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With its cosmic benefits and cosmetic privileges, exports are the crowning glory of Indian Economy. Such exports are of two types namely, physical exports and deemed exports. Chapter 8 of the Exim Policy deals with such "Deemed Exports". As per para 8.1 of the Policy "Deemed exports refers to those transactions in which the goods supplied do not leave the country and the payment for such supplies is received either in Indian rupees or in free foreign exchange".

Chapter 6 of the Exim Policy deals with the 100% EOUs, EHTPs and STPs. As per para 6.8 of the Policy, the EOUs (other than gems and jewellery units) are permitted to sell goods/ services upto 50% of FOB value of exports, subject to fulfillment of positive MFE (foreign exchange), on payment of applicable duties.

Section 3 of Central Excise Act 1944, levies duty of excise on the goods manufactured and cleared by a 100% EOU, which is equal to the aggregate duties of Customs which would be leviable under the Customs Act.

Erstwhile Notification 2/95, presently Notification 23/2003 prescribes the effective rate of duty on the goods produced and cleared by a 100% EOU to the extent of 50% of the duty leviable under Section 3, with various conditions *interalia*, the total value of clearances does not exceed 50% of the FOB value of exports.

Now to the issue on hand,

Whether a 100% EOU can clear their manufactured goods upto 50% of the FOB Value of the aggregate of both physical and deemed exports effected by them or only to their physical exports?

Let us proceed to examine the issue.

Kind reference is drawn to the unreported circular of Ministry of Finance vide F.No.305/48/2000-FTT dated 07.04.2000, carrying the subject "Grant of DTA Sale entitlement to EOU/ EPZ unit against Deemed Export made by EOU under the provision of paragraph 9.10 of Exim Policy – Possible Loss of Customs Revenue – regarding." In the said circular it has been communicated that "Though it is very clear that DTA Sale entitlement of EOU/EPZ unit under paragraph 9.9 (b) would be upto 50% of FOB value of Exports (i.e. physical export only). It appears that in many cases EOU/EPZ units have been allowed DTA sale entitlement against "Deemed Export" effected under the provision of Para 9.10 of the Policy. As the clearances under 9.9 (b) are on payment of Concessional duties, it is possible that this DTA entitlement might have been availed of by EOU/EPZ unit, resulting in loss of revenue".

The Hon'ble Tribunal in the case of M/s Ginni International Vs CCE, Jaipur as reported in 2001 (47) RLT 412 (CEGAT, Delhi) has observed that

1. In terms of jurisdiction of permitting DTA sale for 100% EOU, the Development Commissioner is the proper authority to accord the permission and once he / she permits, the same cannot be disputed by the revenue, and

2. The revenue cannot disallow the clearance and demand Central Excise duty on the ground that the entitlement was required to be restricted to 50% of the FOB value of physical exports.

The above judgement, made the Development Commissioner as the ultimate signature, in cases pertaining to the entitlement of DTA and also allowed the benefit of the concessional duty, once permitted by the above competent authority.

The above judgement has been appealed and admitted without stay, in the Hon'ble Supreme Court as reported in 2002 (52) RLT F9 (SC).

Further, in the case of M/s Virlon Textile Mills Vs CCE, Mumbai-III as reported in 2002 (50) RLT 349 (CEGAT-Mumbai), the Hon'ble Tribunal has observed as under:

"7..... As we have seen paragraph 9.9 and 9.10 deals with two different issues altogether. Para 9.9 prescribed the mode of disposal of the goods manufactured by a 100% EOU. It lays down that the entire production of such EOU shall be exported and thereafter proceeds to specify exceptions. Among these are, goods sold in the domestic tariff area upto 50% of the FOB value of the exports. Paragraph 9.10 consists series of deeming provisions holding that the supplies to domestic tariff area of various kinds among which those made against payment in foreign exchange shall be counted towards fulfillment of export performance. Therefore the supplies made by the appellant to the domestic tariff area against payment in foreign exchange will be deemed, for purpose of paragraph 9.9 to have been exported. From this it would follows that up to 50% of the value of such supplies could be sold at the concessional rate of duty available in Notification 2/95. Suppose, the appellant had exported, physically, all its goods, to countries out of India, all its goods against payment of foreign exchange it would have got the benefit of the Notification 2/95 for 50% of the value of exports. If we accept the appellant's claim it would mean that the sale of its goods to anybody against foreign exchange itself be entitled to exemption upto 100% of the FOB. That exemption only would be available upto 50% if physically exported. Acceptance of the claim therefore would lead to a conclusion that a premium is placed upon the selling the goods in the domestic tariff area against foreign exchange. Surely that is not what the makers of the notification had in mind. The object behind the provisions of para 9.10 are clear. The object of exporting goods are after all to earn foreign exchange badly needed for financing import of goods and to acquire technical and other knowledge and services for economic development. If that foreign exchange is earned without being the goods physically exported that benefit should not be denied. That, however, earns the foreign exchange without physically being exported. However, not a superior method of earning foreign exchange without physically exporting the goods. We are unable to see anything in the Policy that supplies to domestic tariff area against foreign exchange on a higher level than exports. Therefore supplies to domestic tariff area against foreign exchange would be treated on the same footing as physical exports".

This decision was further fortified in the case of M/s Margoan Tetronics Ltd., Vs CCE Noida as reported in 2003 (55) RLT 26 (CEGAT, Delhi) and M/s Kurt-o-John shoe Components (India) Pvt. Ltd. Vs.CCE, NOIDA as reported in 2003-Taxindiaonline-54CESTAT-DEL.

From the above, it is lucid and clear that, by the various above stated judgements, the answer to the poser placed above is that **the 100% EOU is entitled to clear their manufactured goods in DTA upto 50% of the FOB value of both physical and deemed exports effected by them, provided the receipt is in foreign exchange.**

Having thus answered the poser we prefer to proceed bit further. Having accepted the clearances under "Deemed Exports" category as exports for the purpose of DTA entitlement, why to insist upon a condition that the receipts shall be in foreign exchange? With due respects to the reasons brought out in the case of M/s Virlon Textile Mills Vs CCE, Mumbai-III, we put forth the following points in favour of our contention that for the purpose of DTA entitlement even the clearances effected under "Deemed Export" category, wherein the payment is received in Indian rupees shall also be taken into account.

1. As per para 8.1 of the Policy "Deemed exports refers to those transactions in which the goods supplied do not leave the country and the payment for such supplies is received either in Indian rupees or in free foreign exchange". There is no distinguishment between the receipts in Indian rupees and foreign currency.

2. Even though, the payment is received in Indian rupees, ultimately it would have discharged an intended export obligation/ purpose at the other end, thus creating a level playing field with that of receipts in foreign exchange and making an equivalent saving of foreign exchange outflow.

3. Had the intention been to insist upon receipt in foreign exchange, there could have been a specific mention in para 6.8 (b) itself of the Policy as specifically mentioned for the category of the services under 6.8 (g) of the Policy.

4. Last but not the least, as per para 6.9 (a) of the Policy, the supplies effected to the "Deemed Exports" category are counted for the purpose of fulfillment of NFE (Net Foreign Exchange Earning), irrespective of the currency of realisation. Accepting the supplies effected to the "Deemed Exports" for fulfillment of NFE on one hand and denying it for the purpose of DTA entitlement shall only be a selective disregard.