

(1992) 10 MAD CK 0024

In the Madras High Court

Case No : Writ Petition No's. 7505, 8210 and 8211 of 1987

Advani Oerlikon Ltd.

APPELLANT

Vs

Assistant Collector of Central Excise

RESPONDENT

Date of Decision : 27-10-1992

Acts Referred:

Central Excise Rules, 1944 — Rule 3(1), 56A, 56G(2), 57, 57A
Central Excises and Salt Act, 1944 — Section 11A, 3, 37

Citation : (1993) 42 ECC 219 : (1993) 63 ELT 427

Hon'ble Judges : R.R. Mishra, J;N. Arumugham, J

Bench : Division Bench

Advocate : Shri S. Panchu and Dilip Singh, for the Appellant; Shri K. Jayachandran, A.C.G.S.C., for the Respondent

Judgement

Mishra, J.—The petitioners herein, who have been previously benefited by what is called MODVAT credit are aggrieved by the demands of

excise duty, which, according to them, have been made -

(1) in violation of the Notification No. 208/83 dated 1-8-1983;

(2) without complying with the requirements of rules of natural justice; and

(3) in violation of Section 11A of the Central Excises and Salt Act, 1 of 1944.

Petitioner, Rockweld Electrodes India Ltd., hereinafter called "Rockweld", manufacturers electrodes of various qualities and sizes which are made

out of steel wire rods. According to the petitioner, the input steel wire rods are normally purchased from public sector undertakings like Steel

Authority of India or units like TISCO. These rods are classified under Heading 72.09 of the Central Excise Tariff Act and are charged to duty at

the rate of Rs. 365 per M.T. Rods themselves are obtained from rolling of billets. Billets are charged to duty at the rate of Rs. 365 per M.T. under

Heading 72.07 of the Tariff. Although they have named from whom rods are ordinarily procured they have said : ""The petitioner purchases the wire rods from the market and produces electrodes from them. These electrodes are subject to excise duty u/s 3 of the Act read with the Tariff and they are classified under Heading 83.10 of the Tariff."" Petitioner, Advani Oerlikon Ltd., hereinafter called "Advani" also manufactures electrodes using steel wire rods as raw materials. In their petition, however, they have said : ""The raw materials for manufacture of welding electrodes is steel billets which are rerolled into steel wire rods. M/s. Tata Iron and Steel Company, (hereinafter referred to as ""TISCO"") are one of the Suppliers of the said raw materials to the petitioner. The petitioner places its orders for the billets rerolled into steel wire rods on TISCO. TISCO arranges with the Indian Steel Rolling Mills Nagapattinam (hereinafter referred to as ""ISRM"") to have the billets rerolled into rods and under the instructions of TISCO the rods are delivered to the petitioner. On the basic raw material, namely the steel billets TISCO pays an excise duty of Rs. 365 per M.T. under the Central Excise Tariff Act, 1985. No duty is paid on the steel wire rods at the time of their conversion from billets. It is submitted that the process of rerolling rods into billets does not amount to a manufacture of goods under the Central Excises and Salt Act, 1944 (hereinafter referred to as ""the said Act"") since the rerolling process consists essentially of only reducing the diameter of the billets. In any event as per Notification 208 of 83 dated 1-8-1983 the rods drawn out of billets are exempt from duty.

2. Exercising its rule making power u/s 37 of the Act, Central Government has framed Rules for "Credit of duty paid on excisable goods used as inputs". Such Rules are found under the Division "AA" of Chapter V of the Central Excise Rules, hereinafter called "Rules", consisting of a set of Rules from 57A to 57J. Rule 57A says that the provisions of Division "AA" of the Rules shall apply to such finished excisable goods (hereinafter referred to as the ""final products""), as the Central Government may, by notification in the Official Gazette, specify in this behalf, for the purpose of allowing credit of any duty of excise or the additional duty under Sec. 3 of the Customs Tariff Act, 1975 (51 of 1975), as may be specified in the said notification (hereinafter referred to as the ""specified duty"") paid on the goods used in or in relation to the manufacture of the said final products

(hereinafter referred to as the "inputs") and for utilising the credit so allowed towards payment of duty of excise leviable on the final products,

whether under the Act or under any other Act, as may be specified in the said notification, subject to the provisions of this section and the

conditions and restrictions that may be specified in the notification : provided that the Central Government may specify the goods or class of goods

in respect of which the credit of specified duty may be restricted. To this, there is an explanation which says that for the purposes of this rule

inputs" includes :-

(a) inputs which are manufactured and used within the factory of production or in relation to the manufacture of final products, and

(b)

Exercising this power of allowing credit of any duty of excise or the additional duty u/s 3 of the Customs Tariff Act on the inputs used in or in

relation to the manufacture of final products, the Central Government has been issuing notifications from time to time and specifying the inputs as

well as the duty payable, if any. One such notification has been issued in F. No. B. 22/5/86-TRU, dated 7-4-1986 in supersession of an earlier

direction dated 14-3-1986 stating inter alia that the inputs specified in Column (2) of the Table thereto annexed and falling under the heading Nos.

of the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) specified in the corresponding entry in Column (3) of the said Table, purchased

from outside and lying in stock on or after 1-3-1986 with the manufacturers manufacturing the final products specified in the Notification No.

177/86-C.E., dated the 1st March, 1986, may be deemed to have paid the specified duty at the rates specified in Column (4) of the said Table

and a credit of the specified duty in respect of such inputs used in the manufacture of the said final products on which the duty of excise is leviable

either in whole or in part, may be allowed at the rate specified in Column (4) of the said Table, without production of documents evidencing

payment of duty, but added :

No such credit shall, however, be allowed -

(i) if in respect of any inputs the credit of specified duty paid thereon has already been availed of under any rule or notification granting such credit;

(ii) if such inputs are clearly recognisable as being non-duty paid or charged to

nil rate of duty; or

(iii) if in respect of any inputs where the reduction of duty as provided under the proviso to Notification No. 55/86-C.E., dated 10th February,

1986, is claimed on the ground that the inputs have been manufactured with the aid of electric furnace and documentary evidence exists to show

that the reduced duty has been paid on such inputs. In such cases, actual duty paid should be allowed.

3. Petitioners say that they genuinely believed and they so believed even now that the inputs of their final products come under the exemption and

notwithstanding the said notification they were allowed the credit without any interference by the respondents. The respondents, however, served

upon the petitioners notices alleging that they were not entitled to the exemption and demanding duty accordingly. According to them, the

respondents have already determined that any credit on steel wire rods is inadmissible and accordingly they should demand orders. They

(respondents) have not given to the petitioners any opportunity of being heard in time before deciding to hold that no credit on their inputs is

available and further they (respondents) have insisted with the demand by repeating the notices. The petitioners also allege that the respondents

have not answered their representations in which they demanded a personal hearing. Petitioners have further said that the respondents, who have

alleged that the petitioners have not paid duty of excise, have not followed the statutory requirements of Section 11A of the Act which empowers

the Central Excise Officer to serve notice on the person chargeable with the duty which has not been levied or paid or which has been short-levied

or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the

notice, and which also fixes a time limit for such a notice saying that such a notice has to be issued within six months from the relevant date. Besides

the above, the petitioners have questioned the demand saying that their cases do not fall under the exceptions in the Notification dated 7-4-1986

inasmuch as their inputs can now be said to be "non-duty paid" or charged to "nil rate of duty" as well as that they have not availed of under any

Rule or Notification any credit on their inputs or any part of the duty.

4. Respondents/State have filed a common return stating as follows :

The petitioner herein are engaged in the manufacture of welding electrodes falling under Chapter Heading 83.10 of Central Excise Tariff. They

manufacture welding electrodes out of steel wire rods (falling under Chapter Heading 72.09) which in turn has been rerolled out of steel billets.

These steel billets are liable to pay duty at Rs. 365/- per metric ton under Heading 72.07. If steel wire rods are manufactured out of duty paid

billets, then duty on steel wire rods are exempted from duty in terms of Notification No. 208/83 on the condition that no credit of duty paid on the

billets has been taken by following the procedure prescribed under Rule 56A or 57A.

The petitioners herein procure steel wire rods from M/s. Indian Steel Rolling Mills (I.S.R.M.) M/s. I.S.R.M. obtain steel billets on which duty at

Rs. 365/- per metric ton has been paid, from M/s. T.I.S.C.O., Jamshedpur, and re-roll the same into steel wire rods according to the requirements

of the petitioners herein. M/s. I.S.R.M. Nagapattinam clear the steel wire rods intended for the petitioner without payment of duty in terms of the

full exemption from duty granted under Notification No. 208 of 1983.

The petitioner, had been taking credit of duty paid at Rs. 365/- per metric ton, in respect of steel wire rods (inputs) received from M/s. I.S.R.M.

purportedly under the MODVAT Scheme. The petitioner stated that they had been taking the MODVAT credit in terms of Government of India's

direction F. No. B. 22/5/86-TRU, dated 7-4-1986. This order of the Government was issued under authority of proviso to Rule 56G(2).

Rules 57A to 57-I provide for taking instant credit of duty of excise paid on the goods used as inputs or in relation to the manufacture of the final

product, and the procedure to be followed therefor. This Scheme is known as MODVAT Scheme. This Scheme envisages credit of duty, actually

paid on the inputs used in the manufacture of the final product. It also envisages strict proof showing payment of duty on the inputs and production

of duty paying documents. However, proviso to Rule 57G(2) relaxes the condition for strict proof of payment of duty on the inputs used. It

empowers the Government to issue such directions subject to certain condition as the Govt. may deem fit, waiving production of documents

evidencing payment of duty. The Government of India issued the aforesaid directives F. No. B. 22/5/86 dated 7-4-1986 under the 2nd proviso to

Rules 57(G)(2).

According to the directions of the Government of India, certain specified inputs purchased from outside, any lying in stock on or after 1-3-1986

with the manufacturer, manufacturing a final product, specified in the Notification No. 177/86, may be deemed to have paid the duty at the rates

specified in the directives and the credit of the said duty in respect of the specified goods used in the manufacture of final products which excise

duty is leviable either in whole or in part may be allowed without production of documents evidencing payment of duty. The direction, however,

stipulated that no such credit shall be allowed if such inputs are clearly recognisable as being non-duty paid or charged to "nil" rate of duty.

Steel wire rods falling under Chapter 72.09 and used as input in the manufacture of welding electrodes is one such specified input enumerated in

the Government of India's directions. There is no need for production of documentary evidence to show that duty has been paid on the steel wire

rods unless it is clearly recognisable that no duty has been paid or it has been charged to "nil" rate of duty. In the case of the petitioner, it is clearly

established that steel wire rods received by them from M/s. I.S.R.M. have been cleared by M/s. I.S.R.M. without payment of duty under

Notification No. 208/83.

The contention of the petitioner that duty paid by M/s. T.I.S.C.O. at Rs. 365/- per metric tonne on steel billet sent to M/s. I.S.R.M. for rolling out

steel wire rods can be availed as MODVAT credit is not tenable. The billets on receipt by M/s. I.S.R.M. are rolled into steel wire rods and

cleared without paying any duty under a Central Excise gate pass and sent to the petitioner for manufacture of welding electrodes. Since it is clearly

recognisable that no duty has been paid on the inputs viz. steel wire rods, the petitioner is not eligible for any MODVAT credit even though duty

was paid on the steel billets at T.I.S.C.O. and supplied thereafter to M/s. I.S.R.M. The condition stipulated in the Government of India's directive

have not been complied with. Hence any MODVAT credit taken in respect of purported duty involved on the steel wire rods is liable to be

expunged.

The respondents have also stated that the Superintendent of Central Excise, Range VII-D, directed Rockweld to expunge the deemed credit on

the wire rods from 1-3-1986 onwards by his letters dated 5-1-1987, 10-2-1987, 20-3-1987 and 29-4-1987 and the Assistant Collector,

Madras VII Division passed a speaking order dated 23-6-1987 against which order Rockweld have come to this Court. The order would show

that the demand is based on a true implementation of the Notification which has not exempted inputs on which duty was not paid or which was

charged to nil rate of duty. They have maintained that the petitioners have not understood properly the Government of India's Order dated 7-4-

1986 and have not understood the distinction between the payment of duty on inputs and production of duty paying documents for taking

MODVAT credit. According to them, what the order provides for is the relaxation given in the order dated 7-4-1986 that is only for production of

duty paying document but it does not allow taking credit on inputs on which duty has not at all been paid. According to them, the petitioners are

trying to interpret the order stating that all the inputs notified in the order dated 7-4-1986 should be deemed to have paid duty whether duty has

been actually paid or not and therefore contend that the condition imposed in the Government of India order dated 7-4-1986 is contrary to the

scope of Rule 57G(2). The conditions imposed in the order is only to effectuate the object of the MODVAT scheme. When no duty has been paid

on the input there is no question of permitting MODVAT credit. They have however admitted that the petitioners have submitted their returns

regularly, but in that have erroneously credited the duty which they are liable to pay. They have answered the allegation of the violation of the

principle of natural justice as under :

The above averments of the petitioner are incorrect. The petitioners were first informed of their ineligibility to deemed credit facilities on 5-1-1987

by the Superintendent and subsequently on 10-2-1987, 20-3-1987 and 29-4-1987. The petitioners in their letter MAN/300 dated 4-5-1987

addressed to the Superintendent of Central Excise VII-D Range and copy endorsed to Assistant Collector, Madras VII Division, have stated that

they would comply with the instructions of the Superintendent after getting clearance from their Head Quarters Office. After that no communication

was received from the petitioner and therefore the Assistant Collector passed an order dated 23-6-1987 in his file C. No. IV/16/36/87 T. 5. It is

therefore submitted that the petitioners were fully aware of the situation much earlier and the petitioner cannot argue at a later date that they have received the communication suddenly and there is no speaking order on the issue. Thus it may be seen that the petitioners had reasonable time to explain their difficulties immediately after receipt of the Superintendent's letter dated 29-4-1987 but they have not raised any objections to the Superintendent's letter. Instead they stated that they would comply with the same on receipt of the clearance from their Head Office. It therefore, proves that they were aware of wrong availment of credit.

5. Prior to the Notification dated 7-4-1986, as we have noticed, there have been notifications making provision for deemed credit in respect of certain kinds of products/or inputs. Courts were frequently called upon to interpret such notifications and the Government itself on many occasions issued clarifications or gave it own interpretations to such notifications. A notification exempting steel ingots falling under Item No. 26 of the First Schedule to the Act from the whole of the duty of excise leviable thereon has been issued on 1-3-1973 which provided that :

(a) all such ingots are manufactured exclusively from fresh unused steel melting scrap on which the appropriate duty of excise leviable under the aforesaid Item No. 26 of the said First Schedule has already been paid; and
(b) no set off or proforma credit has been availed of in respect of the duty paid on such steel melting scrap used in the manufacture of steel ingots.

The above was followed by yet another notification on 18-6-1977 exempting fresh unused, steel melting scraps of the types commonly known as

(i) skull scraps, (ii) broken ingot moulds, (iii) butts and shorts, (iv) mould splashings which arise in steel melting shops, and (v) turnings and borings, falling under Item No. 26 of the First Schedule to the Act from the whole of the duty of excise leviable thereon provided that :

(a) such fresh unused steel melting scrap is cleared direct from an integrated steel plant and it is proved to the satisfaction of an Officer not below the rank of an Assistant Collector of Central Excise that such scrap is intended to be used as melting scrap in the manufacture of steel ingots or semi-finished steel, as the case may be, by a manufacturer manufacturing such ingots or semi-finished steel with the aid of electric furnace; and
(b) the procedure set out in Chapter X of the Central Excise Rules, 1944 is

followed.

6. The question as to what may be the meaning of the expression ""appropriate duty ... has already been paid"" came up for determination in the

case of Tata Yodogawa Limited and Another Vs. Union of India(UOI) and Others, on a reference by a learned single Judge before a Division

Bench of the Patna High Court. One of us, who delivered the judgment in the Patna High Court, noticed that in the case of N.B. Sanjana, Assistant

Collector of Central Excise, Bombay and Others Vs. The Elphinstone Spinning and Weaving Mills Company Ltd., the Supreme Court taking note

of a rule which provided,

Recovery of duties or charges short-levied, or erroneously refunded. - When duties or charges have been short-levied through inadvertence,

error, collusion or misconstruction on the part of an officer, or through mis-statement as to the quantity, description or value of such goods on the

part of the owner, or when any such duty or charge, after having been levied has been owing to any such cause, erroneously refunded, the person

chargeable with the duty or charge, so short-levied, or to whom such refund has been erroneously made, shall pay the deficiency or pay the

amount paid to him in excess, as the case may be on written demand by the proper officer being made within three months from the date on which

the duty or charge was paid or adjusted in the owner's account-current, if any, or from the date of making the refund.

has said :

(1) Expression "paid" in the context of a particular statute may mean ""ought to have been paid"" and (2) Nil assessment may mean ""assessed to

duty"".

and quoted with approval what is said in a judgment of the Court of Appeal in the case of Allen v. Thorn Electrical Industries Ltd. 1968 I. Q.B.

487 :

The literal meaning of the expression "paid" as actually paid in cash has again not been adopted by the Court of Appeal in the case of Allen v.

Thorn Electrical Industries Ltd. (1968) I Q.B. 487. Having regard to the context in which the said expression appeared in the particular provision

which came up for interpretation the Court of Appeal construed the said expression to mean ""contracted to be paid.

After a detailed study of this aspect of the law, the Patna Bench has said :

The expression ""paid"" in the rule quoted above was given a meaning in the context of the law under consideration by the Supreme Court and it

found no error in reading the expression ""paid"" as ""ought to have been paid"". The law stated by the Supreme Court without any ambiguity makes

one aware that the literal meaning of the expression ""paid"" as actually paid in cash need not be accepted.

Similarly after taking stock of the meaning as to levy of tax and collection of tax in accordance with the imposition or levy, the Patna Bench has

said that assessment includes nil duty and the expression "paid" has to be construed to mean contracted to be paid and it is not necessary that

some amount of duty should have been assessed and actually paid for extending the exemption to such inputs which may be exempted in case duty

had already been paid. The Patna Bench, however, had the advantage of contemporanea expositio of notification caring interpretation of the

expression "already paid" issued by the Government of India or on its behalf. The case before the Patna Bench had the advantage of the

application of the doctrine of promissory estoppel and the bar u/s 11A of the Act in the enforcement of the demand of the taxes. There is,

however, no contemporary exposition on the words ""non-duty paid"" or ""charged to nil rate of duty"" by the respondents and so, the petitioners do

not have the advantage of the rule of the principle of contemporanea expositio. There is also no scope for invoking the doctrine of promissory

estoppel in the instant cases, as there is nothing shown in the conduct of the respondents or the petitioners suggesting any promise by the

respondents that can be used to stop them from making any demand from the petitioners. A plea as to the non-compliance with the requirements

of Section 11A of the Act, however, has been expressly raised in these cases and we have to advert to this aspect of the controversy between the

parties in some detail.

7. In view of the weighty authorities noticed in the judgment and the interpretation of the words "nil duty and paid or already paid" almost

universally accepted, we have to see as to what meaning the words ""non duty paid"" or ""charged to nil rate of duty"" should receive in the

Notification dt. 7-4-1986. The words ""duty paid"" can receive no other meaning

than one approved judicially and universally accepted, that is, ought to have been paid or contracted to be paid. "Non-duty paid" in that context has to be read, non-duty ought to have been paid or non-duty

contracted to have been paid. "Non" however is a prefix which gives the negative sense of the words with which it is combined. The new edition

for the 1990s of the Concise Oxford Dictionary says,

Non-(non)/prefix giving the negative sense of the words with which it is combined especially

(1) not doing or having or involved with (non-attendance, non-payment, non-productive).

(2) a. not of the kind or class described, (non-alcoholic, non-member, non-event)

b. forming terms used adjectively, (non-union, non-party)

(3) a lack of (non-access)

(4) (with adverbs) not in the way described, (non-aggressively)

(5) forming adjectives from verbs, meaning that does not or that is not meant to (or to be non-skid, non-iron)

(6) used to form a neutral negative sense when a form in (in or un-has a special sense or (usu. unfavourable) connotation (non-controversial, non-

effective, non-human). The number of words that can be formed with this prefix is unlimited, consequently only a selection, considered the most

current or semantically noteworthy, can be given here (from or after ME no (u)n-f. AF noun, OF-non, nom-f, L-non not).

When "duty" is a noun, non as a prefix can be said to have been used adjectively. When "duty" is used first in the expression "duty paid", the

former is a noun, the latter a verb. Compound nouns are accepted in English language and some verbs used in participles are used as nouns. The

common prefix of negation as Black's Law Dictionary also say, for which the word "non" stands unless extended to the expression "duty paid"

carries not much sense as "non duty" in that event will mean no duty and the words "non duty paid" will only mean when no duty has been

contracted to be paid.

8. When compared to the expression "non duty paid", the expression "charged to nil rate of duty" is more explicit, as this conveys in no uncertain

terms that the commodities as it conveys in the context of the notification, the

inputs which are charged to nil rate of duty, meaning, which are assessed to nil rate of duty and thus, no duty is charged for the reason of nil assessment.

9. Interpretation of these expressions "non duty paid", or "charged to nil rate of duty" has fallen in quite a controversy. East Regional Bench of the

Central Excise Tribunal at Calcutta in "two judgments, one dated 9/1/1991 in the case of 1991 (55) ELT 279 and another dated 18-01-1991 in

the case of 1992 (40) ECR 94 has given one meaning. The North Regional Bench of the Tribunal at New Delhi in 1992 (42) ECR 246 and the

Bombay Bench in the case of 1990 (25) ECC 474 have taken a different view. The Madras Bench of the Tribunal, which has taken the line of the

East Regional Bench judgment as in the case of 1992 (61) ELT 703 felt the desirability of referring the matter to the Larger Bench of the Tribunal

in view of the decision of West Regional Bench, i.e. 1990 (25) ECC 474 One view is to the effect that the words "charged to nil rate of duty"

appear to have a special significance. Section 3 of the Central Excises and Salt Act is the charging section. Thereunder, it is laid down that duty of

such excise on all excisable goods shall be levied and collected at the rates set forth in the First Schedule. Hence, levy and collection on excisable

goods is to be done as per the rates set forth in the First Schedule. Where duty on any goods is leviable at nil rate of duty as per the Schedule,

such goods may be construed to be the goods charged to nil rate of duty. Where goods are charged to rates specified as set out in the Schedule

and they are exempted by way of an exemption notification under Rule 3(1) of the Central Excise Rules, they could be construed as goods subject

to the rates specified in the First Schedule but are exempted and they cannot be construed as goods charges to nil rate of duty. Similarly, if for the

reason of exemption, duty is not charged and but for the exemption or credit that was required to be paid, such inputs shall not be recognisable as

being non-duty paid. The other view is that a distinction has to be maintained between the expression "charged to nil rate of duty" and "nor

chargeable to nil rate of duty". "Charged to nil rate of duty" will only mean that nil rate has been applied and "non-duty paid" must mean duty not

paid or duty has not been paid and if duty has not been paid for the reason of any exemption, it should mean, since no duty has been paid, the

input is not available for the credit.

10. A learned single Judge of the Punjab and Haryana High Court as in the case of Upper India Steel Mfg. and Engg. Co. Ltd. Vs. Union of India

(UOI), has made, however, an order mainly of course on the [contention] of the learned counsel appearing for the parties that the general rule is as

stated in sub-rule (2) of Rule 57G framed under the Act which is to the effect that in order to avail a deemed credit, the input must inter alia be

accompanied by documents prescribed by the Central Board of Excise and Customs evidencing payment of duty of such inputs. The second

proviso to the said rule contains an exception. It empowers the Central Government to notify inputs which would be deemed to be duty paid so as

to obviate the necessity of documents showing payment of duty. By the above legal fiction, the Central Government could declare all stocks of

inputs in the country to be duty paid for the limited purposes in question without production of duty paying documents. This was, however, subject

to the exception noted in Rule 57G itself. The second proviso referred to above thus conferred a very wide power on the Central Government with

regard to the legal fiction that duty has been paid without production of necessary documents evidencing payment of the duty, but, this is no reason

to conclude that the notification issued in pursuance of the said second proviso was equally in its sweep. The scope of the notification issued has

necessarily to be gathered from the words used therein. In this judgment, it is observed on a Notification dated March 1, 1986, which reads :

(i) if in respect of any inputs, the credit of specified duty paid thereon has already been availed of under any rule or notification granting such

credit;

(ii) if such inputs are clearly recognisable as being non-duty paid or charged to nil rate of duty; or

(iii) if in respect of any inputs where the reduction of duty as provided under the proviso to Notification No. 55/86-C.E., dated the 10th Feb.,

1986, is claimed on the ground that the inputs have been manufactured with the aid of electric furnace and documentary evidence exists to show

that the reduced duty has been paid on such inputs, that in such cases actual duty paid should be allowed.

That the contention of the learned counsel for the petitioners is that the burden

of proving that a certain input falls in any one of the exceptions enumerated at (i) to (ii) above is on the department, the tenor of the notification Annexure P3 being to cover all inputs as deemed to have paid the duty without production of documents evidencing payment of duty. It was also argued that the system in force in the country is such that without payment of requisite duty no scrap can come out of the factory gate. The scrap changes several hands before it is ultimately purchased by the manufacturer for production of the final products. In such circumstances, the purchaser was entitled to presume that necessary duty had already been paid. It was also pointed out that goods liable to Central Excise duty brought into the market without payment of the duty were liable to confiscation. The fact that waste and scrap of steel is openly sold in the market raises the presumption that necessary duty had been paid. It was also argued that the petitioners could not be required to prove a negative proposition that certain input in respect of which they were claiming deemed credit was not a non-duty paid or charged to nil rate of duty item.

On a careful consideration, I find myself unable to accept the above contention. It has been stated that the notification Annexure P-3 in the nature of an exception. The normal rule of construction is that if a person wants to avail of the exception, it is for him to make out a case showing that he is covered by the exception. The issuance of the notification Annexure P-3 dated April 7, 1986, and the prescription of the three exceptions reproduced above, clearly indicates that the matter has not been left to presumptions. It is regulated by positive rules, inter alia, by notification issued under Rule 57G(2). The petitioner in order to avail of the deemed credit has to take a stand in the various returns which are required to be filed. It is for the department to verify the stand thus taken and either to allow or contest the same. I am of the considered view that there is no general rule that the burden is on the department to show that a certain input is recognisable as being non-duty paid or charged to nil rate of duty.

In my view, the initial burden is on the manufacturer claiming deemed credit to take a definite stand with regard to a certain input. It is then open to the department to accept that claim or to contest the same.

We have noted some of the features of the notification under which petitioners claim the credit and noted that much of the controversy has arisen

on account of the inapt and injudicious use of the words like non-duty paid and charged to nil rate of duty. It is often said that words and language are poor vehicles of ideas and thoughts. Where intendment is clear, there is no difficulty for a Court in understanding the meaning even of inapt and injudicious expressions but then, there are rules of interpretation which limit the role of a Court of Law. If there are ambiguities, Courts can interpret and remove the ambiguities. If there are omissions, Court cannot introduce in a Legislation words of their own to fill up the gap. We would have given our own interpretation, but for the other two contentions that we have already noticed and in case we have to interfere with the notices of demand for the reason of any of the said two grounds, we shall have to remit the case to the proper Authority for compliance with the requirements of law. We are informed that the reference made to the Larger Bench of the Tribunal by the Madras Bench of the Tribunal in 1992

(61) ELT 703 is still to be disposed of. Those who are regularly attending to the tax disputes and involved in the interpretation of the taxing statutes, are themselves, it appears, seized with the problem of giving a proper meaning to the expressions "non-duty paid" and "charged to nil rate of duty". If Court is required to go into this question despite a verdict by a Larger Bench of the Tribunal, the Court may do so, but in our opinion, any final verdict by us on the subject should await the decision of the Larger Bench of the Tribunal.

11. A learned single Judge of this Court in Ennore Steel Enterprises Limited Vs. Union of India, has, after taking notice of Rules 57A and 57G in particular, and the contention that Rule 57A is ultra vires Section 11A of the Act, quashed the demand notices on the short ground of violation of principles of natural justice, saying as follows :

In so far as the contentions in W.P. Nos. 13564, 13566 of 1986 are concerned, the petitioner is well founded in his contention that though in terms, Rule 57-I does not contemplate the issue of a show cause notice and an opportunity to the person likely to be affected by the adverse orders that may be passed under Rule 57-I, it is elementary that insofar as the orders are likely to affect adversely the interest of the petitioners and involve him in other liabilities that before passing orders under Rule 57-I, the third respondent should issue a show cause notice to the petitioners

stating the circumstances under which the powers under the said rule is to be invoked and an opportunity to the petitioners should be given to state

their case. This line of thinking is supported by the decision of the Madhya Pradesh High Court in *Steel Ingots Private Limited v. Union of India*

[1988 (36) E.L.T. 529]. There is held : "In the instant case, no opportunity was admittedly given to the petitioners to show cause before passing

the impugned orders under Rule 57-I. These orders, therefore, deserve to be quashed on this short ground."

Madhya Pradesh High Court relied on the judgment of the Supreme Court in *Ramana Dayaram Shetty Vs. International Airport Authority of India*

and Others, and *Olga Tellis and Others Vs. Bombay Municipal Corporation and Others*, "".

While we do not propose to multiply the authorities, we may here indicate the basic, namely, that in all actions of men in power, authorities,

Tribunals, which visit or intend to visit any person with a civil consequence, rules or principles of natural justice enter automatically, if there is no

specific bar in this behalf. The orders or notions, which visit or intend to visit anyone with civil consequences, are ordinarily included in the category

of quasi-judicial orders. Quasi-judicial orders must conform to the rules or principles of natural justice. While it is so, in respect of quasi-judicial

orders, the Courts in India have recognised the rule of fair play or fairness in action as a rule inherent in all administrative actions. There has been

two well recognised principles of natural justice, (1) that a Judge or an Umpire, who is entrusted with a duty to decide a dispute should be

disinterested and unbiased (*nemo iudex in causa sua*); and (2) that the parties to dispute should be given adequate notice and opportunity to be

heard by the authority (*audi alteram partem*). In the former, the expression "Judge" or "Umpire" does not mean a Judge presiding in a Court of law

or an umpire deciding a dispute between two individuals. It is a concept extended to any person who has been given the authority to adjudicate or

act in his discretion within the bounds of law and in that sense thus it embraces persons, who, exercising their authority, call upon another to do a

thing which might cause prejudice to him. The second rule is similarly understood. It not only to be found in the acts of the Judges or Umpires, but

in the acts of all such persons in authority, who call upon another to do a thing which they think they are not bound to do. A third rule has since

been recognised, called the rule of speaking orders, as observed in the judgment of the Supreme Court in the case of The Siemens Engineering and

Manufacturing Co. of India Ltd. Vs. The Union of India (UOI) and Another, and in Bharat Raja Vs. The Union of India (UOI) and Others, . This

rule means that a Tribunal or authority acting in quasi-judicial capacity is required to give reasons in support of its order. The three rules

aforementioned are reiterated by a Constitution Bench of the Supreme Court in AIR 1990 1426 (SC) , saying that these rules must inhibit every

quasi-judicial act pertaining to public law field. Rule 57A says that, MODVAT credit shall be available on the inputs used in the manufacture of

finished products at the discretion of the Central Government, as it says, "the Central Government may by notification in the Official Gazette,

specify in this behalf, for the purpose of allowing credit of any duty of excise or the additional duty u/s 3 of the Customs Tariff Act, 1975 (Act 51

of 1975), as may be specified in the said notification (hereinafter referred to as the "specified duty") paid on the goods used in or in relation to the

manufacture of the said final products (hereinafter referred to as the "inputs) and for utilising the credit so allowed towards payment of duty of

excise leviable on the final product...". Rule 57G lays down the procedure to be adopted by the manufacturer seeking credit of the duty paid on

inputs under Rule 57A, saying "every manufacturer...shall file a declaration...indicating the description of the final products manufactured in his

factory and the inputs intended to be used in each of the final products and such other information...and obtain an acknowledgment of the said

declaration" and permits credit of the duty paid on the inputs, provided that no credit is allowed unless the inputs are received in the factory in the

cover of a gate-pass, and under a bill of entry or any other document restrained by the Central Government or Board of Customs in this behalf

evidencing the requirement of duty on such inputs.

12. Rule 57-I, however, has undergone a substantial amendment and reads after amendment, vide Notification dated 6-10-1988, as follows :

Recovery of credit wrongly availed of or utilised in an irregular manner :

1(i) Where credit of duty paid on inputs has been taken on account of an error, omission or misconstruction, on the part of an officer or a

manufacturer, or an assessee the proper officer may, within six months from the

date of such credit, serve notice on the manufacturer or the assessee who has taken such credit requiring him to show cause why he should not be disallowed to such credit and where the credit has already been utilised, why the amount equivalent to such credit should not be recovered from him :

Provided that where such credit has been taken on account of wilful mis-statement, collusion or suppression of facts on the part of a manufacturer or an assessee, the provisions of this clause shall have effect as if for the words "six months" the word "five years" were substituted.

(ii) The proper officer, after considering the representation, if any, made by the manufacturer or the assessee on whom notice is served under

clause (i), shall determine the amount of such credit to be disallowed (not being in excess of the amount specified in the show cause notice) and

thereupon such manufacturer or assessee shall pay the amount equivalent to the credit disallowed, if the credit has been utilised, or shall not utilise

the credit thus disallowed.

(2) If any inputs in respect of which credit has been taken are not fully accounted for as having been disposed of in the manner specified in this

section the manufacturer shall upon a written demand being made by the Assistant Collector of Central Excise pay the duty leviable on such inputs

within 10 days of the notice of demand.

Before amendment, Rule 57-I stood as follows :

Recovery of credit wrongly availed of or utilised in an irregular manner :

(1) If the credit of duty paid on inputs has been taken wrongly, the credit so taken may be disallowed by the proper officer and the amount so

disallowed shall be adjusted in the credit account or the account-current maintained by the manufacturer or if such adjustments are not possible for

any reason, by cash recovery from the manufacturer of the said goods.

Provided that such manufacturer may make such adjustments on his own in the credit account or the account-current maintained by him under

intimation to the proper office.

(2) If any inputs in respect of which credit has been taken are not fully accounted for as having been disposed of in the manner specified in this

section the manufacturer shall upon a written demand being made by the

Assistant Collector of Central Excise pay the duty leviable on such inputs within ten days of the notice of demand.

A glance at this rule, as it existed before 6-10-1988, and as has now been amended, will show that all elements that exist in Section 11A of the

Act are incorporated in the amended rule, but before amendment the rule appeared not to contemplate any notice calling upon the defaulter

manufacturer to show cause why he should not be disallowed to the credit or where the credit had already been utilised why the amount equivalent

to such credit, should not be recovered from him. There was also no provision for such notice to be given within a period of six months or within a

period of five years, as the case may be, depending upon the facts that are mentioned in the amended rule or in the rule that existed before 6-10-

1988. Section 11A reads as follows :

Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded - (1) When any duty of excise has not been levied

or paid or has been short-levied or short-paid or erroneously refunded, a Central Excise Officer may, within six months from the relevant date,

serve notice on the person chargeable with the duty which has not been levied or paid or which has been short-levied or short-paid or to whom the

refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice :

Provided that where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of

fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made

thereunder with intent to evade payment of duty, by such person or his agent, the provisions of this sub-section shall have effect, as if, for the

words "Central Excise Officer", the words "Collector of Central Excise" and for the words "six months", the words "five years" were substituted.

Explanation : Where the service of the notice is stayed by an order of a court, the period of such stay shall be excluded in computing the aforesaid

period of six months or five years as the case may be.

(2) The Assistant Collector of Central Excise or, as the case may be, the Collector of Central Excise shall, after considering the representation, if

any, made by the person on whom notice is served under sub-section (1),

determine the amount of duty of excise due from such person not being in excess of the amount specified in the notice and thereupon such person shall pay the amount so determined.

(3) For the purpose.....

It says clearly that when any duty of excise has not been levied or has been short-levied, when any duty of excise has not been paid or has been

short-paid, or when any duty of excise has not been paid or has been short-paid, or when any duty of excise has been erroneously refunded, a

Central Excise Officer may, within six months from the relevant date, serve notice on the person chargeable with the duty, which has not been

levied or paid or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why

he should not pay the amount specified in the notice. A person, who is not found entitled to MODVAT credit, as contemplated under Rule 57A

aforementioned, will undoubtedly be a person chargeable with the duty and if the requisite duty has not been levied or has not been paid or has

been short-levied or short-paid or erroneously refunded, his case will come u/s 11A. A rule to stand the test of validity had to serve the purposes

of the Act. The rule making power in Section 37 of the Act says, "The Central Government may make rules to carry into effect the purposes of this

Act" and specifies, in particular, and without prejudice to the generality of these matters for which rules can be framed. We have already noticed

rules in Section "AA" of the Rules are framed to prescribe the procedure for availing of the credit of duty paid on the inputs. Rules, when validly

framed, become part of the Act and the exist along with other provisions of the Act. Rules in Section "AA" of Chapter V of the Central Excise

Rules shall thus have to be read as part of the main Act. They cannot be read as special rules as if that will have independent existence. These rules

shall in no way destroy a valuable right of the person chargeable with the duty, recognised u/s 11A of the Act, for a notice to show cause why he

should not pay the amount specified in the notice.

13. The omission in Rule 57-I before amendment of any mention of a notice to the manufacturer, the person chargeable to duty to show cause,

cannot/could not absolve the respondents of their obligation in terms of Section 11A of the Act to serve a notice upon the petitioners to show

cause within the period of limitation prescribed therein. On the above principle, as we find applicable in all fours on the facts of the instant case, we

have no hesitation in holding that even while acting under Rule 57-I, as it existed prior to the amendment, the respondents were obliged to issued

notice calling upon the petitioners to show cause why they should not be disallowed MODVAT credit on the inputs and if the credit had already

been utilised why the amount, equivalent to such credit, should not be recovered from them, before issuing a written demand, as contemplated

under sub-rule (2) thereof.

14. We are thus of the opinion that notwithstanding the rule, which did not contemplate any notice or any period of limitation for the demand, the

rule of limitation, as found in Section 11A of the Act, has still to be applied to the case of the petitioners. We have come to this conclusion

following the rule of strict construction of a taxing statute. It is said in Maxwell on the Interpretation of Statutes - 10th Edition, Page 284,

The tendency of modern decisions, upon the whole, is to narrow down materially the difference between what is called a strict and beneficial

construction"".

No doubt one has to look merely on what is clearly said in a taxing statute. There is no room for any intendment. There is no equity about a tax.

There is no presumption as to a tax. Nothing has to be read in, nothing has to be implied, one can only look fairly at the language used. (See Cape

Brandy Syndicate v. I. R. C. (1921) 1 K.B. 64. Even so that fundamental rule of construction is the same for all statutes, whether fiscal or

otherwise. To arrive at the real meaning, it is always necessary to get an exact conception of the aim, scope and object of the whole Act. But, as

pointed out by a Division Bench of the Calcutta High Court in Commissioner of Income Tax Vs. Vegetable Products Ltd., and the judgment of the

Supreme Court affirming the said Calcutta decision in The Commissioner of Income Tax, West Bengal 1, Calcutta Vs. Vegetables Products Ltd.,

and stated in a Full Bench decision of Patna High Court in the case of Jamunadas Mannalal Vs. Commissioner of Income Tax, , we have

construed the provisions of the rules following,

when a provision is ambiguous or is capable of two meanings, the construction beneficial to the citizen should be adopted"".

15. When we return to the facts of the case to see how the respondents have proceeded in the case, their answer to the violation of the principles of natural justice has already been referred to above. The only notice given to the petitioners is one falling under sub-rule (2) of Rule 57-I, as it existed before 6-10-1988, that notice has to come only after the notice, calling upon the petitioners to show cause why they should not pay the amount, as specified in the notice. The notice calling upon the petitioners to show cause has to conform to the requirements of Section 11A of the Act and thus should be within six months or within five years, as the case may be, depending upon the fact, for which periods of limitation of six months and five years are respectively contemplated. Respondents are persons who are expected to know the law and follow strictly the procedure for realisation of taxes. They are duty-bound to ensure that no one escaped the tax liability, dodged revenue and unfairly benefited himself by not paying the taxes. They are required, however, to act with caution when proceeding to implement the laws, which have far reaching consequences. They cannot, assume into themselves a finality of the judgment as to the tax liability of certain persons, without informing them of the grounds on which they have come to think that the person concerned had not paid the tax or had short-paid the tax or he had not been levied to tax or had been short-levied. It is only after knowing what is the representation of the person, who is chargeable to tax, in the situations as above, that they should decide to issue demand notice. Any ex parte decision without affording opportunity of being heard to a tax payer, in the situations of this kind, in our opinion, apart from what is stated in Section 11A, shall be hit by the principle of audi alteram partem, one of the three well recognised rules of the principles of natural justice.

16. We are not adverting in this case to decide whether it can be said definitely, on the facts, as presented before us, that petitioners have any plea of limitation available and that the demand notices, for the reasons of admitted facts, are barred by limitation. The reasons for our not doing so are :

(1) Pleadings and facts in this behalf are insufficient;

(2) Respondents had not approached the case with this in their mind and they may, in the situation that may be found, after remand, themselves find

whether a claim now by them will be barred by limitation or not and whether to

call upon the petitioners to show cause or not.

For the reasons aforementioned, we are inclined to interfere with the demand notices. Accordingly, the orders C. No. IV/16/36/87 T. 5, dated

23-6-1987 of the Assistant Collector of Central Excise against the petitioners in W.P. No. 7505 and 8210 of 1987 are quashed. The

respondents, however, may proceed with the matter by issuing notices calling upon the petitioners to show cause and decide after giving

opportunity to the petitioners of being heard in accordance with law. Writ Petitions Nos. 7505 and 8210 of 1987 accordingly allowed to the

extent indicated above.

17. We need not specifically advert to the validity of the Notification F. No. B. 22/5/86-TRU, dated 7-4-1986, which has been challenged in

W.P. No. 8211 of 1987, for no specific arguments had been advanced in this behalf. We are, however, of the opinion that there cannot be any

valid challenge to the notification for the obvious reason that the power to issue such notifications for granting credit on inputs etc., has been

specifically recognised in the Rules and no one can have any objection if only certain kind of inputs are exempted. For this reason, W.P. No. 8211

of 1987 is dismissed. On the facts and in the circumstances of the case, there shall, however, be no order as to costs in all the three Writ Petitions.