
(2010) 05 RAJ CK 0027
In the Rajasthan High Court

Sulzer Processors Pvt. Ltd.

APPELLANT

Vs

The Commissioner of Central Excise and Another

RESPONDENT

Date of Decision : 03-05-2010

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35G
Industries (Development and Regulation) Act, 1951 — Section 11B, 29B

Citation : (2010) 4 RLW 3304

Hon'ble Judges : Jagdish Bhalla, C.J.;Dinesh Maheshwari, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Dinesh Maheshwari, J.—This appeal u/s 35G of the Central Excise Act, 1944 is directed against the final order dated 13.08.2009 whereby the Customs, Excise and Service Tax Appellate Tribunal, New Delhi ["the Tribunal"] has dismissed the appeal [Excise Appeal No. 3308/2004 ? Ex(BR)] filed by the appellant-assessee against the order dated 31.03.2004/06.04.2004 as passed by the Commissioner, Central Excise, Jaipur-II ["the Commissioner"] insofar relating to the demand of duty and interest while affirming the finding that the appellant was not eligible to avail of the special procedure of Compound Levy Scheme under Notification No. 32/2001.

2. Briefly put, the relevant facts and the background aspects of the matter are that by way of Notification No. 16/2001, the Central Government introduced, with insertion of Section E-XA containing Rules 96-ZNA to 96-ZND in the Central Excise Rules, 1944, a special procedure [referred to as "the Compound Levy Scheme"/"the Scheme"] for discharge of liability for Excise Duty leviable on production, by specified process, of the specified goods [referred to as "the said goods"] by an "independent processor of textile fabrics", on payment of the amount to be calculated per Rule 96-ZNC *ibid*. The appellant-assessee, Sulzer Processors Private Limited, Bhilwara made an application in the prescribed manner to the prescribed authority i.e., the Commissioner, Central Excise, Jaipur-

II on 01.05.2001, seeking to avail of the said special procedure. While the application so made by the appellant was pending consideration, the aforesaid Rules of 1944 came to be rescinded but and however, the Central Government continued with the Compound Levy Scheme by issuing Notification No. 32/2001 dated 28.06.2001 under the Central Excise (No. 2) Rules, 2001. This Notification No. 32/2001, while retaining the basic features of the abovementioned Section E-XA provided, inter alia, the procedure for dealing with the pending applications too.

3. For their relevance and implications, apposite it shall be to take note, at this stage itself, of some of the provisions contained in the said Notification No. 32/2001, particularly the opening paragraph, and paragraph 7 and part of paragraph 8 as under:

In exercise of the powers conferred by Rule 15 of the Central Excise (No. 2) Rules, 2001, (hereinafter referred to as "the said Rules") the Central Government, hereby, specifies the processed textile fabrics falling under heading Nos. 52.07, 52.08, 52.09, 54.06, 54.07, 55.11, 55.12, 55.13 or 55.14, or processed textile fabrics of cotton or man-made fibres, falling under heading Nos. or sub-heading Nos. 58.01, 58.02, 5806.10, 5806.40, 6001.12, 6001.22, 6001.92, 6002.20, 6002.30, 6002.43, or 6002.93 (hereinafter in this section referred to as the "said goods") of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), manufactured or produced by an independent textile processor exclusively with the aid of a hot-air stenter (hereinafter referred to as "independent textile processor"), and notifies the rate of excise duty as-

(a) in the case of a processing factory whose average value of processed fabric is up to and including Rs. 30 per sq. mtr., Rs. 2.5 lakhs per chamber per stentor per month; and

(b) in the case of a processing factory whose average value of processed fabric exceeds Rs. 30 per sq. mtr., Rs. 3 lakhs per chamber per stentor per month,

installed in the processing factory, irrespective of whether such stentor or chamber is in use or not, or is in working condition or not.

2 to 6 xxxx xxxx xxxx 7. (1) The independent textile processor, who is engaged exclusively in the manufacture or production of the said goods, shall make an application prior to the commencement of commercial production, in the form specified in the Appendix to this notification, to the Commissioner of Central Excise for the purpose of availing of the special procedure for payment of excise duty as contained in this notification. The Commissioner of Central Excise, on such application being made, shall grant permission, subject to such conditions and limitations as laid down in this notification, so as to cover the period commencing from the date of making the application and ending on the 31st March, 2002. Pending grant of such permission by the Commissioner of Central Excise, the independent textile processor may avail the provisions of this notification on a provisional basis. But if such application is rejected by the

Commissioner of Central Excise, then the independent textile processor shall not be eligible to avail of the provisions of this notification from the date of making the application and shall discharge the duty liability as per the provisions contained elsewhere than in this notification and the duty, if any, paid under the provisions of this notification, shall be adjusted against the duty payable on such goods.

Explanation I.- For the purposes of this notification, "independent textile processor" means a manufacturer who undertakes bleaching, dyeing or printing or any one or more of these processes with the aid of power or steam and who also has the facility in his factory (including plant and equipment) for carrying out heat setting or drying, with the aid of power or steam exclusively in a hot air stenter and who has no proprietary interest in any factory primarily and substantially engaged in the spinning of yarn or weaving or knitting of fabrics, on or after the 1st day of May, 2001.

Explanation II.- For the removal of doubt, it is hereby declared that the provisions of this notification shall not apply to an independent processor who carries out heat setting or drying with the aid of an open-air stenter installed in his factory.

(2) Notwithstanding anything contained in sub-paragraph (1), in respect of a processing factory existing as on 1st May, 2001, the application made by an independent textile processor, on or before the 20th May, 2001, to the Commissioner of Central Excise under Sub-rule (2) of Rule 96ZNA for availing the special provisions contained in section E-XA of the Central Excise Rules, 1944, for the period on and from 1st May, 2001 to 31st March, 2002, shall be deemed to be an application made under sub-paragraph (1). If such application had been granted by the Commissioner of Central Excise on a date prior to 1st day of July, 2001, the same shall be deemed to have been granted under sub-paragraph (1), subject to all the conditions and limitations as laid down in this notification. Otherwise, the Commissioner shall dispose of the application as if it is an application made under sub-paragraph (1).

Explanation.- For the removal of doubts, it is hereby declared that a processing factory, of an independent textile processor, existing on 1st May, 2001 and in respect of which no application was made under Rule 96ZNA of the Central Excise Rules, 1944, on or before 20th May, 2001, shall not be eligible to avail of the benefit of this notification.

Provided further that an application made prior to the commencement of commercial production by an independent textile processor, commencing production for the first time in a new processing factory coming into existence after the 1st May, 2001 but prior to 1st July, 2001, under the proviso to Sub-rule (2) of Rule 96ZNA of the Central Excise Rules, 1944, so as to cover the period up to the 31st March, 2002, shall also be deemed to be an application under sub-paragraph (1) and shall be disposed of under that sub-paragraph. If such

application had been granted by the Commissioner of Central Excise under Rule 96ZNA of the Central Excise Rules, 1944, so as to cover the period up to 31st March, 2002, such disposal shall be deemed to be the disposal of the application under sub-paragraph (1), subject to all the conditions and limitations as laid down in this notification.

8. (1) The original value of the investment in the plant and machinery installed in the factory of the independent textile processor of the said goods, as on the 1st March, 2001 or on the 1st of May, 2001, whichever is higher, for a factory existing as on 1st May, 2001, of the independent textile processor or on the date of making the application under Rule 96ZNA of the Central Excise Rules, 1944 or paragraph 7 of this notification, as the case may be, in the case of an independent textile processor commencing production for the first time in a new factory coming into existence after the 1st of May, 2001, shall not exceed three crore rupees, irrespective of whether such plant and machinery is in use or not, or in working condition or not, and the independent textile processor shall declare the original value of investment in such plant and machinery installed in his factory, on the dates mentioned above, in the prescribed format duly certified by a Chartered Accountant or Cost Accountant. The Commissioner of Central Excise may require any such documentary evidence as he considers appropriate in respect of such original value before granting the application.

(2) If any additional plant and machinery is installed by the independent textile processor at any point of time, he shall intimate the same to the Commissioner of Central Excise within seven days of such installation and the original value of investment in plant and machinery together with the original value of investment in such additional plant and machinery shall not exceed three crore rupees. Where such original value of investment exceeds the limit of three crore rupees, the provisions of this notification shall not apply from the first day of the month in which such investment exceeded the said limit of three crore rupees.

xxxx xxxx xxxx

4. Further, by way of Notification No. 41/2001, as issued on 21.09.2001, the Central Government proceeded to insert an Explanation under paragraph 8(1) supra. The said Notification No. 41/2001 reads as under:

In exercise of the powers conferred by Rule 15 of the Central Excise (No. 2) Rules, 2001, the Central Government, being satisfied that it is necessary in the public interest so to do, hereby makes the following amendment in the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 32/2001-Central Excise, dated the 28th June, 2001, namely:

In the said notification, in paragraph 8, after sub-paragraph (1), the following shall be inserted, namely:

Explanation.- For the removal of doubt, it is hereby clarified that "the original value of the investment in the plant and machinery installed in the factory of the

independent textile processor", shall be the original value as determined in accordance with the Accounting Standards issued by the Institute of Chartered Accountants of India on Accounting for Fixed Assets.

5. Its application for availing the Compound Levy Scheme having remained pending, the appellant proceeded to discharge the duty liability in accordance with the said Scheme as permitted by Rule 96-ZNA(2) *ibid*. As per Clause (2) of paragraph 7 of Notification No. 32/2001, the application made by the appellant was required to be dealt with as if made under this Notification and hence, the Commissioner proceeded to deal with the same in his detailed order dated 20.09.2001. The learned Commissioner, at the outset, pointed out the following four pre-conditions to be fulfilled by the applicant to avail the said Compound Levy Scheme:

2. As per the provisions laid down in Rule 96ZNA to 96 ZND of Central Excise Rules, 1944 inserted *vide* Notification No. 16/2001 (NT) dated 30.4.2001, following four pre-conditions are to be fulfilled by a manufacturer of specified processed textile fabric to avail the compound levy scheme under the said rules:

(i) He should undertake bleaching, dyeing or printing or any one or more of these processes with the aid of power or steam.

(ii) He should have the facility in his factory (including plant & equipment) for carrying out heat setting or drying with the aid of power or steam exclusively in a Hot Air Stenter.

(iii) He should not have proprietary interest in any factory primarily and substantially engaged in the spinning of yarn or weaving or knitting of fabrics.

(iv) The Original value of investment in the plant & machinery installed in the factory as on 1.3.2001 or 1.5.2001 shall not exceed three Crore rupees, irrespective of whether such plant and machinery is in use or not, or is in working condition or not.

(emphasis supplied)

6. The Commissioner pointed out that there were doubts regarding fulfillment of the conditions (i), (ii), and (iv) by the appellant-assessee, that the inquiries were caused by the department, and that the opportunity was extended to the appellant to adduce necessary evidence. After observing that there was no dispute as regards condition (iii), as the assessee was not having proprietary interest in any factory primarily and substantially engaged in the spinning of yarn or weaving or knitting of fabrics, the learned Commissioner proceeded to take up the issues relating to the other conditions.

7. As regards condition (i) *supra*, after a thorough analysis of the process being carried out by the appellant and after dealing with the contentions urged on its behalf, the learned Commissioner recorded the findings that none of the processes specified in the Notification for availing Compound Levy Scheme was

carried out on fiber/top dyed fabric although one or more specified processes were carried out on piece dyed fabrics. The learned Commissioner said,-

7.5. All the above facts lead to an inevitable conclusion that fiber/top dyed fabrics do not undergo the process of bleaching or dyeing. It is in fact illogical to say that fully dyed fabrics is subjected to the process of bleaching, since it would not serve any purpose to remove colour from a fully dyed piece of fabrics. It is also an admitted fact that printing of fabrics is not being carried out by the assessee on any type of fabrics, as per their own submission. Thus I am satisfied that none of the processes specified in the Notification for availing Compound Levy System is carried out on fiber/top dyed fabric. Whereas one or more specified processes are carried out on piece dyed fabrics only.

(emphasis supplied)

8. Thus, the very basic condition regarding the nature of activity/process was held not fulfilled by the appellant-assessee. In the face of this fundamental adverse finding on the nature of activity, a request came to be made on behalf of the appellant that the unit may be allowed to avail the Scheme in relation to "piece dyed fabrics" and the other goods may be subjected to ad valorem rate of duty but the same was declined by the Commissioner with the observations that the Scheme could not be extended to the part goods being manufactured by the assessee. The Commissioner said,-

7.6. A request was made that the unit may be allowed to avail provision of the Compound Levy Scheme in respect of piece dyed fabrics and other goods namely Fiber/Top Dyed fabrics may be subjected to Ad-valorem rate of duty. However I am of the view that provisions of the present Compound Levy Scheme cannot be extended to the part goods being manufactured by the assessee. Thus on this ground I hold that the assessee do not fulfill this pre condition to be eligible to avail the Compound Levy Scheme under Rule 96ZNA of the Central Excise Rules, 1944.

9. The learned Commissioner, thereafter, dealt with the precondition (ii) regarding the facility in the factory for carrying out heat setting or drying with the aid of power or steam exclusively in a Hot Air Stenter; and disagreed with the contention urged on behalf of the department that the Scheme would not be available to the appellant for the process of drying of fabric being not carried out exclusively in a Hot Air Stenter. The Commissioner referred to the explanation in the Rules and said,-

8.6. ...Thus the explanation I does not lay down an absolute condition that both the process of heat setting and drying must be carried out exclusively in a hot air stenter is covered under the scheme. In view of this I hold that this condition as laid down under explanation-I to Rule 96ZNA appears to be fulfilled by the assessee.

10. The learned Commissioner, thereafter, adverted to the precondition (iv) about

the value of investment in the plant and machinery and, while observing that it was the total investment made on installation of plant and machinery in the factory that was relevant, found that the assessee had shown the figure of investment at Rs. 2,59,15,459/- but an additional investment of about Rs. 80,00,000/- was not included in relation to various machineries/equipments. The appellant-assessee relied upon the guidelines issued by the Ministry of Industries on 10.12.1997 in support of its case, particularly regarding exclusion of certain items in computation of the value of investment in plant and machinery but the learned Commissioner found the said guidelines inapplicable for computation of investment for the purpose of the Compound Levy Scheme in question; and held the appellant ineligible for the total investment in the plant and machinery installed in the factory being about Rs. 339.15 lacs while saying,-

9.4 The figures of value of investment furnished by the assessee in their application ASP-I were got verified. As per the books of accounts and the "Summary of ledger of Capital Accounts Work in progress" of the assessee, the total investment in plant and machinery installed in their factory works out to be Rs. 339.15 lacs which is much above the prescribed investment limits of rupees three Crores. Thus the assessee does not fulfill this condition laid down in Sub-rule (1) of Rule 96ZNB, to be eligible for the special procedure of compound levy scheme.

(emphasis supplied)

11. Accordingly, the Commissioner found the appellant ineligible to avail the Compound Levy Scheme particularly for not fulfilling the aforesaid pre-conditions (i) and (iv); and rejected the application with the following order:

10. In view of the above findings I hereby hold that the assessee does not fulfill the above conditions at para 2 (i) & 2 (iv) to be eligible for the special procedure of compound levy duty scheme prescribed for independent textile processors engaged in the manufacture of specified textile fabrics. Therefore in exercise of the powers conferred under Sub-rule (2) of Rule 96ZNA (now Rule 15 of Central Excise Rules, 2001 read with Notification No. 32/2001 ? CE dated 28.06.2001), I hereby reject the application of M/s. Sulzer Processors (P) Ltd., Bhilwara opting therein to avail special procedure of compound levy duty scheme. (emphasis supplied)

12. Aggrieved by the aforesaid order dated 20.09.2001 as passed by the Commissioner, the appellant approached the Tribunal in appeal; and before the appeal came up for hearing, the Hon''ble Gujarat High Court rendered a decision in the case of Mangal Textile Mills Pvt. Ltd. and Anr. v. Union of India 2002 (49) RLT 265 (Guj.) while considering the issue regarding investment in the plant and machinery in the relation to the said Notification No. 32/2001. In the said case, the Gujarat High Court held, with reference to the certificates given by the Chartered Accountants, that the assessee fulfilled the requisite conditions on the quantum of investment; and it was also observed that the Chartered

Accountants" certificate showing the capital investment should be accepted unless displaced by the opinion of professional expert.

13. While considering the appeal preferred by the present appellant alongwith the appeal preferred by another similarly circumstanced assessee, the learned Members of the Tribunal referred to the aforesaid decision in Mangal Textile Mills and observed that when the authority did not accept the certificate issued by the Chartered Accountant on the ground that the criteria adopted by him was incorrect, the appellant should have been allowed an opportunity to produce the certificate in accordance with the requirements of law. On and for this reason alone, the Tribunal proceeded to set aside the order passed by the Commissioner; and remanded the matter for de novo consideration regarding availability of the Scheme to the appellant after affording reasonable opportunity of hearing. The considerations adopted and the directions issued by the Tribunal in the common order dated 09.04.2002 could be noticed as under:

4. We have heard both sides and gone through the impugned order. In our view the issue regarding the investment of the appellants in the units deserves to be re-examined. According to the appellants their investment is less than Rs. 3 crores. The certificate issued by their respective Chartered Accountant had not been accepted by the adjudicating authority on the ground that the criteria adopted by him for preparing the certificate was incorrect, but in that event the adjudicating authority should have allowed an opportunity to the appellants to produce the certificate in accordance with the requirement of the law from the Chartered Accountant instead of out-rightly rejecting their claim for the benefit of the Compounded Levy Scheme. Therefore, in our view the matter deserves to be re-examined especially in the light of the ratio of the law laid down by the Gujarat High Court in the case referred to above.

5. Consequently, the impugned order in both these appeals is set aside and the matter is sent back to the adjudicating authority for de novo consideration regarding the availability of Compounded Levy Scheme benefit to the appellants after affording reasonable opportunity of hearing to both the sides with a liberty to the appellants to produce evidence, if any, in support of their case.

14. Pursuant to the remand order aforesaid, the Commissioner took up the matter for consideration afresh. The department had not accepted the facts and figures stated in the certificates sought to be relied upon by the appellant; and a Cost Accountant was deputed to carry out special audit. The Cost Accountant submitted the report dated 30.12.2003 opining that value of investment by the appellant on plant and machinery was Rs. 3,58,10,250/- as on 01.03.2001; and was to the extent of Rs. 3,73,69,369/- as on 01.05.2001. A copy of the report received from the Cost Accountant was supplied to the appellant and at request, the appellant was permitted to cross-examine the Cost Accountant concerned. After taking note of the submissions made on behalf of the appellant and the material placed on record, the Commissioner proceeded to decide the matter over again by the impugned order dated 31.03.2004/06.04.2004.

15. The learned Commissioner in the first place took note of the significant fact that the adjudicating authority while passing the earlier order had held that in the manufacture of fibre dyed/top dyed fabrics, the processes of bleaching, dyeing or printing were not being undertaken by the assessee and as such, the special procedure scheme did not apply. The Commissioner noted the fact that though the Tribunal had remanded the matter with reference to the ratio in Mangal Textile Mills (supra) but without any specific observation regarding the aforesaid finding on the process undertaken; and also found that no new argument had been advanced from the side of the assessee in this regard. While putting the record straight, the Commissioner proceeded to reiterate the earlier findings thus:

I find that the Hon''ble Tribunal had made no specific observations with regard to point relating to applicability of special procedure to fibre dyed/top dyed fabric, and therefore, in the absence of any new arguments from the assessee in this regard to controvert the findings of my predecessor in his said order dated 1.10.2001, I reiterate the findings of my predecessor, being in agreement with him on this issue.

(emphasis supplied)

16. Thereafter, the Commissioner referred extensively and in detail to the material available on record including the cross-examination of the Cost Accountant; and found the report of the Cost Accountant valid and being in conformity with the requirements of the Notifications relevant for the Scheme in question. The learned Commissioner again thoroughly dealt with the submissions made on behalf of the appellant and considered the relevant provisions contained in the Notification regarding value of investment in plant and machinery; and found that the appellant had nothing specific to controvert or dispute the report of Cost Accountant to the effect that the investment exceeded Rs. 3 crores. The Commissioner also referred to the certificates issued by the Chartered Accountant and found the same not making out a case in favour of the appellant for not answering to the fundamental requirement of determination of value according to the accounting standards (AS10). The learned Commissioner rejected the contention urged on behalf of the appellant that valuation be made with reference to the aforesaid Notification dated 10.12.1997 as issued by the Ministry of Industry; and, while observing that the special procedure provided under the relevant Notifications of Central Excise was not linked with the Notification of the Ministry of Industry and the benefits provided under the later could not be extended to the Compound Levy Scheme, particularly referred to the decision of the Hon''ble Supreme Court in the case of Commissioner of C. Ex., Trichy Vs. Rukmani Pakkwell Traders, on the point that the Exemption Notifications have to be strictly construed, they must be interpreted on their own wordings, and the wordings of some other Notification are of no benefit in construing a particular Notification.

17. Thereafter, the learned Commissioner considered at length the other part of

the matter as to what would be the constituents for the purpose of the value of investment in the plant and machinery, also referred to Notification No. 41/2001, and observed that while AS-10, which is required to be followed, provides for inclusion of various cost items, the Ministry of Industry Notification provides, on the contrary, for exclusion of some of the cost items; and found it to be another factor for the said Notification dated 10.12.1997 being irrelevant. The Commissioner compared the report of the Chartered Accountant with that of the Cost Accountant and found that certain items installed in the factory were, admittedly, not included in the report of the Chartered Accountant.

18. A substantial part of the submissions on behalf of the appellant had been devoted towards the contention that the Electricity Generator Sets, Pollution Control Equipments etc. were not to be included in the computation of valuation for being not the essential parts of the process undertaken. We shall be dealing with this aspect hereinafter, however, noticeable at this juncture are the observations of the learned Commissioner that capital goods credit was being provided in relation to these equipments and thus, there was hardly any ground to say that these items be excluded while computing the value of investment. The learned Commissioner said,-

Further, I find that from 16.3.95, capital goods credit is also admissible on electric generating sets, transformers used in the factory of manufacturer besides other capital goods. Capital goods credit in respect of pollution control equipments and Tubes and pipes of Iron or steel or copper or aluminium used for conveying inputs, intermediate products or final products (subsequently amended as Tubes and pipes and fittings thereof used in the factory vide Notification No. 25/96- Central Excise (NT) dated 31.8.96) was also made applicable with effect from 23.7.96. These facts also support that now there are hardly any grounds for the purposes of Central Excise Act and the rules made thereunder for exclusion of these items while computing original value of investment in plant and machinery installed in the factory of the assessee as on 1.3.2001 or 1.5.2001.

(emphasis supplied)

19. As a result of his discussion, the Commissioner came to the conclusion that the original value of investment in the plant and machinery installed by the appellant as on 01.03.2001 and so also on 01.05.2001 exceeded Rs. 3 crores; and the appellant was not entitled to avail the benefit of the special procedure. The learned Commissioner, accordingly, held the appellant liable to pay Rs. 73,44,424/- being the differential duty payable from 01.05.2001 to 06.10.2001 and interest thereupon; and also imposed a penalty of Rs. 5 lacs.

20. Dissatisfied with the aforesaid order dated 06.04.2004, the appellant preferred the appeal to the Tribunal that has been decided by the order dated 13.08.2009, sought to be challenged in this Central Excise Appeal before us.

21. The Tribunal in its order dated 13.08.2009 proceeded to decide, again, two

appeals together involving more or less similar and akin issues, including the one by the appellant. The Tribunal observed that the basic dispute had been about the value of investment in plant and machinery i.e., as to whether it exceeded Rs. 3 crores as on 01.03.2001 or 01.05.2001 where, on one hand, the appellants contended it to be below Rs. 3 crores relying on the certificates of Chartered Accountants produced by them and, on the other hand, the department was relying on the certificates of Cost Accountant appointed by them to contend that such value exceeded Rs. 3 crores. The Tribunal noticed that the difference in valuation was essentially due to the facts that the Chartered Accountants on behalf of the appellants had followed the guidelines of the Central Government in the Notification dated 10.12.1997 and, after reproducing the contents of the said Notification dated 10.12.1997, pointed out the reasons wherefor the same could not be applied thus:

7.3 The above said clarification/guidelines are at variance with the accepted accounting norms. For example, it excludes the cost of installation of plant and machinery. It excludes transportation charges for indigenous machinery or the plant and machinery to the site of the factory. Charges paid for technical know-how is excluded. In other words, the said instructions/guidelines appears to have been issued to serve the purpose mentioned therein. We have not been shown any authority for relying on the said guidelines to the present notification. We do not find any justification for importing the said guidelines for interpreting the present notifications.

22. The Tribunal, thereafter, referred particularly to paragraph-8 of the Notification No. 32/2001 and so also the explanation inserted thereto by Notification No. 41/2001 and, while observing that the valuation had to be as per AS-10, pointed out that the Cost Accountant had carried out the valuation on that basis alone and nothing to doubt such a valuation came up even in the cross-examination. The Tribunal further found that the other parts of the installations like transformers, DG Sets and effluent treatment plants were required to be included in the plant and machinery and could not be treated anything else. The Tribunal said,-

7.5 By amendment dated 21.9.01, it has been made abundantly clear that the method to be adopted for the purpose of determining the value of plant and machinery is as per AS 10. The certificate issued by the cost accountant appointed by the department clearly specifies that the valuation has been done in terms of AS 10 method. He has also been extensively cross-examined on behalf of both the appellants and we do not find from the proceedings of cross examination anything to doubt the basic finding that the valuation has been done as per the AS 10 norms. The claim on behalf of the appellant that the transformers need not be treated as plant and machinery is clearly not acceptable as it is against the common understanding as well as against the accounting norms as mentioned earlier. Even the guidelines of Central Govt. dated 10.7.97 for determining small scale industries and ancillary industry refers

to exclusion of extras transformers installed by the company. We have not been shown that the exclusion claimed by the appellants relate to extra transformers. Similarly, we are not convinced that the DG sets should be treated as other than plant and machinery. The effluent treatment plant which are mandatory in certain industries cannot be treated anything other than the plant and machinery.

7.6 The certificate given by the CA on behalf of the appellants do not indicate that the valuation has been done in terms of AS 10 method. It merely mentions that they have taken into consideration the AS 10 norms. Nowhere, it is mentioned that the valuation has been actually done by adopting the said norms. The claims of the appellants are for excluding the value of items like DG sets compressors, effluent treatment plant machinery and these claim are merely based on the guidelines of the Central Government dated 10.12.97. We are not inclined to agree that the said guidelines are relevant for the purpose of interpreting this notification.

(emphasis supplied)

23. After rejecting other contentions, the Tribunal concluded the matter while affirming the decision of the Commissioner whereby the appellants were held ineligible for having crossed the eligibility limit of Rs. 3 crores. However, the Tribunal agreed with the submissions made on behalf of the appellants that their case did not warrant levy of penalty and, accordingly, while dismissing the appeal in relation to the demand of duty and interest, partly allowed the same vacating the penalty imposed. Aggrieved, the appellant-assessee has preferred this appeal.

24. Seeking to question the order passed by the Tribunal, the appellant has suggested the following to be the substantial questions of law arising for consideration in this appeal:

(a) Whether the Order of the Tribunal holding that the value of investment in plant and machinery installed in the appellant's factory was in excess of Rs. 3 crores is correct, and whether the action of the Tribunal of not considering the Notification dated 10.12.1997 issued by the Central Government providing for exclusion of items and equipments while determining investment in plant and machinery is correct?

(b) Whether the action of the Tribunal in applying amendment made vide Notification No. 41/2001-CE dated 21.9.2001 in the original Compounded Levy Scheme brought into operation with effect from 1.5.2001 is correct and permissible in law?

(c) Whether the order of the Tribunal holding the appellant to be ineligible for discharging Excise duty liability under the Compounded Levy Scheme from 1.5.2001 to 31.3.2002 is correct in the facts and circumstances of this case?

(d) Whether the term "plant and machinery" in the relevant notification can be construed to include even such items like DG Sets, Transformers, Effluent Treatment Plant etc. which are not sine-qua-non for textile manufacturing, and

are not essentially required by all independent textile processors governed by the notification across the country?

25. The learned Counsel Mr. Rishabh Sancheti arguing for the appellant has taken us through the contents of all the Notifications as referred hereinbefore and laid emphasis on the submissions that the Compound Levy Scheme is precisely in relation to "an independent textile processor" who is processing the specified textile fabrics that have been referred as the "said goods"; and it is the machinery requisite for processing of the said goods that would be relevant towards "the value of the investment in the plant and machinery" for the purpose of the said Exemption Notifications and not all the machinery that might have been installed in the factory. The learned counsel elaborated on the submissions that "manufacturing" or "producing" are the acts different than "processing"; that the only relevant aspect being of "processing", and that too only of "the said goods", the entire of the machinery used in production or installed in the factory is not to be included for the purpose of valuation under the Notification in question. The learned Counsel, in his emphasis on the difference between production and processing, has referred to and relied upon the decision of the Hon'ble Supreme Court in the case of Commissioner of Income Tax, Kerala Vs. Tara Agencies, The learned Counsel yet further referred to the decision of the Hon'ble Supreme Court in the case of Collector of Central Excise Etc. Vs. The Himalayan Cooperative Milk Product Union Limited Etc., to submit that the investment is required to be considered in respect of the plant and machinery used in relation to the "said goods" and not in respect of the whole of the plant and machinery.

26. The learned Counsel further submitted that the authorities have acted wholly illegally in relying upon and applying Notification No. 41/2001 dated 21.09.2001 in the Scheme brought into operation with effect from 01.05.2001; that by the said Notification No. 41/2001, the very fundamentals of the original Notification No. 32/2001 were sought to be altered that was akin to changing the rules of game after the game has begun; and that the department is not entitled to take away the rights of the appellant available under Notification No. 32/2001. The learned Counsel submitted that the method of valuation as suggested under Notification No. 41/2001 cannot be applied in the case of the appellant and there was no reason that the certificate of the Chartered Accountant as produced by the appellant be not relied upon.

27. The learned Counsel yet further submitted that there was no reason not to consider and apply the provisions and the principles of the Notification dated 10.12.1997, the same being directly a relevant one and having been issued by the Central Government itself only for the purpose of true valuation of the plant and machinery. The learned Counsel also referred to the cross-examination of the Cost Accountant and submitted that admittedly there was no definition of "plant and machinery" available with him; and the computation as worked out by the Cost Accountant with reference to the entire of the machinery and

equipments installed at the factory could not have been relied upon.

28. We have heard the learned Counsel for the appellant at length and have scanned through the material placed on record with reference to the law applicable. Having given an anxious consideration to the entire matter, we have not an iota of doubt that this appeal remains totally baseless and does not involve any substantial question of law.

29. Though we shall take up and deal with the submissions as made on behalf of the appellant in regard to the various aspects relating to the valuation of investment in plant and machinery but, before dilating thereupon, we are constrained to observe that the entire of the repeat exercise on the question of valuation, taken up only because of the remand order passed by the Tribunal in the first round of litigation on 09.04.2002, had been unwarranted and unnecessary; and ineligibility of the appellant to avail of the Scheme in question stood concluded for a different but significant reason.

30. As noticed above, there had been a categorical finding by the Commissioner in the initial order dated 20.09.2001 that the nature of activity as undertaken by the appellant did not answer to the basic pre-condition for applicability of the Compound Levy Scheme. The findings of the Commissioner in the order dated 20.09.2001 (as reproduced hereinbefore) had been unambiguous and unequivocal that the appellant had not been carrying out any of the processes specified in the Notification for availing Compound Levy Scheme on fiber/top dyed fabrics; and had been carrying out one or more of the specified processes only on piece dyed fabrics. In fact, in the face of such a position, the appellant made an alternative attempt with a feeble suggestion that the Scheme might be allowed in relation to piece dyed fabrics and other goods might be subjected to ad valorem duty. The baseless suggestion so made was declined by the Commissioner, and rightly so, because the provisions of the Scheme could not be extended to the part of the goods manufactured by the appellant.

31. The aforesaid aspect was dealt with by the Commissioner in the order dated 20.09.2001 in its paragraphs 7.1 to 7.6 and thus, apart from the question relating to valuation (as dealt with in paragraphs 9.1 to 9.4), it had been a separate and distinct, but material, finding that the appellant was not answering to the precondition (i) because it was not carrying out the referred processes of bleaching, dyeing or printing on fiber/top dyed fabric. Needless it is to emphasize that the four pre-conditions as summarized by the Commissioner and reproduced hereinbefore are coextensive and concurrent, and not in the alternative, for the purpose of eligibility under the Notification in question. For the appellant failing in the very basic eligibility condition on the process undertaken, its application for availing the Compound Levy Scheme was liable to be rejected; irrespective of the value of investment in plant and machinery.

32. It appears that the Tribunal in the first round of litigation overlooked this crucial and significant part of the matter regarding ineligibility of the appellant

because of the process undertaken by it on fiber/top dyed fabric being not that envisaged by the Notification in question; and, while ignoring the finding in this regard by the Commissioner, the Tribunal abruptly remanded the matter with the short order dated 09.04.2002 by placing reliance on the decision in Mangal Textile Mill's case (supra) that related only to the question of valuation. However, even after remand, the Commissioner was not swayed by the length of the submissions made on behalf of the appellant in relation to the dispute on valuation; and precisely pointed out that the Tribunal did not say anything on the finding regarding the nature of process and activity. The Commissioner, while further pointing out that there had not been any argument on behalf of the assessee to controvert such findings, consciously reiterated the same finding, as already noticed hereinbefore.

33. It is pertinent to notice that though the appellant took the matter again in appeal before the Tribunal but then, no argument in relation to the findings on the nature of activity/process and ineligibility qua the pre-condition (i) appears in the impugned order dated 13.08.2009. Moreover, no question of law in this regard has even been suggested before us in this appeal. In fact, no question of law would arise in this regard because the findings on the process undertaken by the appellant are essentially those of facts.

34. Thus, the resultant position is that the repeated findings of the Commissioner to the effect that none of processes specified in the Notification for availing Compound Levy System was carried out on fiber/top dyed fabric and thereby the appellant was not answering the very fundamental requirement of eligibility under the Notification in question, remain uncontroverted, unchallenged, and unassailable. These finding, by themselves, are sufficient to conclude that the appellant is not eligible to avail of the Scheme in question; and in the face of these concluded findings, the appellant would remain ineligible, irrespective of value of investment in plant and machinery, whether above or below Rs. 3 crores. In this view of the matter, the issue of value of investment in plant and machinery becomes rather academic. Even if such an issue were to be decided in its favour, the appellant would yet remain disentitled to claim the benefit of the Scheme in question.

35. Though in the above-noted position of the record, we would have dismissed the appeal only on the uncontroverted and final findings on basic ineligibility of the appellant but, in the overall circumstances and in the interest of justice, we have also examined the contentions urged on behalf of the appellant in relation to the issue of value of investment in plant and machinery; and we find the same totally meritless and bereft of substance.

36. It has been contended on behalf of the appellant that the Tribunal had been error in not considering the Notification dated 10.12.1997 issued by the Central Government providing for exclusion of certain items and equipments while determining the value of investment in plant and machinery. The submission is ill-founded. It remains trite that Exemption Notifications have to be strictly

construed, must be interpreted on their own wordings, and the wordings of other Notification are of no benefit in construing a particular Notification. In the case of Rukmani Pakkwell Traders (supra), the Hon''ble Supreme Court said,-

...It is settled law that Exemption Notifications have to be strictly construed. They must be interpreted on their own wording. Wordings of some other Notification are of no benefit in construing a particular Notification.

(emphasis supplied)

37. Apart from the above, it is noticed that the Notification dated 10.12.1997 had been issued by the Government of India in its Ministry of Industry (Department of Industrial Policy and Promotion) in exercise of powers conferred by Sub-section (1) of Section 11B and Sub-section (1) of Section 29B of the Industries (Development and Regulation) Act, 1951 ["the Act of 1951"] in order to specify the requirements to be complied with by an industrial undertaking on the basis of which it could be regarded as a small scale or an ancillary industrial undertaking for the purposes of the said Act of 1951; and essentially, the said Notification was issued for the purpose of ascertaining such industrial undertakings who need supportive measures, exemption or other favourable treatment under the Act of 1951. When read in the context in, and the purpose for, which the same had been issued, particularly Sections 11B and 29B of the Act of 1951, it is crystal clear that the said Notification dated 10.12.1997 operates in an entirely different arena and field; and we are unable to find even a remote reason or basis wherefor and whereupon the same could be imported for the purpose of the Notifications with which we are concerned in this matter.

38. Having examined the relevant Notifications, we are inclined to agree with the Tribunal that the guidelines as stated in the said Notification dated 10.12.1997 as issued by the Ministry of Industry for the purpose of Sections 11B and 29B of the Act of 1951 were not at all relevant for the purpose of the Notifications involved in the present matter particularly when the Notification dated 10.12.1997 had been issued in an entirely different context and for an entirely different purpose; and when the exclusion of the items as stated therein for the purpose of calculating the value of plant and machinery were at variance with the accepted accounting norms like the costs of installation of plant and machinery, transportation charges, the technical know-how etc. were excluded. The contention urged on behalf of the appellant that the value of investment in plant and machinery for the purpose of the Compound Levy Scheme in question be assessed on the basis of the said Notification dated 10.12.1997 stands rejected.

39. Now to the question about the import and effect of the Notification No. 41/2001 whereby explanation has been inserted to paragraph-8 (1) of Notification No. 32/2001. It has been contended that changing the mode of valuation by Notification No. 41/2001 had been of materially altering the Scheme after a right came existing in the appellant. The submission is not correct. The contents of the Notification No. 41/2001 have been reproduced above and

evident it is that thereby only an explanation has been added so as to remove the doubts regarding method of assessment of value of investment in plant and machinery. Such an amendment, essentially being clarificatory in nature, cannot be considered taking away any of the vested rights of the appellant. It being a matter of exemption, if anything in the original Exemption Notification called for clarification or explanation, the exercise in that direction was unexceptionable. By the said Notification No. 41/2001, nothing more has been done except providing that the valuation shall be as per the accounting standards (AS 10). Such an explanation was only engaged to remove the ambiguity or doubts and to avoid fanciful valuation from either side. Noticeable further it is that even under the original Scheme, the Commissioner was entitled to require any documentary evidence as considered appropriate in respect of valuation before granting the application.

40. It is not correct to say that the department has changed the system of valuation after some rights have crystallized in the appellant under Notification No. 32/2001. When one of the precondition had been with reference to the extent of value of investment in the plant and machinery, a reasonable explanation for the method of working out such valuation cannot be said to be beyond the terms of the original Notification itself. By way of such an explanation only the doubts, if any, in the original Notification were quelled and removed. In the given circumstances, Notification No. 41/2001 cannot be held inapplicable to the appellant.

41. Now to the core question about value of investment in plant and machinery, as put by the department and as upheld by the Commissioner and the Tribunal. A great deal of submissions has been advanced before us that the Compound Levy Scheme has been in relation to "an independent textile processor" who is processing the specified textile fabrics that have been referred as "the said goods"; and, with reference to the difference between the concept of production and processing, it has been contended that only the machinery requisite for "processing" of "the said goods" ought to be taken into consideration towards "the value of investment" in the plant and machinery for the purpose of the said Exemption Notifications and not all the machinery installed in the factory of the appellant. The submissions made on behalf of the appellant are entirely baseless and rather ill-conceived.

42. The Compound Levy Scheme under Notification No. 32/2001 (and so also under the earlier Notification No. 16/2001) has been in respect of the such processed textiles fabrics, falling under the given headings and sub-headings, which are "manufactured or produced" by an independent textile processor exclusively with the aid of a hot-air stenter. This manufacturer or producer has been referred for the purpose of the Notification as "an independent textile processor"; and the goods subject to the exemption have been referred as "the said goods". In the context of the wordings and phraseology of the Notification in question, we are unable to find if the observations of the Hon'ble Supreme Court

in Tara Agency's case (supra) have any applicability to the present case. In Tara Agency, the Hon'ble Apex Court found that the benefit u/s 35B(1A) of the Income Tax Act, 1961 was restricted only to the goods "produced" or "manufactured" by the small-scale industrial undertaking and not in case the goods were merely "processed" by a small-scale industrial undertaking. In that context, the Hon'ble Apex explained the construction and different meaning of the terms "manufacture", "production" and "processing" and, while pointing out that processing is only an intermediate stage of production and/or manufacture, held the respondent-assessee, who was engaged in purchase of different qualities of tea and blending the same for the purpose of export, disentitled to weighted deduction u/s 35B(1A) *ibid* because the activity had only been of processing of tea, falling short of either manufacturing or production. In contradistinction to Tara Agency, in the present case, it is not the activity of processing alone that is decisive of the question of applicability of the Notification in question i.e., Notification No. 32/2001. This Notification refers to the textile processor who is manufacturing or producing the said goods; and for the purpose of this Notification, the differential in the terms "manufacturing", "producing" and "processing" has, in our clear view, no bearing.

43. Exemption Notification No. 32/2001, relevant for the present purpose, refers to the textile processor in relation to the activity of manufacturing or producing the said goods; and it is the "valuation of investment in the plant and machinery installed in the factory of the independent textile processor of the said goods" that is relevant per Paragraph-8(1) of Notification No. 32/2001. The argument is too far stretched and rather baseless that only the investment in relation to the plant and machinery to be used in processing should be considered while leaving aside all other parts of the plant and machinery. Contrary to what has been suggested on behalf of the appellant, it is the plant and machinery installed in the factory that is relevant, irrespective whether such plant and machinery is in use or not or in working condition or not.

44. Looking to the terms of Notification No. 32/ 2001, the decision of the Hon'ble Supreme Court in Himalayan Cooperative (supra) is also of no assistance to the appellant; rather, on principles, the said decision operates against the appellant. In Himalayan Cooperative, the respondent-assessee had been manufacturing butter and skimmed milk powder in its industrial complex; and, for the purpose of the chilling plant of its dairy unit, had installed a plant manufacturing liquid nitrogen, which admittedly fell under Item 68 of the excise tariff. The excise authorities were of the view that since the respondent had been using all the plants and machinery for the purposes of manufacturing different excisable goods falling under different tariff items, the total value of capital investment of all plants and machineries installed in its factory was to be taken into account for determining the limit prescribed in Notification No. 105/80-CE. However, the Tribunal upheld the assessee's plea that the value of investment on liquid nitrogen plant alone was relevant, the exemption being in relation to the said goods only. In the context of the questions arising for determination,

regarding exemption of the goods falling under Item 68 of the tariff with reference to Notification No. 105/1980, the Hon''ble Supreme Court pointed out that the relevant provisions of the Notification were not referring to any other goods under clearance except the goods falling under Item 68; and such goods were referred as "the said goods". The Hon''ble Supreme Court found that according to the findings of the Assistant Collector himself, liquid nitrogen was itself a finished product falling under tariff item 68. In that view of the matter, it was held that the question of taking into account the value of capital investment made on plant and machinery manufacturing goods other than those covered under Item 68 would not arise. In the given facts and circumstances, the Hon''ble Supreme Court rejected the contention on behalf of the Revenue that value of all the plant and machinery manufacturing butter and skimmed milk powder had also to be added to assess the total value of capital investment in the plant and machinery.

45. Apart from inapplicability of the aforesaid observations of the Hon''ble Supreme Court to the present case for the fundamental difference of the fact situation and the terms of the Notification, the observations further made by the Hon''ble Court in the said case operate rather heavily against the appellant. The Hon''ble Apex Court noticed that while allowing the appeal, the Tribunal had followed a decision of the Bombay High Court in the case of Devidayal Electronics and Wires Ltd. and another Vs. Union of India and another, wherein, in respect of a similar Notification of the earlier year, the Court had noticed that the Notification employed two expressions namely, "factory" and "industrial unit"; and it was held that industrial unit would mean something other than factory, it would be a separate isolated part of the plant exclusively used for manufacture of goods for which exemption was claimed. The Hon''ble Supreme Court said that in principle, what had been held in Devidayal, cannot be said to be an incorrect view. Taking into consideration the expression used in Notification No. 32/2001, noteworthy it is that herein, it is the investment in the plant and machinery installed in the factory that is relevant; and not in the plant and machinery of the processing unit alone. Thus, on principles, the decision in Himalayan Cooperative (supra) could only be read against the appellant.

46. On the substance of the matter, we have examined the suggestions as made on behalf of the appellant for the purpose of assessment of the original value of investment in plant and machinery and what we find is that the appellant, in order to bring its case as that of investment below Rs. 3 crores, proceeded to exclude various items like DG Set, transformers, air compressors, effluent treatment plant, water softeners, filter press, trolleys, fire fighting equipments, sewing machine and weighing scale, chemical tank, chimney, and even the electric installation and water lines from the value of investment. A major part of such exclusion had been incorrect; and against the fundamental accounting standards.

47. It has been suggested that the items like DG Set (initial investment about

Rs. 16.62 lacs) and effluent treatment plant etc. (initial investment about Rs. 21.00 lacs) are not the essential components of machineries for the purpose of the processing in question. The suggestion is baseless. The place of setting up of its factory had been the choice of the appellant. When certain machinery is required to be installed, as per the law and regulations governing the factory in question and as per the requirements of running the plant, the appellant cannot be acceded a right to exclude such investment while computing the total value of investment in plant and machinery. Moreover, we find rather inexplicable that even the investment in electric installation (about Rs. 16.45 lacs) and water lines (about Rs. 20.97 lacs) was also suggested for exclusion while computing the value of investment in plant and machinery! Noteworthy further are the observation of the learned Commissioner that capital goods credit was also admissible on electric generating sets, transformers, pollution control equipments and various other items.

48. Having examined the findings of the Commissioner and the Tribunal, which are essentially in the nature of findings of fact on the question of value of investment, we find nothing of error or illegality when the investment has been found on the basis of material on record above Rs. 3 crores, rendering the appellant ineligible to avail the Compound Levy Scheme under the Notification in question. Having considered the suggestions made on behalf of the appellant, we are clearly of the view that the appellant is not right in seeking exclusion of a substantial part of the investment in the plant and machinery so as to suggest that the value of investment in the plant and machinery had been about Rs. 2.48 crores only. Preposterous as they are, the suggestions as made on behalf of the appellant seeking exclusion of the relevant items of the plant and machinery can only be, and are hereby, rejected. With inclusion of the other relevant components as noticed above, the value of investment by the appellant in the plant and machinery in the factory definitely exceeded the prescribed limit of Rs. 3 crores. Undoubtedly, the appellant was ineligible to avail of the Compound Levy Scheme.

49. The net result of the discussion aforesaid is that this appeal is totally bereft of substance, does not involve any substantial question of law, and does not merit admission.

50. The appeal fails and is, therefore, dismissed.