

(2012) 05 DEL CK 0292

In the Delhi High Court

Case No : Writ Petition (Civil) No's. 271 of 2012, 273 of 2012, 378 of 2012, 3215 of 2011, 3242 of 2011 and 3696 of 2011

Commissioner of Central Excise, Delhi-I

APPELLANT

Vs

Joint Secretary(Revisionary Authority) and Another

RESPONDENT

Date of Decision : 02-05-2012

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11B, 11B(2), 11B(2)(a), 3(1), 35EE
Customs Act, 1962 — Section 12, 14
Customs Tariff Act, 1975 — Section 2, 3, 3(1)
Finance Act, 2001 — Section 136
Finance Act, 2003 — Section 157, 169
Finance Act, 2004 — Section 3
Finance Act, 2005 — Section 85

Citation : (2013) 287 ELT 177

Hon'ble Judges : Sanjiv Khanna, J;R.V. Easwar, J

Bench : Division Bench

Advocate : Satish Kumar, Standing Counse, for the Appellant; Rajeev Tuli, G.K. Sarkar, Mr. A.Mishra and Mr. Saurabh Yadav, for the Respondent

Final Decision : Dismissed

Judgement

Sanjiv Khanna, J.—These writ petitions have been preferred by Commissioner of Central Excise, Delhi-I impugning orders passed by the Government of India u/s 35EE of the Central Excise Act, 1944(Act, for short). The said orders are authored by Joint Secretary to the Government of India, who has been authorized to pass orders under the said Section in exercise of revisionary jurisdiction. Respondent No. 2 to the present writ petitions are the private parties, who have succeeded in the revision petition before the Joint Secretary, Government of India. We are not required to deal with the individual facts in each of the writ petitions as the controversy and issue raised is legal. Facts relevant for the present decision may however be noticed. The respondent No. 2 assesses are manufacturer exporters of stainless steel utensils (not trader or merchant exporters) and had made applications for rebate/refund of the

Countervailing Duty or additional duty (hereinafter referred as CVD) paid on the inputs utilized for manufacture. These applications were made under Rule 18 of the Central Excise Rules, 2002, read with notification No. 21/2004-CE(NT) dated 6th September, 2004. In some cases, the applications were dismissed, in others the applications were allowed. However, in all cases the matter was taken up in appeals before the Commissioner (Appeals) and then made subject matter of revision petitions u/s 35EE of the Act. As noticed above, the Central Government has held that the respondent No. 2 assessee is entitled to rebate/refund of the CVD paid on the inputs.

2. CVD is imposed when import is made under the Customs Act, 1962 read with Section 3 of the Customs Tariff Act, 1975.

3. Section 3 of the Customs Tariff Act, 1975 reads as under:

3. Levy of additional duty equal to excise duty. (1) Any article which is imported into India shall, in addition, be liable to a duty (hereafter in this section referred to as the additional duty) equal to the excise duty for the time being leviable on a like article if produced or manufactured in India and if such excise duty on a like article is leviable at any percentage of its value, the additional duty to which the imported article shall be so liable shall be calculated at that percentage, of the value of the imported article. Explanation.- In this section, the expression "the excise duty for the time being leviable on a like article if produced or manufactured in India" means the excise duty for the time being in force which would be leviable on a like article if produced or manufactured in India or, if a like article is not so produced or manufactured, which would be leviable on the class or description of articles to which the imported article belongs, and where such duty is leviable at different rates, the highest duty.

(2) For the purpose of calculating- under this section the additional duty on any imported article, where such duty is leviable at any percentage of its value, the value of the imported article shall, notwithstanding anything contained in section 14 of the Customs Act, 1962, (52 of 1962) be the aggregate of-

(i) the value of the imported article determined under sub- section (1) of the said section 14 or the tariff value of such article fixed under sub- section (2) of that section, as the case may be; and

(ii) any duty of customs chargeable on that article u/s 12 of the Customs Act, 1962, (52 of 1962) and any sum chargeable on that article under any 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 duty referred to in sub- section (1).

(3) If the Central Government is satisfied that it is necessary in the public interest to levy on any imported article[whether on such article duty is leviable under sub- section (1) or not] such

additional duty as would counter- balance the excise duty leviable on any raw materials, components and ingredients of the same nature as, or similar to

those, used in the production or manufacture of such article, it may, by notification in the Official Gazette, direct that such imported article shall, in addition, be liable to an additional duty representing such portion of the excise duty leviable on such raw materials, components and ingredients as, in either case, may be determined by rules made by the Central Government in this behalf.

(4) In making any rules for the purposes of sub- section (3), the Central Government shall have regard to the average quantum of the excise duty payable on the raw materials, components or ingredients used in the production or manufacture of such like article.

(5) The duty chargeable under this section shall be in addition to any other duty imposed under this Act or under any other law for the time being in force.

(6) The provisions of the Customs Act, 1962, (52 of 1962) and the rules and regulations thereunder, including those relating to drawbacks, refunds and exemption duties, shall," so far as" may" be, apply to the duty chargeable under this section as they apply in relation to the duties leviable under that Act.

4. It is, therefore, clear from the reading of the aforesaid provision that CVD charged on the imported goods is at par with the excise duty payable on the said goods by the domestic manufacturers.

5. The contention of the Revenue is that the CVD paid is not excise duty as such. The Act, i.e., the Central Excise Act, 1944 is a separate Act and rebate/refund of excise duty on exports is governed by the notification and the language of the notification under which the said rebate/refund can be granted. It is submitted that the notification No. 21/2004 dated 6th September, 2004 postulated and stipulated that the refund/rebate of duty could be claimed but it was restricted to the duty paid under the specified enactments, namely, Central Excise Act, 1944, Additional duties of Excise (Goods or Special Importance) Act, 1957, Additional Duties of Excise (Textiles and Textiles Articles) Act, 1978 and special excise duty collected under the Finance Act. CVD was not specifically stipulated and treated as the duty paid under the notification No. 41/2001. It is submitted that notification No. 21/2004 was amended subsequently by notification No. 12/2007 effective from 1st March, 2007 and with effect from the said date CVD was specified as one of the duties entitled to rebate. It is submitted that the aforesaid amendment is not retrospective or clarificatory in nature and is accordingly prospective and would apply with effect from 1st March, 2007 and not for the period anterior thereto. It is stated that the Central Board of Excise and Customs has clarified that the amendment vide notification No. 12/2007 CE(NT) dated 1st March, 2007 is prospective and not retrospective vide letter dated 25th February, 2008. It is submitted that the general principle is that any substantive amendment should be prospective and not retrospective. More so, when benefit or exemption is being granted. The amendment is not clarificatory and a new beneficial provision has been incorporated vide notification No. 12/2007.

6. In order to appreciate the controversy, we are required to examine the

relevant portion of the notification No. 21/2004 as it existed prior to 1st March, 2007. The said notification prior to 1st March, 2007 reads:

6th September, 2004

Notification No.21/2004-Central Excise (N.T.)

In exercise of the powers conferred by of rule 18 of the Central Excise Rules, 2002 and in supersession of the Ministry of Finance, Department of Revenue, notification No.41/2001-Central Excise (N.T.), dated the 26th June, 2001[G.S.R.470 (E) dated the 26thJune, 2001], the Central Government hereby, directs that rebate of whole of the duty paid on excisable goods (hereinafter referred to as "materials") used in the manufacture or processing of export goods shall, on their exportation out of India, to any country except Nepal and Bhutan, be paid subject to the conditions and the procedure specified hereinafter: -

(1) Filing of declaration. - The manufacturer or processor shall file a declaration with the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise having jurisdiction over the factory of manufacture describing the finished goods proposed to be manufactured or processed along with their rate of duty leviable and

manufacturing/processing formula with particular reference to quantity or proportion in which the materials are actually used as well as the quality. The declaration shall also contain the tariff classification, rate of duty paid or payable on the materials so used, both in words and figures, in relation to the finished goods to be exported. (2) Verification of Input-output ratio. - The Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise shall verify the correctness of the ratio of input and output mentioned in the declaration filed before commencement of export of such goods, if necessary, by calling for samples of finished goods or by inspecting such goods in the factory of manufacture or process. If, after such verification, the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise is also satisfied that there is no likelihood of evasion of duty, he may grant permission to the applicant for manufacture or processing and export of finished goods. (3) Procurement of material. - The manufacturer or processor shall obtain the materials to be utilised in the manufacture of the finished goods intended for export directly from the registered factory in which such goods are produced, accompanied by an invoice under rule 11 of the Central Excise Rules, 2002: Provided that the manufacturer or processor may procure materials from dealers registered for the purposes of the CENVAT Credit Rules, 2002 under invoices issued by such dealers. (4) Removal of materials or partially processed material for processing. - The Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise may permit a manufacturer to remove the materials as such or after the said materials have been partially processed during the course of manufacture or processing of finished goods to a place outside the

factory -

(a) for the purposes of test, repairs, refining, reconditioning or carrying out any other operation necessary for the manufacture of the finished goods and return the same to his factory without payment of duty for further use in the manufacture of finished goods or remove the same without payment of duty in bond for export, provided that the waste, if any, arising in the course of such operation is also returned to the said factory of the manufacture or process; or

(b) for the purpose of manufacture of intermediate products necessary for the manufacture or processing of finished goods and return the said intermediate products to his factory for further use in the manufacture or process of finished goods without payment of duty or remove the same, without payment of duty for export, provided that the waste, if any, arising in the course of such operation is also returned to the factory of manufacturer or processor;

(c) any waste arising from the processing of materials may be removed on payment of duty as if such waste is manufactured or processed in the factory of the manufacturer or processor. (5) Procedure for export. - The goods shall be exported on the application in Form A.R.E. 2 specified in the Annexure to this notification and the procedures specified in Ministry of Finance (Department of Revenue) notification No.19/2004-Central Excise (N.T.), dated the 6th September, 2004 or in notification No. 42/2001-Central Excise (N.T.), dated the 26th June, 2001 shall be followed. (6) Presentation of claim of rebate. - The claim for rebate of duty paid on materials used in the manufacture or processing of goods shall be lodged only with the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise having jurisdiction of the place approved for manufacture or processing of such export goods. Explanation: - "duty" means for the purposes of this notification, duties of excise collected under the following enactment, namely: - (a) the Central Excise Act, 1944 (1 of 1944); (b) the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957); (c) the Additional Duties of Excise (Textiles and Textile Articles) Act, 1978 (40 of 1978);

(d) the National Calamity Contingent duty leviable u/s 136 of the Finance Act, 2001 (14 of

2001), as amended by Section 169 of the Finance Act, 2003 (32 of 2003) and further amended by Section 3 of the Finance Act, 2004 (13 of 2004); (e) special excise duty collected under a Finance Act; (f) additional duty of excise as levied u/s 157 of the Finance Act, 2003 (32 of 2003); (g) Education Cess on excisable goods as levied under clause 81 read with clause 83 of the Finance (No.2) Bill, 2004.

7. By notification No. 12/2007 with effect from 1st March, 2007, the following addition was made to the term "duty":

(i) the additional duty leviable u/s 3 of the Customs Tariff Act, 1975 (51 of

1975), equivalent to the duty of excise specified under clauses (a), (b), (c), (d), (e) and (g) above.

8. The question raised in the present writ petitions is whether the aforesaid amendment is clarificatory or is a substantive amendment and, therefore, prospective in nature and not retrospective.

9. We find that the revisionary authority has ascribed good and valid reasons to come to the conclusion that the amendment made by notification No. 12/2007 is clarificatory in nature and, therefore, retrospective. The reasoning given by the Joint Secretary reads as under:

6. Government has considered both oral and written submissions of the applicant and also perused the orders passed by the lower authorities and case laws cited by the applicant.

7. Government observes that the issue to be decided is whether the Countervailing Duty (CVD) (Additional duty) leviable u/s 3 of the Customs Tariff Act, 1985 equivalent to the duty of excise paid on the imported inputs/materials used in the manufacture of exported goods is rebatable under Rule 18 of Central Excise Rules, 2002 read with Notification No.21/2004-CE(NT) dated 06.09.04. 8. In this regard, Government observes that the countervailing duty (CVD) is levied on the goods imported into India, equal to the duty of excise leviable on the like goods if produced or manufactured in India. The assessee paying CVD at the time of import of goods is allowed to take the cenvat credit of CVD paid. The exporter exporting the goods can claim rebate of duty under Rule 18 of the Central Excise Rules, 2002 of the duty paid from the cenvat credit taken for CVD. Similarly, the assessee can claim the rebate of duty, paid on the Inputs used in the manufacturing/processing of the exported goods under Rule 18 of the Central excise Rules, 2002. 9. It is observed that the Cenvat Credit of CVD is allowed as per Rule 3(vii) of the Cenvat Credit Rules, 2004. The cenvat credit, in respect of the input or Input service so used shall be allowed to be utilized by the manufacture or provider of output service towards payment of, (I) duty of excise on any final product cleared for home consumption or for export on payment of duty, or (II) Service tax on output service. Where for any reason such adjustment is not possible, the manufacturer, or the provider of output service shall be allowed refund of such amount under Rule 5 of Cenvat Credit Rules, 2004 subject to such safeguards, conditions and limitations, as may be specified by the Central Govt. by Notification.

From above, it is clear that the Cenvat credit of CVD paid can be utilized for payment of excise duty on any final product for home consumption or for export. And if such Cenvat credit remain unutilized, it can be refunded to the manufacturer. 10. CBEC vide its Circulars No.83/2000-Cus of 18.10.2002 has clarified that where ever duty appears, it is construed to having reference to Central Excise or the additional duty u/s 3 of the customs Tariff Act, 1975. The relevant paras 4,5, 6 are reproduced below for ready reference.

4. A combined and harmonious reading of these provisions reveals that the word "duty" appearing anywhere in the Modvat Rules, unless otherwise qualified, should always be construed as having reference to duty of Central Excise or the additional duty u/s 3 of the customs Tariff Act, 1975. Since Rule 57 F (13) mentions the wording "Credit of specified duty in respect of Inputs so used....." and Rule 57F (14) states that no credit in sub-rule (13) shall be allowed if the exports avail of drawback.....in respect of such duty, it is amply clear that the prohibition of Rule 57F(14) for grant of refund is only in respect of avilment of drawback as regards the Central Excise duty or countervailing duty. There is no double benefit available to the manufacture where only Customs portion of All Industry Rate of Drawback is claimed, if refund of unutilized credit is given, as no Modvat (now Cenvat) credit facility is permissible for customs duties suffered on imported inputs. Denial of refund of Modvat credit of Excise/Countervailing duty paid on inputs relating to export products, if this cannot be used otherwise, will this not only act harshly on the exporters, it will not be in accordance with the provisions of the modvat rules.

5. It is, therefore, clarified that where only customs portion of duties is claimed as per the all industry rate of drawback, Rule 57F(14), does not come in the way of admitting refund of unutilized.. credit of Central Excise/Countervailing duty paid on inputs used in products exported. 6. Rule 57AC(7) of the Cenvat contains similar provisions for refund of unutilized credit earned on inputs used in goods/ intermediate goods cleared for export. Therefore, the interpretation would be applicable to all such cases under the erstwhile modvat rules (sic) as well as the Cenvat rules effective from 1.4.2000.

11 Government has issued two notifications under Rule 18 of the Central excise Rules, 2002 for claiming rebate of duty on export of goods. Notification 19/2004-CE is for claiming rebate of duty paid on finished goods and Notification No.**21/2004-CE(NT) is for claiming rebate of duty paid on inputs/materials on goods used in manufacture/processing of export goods. Both the Notifications are issued prescribing the procedure for clearance of the exported goods under claim of rebate. Govt. further observes that the exporter has the option to export the goods under Rule 18 under claim of rebate, or under Rule 19 of the Central Excise Rules, 2002 under Bond or undertaking without payment of duty. The purpose of both the schemes is the same that is to relieve the duties paid on the exported goods to make these competitive in International market to earn foreign exchange.

As per Rule 18, the duty paid on goods exported and duty paid on materials used in

manufacture or processing of such goods is to be rebated. The Rule 18 of Central Excise Rules, 2002 reads as under: Rule 18 reads as under:

Rule 18 : Rebate of Duty : Where any goods are exported, the Central Government may, by Notification, grant rebate of duty paid on such excisable

goods and duty paid on materials used in the manufacturer or limitations, if any, and fulfilment of such procedure, as may be specified in the notification.

The plain reading of this rule makes it clear that duty paid inputs/materials is to be rebated.

11 Government notes that in the Notification No.21/2004-CE(NT) dated 06.09.04 issued under Rule 18 of the Central Excise Rules, 2002 in the explanation, the additional duty of excise specified under clause (a), (b), (c), (d), (e) & (g) was not mentioned. It was added only vide Notification No.12/2007-CE(NT) dated 1.3.07 as to set right the anomaly in the Rules as discussed in above Paras. In this case the period prior to 1.03.07 similar type of situation was created at the time of levy of Education Cess as the Education Cess is levied from 09.07.04 in terms of Section 91, 92 and 93 of the Finance Act, 1944. However, the Education Cess has been included in the Notification No.19/2004-CE dated 06.09.2004, 20/2004-CE dated 06.09.04, 21/2004-CE dated 06.09.04 vide Notification No. 28/2004-CE dated 21.10.04, 29/2004-CE dated 06.09.04 & 30/2004-CE dated 21.10.04 respectively. The applicants throughout India filed the rebate of Education Cess from date of its levy i.e. from 09.07.04. But the department rejected the claim for the period from levy of education cess to issue of Notification No.28/2004-CE dated 21.10.04. Finally this matter was settled by the Hon''ble High Court of Rajasthan in the matter of

M/s Banswara Syntex Ltd. Vs. Union of India [(2007) 216 ELT 16 (Raj.)]. Vide the above judgment, Hon''ble High Court has decided that the amendment in rebate Notification adding education cess as duty of excise clarificatory in nature. Hence, the Rebate of education cess is eligible from date of effect of levy. The said decision is being followed by the department now in the case of Education cess. The Hon''ble Supreme Court judgement in the case of Belapur Sugar and Allied Industries Ltd Vs. Collector of Central Excise, Aurangabad, on the interpretation of exemption Notification also lends support to the fact that the Notification No.12/2007-CE(NT) dated 1.03.07 should be retrospective being clarificatory in nature.

12 Government further observes that in the case of M/s Satkar Plywood Pvt. Ltd., the rebate under Rule 18 on the inputs used in the manufacture/processing of the exported goods were denied by the lower authorities on the plea that the CVD is not covered under the definition of duty under notification No.21/2004-CE dated 06.09.04 as is levied u/s 3 of the Customs Tariff Act, 1975. On a revision application filed by the applicant, Government vide its order No.54/07-CE dated 15.3.07 F.No.195/663/06-RA held that the rebate of duty paid as CVD on the Imported inputs utilized in the manufacture/processing of exported goods is admissible under Rule 18 of the Central Excise Rules, 2002.

13 Now the similar issue is decided by Hon''ble High Court of Punjab and Haryana vide order dated 14.01.08 in Central Excise Appeal No.10/07, in the case of The Commissioner, Central Excise Vs. Simplex Pharma Pvt. Ltd., In this

case, the merchant exporter exported the goods under Notification No. 21/2004-CE(NT) dated 06.09.04 read with Rule 18 of the Central Excise Rules, 2002 and filed refund claims on the duty (CVD) paid on the imported inputs used in the processing/manufacturing of the exported goods which was rejected by the Assistant Commissioner and Commissioner (Appeals). The merchant exporter filed an appeal with the CESTAT who set aside the order of the Commissioner (Appeals) and allowed the exporters appeal. The department filed an appeal to the Hon'ble High Court of Punjab and Haryana who vide order held "Refund of Countervailing Duty-the eligibility of applicant for benefit of Cenvat/Modvat Credit on Countervailing Duty paid by him is not disputed by Revenue then applicant is entitled to payment/refund of said amount u/s 11B(2) of Central Excise Act, 1944." The relevant para 10 & 11 of the said judgments are reproduced below for ready reference:

Para 10: From the perusal of Section 11B, it is clear that any person claiming refund of any duty of excise may apply for refund of such duty in such form and manner as may be prescribed along with such documentary or other evidence to establish that the amount of duty of the excise in relation to which such refund is claimed was collected from or paid by him and the Incidence of such duty had not been passed on by him to any other person. Proviso (A) to sub-section (2) of Section 11B further provides that if the competent authority is satisfied that the whole or any part of the duty of excise paid by the applicant is refundable he may make an order accordingly and the amount so determined relatable to rebate on duty of excise on excisable goods exported out of India or on excisable material used in the manufacture of goods exported out of India or on excisable material used in the manufacture of goods which are exported out of India. Explanation (A) of Section 11B of the Central Excise Act, 1944 has further clarified the issue "refund" includes rebate of duty of excise on excisable goods out of the India or on excisable material used in the manufacture of goods which are exported out of India. Section 3 (1) of the Central Excise Act, 1944 provides for levying and collection of duty of excise/special duty of excise to be called the Central Value Added Tax (CENVAT) on all excisable goods which are produced or manufactured in India and at the rates set forth in the First and Second Schedules to the Central Excise Tariff Act, 1985. The proviso to this Section has further added that the duties of excise which shall be levied and collected on any excisable goods which are produced or manufactured by a 100% export oriented undertaking shall be an amount equal to the aggregate of the duties of the customs which would be leviable under the Customs Act, 1962 on like goods produced or manufactured outside India if imported into India and where the said duties of customs are chargeable by reference to their value, the value of such excisable goods notwithstanding anything contained in any other provision of this Act be determined in accordance with the provisions of the Customs Act, 1962 and the Customs Tariff Act, 1975. Thus, from the conjoint reading of the above referred provisions of the Act, it is crystal clear that the rebate of duty of excise on goods exported or on excisable material used in the manufacture of

goods which are exported are eligible for refund and such refund includes rebate of duty as well as the duty of excise on excisable material and the refund of such rebate of duty is payable in cash to the applicant if such amount is relatable to rebate of duty of excise on excisable goods exported out of India on excisable material used in the manufacture of goods which is exported out of India.

Para 11: From the facts on the record, it is not disputed that the countervailing Duty amounting to Rs.9,69,250/- paid by the applicant at the time of import of raw material was in fact a duty of excise equivalent to the excise duty payable on such raw material if manufacturing in India and admittedly, the said raw material was consumed in the manufacturing of excisable goods exported out of India by the time of import of raw material was leviable. Further, the applicant is admittedly eligible for the benefit of Modvat/Cenvat Credit, on the CVD/additional duty paid by him at the time of import of raw material and if he had availed the Modvat/Cenvat Credit, then he would have got the refund of the same under the provisions of Section 11B(2). Once the eligibility of the applicant for the benefit of Modvat/Cenvat Credit on the CVD paid by him is not disputed by the Revenue then in that case the applicant is entitled to payment/refund of the said amount u/s 11B(2) of the Act." The above judgment is not only on identical issue but laid down a clear principal to be followed for setting the confusions/disputes which would have emerged and are pending for decision. Moreover, this recent judgment is directly from the Hon"ble High Court of the very jurisdiction which covers the area of notices under reference. The ratio of said judgment is squarely applicable to this case as the identical issue is involved in both the cases.

14. In this regard, Govt. further observes that rebate/drawback etc. are export-oriented schemes and unduly restricted and technical interpretation no (sic) procedure etc. is to be avoided in order not to defeat the very purpose of such schemes which serve as export incentive to boost export and earn foreign exchange and in case the substantive fact of export having been made is not in doubt, a liberal interpretation is to be given in case of any technical breaches. In Suksha International Vs. UOI 1993 (39) ELT 503 (SC), the Hon"ble Supreme Court has observed that an interpretation unduly restricting the scope of beneficial provision is to be avoided so that it may not take away with one hand what the policy given with the other. In the Union of India Vs. A.V. Narasimhalu 1983 ELT 1534 (SC), the Apex Court also observed that the administrative authorities should instead of relying on technicalities, act in a manner consistent with broader concept of justice. Similar observation was made by the Apex Court in the Formica India Vs. Collector of Central Excise 1995 (77) ELT 51 (SC) in observing that once a view is taken that the party would have been entitled to the benefit of the notification had they met with the requirement of the concerned rule, the proper course was to permit them to do so rather than denying to them the benefit on the technical grounds that the time when they could have done so, had elapsed.

15. In view of the above discussion and findings, Govt. observes that the rebate

of Countervailing Duty (CVD) paid on inputs/materials used in the manufacture of exported goods is admissible to the applicants under Rule 18 of Central Excise Rules, 2002 read with Notification 21/2004 dated 6.09.2004 provided no cenvat credit or drawback is availed by the applicants.

10. The aforesaid reasoning is logical and merits acceptance. Para 15 quoted above however has to be read with our observation below. Section 11B(2)(a) of the Act provides for "rebate of duty of excise on excisable goods exported out of India or on excisable materials used or manufacture of goods which are exported out of India". Explanation (A) to the Section states that refund includes rebate of any duty of excise on excisable goods exported out of India or on excisable material used and manufactured goods which are exported out of India.

11. Rule 18 of the Central Excise Rules, 2002 provides for rebate of duty and reads:

Rebate of duty RULE 18.. - Where any goods are exported, the Central Government may, by notification, grant rebate of duty paid on such excisable goods or duty paid on materials used in the manufacture or processing of such goods and the rebate shall be subject to such conditions or limitations, if any, and fulfilment of such procedure, as may be specified in the notification.

Explanation. - "Export" includes goods shipped as provision or stores for use on board a ship proceeding to a foreign port or supplied to a foreign going aircraft.

12. In terms of Rule 18, the notification No. 21/2004 dated 6th September, 2004 has been issued. The said notification has been quoted above. Along with the said notification, the notification Nos. 19/2004 and 20/2004 were also issued on 6th September, 2004. They provide for rebate of duty on export of goods to all countries other than Nepal and Bhutan and rebate of duty on exports of excisable goods to Nepal respectively.

13. Rule 5 of the CENVAT Credit Rules, 2004 provides for refund of CENVAT Credit. The said Rule reads:

5. Refund of CENVAT credit. -

Where any input or input service is used in the manufacture of final product which is cleared for export under bond or letter of undertaking, as the case may be, or used in the intermediate product cleared for export, or used in providing output service which is exported, the CENVAT credit in respect of the input or input service so used shall be allowed to be utilized by the manufacturer or provider of output service towards payment of, (i) duty of excise on any final product cleared for home consumption or for export on payment of duty; or (ii) service tax on output service, and where for any reason such adjustment is not possible, the manufacturer or the provider of output service shall be allowed refund of such amount subject to such safeguards, conditions and limitations, as may be specified, by the Central Government, by notification: Provided that no refund of credit shall be allowed if the manufacturer or provider of output service

avails of drawback allowed under the Customs and Central Excise Duties Drawback Rules, 1995, or claims rebate of duty under the Central Excise Rules, 2002, in respect of such duty; or claims rebate of service tax under the Export of Service Rules, 2005 in respect of such tax. Provided further that no credit of the additional duty leviable under sub-section (5) of section 3 of the Customs Tariff Act shall be utilised for payment of service tax on any output service. Explanation: For the purposes of this rule, the words "output service which is exported" means the output service exported in accordance with the Export of Services Rules, 2005.

14. Rule 3 of the CENVAT Credit Rules, 2004 reads:-

Rule 3. CENVAT credit- (1) A manufacturer or producer of final products or a provider of taxable service shall be allowed to take credit (hereinafter referred to as the CENVAT credit) of -

xxxxxxx (vii) the additional duty leviable u/s 3 of the Customs Tariff Act, equivalent to the duty of excise specified under clauses (i), (ii), (iii), (iv), (v) (vi) and (via); (viiia) the additional duty leviable under sub-section (5) of section 3 of the Customs Tariff Act, Provided that a provider of taxable service shall not be eligible to take credit of such additional duty; (viii) the additional duty of excise leviable u/s 157 of the Finance Act, 2003 (32 of 2003); xxxxxxxxxxxxxx (xi) the additional duty of excise leviable u/s 85 of Finance Act, 2005 (18 of 2005) paid on- (i) any input or capital goods received in the factory of manufacture of final product or premises of the provider of output service on or after the 10th day of September, 2004; and xxxxxxxxxxxxxxxx Explanation.- Where the provisions of any other rule or notification provide for grant of whole or part exemption on condition of non-availability of credit of duty paid on any input or capital goods, or of service tax paid on input service, the provisions of such other rule or notification shall prevail over the provisions of these rules.

It is, therefore, clear that under Rule 3 of CENVAT Credit Rules, 2004, CVD is treated and allowed as a duty credit.

15. Rule 6 of the CENVAT Credit Rules, 2004 stipulates that CENVAT Credit shall not be allowed on such quantity of input or input service, which is used in the manufacture of exempted

goods or for provision of exempted services except in the circumstances mentioned in sub-rule 2. We need not refer to sub-rules 2, 3 and 4, as sub-rule 6 clause 5 specifically deals with goods cleared for export under bond in terms of provisions of Central Excise Rules, 2002. Rule 6 (6)(v) reads as under: ?

6. Obligation of manufacturer of dutiable and exempted goods and provider of taxable and exempted services.- xxx

(6) The provisions of sub-rules (1), (2), (3) and (4) shall not be applicable in case the excisable goods removed without payment of duty are either- xxx v) cleared for export under bond in terms of the provisions of the Central Excise

Rules, 2002; or

16. Interpreting the aforesaid Rule, the Bombay High Court in *Repro India Limited versus Union of India*, (2009) 235 ELT 614 (Bom.) observed as under:

9. The Cenvat credit is allowed the duty paid on inputs to mitigate the effect of double taxation of levying duty on inputs as also on the final product. If, however, the exempted final product is exported it calls for a special relaxation/dispensation to make the goods of the country internationally competitive. As an illustration suppose a final product like tractor is otherwise exempted from excise duty even for domestic consumption and such tractors are exported. The various inputs like engines, etc., used in the tractor may have suffered excise duty. The intention is not to export taxes but only to export the goods. If the inputs like engine going into the manufacture of export commodity namely tractors are subject to excise duty, the Indian manufacturer of tractors becomes internationally uncompetitive. This appears to be the object behind the Government enacting special scheme to ensure that the duty is not levied even on inputs going to the export products. Rule 6(6)(v) has been consciously and expressly enacted with the specific objective to ensure that duty is not levied even on inputs going to the export products. This method of adjustment, both from the point of Government and the assessee is to allow the assessee to take Cenvat credit on the inputs used in the export products and allow the assessee himself to adjust it for payment of duty on other products. If the adjustment is not possible, Cenvat credit is refunded in cash. This appears to be the Scheme of Rule 5 of the Cenvat Credit Rules, 2004. With a view to achieve this object, the Central Government has specifically enacted Rule 6(6)(v) of the Cenvat Credit Rules, 2004 to the effect that the bar created by Rule 6(1) will not apply for goods exported. Considering the conscious and express provisions contained in Rule 6(6)(v) for exported goods, to deny the permission to export under bond and/or to levy 10% on the value of the exported goods under Rule 6(3)(b) on the footing that the printed books exempt and, therefore, attract Rule 6(1) would be incorrect and completely nullify and frustrate Rule 6(6)(v).

17. This decision of the Bombay High Court was followed in *Union of India versus Sharp Menthol India Limited*, (2011) 113 Bombay Law Reporter 1531. It was held as under:

27. The argument of the Revenue that in the present case, the credit of duty paid on menthol is not allowable or has lapsed for the reason that the duty paid menthol has been used in the manufacture of exempted menthol crystals cannot be accepted, because, admittedly the exempted menthol crystals have not been cleared for home consumption but have been cleared for export under bond and, therefore, Rule 6(1) to 6(4) of 2004 Rules would not apply, but Rule 6(6)(v) would apply. In other words, non allowability of input credit under Rule 6(1) to 6(4) of 2004 Rules is applicable only when the inputs used in the manufacture of exempted final products are cleared for home consumption without payment of duty and not when exempted final products are cleared for export without

payment of duty under bond. In the present case, exempted menthol crystals has been exported without payment of duty under bond and, therefore, the assessee was entitled to take the credit of duty paid on menthol used in the manufacture of exempted menthol and utilize that credit for paying duty on clearance of peppermint oil. Since peppermint oil was exported on payment of duty, the assessee was entitled to claim rebate of duty paid on exported peppermint oil under Rule 18 of the Central Excise Rules, 2002.

18. We may note that after the decision in *Repro India Limited* (supra) vide notification No. 24/2010-CE(NT) dated 26th May, 2010, the Government has amended and stated that export of excisable goods which are chargeable to nil rate of duty or are wholly exempt from payment of duty, other than the goods cleared by the 100% export oriented undertaking, shall not be allowed to take the benefit under Rule 6 of the CENVAT Credit Rules, 2004. Circular No. 928/18/10-CX dated 28th June, 2010 has stated that the notification No. 24/2010 is not retrospective.

19. Going by the aforesaid reasoning, in case the assessee had applied in terms of Rule 6(6)(v) of the CENVAT Credit Rules, 2004, they would have been entitled to refund of the CVD paid by them. This is an important and a relevant circumstance which we have to keep in mind, though in the present case the assessee had not applied for refund under Rule 6(6)(v) and the applicable notifications issued thereunder, namely, notification Nos. 41/2001 and 42/2001. We may also note that the term "duty" as defined in the notification No. 41/2001 and 42/2001, which are both dated 26th June, 2001, are identical. However, these relate to export of goods on bond or export under the bond procedure without payment of duty. These notifications have been issued under Rule 19 of the Central Excise Rules, 2002.

20. The contention of the petitioner, if accepted, would result in an anomalous situation. In case the assessee had followed procedure prescribed under Rule 6(6)(v) in terms of notification No. 41 and 42/2001, they would have been entitled to refund of the excise duty paid on the raw material in form of CVD, but they would be denied the benefit under notification No. 21/2004, which has been issued under Rule 18 of the Rules. The aforesaid distinction does not merit acceptance.

21. Issue of notification No. 24/2010-CT(NT) dated 26th May, 2010 is an acceptance by the Government that till the said date, the exporters were entitled to claim refund/rebate on the CVD paid on the raw material even when the exported goods were excisable at nil rate of duty or were wholly exempt from payment of duty. Even after notification No. 24/2010 has been issued, the said benefit could continue and will apply only to 100% export oriented undertakings but would not apply in other cases.

22. Duty paid u/s 3 of the Customs Tariff Act, 1975, is excise duty. We have already referred to and quoted Section 3 of the said Act. The Joint Secretary in

the impugned order has referred to Circular No. 83/2000 dated 16th October, 2000 issued by the Central Board of Excise and Customs. In the said circular, the aforesaid Board had cleared doubts, if any, as the definition of term duty for the purpose of MODVAT Rules. In the said circular, it has been observed as under:

4. A combined and harmonious reading of these provisions reveals that the word "duty" appearing any where in the MODVAT rules, unless otherwise qualified should always be construed as having reference to duty of Central Excise or the additional duty u/s 3 of Customs Tariff Act, 1975. Since Rule 57F(13) mentions the wording "Credit of specified duty in respect of inputs so used -----" and Rule 57F(14) states that no credit in sub-rule (13) shall be allowed in the exporters avail of drawback- in respect of such duty, it is amply clear that the prohibition of Rule 57F(14) for grant of refund is only in respect of availment of drawback as regards the Central Excise duty or Countervailing duty. There is no double benefit available to the manufacturer where only Customs portion of All Industry Rate of Drawback is claimed, if refund of unutilised credit is given, as no MODVAT (now CENVAT) credit facility is permissible for Customs duty suffered on imported inputs. Denial of refund of MODVAT credit of Excise/Countervailing duty paid on inputs relating to export products, if this cannot be used otherwise, will thus not be only act harshly on the exporters, it will not be in accordance with the provisions of the MODVAT rules.

23. The Supreme Court in S.K. Pattanaik versus State of Orissa, (2000) 115 ELT 9 (SC) has held as under:- 4. "Excise duty" and "countervailing duty" are well-known concepts and are attracted in different situations. "Excise duty" is essentially a duty on manufacture of goods, and the taxable event is the manufacture of the excisable goods. "Countervailing duty", on the other hand, is imposed when excisable articles are imported into the State, in order to counterbalance the excise duty, which is leviable on similar goods if manufactured within the State. So far as countervailing duty is concerned, the incidence of the impost is on the import of the excisable articles, i.e., at the time of entry into the State.

24. In Hyderabad Industries Limited versus Union of India, (1999) 108 ELT 321 (SC) it was held:

10. Section 3(1) of the Customs Tariff Act, 1975 provides for levy of an additional duty. The duty is, in other words, in addition to the customs duty leviable u/s 12 of the Customs Act read with Section 2 of the Customs Tariff Act. Secondly this duty is leviable at a rate equal to the excise duty for the time being leviable on a like article to the one which is imported if produced or manufactured in India. The explanation to this sub-section expands the meaning of the expression "the excise duty for the time being leviable on a like article if produced or manufactured in India". The explanation to Section 3 has two limbs. The first limb clarifies that the duty chargeable under sub-section (1) would be the excise duty for the time being leviable on a like article if produced or manufactured in India. The condition precedent for levy of additional duty thus contemplated by

the explanation is that the article is produced or manufactured in India. The second limb to the explanation deals with a situation where "a like article is not so produced or manufactured". (emphasis supplied) The use of the word "so" implies that the production or manufacture referred to in the second limb is relatable to the use of that expression in the first limb

which is of a like article being produced or manufactured in India.

11. The words "if produced or manufactured in India" do not mean that the like article should be actually produced or manufactured in India. As per the explanation if an imported article is one which has been manufactured or produced then it must be presumed, for the purpose of Section 3(1), that such an article can likewise be manufactured or produced in India. For the purpose of attracting additional duty u/s 3 on the import of a manufactured or produced article the actual manufacture or production of a like article in India is not necessary. As observed by this Court in *Thermax (P) Ltd. v. Collector of Customs* (at SCC pp. 452-53, para 11) that Section 3(1) of the Customs Tariff Act "specifically mandates that the CVD will be equal to the excise duty for the time being leviable on a like article if produced or manufactured in India. In other words, we have to forget that the goods are imported, imagine that the importer had manufactured the goods in India and determine the amount of excise duty that he would have been called upon to pay in that event". To our mind the genesis of Section 3(1) of the Customs Tariff Act has been brought out in the aforesaid observations of this Court, namely, that for the purpose of saying what amount, if any, of additional duty is leviable u/s 3(1) of the Customs Tariff Act, it has to be imagined that the articles imported had been manufactured or produced in India and then to see what amount of excise duty was leviable thereon.

25. We have quoted Rule 3 of the CENVAT Credit Rules, 2003 in which the term "duty" on which credit can be allowed includes additional duty or CVD leviable u/s 3 of the Customs Tariff Act, 1975.

26. A harmonious and cumulative reading of the said provisions would show that there was no good cause or reason why CVD

paid should not be or was not intended to be included in the term "duty" in the notification No. 21/2004. Excise duty payable under the Act was included in the term duty. CVD which is imposed is equal to the excise duty and partakes the character of excise duty. The amendment notification No. 12/2007 clears and was issued with the intention to bring all debates and disputes to an end. It ensures that it fully applies to all cases and there is no discrimination. Even without the aforesaid notification there is a valid, plausible and a good case to include and treat CVD as a duty covered by the Notification no. 21/2004.

27. There is law in which it has been held that exemption notification should be construed strictly and literally. There are also observations that notification should be interpreted in the light of the words employed and there is no room for

intendment. (see Commissioner of Central Excise, New Delhi Vs. Hari Chand Shri Gopal and Others, etc. etc., , quoting from Novapan India Ltd. vs. Commissioner of Customs & Excise, 1994 Supp. (3) SCC 606 and Tata Iron and Steel Co. Ltd. Vs. State of Jharkhand and Others, These are decisions relating to eligibility clause in which it has been held that strict interpretation and meaning should be given. The person who claims exemption or concession has to establish that he is entitled to the concession or exemption. However, once the assessee satisfies the eligibility clause/criteria, exemption therein to be construed liberally if the contextual construction does not deserve the strict meaning. Meaning of the exemption notification has to be gathered from the language employed without ignoring the reason and cause why the Government has issued the said notification and purpose behind the said notification. The purpose should not be defeated so as to deny and deprive what is clearly flowing from it. But no violence should be done to the language employed and it should be borne in mind that absurd results and constructions should be avoided. (see Bhai Jaspal Singh and Another Vs. Assistant Commissioner of Commercial Taxes and Others, G.P. Ceramic (P) Ltd. vs. CTT,(2009) 2 SCC 90; A.P. Steel Re-Rolling Mill Ltd. Vs. State of Kerala and Others, and Government of India and Others Vs. Indian Tobacco Association, , Collector of Central Excise, Bombay-I and Another Vs. Parle Exports (P) Ltd.,

28. We have already referred to detailed reasoning and logic in the findings given by the Joint Secretary, the Revisionary Authority who has accepted the plea/ contention raised by the respondent No. 2 herein. We have appreciated the same and after independently applying our mind also find that the reasoning merits acceptance. In view of the aforesaid findings, the present writ petitions are dismissed. However, there will be no orders as to costs.