
(2016) 03 MAD CK 0226

In the Madras High Court

Case No : Civil Miscellaneous Appeal Nos. 3121-3122 of 2009

Commr. of Cus. (Exports), Chennai

APPELLANT

Vs

Prashray Overseas Pvt. Ltd.

RESPONDENT

Date of Decision : 28-03-2016

Acts Referred:

Citation : (2016) 338 ELT 44

Hon'ble Judges : V. Ramasubramanian and T. Mathivanan, JJ.

Bench : Division Bench

Advocate : Shri G. Rajagopalan, Additional Solicitor General, for the Appellant;
Shri Joseph Prabakar, Advocate, for the Respondent

Final Decision : Allowed

Judgement

V. Ramasubramanian, J.—Both the appeals are filed by the Commissioner of Customs under Section 130 of the Customs Act, 1962, challenging a common order passed by the Customs, Excise and Service Tax Appellate Tribunal [2008 (232) E.L.T. 63 (Tribunal)], holding that imported silk fabrics were not liable for payment of counter veiling duty, during the relevant period, in view of the fact that no duty was payable even on indigenous silk yarn during the material period.

2. We have heard Mr. G. Rajagopalan, learned Additional Solicitor General, for the appellant and Mr. Joseph Prabakar, learned counsel for the first respondent/assessee.

3. Admittedly, the first respondent is engaged in the business of import and trading of raw silk, silk yarn, silk fabrics etc. They are importing silk yarn and silk fabrics from China. "silk" itself is included in Chapter 50. While "silk worm cocoons" are included under Tariff Item 5001 00 00 in Chapter 50, raw silk including Mulberry raw silk, Mulberry dupion silk and non-Mulberry silk are included in Tariff Item Nos. 5002 00, 5002 00 10, 5002 00 20 and 5002 00 30. Similarly silk waste and the other varieties of silk waste are included in Tariff Item 5003 00, 5003 00 10, 5003 00 20, 5003 00 30, 5003 00 40 and 5003 00

90.

4. The Tariff Items 5001, 5002 and 5003, including sub-headings thereunder, do not bear any duty of excise. However, silk yarn (other than yarn spun from silk waste not put up for retail sale), is included in Tariff Item 5004 and it is exigible to duty at 8%. Similarly, woven fabrics of silk or silk waste is included in Tariff Item 5007 and it is also exigible to duty at 8%. But by a Notification Bearing No. 30/2004-C.E., dated 9-7-2004, issued in exercise of the powers conferred by Section 5A(1) of the Central Excise Act, 1944 read with Section 3(3) of the Additional Duties of Excise (Goods of Special Importance) Act, 1957, the Central Government exempted all goods falling under Chapter Heading 5007, from payment of the whole of the duty of Excise leviable under the Central Excise Act.

5. It appears that the first respondent imported fabrics of silk classifiable under Central Excise Tariff Heading 5007 20 90, under 24 Bill of Entry and claimed Nil duty benefit in terms of the Central Excise Notification No. 30/2004, dated 9-7-2004. The claim was rejected by the original adjudicating authority on the ground that the Notification dated 9-7-2004 was a conditional one and that therefore the same cannot be applied if the goods are manufactured or imported from abroad.

6. Aggrieved by the order of the adjudicating authority, the first respondent filed appeals before the Commissioner of Customs (Appeals). The Commissioner of Customs (Appeals) allowed the appeals and remanded the matter back to the original authority.

7. Thereafter, the original authority granted the benefit of the Notification to the first respondent/assessee. But the said order was reversed by the Commissioner of Customs (Appeal). The first respondent/assessee filed further appeals to the CESTAT. The CESTAT allowed the appeals by a common order dated 29-9-2008 [2009 (235) E.L.T. 300 (Tribunal)]. Aggrieved by the said order, the Revenue has come up with the above appeals.

8. In the main grounds of appeal, the Revenue has raised the following substantial questions of law for the consideration of this Court :

(i) Whether the imported goods are eligible for claiming benefits under the Central Excise Exemption Notification No. 30/2004, dated 9-7-2004 when there was no compliance of the conditions as contemplated under the said Notification? and

(ii) Whether the Central Excise General Exemption Notification No. 030/2004, dated 9-7-2004 is applicable only for the indigenously manufactured goods or even for the imported goods manufactured abroad?

9. It is the contention of Mr. G. Rajagopalan, learned Additional Solicitor General that the exemption granted to domestic manufactures under the Notification dated 9-7-2004 was conditional, inasmuch as there was a proviso which read as follows : -

"Provided that nothing contained in this Notification shall apply to the goods in respect of which credit of duty vide Corrigendum F. No. 334/3/2004-TRU (PT.I), dated 9-7-2004 on inputs goods has been taken under the provisions of the Cenvat Credit Rules, 2002".

10. According to the learned Additional Solicitor General, a domestic manufacturer of the goods specified in the table under the exemption notification dated 9-7-2004 will be eligible to claim exemption only if the goods that are used as inputs in the product manufactured by him had already suffered duty of Excise and yet he had not claimed credit of such duty on those inputs under the provisions of Cenvat Credit Rules, 2002. Such a condition imposed upon the domestic manufacturer, to be eligible for the benefit of the exemption notification, can never be satisfied by an importer. This is due to the fact that the imported goods cannot contain inputs on which a duty of Excise could have already been paid in India. Therefore, the learned Additional Solicitor General contended that an importer who is incapable of satisfying the conditions stipulated in the exemption notification, cannot seek the benefit of the exemption notification.

11. However, it is contended by Mr. Joseph Prabakar, learned counsel for the first respondent that the goods imported by the first respondent are silk fabrics, which are manufactured from out of raw silk or silk waste. On these raw materials, the local manufacturers do not suffer any duty of Excise, as seen from Chapter Heading 50. Therefore, it is his contention that even a domestic manufacturer of silk fabrics will not be able to satisfy the condition stipulated in the proviso to the exemption notification, as he would also use only the very same raw material as input, which do not attract any duty of Excise. If the inputs that go into the process of manufacturing of a product are not exigible to duty of Excise, the question of claiming Cenvat credit on the duty component of those inputs would also not arise. Hence, the learned counsel for the first respondent contended that in respect of products, whose inputs are also exempt from payment of duty of Excise, the proviso to the Notification No. 30/2004, dated 9-7-2004 becomes meaningless. As a consequence, all the domestic manufacturers will be eligible to claim exemption without establishing the satisfactory compliance of the condition stipulated in the proviso to the exemption notification. Once this is so, an importer of the very same product cannot be denied exemption.

12. In response to the above contentions of the learned counsel for the first respondent, it is submitted by Mr. G. Rajagopalan, learned Additional Solicitor General that the expression "input" under the Cenvat Credit Rules, 2002 is so wide to include even the power consumed in the process of manufacturing. Therefore, he contended that unless the first respondent establishes that there was no manufacturing process involved in the production of silk fabrics or that all the inputs used in the manufacturing process did not suffer any duty of Excise, the first respondent would not be entitled to advance the above arguments.

13. We have carefully considered the rival submissions.

14. Before we proceed to deal with the rival contentions, it may be necessary to take note of two important developments that have taken place in the recent past. It appears that the law on this issue, has swayed from one extreme to the other. The last of the decisions on the issue on hand was that of the Supreme Court in *S.R.F. Limited v. Commissioner of Customs* [2015 (318) E.L.T. 607 (S.C.)]. This decision went in favour of the assessee. Thereafter, the Central Government issued two amendments to the Exemption Notification No. 30/2004, dated 9-7-2004. By the first amendment, issued under Notification No. 34 of 2015, dated 17-7-2015, the proviso to the original notification, which we have extracted in Paragraph 9 above, was amended. After the said amendment, the proviso to the notification reads as follows :

"Provided that the said excisable goods are manufactured from inputs, on which, appropriate duty of excise leviable under the First Schedule to the Central Excise Tariff Act or additional duty of customs under Section 3 of the Customs Tariff Act, 1975 (51 of 1975) has been paid and no credit of such excise duty or additional duty of customs on inputs has been taken by the manufacturer of such goods (and not the buyer of such goods), under the provisions of Cenvat Credit Rules, 2004."

By the second amendment, under Notification No. 37/2015, dated 21-7-2015 an Explanation was inserted under the above proviso. This Explanation reads as follows :

"Explanation : - For the purposes of this Notification, appropriate duty or appropriate additional duty includes nil duty or concessional duty, whether or not read with any relevant exemption Notification for the time being in force."

15. Contending that the amendment to the Notification is unconstitutional, inasmuch as it seeks to annul the effect of the decision of the Supreme Court in *SRF Limited*, a batch of writ petitions have been filed before this Court. But simultaneously, the Central Government also moved a petition before the Supreme Court for a Review of the Judgment in *SRF Limited*. On 9-9-2015, the Supreme Court condoned the delay and ordered notice in the Review Petition. Therefore, we will have to examine the rival contentions, keeping in mind these two developments namely (i) the two amendments to the Exemption Notification and (ii) the notice ordered by the Supreme Court in the petition for Review of the decision in *SRF Limited*.

16. For the purpose of easy appreciation, we shall divide our discussion into three parts, the first comprising of statutory provisions, the second comprising of the ratio of the decisions of the Supreme Court and the third comprising of an analysis of the rival contentions.

Statutory Provisions

17. It is common knowledge that the goods manufactured in India, subject to

certain exceptions, are exigible to duty of Excise. The same goods when imported into India are chargeable to Customs Duty. If due to various reasons, the goods imported into India, even after suffering Customs Duty, cost lesser than those manufactured domestically, the domestic manufacturers would be at a disadvantage. Therefore, in order to provide a level playing field between domestic manufacturers and the importers, Section 3(1) of the Customs Tariff Act, 1975 stipulates that when an article is imported into India, it shall be liable to a duty (referred to as countervailing duty) equal to the Excise Duty for the time being leviable on a like article if produced or manufactured in India. The Explanation to Section 3(1) of the Customs Tariff Act, 1975 stipulates that the expression "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. If a like article is not so produced or manufactured in India, the expression would mean the duty that would be leviable on the class or description of articles to which the imported article belongs. Sub-section (8) of Section 3 makes it clear that the provisions of the Customs Act, 1962 and the Rules and Regulations made thereunder, including those relating to drawbacks, refunds and exemption from Duties shall apply to the Duty chargeable under this Section as they apply in relation to the Duties leviable under that Act. Sub-section (1), the Explanation thereto and sub-section (8) of Section 3 of the Customs Tariff Act, 1975 read as follows :-

"3(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 :

Provided that in case of any alcoholic liquor for human consumption imported into India, the Central Government may, by notification in the Official Gazette, specify the rate of additional duty having regard to the excise duty for the time being leviable on a like alcoholic liquor produced or manufactured in different States or, if a like alcoholic liquor is not produced or manufactured in any State, then, having regard to the excise duty which would be leviable for the time being in different States on the class or description of alcoholic liquor to which such imported alcoholic liquor belongs.

Explanation. - In this sub-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.

(8) The provisions of the Customs Act, 1962 and the rules and regulations made thereunder, including those relating to drawbacks, refunds and exemption from 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."

18. Since what is leviable under Section 3(1) of the Customs Tariff Act, 1975 is actually a Duty of Excise, it is imperative for us now to make a reference to Section 5A of the Central Excise Act, 1944 and the provisions of Central Excise Tariff Act, 1985.

19. Section 5A of the Central Excise Act, 1944 empowers the Central Government to exempt, either absolutely or subject to such conditions as may be specified, excisable goods of any description from the whole or any part of the duty of excise leviable thereon. This power is expected to be exercised by the Central Government, if it is satisfied that it is necessary in the public interest to do so. The Proviso to Section 5(A)(1) makes it clear that the exemption granted by the Central Government by way of a Notification issued thereunder, will not automatically apply to goods produced or manufactured in a free trade zone and brought to any other place in India or by a 100% export oriented undertaking and allowed to be sold in India, unless the exemption Notification specifically provides that it shall apply to such goods also.

20. Since the object of levying a countervailing duty upon the imported goods is just to ensure a level playing field between domestic manufacturers and the importers, the imported article would normally be entitled to the same benefit that is given to a domestic manufacturer. In other words, if the goods manufactured in India are exempt from payment of duty of excise, the imported goods of the same description would not also suffer countervailing duty.

21. Therefore, when the Central Government issued a Notification Bearing No. 30/2004, dated 9-7-2004, in exercise of the powers conferred by Section 5A of the Central Excise Act, 1944, exempting goods falling under Chapter Heading 5007, from payment of duty of excise, the first respondent thought that they would be entitled to the same benefit, since the eligibility to the benefit is decided in terms of the expression "the excise duty for the time being leviable on a like article, if produced or manufactured in India" expounded in the Explanation to Section 3(1) of the Customs Tariff Act, 1975. But, the Department has taken a stand that Section 5A(1) of the Central Excise Act, 1944 contemplates different types of exemptions. The exemption could be conditional or absolute. It could be partial or whole. According to the Department, if the exemption is absolute and total, an importer may be entitled to the benefit thereon. But, if it is conditional even in respect of a domestic manufacturer, an importer cannot juxtapose himself in the position of a domestic manufacturer and claim the benefit.

22. It appears that the same issue has repeatedly come up for consideration before the Hon"ble Supreme Court on various occasions. But unfortunately, some decisions have gone in favour of the assessee and some gone in favour of the

Department. Therefore, it may be necessary to have a look at those decisions in the chronological order for the better understanding of the issue on hand.

23. In *Ashok Traders v. Union of India* [1987 (32) E.L.T. 262 (Bombay)], a Division Bench of the Bombay High Court was concerned with a claim made by an importer of High Density Polythelene Moulding Powder for exemption from payment of countervailing duty. The exemption Notification was actually a partial exemption and the Notification stipulated two conditions namely (a) that the product should have been manufactured from raw naphtha or any chemical derived therefrom and (ii) that on such raw material, the appropriate amount of duty of excise should have already been paid. In other words, the benefit of exemption was available under the Notification only to a manufacturer, who used a particular raw material, on which, an appropriate amount of duty of excise had already been paid. Therefore, projecting the claim of the importer for exemption, the Division Bench of the Bombay High Court held that "a taxpayer, who desires to take advantage of an exemption, must bring his case within the four corners of the exemption Notification." An argument was advanced in that case that a condition, which could not be fulfilled by an importer, cannot be put against the importer and could be taken only to be directory in nature. But, the said contention was repelled by the Bombay High Court.

24. In *Thermax Private Limited v. the Collector of Customs* [1992 (4) SCC 440 : 1992 (61) E.L.T. 352 (S.C.)], the assessee, who imported certain goods from Japan for the purpose of using the same for refrigeration/air conditioning of two factories, claimed the benefit of two exemption Notifications Bearing Nos. 93/76 and 63/85, which provided concession of 25% ad valorem. The Notifications stipulated two conditions to be fulfilled namely (a) that the parts indicated therein should be used for refrigeration and air conditioning appliances in any one of the places set out in the Table and (b) that the procedure specified in Chapter X of the Central Excise Rules, 1944 had been followed. The importer, admittedly, fulfilled one of the conditions. The importer used the parts indicated in the Notification for setting up refrigeration or air conditioning appliances or machinery in one of the places set out in the Notification itself. But, the assessee obviously could not specify the second of the conditions, as the same was attracted only when the Central Excise Rules are applied. Therefore, the assessee paid the CVD and then made a claim for refund. But, the claim was rejected.

25. Their appeals against two orders of rejection, suffered different consequences at the hands of the First Appellate Authority. Therefore, both the assessee as well as the Department filed appeals. The Tribunal allowed the Department's appeal and dismissed the assessee's appeal. When the matter landed up in the Supreme Court, the Supreme Court pointed out that for deciding the question of eligibility, one must forget the fact that the goods are imported, but imagine that the importer had manufactured the goods in India and then determine the amount of excise duty that they would have been called upon to pay in that event. If so done hypothetically, if such a person had been

entitled to the exemption or remission, then the importer will be automatically entitled to the benefit, irrespective of the non fulfilment of the second condition namely the adherence to the procedure of Chapter X of the Rules. In Paragraph 11 of the report, the Supreme Court held that the Tribunal was wrong in denying the benefit to the assessee merely on the ground that the procedure stipulated in Chapter X of the Rules is inapplicable to importers as such.

26. In *Hyderabad Industries Limited v. Union of India* [1995 (5) SCC 15 : 1999 (108) E.L.T. 321 (S.C.)], an importer of asbestos fibre who used a raw material for manufacturing some other product, was aggrieved by a demand of additional duty of customs made under Section 3(1) of the Customs Tariff Act, 1975. The Department took a stand that the process, by which, asbestos fibre was obtained, was a process of manufacture and hence, the said item fell within Tariff Item 22F of the First Schedule to the Excise Act. Reliance was placed by the Department upon the decision of the Supreme Court in *Khandelwal Metal and Engineering Works v. Union of India* [(1985) 3 SCC 620 : 1985 (20) E.L.T. 222 (S.C.)].

27. In *Khandelwal*, the Court was concerned with the import of brass scrap. The brass scrap so imported consisted of damaged articles like taps and pipes not manufactured in India or elsewhere. The assessee argued that additional duty of customs under Section 3(1) could be levied only if an article, which was imported into India, could be manufactured in India or elsewhere. This argument was rejected in *Khandelwal* by holding that the levy stipulated in Section 3(1) is a supplementary one and that it is only an enhancement of the levy charged by Section 12 of the Customs Act. In other words, the decision in *Khandelwal* was to the effect that an additional duty of customs is leviable even merely on the import of the article, though it may not be manufactured or produced in India.

28. But, the correctness of the decision in *Khandelwal* was doubted in *Hyderabad Industries Limited*. In Paragraph 17 of the report in *Hyderabad Industries Limited*, a Five Judges Bench of the Supreme Court (in a majority opinion of 3 : 2), held that Section 3(1) of the Customs Tariff Act, 1975 is a charging section independent of Section 12 of the Customs Act. The view taken in *Khandelwal* that even if the article had not undergone a process of manufacture or production, it is still subjected to the levy of additional duty, was held, in *Hyderabad Industries Limited*, to be incorrect.

29. In *Motiram Tolaram v. The Union of India* [1999 (6) SCC 375 : 1999 (112) E.L.T. 749 (S.C.)], the Supreme Court was concerned with an exemption Notification No. 185/83, which reduced the rate of duty on polyvinyl alcohol manufactured from duty paid vinyl acetate monomer to 10% ad valorem. The Department refused the benefit of the Notification to the importer on the ground that the exemption Notification was conditional in nature and that the condition could not have been fulfilled by the importer. The assessees contended that they had imported the exempted goods, which were also manufactured only with the same raw material by the foreign manufacturer, but since no duty was payable

under the Indian Law on the raw material, as it was manufactured by a foreign manufacturer, the condition stipulated in the Notification was impossible of being complied with by an importer. While rejecting the said contention, the Supreme Court held as follows :

"Vinyl acetate monomer is an item which is manufactured in India and a rate of excise duty is leviable thereon. On the polyvinyl alcohol which has been imported, vinyl acetate monomer has not been subjected to the appropriate amount of duty payable under the Indian law. Because this condition had not been satisfied in the present case, therefore, the appellants are unable to get the benefit of the said Notification."

30. In *Collector of Central Excise v. Dhiren Chemical Industries* [2002 (2) SCC 127 : 2002 (139) E.L.T. 3 (S.C.)], a reference was made to a Five Judges Bench on the ground that there was a conflict between the views taken in *Commissioner of Central Excise v. Usha Martin Industries* [(1997) 7 SCC 47 : 1997 (94) E.L.T. 460 (S.C.)] and *Motiram Tolaram*. In *Usha Martin Industries*, the exemption Notification had imposed a condition that the exempted product should contain a raw material "on which, the appropriate amount of duty of excise had already been paid". The Department took a stand that in cases where the raw material had attracted - NIL - duty, the condition stipulated in the Notification cannot be fulfilled and that therefore, the benefit of the exemption Notification may not be available in respect of products, on whose inputs, no duty was paid. But, this stand of the Department was rejected by the Court in *Usha Martin Industries* on the ground that the expression "appropriate" cannot be sidelined. But, in *Motiram Tolaram*, the Supreme Court held that unless the product in question was such that if, manufactured in India, a rate of excise duty was leviable thereon, the benefit of exemption will not be available.

31. While resolving the conflict between *Usha Martin Industries* and *Motiram Tolaram*, the Five Judges Bench of the Supreme Court held in *Dhiren Chemical Industries* that the conclusion reached in *Usha Martin Industries* was not correct. Paragraphs 7 to 9 of the opinion in *Dhiren Chemical Industries* are extracted as follows :

"In our view, the correct interpretation of the said phrase has not been placed in the judgment in the case of *Usha Martin*. The stress on the word "appropriate" has been mislaid. All that the word "appropriate" in the context means is the correct or the specified rate of excise duty.

An exemption notification that uses the said phrase applies to goods which have been made from duty paid material. In the said phrase, due emphasis must be given to the words "has already been paid". For the purposes of getting the benefit of the exemption under the notification, the goods must be made from raw material on which excise duty has, as a matter of fact, been paid and has been paid at the "appropriate" or correct rate. Unless the manufacturer has paid the correct amount of excise duty, he is not entitled to the benefit of the

exemption notification.

Where the raw material is not liable to excise duty or such duty is nil, no excise duty is, as a matter of fact, paid upon it. To goods made out of such material, the notification will not apply."

32. In *Commissioner of Customs, Amritsar v. Malwa Industries Limited* [2009 (235) E.L.T. 214 (S.C.)], the Supreme Court was concerned with a Notification dated 1-3-2006. As per the said Notification issued in exercise of the powers conferred by Section 5A(1) of the Central Excise Act, 1944, an exemption was granted subject to the condition that the product is used in the same factory. The question that arose for consideration was as to whether the goods that were used must also be manufactured in the same factory or not. While answering the question in favour of the assessee, the Supreme Court held that an exemption Notification should be read literally and that a person claiming the benefit of an exemption Notification, must show that he satisfied the eligibility criteria. But, once it is found that the exemption Notification is applicable to the case of the assessee, the same should be construed liberally. The expression "same factory" found in the Notification was interpreted by the Supreme Court in *Malwa Industries Limited*, to mean factory belonging to the importer where the manufacturing activity took place.

33. In *Commissioner of Central Excise v. Hari Chand Shri Gopal* [2010 (260) E.L.T. 3 (S.C.)], a Five Member Bench of the Supreme Court held that a provision in a fiscal statute providing for an exemption, concession or exception, has to be construed strictly and that an exemption Notification has to be interpreted in the light of the words employed by it and not on any other basis. The Court went on to hold that "a person, who claims exemption or concession, must establish clearly that he is covered by the provision concerned and in case of doubt or ambiguity, the benefit of it must go to the State."

34. In *Hari Chand Shri Gopal*, an argument revolving around the doctrine of substantial compliance was raised. But, the Court pointed out that this doctrine is a judicial invention equitable in nature, designed to avoid hardship, where a party does all that can reasonable be expected of it, but failed or faulted in some minor or inconsequential aspects, which cannot be described as the "essence" or the "substance" of the requirements. In other words, if there are certain statutory requirements, the fulfilment of which would not constitute the essence or substance, then the same can be ignored based upon this doctrine.

35. The decisions in *Usha Martin Industries*, *Motiram Tolaram* and *Dhiren Chemical Industries* came up for consideration before a Two Member Bench of the Supreme Court in *Commissioner of Central Excise v. Kay Kay Industries* [2013 (14) SCC 94 : 2013 (295) E.L.T. 177 (S.C.)]. But, it was in a different context. The case related to a company, which availed MODVAT credit on the inputs on the strength of the invoices raised by its supplier. But, on verification, it was found that the supplier of inputs had not discharged fully the duty liability

for the period covered by the invoices. Therefore, the benefit availed earlier was disallowed. The First Appellate Authority concurred with the view of the Adjudicating Authority. But, the Tribunal (CESTAT) reversed the decisions of the Adjudicating and Appellate Authorities on the ground that there was sufficient compliance of the conditions enumerated in the Notification. The High Court, in an appeal filed by the assessee, answered the question in favour of the assessee forcing the Revenue to take up the matter to the Supreme Court.

36. After noting the conflict between Usha Martin Industries and Motiram Tolaram that was resolved by a decision of the Constitution Bench in Dhiren Chemical Industries, the Supreme Court held that the Constitution Bench was concerned in Dhiren Chemical Industries, with a Notification for exemption. But, in Kay Kay Industries, the Supreme Court was concerned with a Notification issued under sub-rule (6) of Rule 57A of the Rules, dealing with the availing of MODVAT credit. Therefore, the Court held that the decision of the Constitution Bench in Dhiren Chemical Industries would have no application to cases of that nature.

37. In Aidek Tourism Services Pvt. Ltd. v. Commissioner of Customs [2015 (7) SCC 429 : 2015 (318) E.L.T. 3 (S.C.)], the assessee, which had imported Honda Accord cars and filed a claim for refund on the ground that in terms of the Notification No. 64/93, they were entitled to concessional rate of CVD. The assessee's claim for refund at Mumbai was allowed, but their claim for refund at New Delhi was dismissed. Therefore, both matters landed up before the Supreme Court. The Supreme Court found that the benefit of concessional rate of duty was available under the Notification dated 28-2-1993 subject to the condition that the particular goods namely saloon cars are used solely as taxis. There were also four more conditions stipulated in the Notification. A Two Member Bench of the Supreme Court, allowing the claim of the assessee, held that the ratio of the decision in Thermax Private Limited would be squarely applicable to the case, going by the spirit and objective behind the Notification.

38. Aidek Tourism Services Pvt. Ltd. was followed immediately by S.R.F. Limited v. Commissioner of Customs [2015 (318) E.L.T. 607 (S.C.)]. In S.R.F. Limited, the assessee was an importer of nylon filament yarn of 210 deniers falling under Chapter LXIV. The exemption Notification No. 6/2002, dated 1-3-2002 stipulated certain conditions, one of which read as follows :

"If no credit under Rule 3 or Rule 11 of the Cenvat Credit Rules, 2002 had been taken in respect of the inputs or capital goods, used in the manufacture of these goods."

39 The contention of the Department in S.R.F. Limited was that an importer could have never satisfied the aforesaid condition, as the inputs or capital goods used in the manufacture of those imported goods would not have suffered any duty of excise, making the assessee even eligible for a Cenvat credit. But, the Supreme Court held in S.R.F. Limited that the contention of the Department was completely contrary to the judgment in Thermax Private Limited. Accordingly, the

Supreme Court allowed the claim of S.R.F. Limited.

40. As we have pointed out earlier, the Central Government did two things, after the decision of the Supreme Court in S.R.F. Limited (rendered on 26-3-2015). The Central Government amended the Notification No. 30/2004, dated 9-7-2004 by two Notifications, one Bearing No. 34/2015, dated 17-7-2015 and another Bearing No. 37/2015, dated 21-7-2015. By the first amendment, the Central Government substituted a new proviso in the place of the existing one. The new proviso reads as follows :

"Provided that the said excisable goods are manufactured from inputs, on which, appropriate duty of excise leviable under the First Schedule to the Central Excise Tariff Act or additional duty of customs under Section 3 of the Customs Tariff Act, 1975 (51 of 1975) has been paid and no credit of such excise duty or additional duty of customs on inputs has been taken by the manufacturer of such goods (and not the buyer of such goods), under the provisions of Cenvat Credit Rules, 2004."

By the second amendment, under Notification No. 37/2015, an Explanation was inserted under the above proviso. This Explanation reads as follows :

"Explanation : - For the purposes of this Notification, appropriate duty or appropriate additional duty includes nil duty or concessional duty, whether or not read with any relevant exemption Notification for the time being in force."

41. The Central Government also filed a petition for review. On 9-9-2015, the Supreme Court condoned the delay and ordered notice in the review. Therefore, it is clear that the law has travelled in a zig zag fashion from one extreme to the other. This is at least apparently so.

42. But, a careful look at the various types of Notifications issued by the Central Government from time to time in exercise of the powers conferred by Section 5A(1) of the Central Excise Act, 1944 and the manner in which the Supreme Court interpreted the Notifications, would make clear one important fact. This fact is that all the Notifications so far issued and which had so far come up for consideration, could be categorised into four types, as follows :

(i) Notifications, which have stipulated a condition that related only to the processing of the returns or declarations, but which did not impose a condition with regard to payment of any duty of excise on the inputs.

(ii) Notifications, which contained a stipulation that the inputs that had gone into the process of manufacture of the exempted goods, should have already suffered a duty of excise.

(iii) Notifications, which contained a condition that the inputs used in the manufacture of the exempted goods should not only have suffered a duty of excise, but the manufacturer should not also have claimed Cenvat credit on the quantum of such duty of excise suffered on the inputs and

(iv) Notifications, which contain a condition that the manufacturer should not have claimed Cenvat credit on the duty of excise leviable on the inputs.

43. That the Notifications that came up for consideration so far before the Supreme Court could be classified into the above four types, can be easily from the following table :

Decision

Notification No. and condition stipulated therein

Ashok Traders (Bombay DB)

Notification No. 302/79, dated 4-12-1979. It stipulated a condition that the exempted goods should have been manufactured from a particular raw material and that on such raw material, the appropriate amount of duty of excise should have been paid.

Khandelwal Metal and Engineering Works

The Court was not concerned with an exemption Notification, but concerned with an article, which was not manufactured in India and hence, the question was whether in respect of such an article, Section 3(1) of the Tariff Act could be invoked.

Thermax Private Limited

Notifications 93/76 and 63/85. The product should be used for a particular purpose in any one of the places set out in the table under the Notification and the procedure specified in Chapter X of the Central Excise Rules, 1944 should have been followed.

Hyderabad Industries Limited

Even in this case, the Supreme Court was not concerned with any notification, but primarily concerned with a question as to whether asbestos fibre was brought out by a mechanical or other process, from out of raw rock and as to whether asbestos fibre is exigible to duty under Tariff Item 22F. The Department relied upon Khandelwal. But, the correctness of the decision was doubted in this case, in the sense that Section 3(1) of the Customs Tariff Act was held to be a charging section independent of Section 12 of the Customs Act.

Motiram Tolaram

Dealt with an exemption Notification No. 185/83, which imposed a condition that the input used for the manufacture of the product should have suffered an appropriate amount of duty under the Indian Law.

Usha Martin Industries

Exemption Notification dated 30-11-1963 as amended up to 7-4-1981, which imposed a condition that the exempted product should contain a raw material, on

which, appropriate amount of duty of excise had already been paid.

Dhiren Chemical Industries

It arose out of a reference on the ground that there was a conflict between the decision in Usha Martin Industries (which dealt with a Notification that stipulated a condition that an appropriate amount of duty should have been paid on the input) and Motiram Tolaram, in which, the Court held that if the product was not manufactured in India, it must be taken that appropriate duty had been paid. The conflict between the two was resolved by the Constitution Bench in Dhiren Chemical Industries by holding that where the raw material is not liable to excise duty, no excise duty could have been paid upon it and that therefore, to such goods made out of such material, the Notification will not apply.

Malwa Industries Limited

The exemption Notification No. 4/2006, which imposed a condition that the exempted goods are used in the same factory fell for consideration. The expression "same factory" was interpreted to mean "factory" where the goods are actually manufactured. In case of imported goods, they should be used in the factory belonging to the importer where the manufacturing activity took place.

Hari Chand Sri Gopal

Notification No. 121/94, dated 11-8-1994, which granted the benefit of exemption on specified intermediate goods captively consumed for the manufacture of final products fell for exploration. The doctrine of substantial compliance was held to be inapplicable where the clear statutory pre-requisite is not met.

Kay Kay Industries

The Court was not concerned with an exemption Notification. It was concerned with Notification No. 58/97 issued in exercise of the powers conferred by Rule 57A(6).

Aidek Tourism Services (P) Limited

Dealt with a Notification Bearing No. 64/93, which imposed a condition that the exempted good namely a saloon car, after clearance, should have been registered for use, solely as a taxi and the manufacturer has paid excise duty at 40% ad valorem.

S.R.F. Limited

Notification No. 6/2002, dated 1-3-2002, which imposed a condition that no credit under the Cenvat Credit Rules should have been taken in respect of the inputs or capital goods used in the manufacture of those goods.

44. In the light of what is reflected in the above table, it can safely be concluded that the interpretation given by the Supreme Court to the Notifications that were

in question, depended primarily upon two important facts namely (a) as to whether the Notification imposed a condition that the input used for the manufacture of the exempted goods had already suffered a duty of excise or not and (b) as to whether the manufacturer of the exempted goods had claimed Cenvat credit in respect of a duty paid on the inputs or not.

45. Wherever the Notifications prescribed conditions, which were merely procedural in nature, but did not involve the payment of any duty of excise on the inputs, the Court interpreted the Notifications in favour of the assessee, in view of the fact that an importer could not comply with those procedural formalities. But, wherever the Notifications imposed either (i) a condition that the input used for the manufacture of the exempted goods, should have suffered a duty or (ii) a condition that duty ought to have been paid and Cenvat credit not claimed, the Court interpreted such Notifications in favour of the Revenue (except perhaps in the case of Aidek and SRF).

46. It must be pointed out at this stage that one cannot make a distinction between (i) a Notification, which merely stipulates a condition that the manufacturer ought not to have claimed Cenvat credit in respect of the duties paid on the inputs and (ii) a Notification that imposes a condition that a duty of excise should have been paid on the inputs and no Cenvat credit should have been claimed in relation to the same. This is for the reason that the very entitlement to claim Cenvat credit would arise only in cases where a duty of excise had been paid on the inputs. For a person, who never paid a duty of excise, on the inputs used for the manufacture of exempted goods, the question of claiming Cenvat credit would never arise.

47. A Notification such as the one Bearing No. 30/2004, dated 9-7-2004, which merely stipulates a condition that no Cenvat credit ought to have been availed in respect of the duties paid on the inputs, is in no way different from a Notification, which stipulates a condition that the inputs ought to have suffered a duty and no Cenvat credit should have been claimed on the same.

48. In simple terms, we can understand the proposition by looking at the different alternative scenarios as follows :

S. No.

Conditions stipulated in the Notification

Possible scenarios

Result

1

A condition that the inputs ought to have suffered a duty, without any further rider in relation to CENVAT credit

(i) In the first scenario, there may be cases where a manufacturer of exempted

goods, who satisfies the condition, might have claimed Cenvat credit

(ii) The same person might not have claimed Cenvat credit

If the Notification stops merely by stipulating that the inputs ought to have suffered a duty and the Notification does not make it a pre-condition that no Cenvat credit should have been taken, then the Department cannot improve upon the condition, irrespective of whether a person falls under the first scenario or the second scenario. The Department is obliged to give the benefit of the exemption Notification to all persons, who manufacture exempted goods with inputs, which have suffered a duty of excise

2

A Notification with the only stipulation that no Cenvat credit has been availed on the duties leviable on the inputs

In this type of a case there can be only one scenario.

The same is that a person should not have claimed Cenvat credit in relation to the duties of excise leviable on the inputs, to satisfy this condition. He can fulfil this condition only if he has already suffered duties of excise on the inputs used in the manufacture of exempted goods. This condition has inbuilt within itself, the pre-condition that a duty of excise had been paid

Therefore, a person can be taken to have satisfied this condition only

(i) if he establishes that the inputs used by him had suffered duty and

(ii) that he had not claimed Cenvat credit on them

3

A condition, which incorporates both (1) and (2) above. In other words, a condition that stipulates that the inputs should have suffered a duty and no Cenvat credit had been taken

Even in this type of Notification, there is only one possible scenario

Consequently, a person will be entitled to the benefit of the exemption Notification only if both conditions are satisfied.

49. Therefore, the interpretation to be given to a Notification stipulating a pre-condition that the inputs should have suffered a duty and no Cenvat credit should have been claimed, should be the same as the interpretation to be given to a Notification, which imposes a pre-condition that no Cenvat credit should have been claimed in relation to the duties leviable on the inputs. Once this is very clear, the juggernaut that the assessees sought to create legally, could be easily untied. The object behind the two types of Notifications, one stipulating the sufferance of duty on the inputs and another merely stipulating that no Cenvat credit should have been claimed, is to ensure that though the goods by

themselves are exempt, some element of duty has been paid on the inputs that were used in their manufacture.

50. Keeping the above legal principles in mind, if we come back to the case on hand, it will be seen that the arguments of Mr. Joseph Prabhakar, learned counsel for the first respondent are two fold. His first argument is that the raw materials, from out of which, silk fabrics are manufactured, even if they are manufactured in India, are not liable to excise duty as seen from Chapter Heading 50. Therefore, his first contention is that when the inputs are not even exigible to duty, the Proviso to the exemption Notification has no application. The second argument of the learned counsel for the first respondent is that in any case, the first respondent, being an importer, satisfies the condition stipulated in the proviso, as he has not claimed Cenvat credit (rather had no occasion to claim Cenvat credit).

51. The second argument of the learned counsel for the first respondent is liable to be rejected, in the light of what we have indicated in the table in Paragraph 48. A stipulation that Cenvat credit ought not to have been claimed, has inbuilt within itself, the stipulation that the inputs had suffered some duty. If the inputs had not suffered any duty, then the question of claiming Cenvat credit would not arise. As a consequence, an importer will not be entitled to the benefit of the exemption Notification, as he would not be in a position to satisfy the condition that is inbuilt into the proviso under the Notification dated 9-7-2004.

52. But, the learned counsel for the first respondent has an arguable point on the first contention. We have given in the tabular form in Paragraph 48 above, the three different categories of Notifications, the various scenarios that could emerge out of each one of them and the resultant position as against each. But, the first contention of the learned counsel for the first respondent presents us a completely different scenario, which may not be covered even by any of the three types of Notifications. This first contention travels beyond the exemption Notification, and falls back upon the Chapter Headings and the rates of duty stipulated therein.

53. As we have seen, Chapter Heading 50 shows that Tariff Item Nos. 5001, 5002 and 5003 respectively, relating to silk worm cocoons, raw silk and silk waste, attract nil rate of duty. Therefore, if silk worm cocoons, raw silk or silk waste alone are used in the manufacture of silk fabrics falling under Tariff Item No. 5007, the inputs would not have suffered a duty of excise. If a hypothetical situation arises, in which, all the inputs used in the manufacture of an exempted goods, attract nil rate of duty under the relevant Chapter Headings, then even the domestic manufacturer of such exempted goods would not be able to satisfy either the condition that the inputs had suffered duty or the condition that he did not avail Cenvat credit. Therefore, what happens to such cases becomes a moot question.

54. If the fundamental premise on which additional duty is imposed under

Section 3(1) of the Customs Tariff Act, 1975, is to ensure that the importer pays the same duty on his goods as the domestic manufacturer pays, then it goes without saying that the importer cannot be asked to pay something when the domestic manufacturer is not liable to pay any duty at all, in view of the inputs falling under Tariff Items that attract nil rate of duty. Therefore, to some extent, the first contention of the learned counsel for the first respondent is correct. In other words, if the domestic manufacturer of woven silk fabrics falling under Tariff Item No. 5007, would not have suffered any duty on the inputs used in the manufacture of woven silk fabrics, then the first respondent cannot be placed in a disadvantageous position, by asking the first respondent alone to pay additional rate of duty. In a case of such nature, the proviso to the Notification dated 9-7-2004 will have no application either in respect of a domestic manufacturer or in respect of an importer.

55. But, that is not the end of the matter. The expression "input" is defined in Rule 2(k) of the Cenvat credit Rules as follows :

"(k) "input" means -

(i) all goods, except light diesel oil, high speed diesel oil and motor spirit, commonly known as petrol, used in or in relation to the manufacture of final products whether directly or indirectly and whether contained in the final product or not and includes lubricating oils, greases, cutting oils, coolants, accessories of the final products cleared along with the final product, goods used as paint, or as packing material, or as fuel, or for generation of electricity or steam used in or in relation to manufacture of final products or for any other purpose, within the factory of production;

(ii) all goods, except light diesel oil, high speed diesel oil, motor spirit, commonly known as petrol and motor vehicles, used for providing any output service;

Explanation 1. - The light diesel oil, high speed diesel oil or motor spirit, commonly known as petrol, shall not be treated as an input for any purpose whatsoever.

Explanation 2. - Input include goods used in the manufacture of capital goods which are further used in the factory of the manufacturer; but shall not include cement, angles, channels, Centrally Twisted Deform bar (CTD) or Thermo Mechanically Treated bar (TMT) and other items used for construction of factory shed, building or laying of foundation or making of structures for support of capital goods."

56. Therefore, even if something is used in or in relation to the manufacture of final products whether directly or indirectly and irrespective of whether what is so used is contained in the final product or not, the same would be treated as inputs. The definition of the word "input" is so wide as to include even packing material, fuel, electricity, etc. Therefore, unless the first respondent establishes that the manufacturing process is a mechanical process, in which, nothing else

other than raw silk or silk waste or silk cocoon is used, the first respondent cannot claim to satisfy the prescription in the proviso.

57. Drawing our attention to the manufacturing process indicated in Paragraph 33 of the counter affidavit filed by the first respondent, Mr. Joseph Prabhakar, learned counsel for the first respondent contended that the process of production of silk fabrics comprises of four stages namely (i) hatching of eggs (ii) silk production by worm (iii) transition of the worm and (iv) brushing the cocoons and obtaining silk from the undamaged cocoons and winding the silk filaments in a reel.

58. But unfortunately, what is stated in Paragraph 33 of the counter affidavit appears to be the process of creation of raw silk. The manufacture of woven silk fabrics covered by Tariff Item No. 5007, in respect of which, the first respondent claimed the benefit of exemption, is different from what is narrated by the first respondent in Paragraph 33. From the literature available on the manufacture of silk fabrics, it is seen that there are several stages involved in the process. The process of manufacture of silk fabric, as seen from the literature available on the subject, is as follows :

"Silk Fabric Manufacturing Process -

Sorting and softening the cocoons :

The filature is the factory in which the cocoons are processed into silk thread.

In the filature the cocoons soaked in hot water to loosen the sericin. Only a part of the sericin is removed at this stage.

Reeling the filament (creating raw silk) :

Reeling may be achieved manually or automatically. The cocoons are processed through machinery to separate the threads from each other.

Through this process, a single long piece of thread is created. The sericin naturally present in the cocoons contributes to the adhesion of the fibers to each other.

Packaging the skeins :

The end product, the raw silk filaments, is reeled into skeins. These skeins are packaged into bundles from which silk thread can be woven at manufacturing centers.

Forming silk yarn :

Twisting the reeled silk forms silk thread, also called yarn. First the skeins of raw silk are categorized by color, size, and quantity. Next they are soaked in warm water mixed with oil or soap to soften the sericin. The silk is then dried.

The silk yarn is put through rollers to make the width more uniform.

Degumming thrown yarn :

To achieve the distinctive softness and shine of silk, the remaining sericin must be removed from the yarn by soaking it in degumming solution.

Finishing silk fabrics :

After degumming, the silk yarn is a creamy white colour. It may next be dyed as yarn, or after the yarn has been woven into cloth."

59. Therefore, in the absence of any material to show that the processes indicated above would involve inputs, none of which would attract duty of excise, it is not possible to conclude that the first respondent would satisfy both conditions namely (a) payment of duty on the inputs and (b) the non availing of Cenvat credit on the same. Though the Notification Bearing No. 30/2004, dated 9-7-2004 does not stipulate the first condition, we have held that the first condition is inbuilt into the second condition. Therefore, the first respondent cannot be taken to have fulfilled the condition stipulated in the proviso to the Notification No. 30/2004, dated 9-7-2004, unless he had shown that in the entire process of manufacture of woven silk fabrics falling under Tariff Item No. 5007, there are no inputs (used directly or indirectly and whether found in the final product or not), which attract any levy of duty under tariff items relevant to those inputs.

60. Hence, in fine, the propositions of law that would emerge out of the above discussion, can be summed up as follows :

(i) In cases where the exemption Notifications are absolute and they do not make the benefit available only upon the fulfilment of any condition, even the importer would be entitled to the benefit of exemption.

(ii) In cases where the Notifications for exemption stipulate only one condition namely that the inputs used in the manufacture of the exempted goods should have suffered a duty, then the benefit of the Notification will not be available to any of the importers, since he could have never paid any duty of excise on the inputs used in their manufacture by the foreign manufacturer. This proposition is based upon the premise that the object of such Notifications is only to grant exemption to those final products, on which, some duty has been paid (in India) at the stage of inputs. In other words, Notifications of this nature, are not merely conditional, but also restrictive in nature, as they confer benefit not upon all manufacturers of exempted goods, even if they are domestic manufacturers, but only upon those, who use inputs that had suffered duty.

(iii) In cases where the exemption Notification stipulates only one condition namely that no Cenvat credit ought to have been availed on the inputs, the benefit of the Notification will be available only to those, who satisfy two conditions namely that the inputs used by them suffered a duty and that they did not seek Cenvat credit. Since an importer can never satisfy the first condition, the second condition becomes inapplicable to him and he cannot be heard to

contend that the inapplicability of the condition by itself would make him eligible for the grant of the benefit.

(iv) In cases where the exemption Notification stipulates two conditions, namely that the inputs should have suffered duty and that no Cenvat credit should have been availed, then the benefit of the Notification will be available only if both conditions are satisfied. An importer will never be able to satisfy both these conditions and hence, he cannot claim the benefit.

61. Therefore, we answer both questions of law against the assessee. As a consequence, the appeals of the Revenue are allowed. No costs.