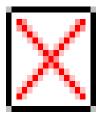


DTA sale of unutilised goods by an EOU - MoF conflicts with MoC

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Introduction

THE

Export Oriented Unit (EOU) Scheme was introduced by the Ministry of Commerce (MoC) in the year 1980 with the objective to boost exports by creating additional production capacity.

To achieve the said objective, the EOU Scheme extends various exemptions and concessions for imports and local procurements. Though the benefits under EOU Scheme have been announced by MoC, it is operationalised by the Ministry of Finance (MoF) by way of issuing exemption notifications under the Customs Law and Central Excise Law.

The EOU scheme has evolved over a period of time to adopt to the changing business environment. Various aspects under the EOU Scheme underwent major changes on introduction of Goods and Services Tax (GST) viz., manner of availing the exemptions, withdrawal of exemptions to local procurement, amount of duty payable on DTA sale, etc. This article deals with one such change brought in by the MoC in EOU Scheme which is conflicting with the exemption notification issued by the MoF.

DTA sale of unutilised goods

The EOU Scheme permits units operating under said scheme to dispose/sell the goods imported or locally procured, when it is unable to utilise the same for its operations. Similarly, the scheme also permits disposal of Capital goods and spares that have become obsolete/surplus.

In terms of para 6.15 of the Foreign Trade Policy 2015-20 (for brevity 'the FTP

') as amended, the said DTA sale of unutilised goods including capital goods is permitted on payment of duties of Customs leviable under First Schedule of the Customs Tariff Act, 1975 (for brevity, 'the Tariff Act) which is in short termed as 'BCD

', in addition to payment of applicable GST on such DTA sale.

Now we turn to the Notification No.52/2003-Cus., dated 31.03.2003 (for brevity, 'the N.No. 52/03-Cus'

') issued by the MoF. As per N.No. 52/03-Cus., the clearance of imported goods other than capital goods is subject to payment of duty but for exemption on the value at the time of import. Similarly, the clearance of capital goods would be subject to payment of duty but for the exemption on the depreciated value. The term 'duty' for the purpose of N.No. 52/03-Cus., means the BCD, and the additional duty, if any, leviable thereon under sub-sections (1), (3) and (5) of the Tariff Act which is in short termed as '*CVD and SAD*

' and integrated tax and compensation cess, if any, leviable thereon under sub-sections (7) and (9) of the Tariff Act which is in short termed as ' **IGST & Compensation cess**'.

MoF conflicts with MoC

A conjoint reading of the provisions of FTP notified by the MoC and the N.No. 52/2003-Cus., issued by the MoF evidences that while the FTP requires payment of BCD alone at the time of DTA sale, the N.No. 52/2003-Cus., requires payment of BCD as well as the CVD and SAD, or IGST and/or Compensation cess, as applicable, which was availed as exemption at the time of import. There is a conflict between the

provisions of FTP notified by the MoC and the provisions of exemption notification issued by the MoF.

While there is a conflict between the provisions of two Ministries, the question that would arise is which Ministry will prevail. The Hon'ble High Court of Calcutta in the case of **Suttons & Sons (India) Pvt Ltd., v. Union of India** reported in **1995 (75) ELT 229 (Cal.)** has held that in case of inconsistency between two statutory notifications, they should be harmoniously construed. Accordingly, the Hon'ble Court has held that the relaxations provided by the Ministry of Agriculture which is the concerned ministry would prevail over the notifications issued by the Ministry of Finance.

Similarly, the Hon'ble High Court of Delhi in the case of *Greatship (India) Ltd., v Union of India & Ors reported in -* 2016-TIOL-1018-HC-DEL-Cus

has held that if there are conflicting views between two central government ministries, then view taken by the ministry that is primarily responsible for policy in question should prevail. Accordingly, it was further held that as commerce ministry which is primarily responsible for FTP, its view should prevail over finance ministry.

Therefore, it is obvious that when there is a conflict between the provisions of Ministry of Commerce and Ministry of Finance with respect to EOU Scheme, the provisions of EOU would prevail.

In view of the conflicting provisions under the FTP and the Customs Law, the Customs department's demand of IGST and/or Compensation cess or the CVD and SAD, as the case may be, on the DTA sale of unutilised goods may not be correct since the FTP does not require for such payment. However, there have been demands raised by the customs department which the assessees will have to challenge in light of the provisions of FTP and the decisions of Courts.

In case the EOU surrenders the IGST and compensation cess exemption availed on import, the unit would be eligible to avail input tax credit of same, subject to other conditions. Therefore, the entire exercise is revenue neutral. The aforesaid provisions under the N.No. 52/03-Cus., would pose unnecessary compliance burden on the EOUs though there would be no revenue loss or gain to the Government. In case, the EOU requires to surrender the CVD and SAD exemption which was availed under pre-GST regime, there is an uncertainty on availability of ITC or refund of same considering that there have been no corresponding transitional provisions in the GST law in this regard despite many representations bringing out this omission.

In any case, the requirement to surrender the IGST and/or Compensation cess or CVD and SAD as the case may be, prescribed under the N.No. 52/03-Cus., is forcing the EOUs to face unnecessary litigations and additional compliance burden.

In order to remove such difficulties being faced by EOUs and to facilitate ease of doing business, the Central Government should make suitable amendment to N.No. 52/03-Cus., in line with the provisions of FTP, without further loss of time.

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