kolkata has again held as under: -

"6. We find that a pure question of law arises for our consideration in these appeals not involving any factual controversy The issue involved in these appeals relates to the levy and collection of SWS under Section 110(3) of the Finance Act, 2018 set out hereunder to the extent relevant for the instant appeals

(3) The Social Welfare Surcharge levied under sub-section (1), shall be calculated at the rate of ten percent on the aggregate of duties, taxes and cesses which are levied and collected by the Central Government in the Ministry of Finance (Department of Revenue) under Section 12 of the Customs Act, 1962 and any

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sum chargeable on the goods specified in sub-section (1) under any other law for the time being in force as an addition to and in the same manner as a duty of customs, but not including (a)....

(b).....

(c).....

(d).....

Therefore, SWS is required to be quantified @ 10% with reference to specified duties of customs, which are not only levied but also collected by the Ministry of Finance. In the facts of the present case, it is not in dispute that the Appellant had imported goods by availing the benefit of Notification No. 24/2015 and Notification No. 25/2015 ('the said notifications') and fulfilled the conditions thereunder. It is the case of the Appellant that under the said notifications issued in exercise of the powers to grant exemption under Section 25 of the Customs Act, 1962, BCD stands exempted albeit subject to the condition inter alia of a debit to the MEIS/SEIS scrip (as the case may be) of the BCD leviable on the goods but for the exemption. Since there is no actual collection of BCD in view of the exemption, the Appellant argues that no SWS can be levied and collected with reference to notional BCD under Section 110(3) of the Finance Act, 2018 extracted (supra). The contention of the revenue, on the other hand, is that debit of BCD to the scrip under the said notifications is an alternate mode of payment and not an exemption perse so as to justify the computation of SWS. However, we find that BCD amount is conspicuously reflected as "zero" in the BOEs filed availing the said notifications, which is not in consonance with the contention of the revenue that BCD is collected in case of goods imported under the said notifications. The Hon'ble Supreme Court in the Somaiya Organics Case (supra) has held in no un-certain terms

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that the expression "collection" in the context of tax laws would mean "physical realization of tax" where as in the instant case, the Appellate Commissioner has himself accepted at para 28 of the impugned orders that no money representing BCD goes to the exchequer under the said notifications meaning thereby that the test of "physical realization of tax is clearly not met and the debit of BCD to the scrip is at best a notional collection of tax when the said notifications are read in entirety. Moreover, a similar condition of debit to the duty credit scrips as prevalent in the notifications operationalizing the DEPB scheme and the Target Plus Scheme had fallen for consideration of various High Courts and Tribunal in the following cases in the context of levy and collection of EC imposed by the Finance (No. 2) Act, 2004:

(i) Gujarat Ambuja Exports Vs. Government of India [2013 (289) E.L.T. 273 (Guj.)]

(ii) Commissioner of Central Excise, Vishakhapatnam Vs. Kedia Overseas Limited [2014 (305) E.L.T. 268 (AP)] Maintained SC [2015 (326) E.L.T. A134]

(iii) Commissioner of Central Excise, Tuticorin Vs. DCW Limited [2014 (306) E.L.T. 398 (Mad.)]

(iv) Commissioner of Customs (Export) Vs. Reliance Industries Limited [2015 (322) E.L.T. 121 (Bom.)]

(v) Commissioner of Customs, Kandla Vs. Bhushan Steel & Strips Limited [2010 (259) E.L.T. 155].

The Hon'ble Gujarat High Court in the Gujarat Ambuja Case (supra) held that the condition of debit of the exempted duties to the Scrips is merely procedural as the Scrip has value and would not change the nature of benefit from one being of exemption having been issued in exercise of powers conferred under Section

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25 of the Customs Act. Relevant para of the said decision is extracted below:

19In essence, therefore for imports made under the DEPB Scheme, of course, subject to the conditions specified in the exemption notification, the customs duty was exempt. Merely because the conditions provided for adjustment of credit in the DEPB Scrips. it cannot be stated that either there was no exemption from payment of customs duty or that the central government was levying and collection customs duty from the importers in the form of adjustment of credit in the DEPB Scrips. We may recall that such credits are given at specified rates on the basis of SION norms primarily taking into account deemed import content of the export product and the basic customs duty payable on such deemed imports. Thus through such adjustment on the DEPB Scrips at the time of further imports, customs duty component is sought to be neutralized The view expressed by the Tribunal in the case of "Reliance Industries Ltd (supra) appeals to us. In the said decision Tribunal taking note of the provisions contained in Section 81 and Section 84 of the Finance Act 2004 held that the impugned Circular No. 5/2005 is legally not sustainable. The Tribunal held that crediting and debiting of entries in the passbook is a matter of procedure and convenience and in essence the Notification No. 45/2002 provides for full exemption from payment of customs duty"

The above view of the Gujarat High Court was followed in S.No (iii) to (v) above. The Hon'ble Madras High Court in S No (ii) above was concerned with the subsequent notification no 96/2004 - Cus dated 17.09 2004 operationalizing the DEPB Scheme and the Tribunal in S.No (v) was concerned with the notification no 32/2005-Cus operationalizing the Target Plus Scheme The

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conditions of debit of BCD to the scrip and the availment of drawback with respect to the subsequent exports out of the imported inputs were also prevalent in notification no 96/2004-Cus dt 17.09.2004 and notification no 32/2005-Cus The DEPB Scheme is similar to the MEIS/SEIS Scheme and that the levy of SWS has replaced EC but learned Appellate Commissioner has himself accepted at para 16 & 17 of the impugned Orders that the DEPB Scheme is similar to the MEIS/SEIS Scheme and that the levy of SWS has replaced EC but erroneously relies upon Circular No. 5/2006-Cus dt. 31.01.2005, which has been held invalid and contrary Section 81 and Section 84 of the Finance Act. 2004 and quashed by the High Court in the Gujarat Ambuja Exports Case (supra) At this stage, it would also be pertinent to refer to the provisions of Section 94 of the Finance (No. 2) Act, 2004, which reads as under:

(1) The Education Cess levied under Section 91, in the case of goods specified in the First Schedule to the Customs Tariff Act 1975 being goods imported into India, shall be a duty of customs (in this section referred to as the Education Cess on imported goods) at the rate of two percent calculated on the aggregate of duties of customs which are levied and collected by the Central Government in the Ministry of Finance (Department of Revenue) under Section 12 of the Customs Act, 1962 and any sum chargeable on such goods under any other law for the time being in force, as an addition to and in the same manner as a duty of customs but not including,

(a).....

(b).....

7. Since both EC and SWS are in the nature of surcharge and the provisions pertaining to their quantification as contained in

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Section 94(1) of the Finance (No. 2) Act, 2004 and Section 110(3) of the Finance Act. 2018 as extracted above are *pari materia*, the jurisprudence as regards non applicability/non levy of Education Cess in respect of goods imported against the DEPB and/or Target Plus Scheme should equally apply in the context of SWS in respect of goods imported against the MEIS/SEIS Schemes.

8. Even otherwise, the self same issue of non leviability of SWS in case of goods imported under the said notifications with which we are concerned in these proceedings had fallen for consideration before the Hon'ble Division Bench of the Bombay High Court in the Appellant's own case in Writ Petition bearing No. 1447 of 2021. The Hon'ble Court after considering the Circular dated 01.02.2022, decided the issue in favour of the Appellant vide its order dated 27.09.2022. No stay has been brought to our notice against the said order of the Hon'ble Bombay High Court. On the contrary, pursuant to the said order, refund of SWS amount has also been sanctioned to the Appellant vide refund sanction order dated 13.04.2022. The grievance of the revenue before us is that an earlier Circular dated 10.01.2020, which was specific to the issue at hand and which has not been rescinded was not considered. We find that both the Circulars deal with levy and collection of SWS, while the earlier one is oppressive and provides for payment of SWS in case of imports against the MEIS/SEIS Scrip the later Circular contemplates that the amount of SWS payable would be "NIL" where the BCD which forms the basis for computation of SWS is "Zero" even though SWS has not been exempted. The later Circular does not contemplate that its operation is limited to situations not covered by the earlier circular. It is settled by the Hon'ble Supreme Court in the case of *Suchitra Components Ltd* reported in 2007 (208) ELT 321 that a

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beneficial circular is to be applied retrospectively. Moreover, both the Circulars were considered by the Hon'ble Bombay High Court in the La Tim Metal Case (supra) in its order dated 15.11.2022 passed in WP No. 12183/2022 at para 6 thereof while holding that when the BCD is "nil", SWS, being computed at the rate of 10% of BCD, shall also be "nil" Further, as already observed above Circular No. 5/2005 dt. 31.01.2005 which provided for levy and collection of Education Cess in case of goods imported under the notifications operationalizing the DEPB Scheme was held to be not in consonance with provisions of Section 94 of the Finance (No. 2) Act, 2004 Therefore, the circular dated 10.1.2020 which takes the same view for SWS as was canvassed in Circular dt. 31.01.2005 for Education Cess cannot be given primacy over the later circular dt. 01.02.2022

9. We also find that the Hon'ble Supreme Court in the Unicorn Case (supra) was concerned with the interpretation of an exemption notification no 71/2003-CE dt. 9.9.2003 granting area based exemption to units located in the north east Under Notification No. 71/2003-CE. units in the north east were entitled to refund of specified duties paid on value addition and the question before the Hon ble Court was whether EC SHEC NCCD imposed by the Finance Act 2001 2004 and 2007 which were not specifically exempted under Notification No. 71/2003 shall also come within the scope of the sate exemption for the purposes of refund. Para 2 and 22 of the said decision are set out hereunder for ease of reference:

2. The question involved in the appeals is with respect to the levy of education cess, higher education cess and National Calamity Contingency Duty on it The appeals arise out of common Judgement The High Court has held that duties in question are

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not part of the exemption notification. The writ petitions have been dismissed Hence, the appeals have been preferred

22. The main question arising for consideration is when 100 percent exemption had been granted for excise duty for a period of 10 years whether the exemption notification issued for the state of Sikkim on 9-9-2003 shall be confined to the basic excise duty under the Act of 1944. additional duty under the Act of 1957 and additional duty under the Act of 1978. which were specifically mentioned in the notification issued on 9-9-2003 or it also includes cess/duty Imposed by Finance Acts of 2001. 2004 and 2007

10. The Hon'ble Supreme Court denied refund of the un-specified duties under Notification No. 71/2003- CE as would be evident from para 40 of the said order as the exemption was categorical in its scope Further, since refund of specified duties under Notification No. 71/2003-CE was only possible post collection, the question of non leviability of Education Cess under Section 94 of the Finance (No. 2) Act 2004 for want of collection of the underlying duty was not germane to the issue before the Hon'ble Supreme Court and was therefore not gone into. A judgement is an authority for what it decides and not what can be inferred from it as held by the Hon'ble Supreme Court itself in Indusind Media Case (supra). The Hon'ble Supreme Court in the Srikumar Agencies Case (supra) has also held that the decisions of the Court are not Euclid's theorem and cannot be read out of context as one fact or circumstantial flexibility can make a whole lot of difference to the outcome of the case. Therefore, reliance placed by the revenue on the decision of the Hon'ble Supreme Court in the Unicorn Case (supra) is clearly distinguishable on facts and we

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are in complete agreement with the Appellant that the ratio thereof cannot be applied to the instant case:

11. The decision of the Hon'ble Bombay High Court in the La Tim Metal Case is not only later in time but also takes into consideration the earlier contrary decision of the learned Single judge of the Madras High Court in the Gemini Case (supra) as also the decision of the Hon'ble Supreme Court in the Unicorn Case (supra). Therefore, in terms of the "later the better" principle [Refer CESTAT Larger Bench decision in Rainbow Silks Vs. CC 2015 (325) E.L.T. 599) as also in light of the fact that the Bombay High Court decision is by a division bench the same has to be given primacy over the decision of the Hon'ble Madras High Court in the Gemini Case (supra) following judicial discipline. Therefore, in terms of the aforesaid, the issue at hand is no more res integra and stands decided in favour of the Appellant by the Hon'ble Bombay High Court.

12. Accordingly, the assessments in each of the impugned BOE's covered by the impugned orders are modified in so far as imposition of SWS is concerned and the appeals are allowed with consequential relief.

The review petition filed by revenue is also dismissed by the Hon'ble High Court of Mumbai on 21.06.2024.

13. We are also of the considered opinion that since in terms of Circular No. 3/2022 dated 01.02.2022, it has been clarified by the C.B.I.C. that SWS payable would be nil in case where aggregate of customs duties (which forms the basis of computation of SWS) is zero, even though SWS has not been exempted, SWS payable in this case is zero. Therefore, we hold that the appellant is not liable to pay SWS as the Basic Customs Duty payable by them is zero.

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14. Accordingly, we do not find any merit in the impugned orders. The same are set aside. 15. In the result, the appeals are allowed with consequential relief, if any."

8. As the issue has already been settled that since in terms of the Circular No.3/2022-Cus dated 01.02.2022, wherein it has been clarified that the amount of Social Welfare Surcharge (SWS) payable would be "Nil" in cases where the aggregate of Customs duties (which form the base for computation of SWS) is zero even though SWS is exempted as SWS payable is zero. Therefore, we hold that the appellant is not liable to pay SWS as debited to the MEIS/SEIS or paid in cash.

9. Accordingly, the same is required to be refunded to the appellant as held by the Hon'ble Bombay High Court in the appellant's own case reported in 2022 (9) TMI 1588, wherein it has been held as under :

"5. Moreover, any amount deducted shall be refunded to petitioner within 8 weeks of receiving an application from petitioner for refund. Mr.Sridharan states that necessary application for refund to justify the quantum of refund will also be filed. Refund shall be issued together with interest thereon in accordance with law."

10. Further, we find that similar views have been taken by this Tribunal in the case of Dalmia Cement (Bharat) Limited Vs.

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Commissioner of Customs (Preventive), Vijaywada reported in 2024 (5)

TMI 632-CESTAT Hyderabad, wherein it has been held as under :

"8. The Mumbai Bench in the case of Reliance Industries Ltd we has gone through the Circular No.3/2022 dated 01.03.2022 where the Board has clarified as under :

2. The matter has been examined. Social Welfare Surcharge (SWS) is levied and collected, as a duty of customs, vide Section 110 of the Finance Act, 2018 (13 of 2018) and is calculated at the rate of 10 per cent on the aggregate of duties, taxes and cesses which are levied and collected by the Central Government as a duty of customs on goods imported into India.

3. In this regard, it may be noted that at present SWS at the rate of 10% of the aggregate of customs duties payable on import of goods and not on the value of imported goods. If aggregate customs duty payable is zero on account of an exemption, the SWS shall be computed as 10% of the value equal to "Nil" (as aggregate amount of customs duties payable is zero). Law does not require computation of SWS on a notional customs duty calculated.

4. Thus, it is clarified that the amount of Social Welfare Surcharge payable would be "Nil" in cases where the aggregate of customs duties (which form the base for computation of SWS) is zero even though SWS has not been exempted at tariff rate where applicable aggregate of duties of customs is zero.

9. After this, the Bench has relied on the case law of La Tim Metal & Industries Ltd. The Bench has followed the decision of Hon'ble

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High Court in the La Tim Metal Industries Ltd., wherein the High Court has held as under :

7. Mr.Mishra also submitted that petitioner's claim about assessment and recovery of amounts in the guise of Social Welfare Surcharge on the goods cleared without payment of BCD is factually incorrect as BCD was chargeable at 7.5% on the goods imported and the same was paid/debited by using the Merchandise Export from India Scheme (MEIS) Scrips issued under Notification No.24/2015- Customs dated 08.04.2015. In response, Mr.Shah relied upon General Exemption No. 162 by which the Central Government, exercising its powers under Section 25 of the Customs Act, has exempted goods when imported into India against duty credit scrip from the whole of the customs duty leviable thereon and the whole of the additional duty leviable thereon under the Customs Tariff Act. The fact that the goods imported under the concerned Bill of Entry has been cleared with Nil BCD is not disputed.

8. Therefore, in our view if the SWS is payable at 10% on BCD but where the BCD is Nil. SWS shall also be computed Nil.

9. Respondents are directed to refund Rs.22,56,760/- that Petitioner has paid towards Notional Social Welfare Surcharge within 8 weeks from the date of receipt of a copy of this order.

10. Petition accordingly stands disposed."

Wherein this Tribunal granted refund in cash along with interest.

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11. Further, in the appellant's own case vide Order-in-Original dated 13.04.2023, DIN : 20230478NV0000919091, the Adjudicating Authority itself has granted the refund along with interest in cash to the appellant.

12. Therefore, following the aforesaid decisions, we direct the Adjudicating Authority to refund the amount of SWS either debited in their MEIS/SEIS License or paid to the appellant in cash along with applicable interest.

13. In view of this, the impugned orders are set aside and the appeals are allowed with consequential relief, if any.

(Pronounced in the open court on.14.11.2024)

**(Ashok Jindal)
Member (Judicial)**

**(K.Anpazhakan)
Member (Technical)**

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