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WHETHER SOCIAL WELFARE SURCHARGE IS PAYABLE BY IMPORTERS UNDER EXPORTS SCHEMES?

In the Finance Budget 2018, Social Welfare Surcharge was introduced vide Section 110 of Finance Act 2018 and thereafter Social Welfare Surcharge was levied on the custom duty levied and collected to the extent of 10% of such amount.

Off let, Directorate of Revenue Intelligence (DRI) initiated the enquiries against the importers, who has imported duty free goods under Advance Authorization or duty-free import authorization or Export Oriented Unit (EOU) / EHTP / STP etc., where custom duties are exempted against the certain obligations and therefore, no custom duty were levied and collected, but department now asking such importers to appear before the authorities against the summons issued by them for non-payment of SWS on imported goods in respect of which whole of the Basic Customs Duty exempted.

DRI have issued various letters asking major importers to pay the duty on imports, where Social Welfare Surcharge (SWS) is calculated on Custom Duties, which is otherwise exempted vide various notifications issued for duty free imports by exporters under advance authorization, Export Promotion Capital Goods Authorizations or who are under EOU / EHTP / STPI Scheme raising the following issues :

- i. Section 110 Finance Act, 2018 has introduced new levy of SWS on the goods specified in the First Schedule of Customs Tariff Act, 1975 with intent to fulfill commitment of Government to finance education, health & social security
- ii. Sub-section (3) provided the computation of such levy and stipulates that the SWS shall be calculated at the rate 10% of aggregate of duties, taxes and Cesses which are leviable. However, in reality such SWS was made payable on the Basic Customs Duty levied only and at the rate of 10% of such duty leviable.
- iii. On examination of data pertaining to imports made by you during the period 02.02.2018 onwards, that exporters have availed exemption from basic customs duty under notification No. 52/2003 Cus. Dated 31.03.2003 and exemption provided from payment of SWS vide notification No. 11/2018 Cus dated 02.02.20218 is not applicable to us. The logic primarily put forth for not paying SWS is that,

SWS being a duty of Customs and computable as a percentage of the BCD is not payable when BCD itself is exempted. It automatically assumed to be that SWS is also exempted.

- iv. Modality of computation of SWS cannot be a ground for non-payment of duty. When particular kind of duty is exempted, other types of duty or cess imposed by different legislation for a different purpose cannot be said to have been exempted.
- v. Exporters have been further asked to submit the data as per format given in the letter.

On behalf of trade and industry, we submit our view for non-payment of SWS in case of imports made by major importer under EOU or against Advance Authorisation or EPCG Authorisation scheme.

- a. Exporters have been operating under Export Oriented Unit (EOU) Scheme / obtaining Advance Authorization or EPCG Authorization, they have been allowed to import goods without payment of Customs Duty. For an EOU Customs Duties have been exempted under relevant notifications.
- b. Exporters would like to invite your kind attention on the provision of Section 110 of Finance Act 2018, wherein it is very clearly mentioned that SWS shall be calculated at the rate of ten percent on aggregate of duties which are **levied and collected** by the Central Government under section 12 of Customs Act, 1962. In your letter it is mentioned that SWS is payable on basic customs duty levied only, in fact SWS is payable on the basic customs duty **levied and collected**. It appears that the word “collected” is ignored while reading the entire provision of law. Exporters reproduce the section for ready reference:

Section 110 of Finance Act 2018

- (1) *There shall be levied and collected, in accordance with the provisions of this Chapter, for the purposes of the Union, a duty of Customs, to be called a Social Welfare Surcharge, on the goods specified in the First Schedule to the Customs Tariff Act, 1975 (hereinafter referred to as the Customs Tariff Act), being the goods imported into India, to fulfil the commitment of the Government to provide and finance education, health and social security.*
- (2) *The Central Government may, after due appropriation made by Parliament by law in this behalf, utilise such sums of money of the Social Welfare Surcharge levied under this Chapter for the purposes specified in sub-section (1), as it may consider necessary.*
- (3) *The Social Welfare Surcharge levied under sub-section (1), shall be calculated at the rate of ten per cent. 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 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—**

The inquiry has been initiated on below points which has been referred in DRI letter:

Para No.	Content of the para	Submissions
2	<p>2. In the Finance Act, 2018, under Section 110, the Government of India introduced a new levy in the name of Social Welfare Surcharge (SWS), on the goods specified in the First Schedule to the Customs Tariff Act, 1975, with intent to fulfil the commitment of the Government to provide and finance education, health and social security. Sub-section (3) of the said Section, provided for computation of such levy and stipulates that the Social Welfare Surcharge shall be calculated at the rate of ten per cent on the aggregate of duties, taxes and cesses which are levied. However, in reality such SWS was made payable on the Basic Customs duty levied only and at the rate of 10% of such duty leviable. So far as other components of Customs duties are concerned, like IGST, Anti dumping duty, Safeguard duty etc, the same were kept outside the ambit of the duties of Customs on which SWS was to be paid either by the Act itself or by notifications issued for that purpose.</p>	<p>The law has very clearly mentioned that SWS shall be calculated at the 10% of Basic Customs duty which levied and collected. Exporters would like to mention that the wording used in the levy section is not “leviable” as stated in your letter. In other words, unless Basic Customs duty is collected on imported goods SWS is not payable. Provision of section 110 is clear and intention of legislatures is unambiguous. Exporters would like to mention that, Exporters have calculated the SWS, which works out to nil as per the levy section, since no basic custom duty is levied and collected from import made by us.</p>
4&5	<p>4. Upon examination of the data pertaining to imports made by you during the period of 02-02-2018, onwards, it is revealed that you have availed benefit of full exemption of Basic Customs duty (BCD) in respect of certain goods imported by you on the strength of some Customs notifications. However, such Customs notification(s) does(do) not extend exemption from SWS. Exemption from Social Welfare Surcharge (SWS) has been extended by the Customs Notification No.11/2018 dated 02-02-2018. It is also noticed that despite not being covered by the said exemption notification meant for SWS, you did not pay SWS on the goods imported by you, for which BCD was exempted. The logic primarily put forth for not paying SWS is that, SWS being a duty of Customs, and computable as a percentage of the BCD, is not payable when the BCD itself is exempted. In other words, exemption of BCD was automatically assumed to be extended in respect of SWS too.</p>	<p>In our opinion, there is absolutely no need for any specific exemption notification in the present case, since there is exemption on BCD in terms of applicable Notifications for duty free import under Advance Authorization / EPCG Authorization / EOU / EHTP / STPI Scheme, SWC works out to nil. Exporters reiterate that Exporters have not claimed any exemption of SWS but by virtue of charging section, it works out to be Nil.</p> <p>Further, there was no specific exemption notification required to exempt SWS, when exemption is provided to the basic custom duty in terms of Section 12 read with Customs Tariff Act 1975 and such exporters including EOU, no basic customs duty is collected and hence the wording in the section 110 of Finance Act, 2008 is levied and collected.</p>

Para No.	Content of the para	Submissions
	<p>5. However, this contention does not have any legal backing. Once a duty is levied by force of an Act, such duty becomes payable at the rate specified in the Act, subject to availability of specific exemption, if any. All other goods that are not specifically exempted will suffer such duty, irrespective of the fact whether or not such duty is straight away ascertainable on the basis of another duty, which is exempted. Modality of computation of such duty cannot be a ground for non-payment of duty, as it can be clearly determined and computed. When a particular kind of duty is exempted, other types of duty or cess imposed by different legislation for a different purpose cannot be said to have been exempted.</p>	
6,7,8, 9 & 10	<p>6. Your attention is invited to the judgment of the three-member Bench of the Supreme Court in the matter of M/s Unicorn Industries Ltd. It has set aside the decisions of the Division bench of the Supreme Court passed in the cases of SRD Nutrients Private Limited vs Commissioner of Central Excise, Guwahati, (2018)1SCC (105) and Bajaj Auto Limited v. Union of India & others, 2019 SCC (online) SC 421, decided on 27-3-2019, for being clearly per-incurium, i.e for not considering the findings of the decision of another three Judge Bench of the Supreme Court, in the case of Modi Rubber Limited, which was also followed by the decision of another three Judge Bench in Rita Textiles Private Limited.</p> <p>7. The Apex Court in the case of M/s Unicorn Industries held that</p> <p>“In the absence of a notification containing an exemption to such additional duties in the nature of education cess and secondary and higher education cess, they cannot be said to have been exempted.”</p> <p>This clearly necessitates the requirement of having a specific notification exempting goods from a particular category of duty levied. In the present case, there is a notification exempting certain goods from payment of SWS, but the goods imported by you are not covered by the subject notification and you did not claim for any such exemption either.</p>	<p>As mentioned earlier, Exporters would like to mention that Exporters have not claimed any exemption on SWC but by virtue of charging section, it works out to be Nil. Therefore, the case laws which are highlighted by you are not relevant to the present case.</p> <p>Further, in your letter decision of Hon’ble Supreme Court in case of UNICORN INDUSTRIES Versus UNION OF INDIA, 2019 (370) E.L.T. 3 (S.C.) has been referred which was in relation to payment of duty. In the said case refund of Central Excise paid after utilizing the Cenvat credit was granted by way of exemption notification. There was no absolute exemption of Excise duty was granted hence there was a duty to calculate Ed. Cess. Other cases referred in letter are on the same subject. There are no relevant judgement covering similar facts i.e. calculation of Cess where duty is absolutely exempted has been cited in your office letter.</p>

Para No.	Content of the para	Submissions
	<p>Therefore, it is your responsibility to pay SWS on such goods in the course of import of the same, but records indicate that you did not pay such duty in the form of SWS and wrongfully availed a non-existent and imaginary exemption, suo-motu.</p> <p>8. The said order further held that</p> <p>“The reason employed in SRD Nutrients Private Limited (supra) that there was nil excise duty, as such, additional duty cannot be charged, is also equally unacceptable as additional duty can always be determined and merely exemption granted in respect of a particular excise duty, cannot come in the way of determination of yet another duty based thereupon. The proposition urged that simply because one kind of duty is exempted, other kinds of duties automatically fall, cannot be accepted as there is no difficulty in making the computation of additional duties, Moreover, statutory notification must cover specifically the duty exempted. When a particular kind of duty is exempted, other types of duty or cess imposed by different legislation for a different purpose cannot be said to have been exempted.</p>	
	<p>9 Therefore, three different three-member bench of the Supreme Court, on different occasions consistently held that exemption in respect of a particular kind of duty does not extend parallel exemption in respect of another type of duty levied by a different legislation with a different purpose. While BCD is levied by force of the Customs Tariff Act, 1975, as amended, SWS was levied by the Finance Act, 2018. The purposes of both were different and therefore, exemption in respect of BCD cannot be considered to be an exemption in respect of SWS. Therefore, non-payment of SWS on the imported goods, on the ground that the BCD on such goods is not payable by virtue of some notification, is outright violation of the provisions of the Customs Act, 1962, read with the Finance Act, 2018, and such duties are recoverable in terms of the provisions of law in force.</p>	

Para No.	Content of the para	Submissions
	<p>10. In this context your attention is also invited to the order passed by the Madras High Court that dealt with an issue pertaining to payment of SWS through debit of scrips in the case of M/s Gemini Edible Oils Ltd. In the final judgment, the High Court relying on the aforesaid decision of the Apex Court has specifically held that –</p> <p>“exemption granted in respect of a particular excise duty cannot be a bar for determination of yet another duty levied and collected under different enactment, even though such levy and collection was based upon the particular excise duty exempted. The Hon’ble Supreme Court has clearly held that when a particular kind of duty is exempted, other types of duty or cess imposed by legislation for a different purpose cannot be said to have been exempted. Therefore, I am of the firm view that assuming the subject matter exemption notifications grant exemption in respect of the customs duty in toto, the petitioner is not justified in contending that the other duties or levy payable under different enactment are also exempted.</p>	
11	<p>11. Your attention is also drawn to the Customs Notifications under which the goods have been imported by you in particular including the Notification Nos. 18/2015-Cus dated 01-04-2015, 16/2015-Cus dated 01-04-2015, 52/2003-Cus dated 31-03-2003, 46/2011-Cus dated 01-06 2011 etc. None of these notifications extends exemption in respect of SWS. Most importantly, all these notifications were issued long before the SWS came into being. Quite naturally, it was not possible for the Policy makers to presume future levy of certain duty and extend exemption in respect of the same in anticipation. The duty in the form of SWS was required to be paid but it appears that you did not pay such duty on the pretext that BCD is exempted, and you assumed that the exemption extended to SWS too.</p>	<p>From the wording of the charging section, the foresightedness of policy makers is evident about the method of levy and collection of SWS. The section is drafted in such a way that there is no requirement of issuance of specific exemption notifications when the BCD is exempted. This intent of the policy maker needs to be appreciated <i>in toto</i>. The law has been rightly worded to clearly spell out the intent of legislature to not to collect SWS where basic custom duty or custom duty under Section 12 of Customs Act 1962 read with Customs Tariff Act 1975 is exempted. Therefore, provisions in section 110 of Finance Act correctly provides the wording “levied & collected” and not “leviable” to obviate from issuance of additional exemption notifications.</p>

To conclude, based on the above submission, it has to be appreciated and agreed on the followings:

- a. The law has very clearly mentioned that SWS is leviable shall be calculated at the 10% of Basic Customs duty which levied and collected. Unless Basic Customs duty is collected on imported goods SWS is not payable. Provision of section 110 is clear, and intention of legislatures is unambiguous.
- b. Since no duties are required to be paid by the EOUs and modality of payment is also made in such a way that if Customs duty is payable then SWS is also required to be paid and exception is provided for specified goods by way of exemption Notification. Kindly note that Exemption Notification No. 11/2018 Cus dated 02.02.2021 is issued to provide exemption to specified goods and not to any specific person or to scheme. Legislatures and policy maker has clear understanding that SWS is payable on the Customs duty to be paid at the time of imports which is linked to Basic Customs Duty levied and collected by the Government.
- c. Export Oriented Units are allowed to bring Customs duty, Cesse and GST free imported goods for the purpose of exports under Notification No. 52/2003 Cus. Dated 31.03.2003, said notification exempts the duty leviable under section 12 of Customs Act. In case said imported goods are cleared in DTA, Exporters are paying all duties, (BCD, Cess, IGST, SWS) saved at the time of imports. In case Exporters pay SWS and exports the goods, the SWS paid on imported goods is getting exported and this is against the policy of Government that Taxes shall not be exported.
- d. In view of above submissions, the SWS is not at all payable in case of above imports.

It will not be out of place to mention based on the article of WTO Agreement, no taxes are required to be exported and this principle seems to be not appreciated by DRI, Kolkatta.

If government really feels that they have to honor WTO agreement on the article, where it was agreed that no taxes should be part of value of goods & services to be exported and if government is serious for implementing ease of doing business and achieve the dream of Hon Prime Minister, Shri Narendrabhai Modi to make India USD 5 Trillion economy then CBIC should come out with necessary circular and stop such enquiries which leading to the harassment. Department of Commerce has worked out a detailed strategy to reach the \$400 billion target this fiscal which will include focus on existing and new markets, existing and new products and also on lost market shares in the past few years, both in countries and in products. With such type of inquiry / investigation and levy charged then the export pricing will hamper and the export target for the country will not be achieved.