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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jan-22-1985

Reported in : (1985)(5)LC1661Tri(Delhi)

Appellant : Vikrant Tyres Ltd.

Respondent : Collector of Central Excise

Judgement :

1. These two appeals raise a question regarding the interpretation of Notification No. 201/ 79-CE, dated 4-6-79. They arise out of two orders passed by the Assistant Collector of Central Excise, IDO, Mysore, and the two corresponding Orders-in-appeal passed by the Collectors of Central Excise (Appeals), Madras.

2. When these two appeals were taken up for hearing, a question arose whether they were properly matters for a Special Bench. It was seen that the West Regional Bench of the Tribunal, in its Order dated 10-1-84 in Appeal No. A. 154/83 of Bajaj Tempo Limited, had also decided a matter in which the above notification was involved. Again, the South Regional Bench, in its Order in the case of Warner Hindustan Ltd., Hyderabad, reported in 1984 (16) E.L.T. 373, dealt with a matter arising out of the same notification. However, we also found that these two appeals originally came up before the South Regional Bench, and that Bench itself had taken the view that jurisdiction to decide these two appeals would lie with a Special Bench and had accordingly transferred them from itself. We were inclined to agree with the South Regional Bench that these appeals could be regarded as involving a question having relation to a rate of duty. Shri Ravinder Narain, the

learned advocate for the appellants in both cases, submitted that he had no strong views on the issue of jurisdiction and would leave the matter for our decision. Shri Verma, the learned representative of the Department, submitted that the appeals would appropriately fall within our jurisdiction. We accordingly held that the appeals fell within our jurisdiction and proceeded to hear them.

3. In the two orders of the Assistant Collector referred to above, he had disallowed the entire proforma credit of duty taken by the appellants on duty-paid raw materials falling under Item 68 of the Central Excise Tariff Schedule brought by them into their factory and utilised in the manufacture of tyres of various specifications, some of which were cleared on payment of duty and others free of duty. Since there is some confusion and lack of correspondence between the respective show-cause notices, orders-in-original and orders-in-appeal, we are setting out below the salient issues in each of the cases.

4. Appeal No. E-2891/83D relates to the period February to July, 1981.

(It appears that the above period refers to the utilisation of proforma credits for duty-paid on the inputs, and not the taking of such credits). In the show cause notice dated 4-9-81 issued by the Superintendent of Central Excise, rive grounds have been specified, and the appellants have been called upon to show cause with reference to them. These five grounds are as follows :- (ii) Not furnishing accounts of inputs used in the manufacture of each variety of tyres; (iii) Using the inputs in the manufacture of T.I. 68 goods and T.I. 16A (2) exempted goods; (iv) Using the inputs in the manufacture of goods falling under T.I. 22 and T.I. 15A (1) (this ground is stated to be without prejudice to any decision to be taken by the Hon'ble Delhi High Court); and (v) Exemption under Notification No. 201/79 not available to exempted tyres [This is covered by ground No. (iii) above].

5. In his order-in-original dated 18-5-82, the Assistant Collector started by setting out the same grounds, except that grounds (i) and (ii) were merged. After setting out the appellants' reply to the show cause notice and their submissions during the personal hearing, the Assistant Collector observed that "there are two questions involved in this case, i.e. (i) whether the assessee is required to furnish full details of the inputs required for the manufacture of each of the goods; and (ii) whether

the set-off of duty is available in respect of finished goods (outputs) which are cleared under 'nil' rate of duty or which are exempted from duty". After discussing the provisions of Notification No. 201/79 and its predecessor Notification No. 178/77, the Assistant Collector held that the answer to the first question was in the affirmative and to the second question in the negative. He also noted that since the appellants had not (though he gave them an opportunity to do so) furnished particulars of the full description of inputs used in the manufacture of each of the exempted tyres, the total set-off of duty wrongly availed of by them could not be worked out. He thereupon passed orders disallowing the entire proforma credit of duty amounting to Rs. 1,78,848.72 taken by the appellants during the relevant period, on the ground that they had not fulfilled the conditions of Notification No. 201/79.

6. It will be seen from the above that although four (or five) grounds for disallowing the proforma credit were taken in the show cause notice and noted in the order-in-original, ultimately only two grounds were discussed and the matter was decided on the basis of those two grounds.

On appeal to the Collector of Central Excise (Appeals), that authority also set out the four grounds as in the Assistant Collector's order but his discussion was confined to the two specific grounds discussed by the Assistant Collector. On both these grounds, he upheld the findings of the Assistant Collector and rejected the appeal.

7. Appeal No. 2613/83D relates to the period January to June, 1982. (In this case it is stated that it relates to the credits taken during the above period). In the show cause notice dated 20-7-82, the following grounds were taken for disallowing the credit:- (ii) Not entitled to avail of exemption for raw materials used in the manufacture of exempted tyres; (iii) Not furnishing account of inputs for goods removed under exemption; (iv) Exemption not available in respect of inputs used for the manufacture of bladders, curing bags and air bags falling under T.I. 68 and further used in the factory otherwise than as raw materials; and (v) Using inputs in the manufacture of goods falling under T.I. 68 (removed as scrap) and Item 16A(2) but exempted.

8. It will be seen that though this is substantially similar to the other case, there are some differences in the grounds set out in the show cause notice, the most noticeable one being as regards the use of inputs for the manufacture of bladders, etc. However, the Assistant Collector in his order dated 20-11-82 remarked that this case was exactly similar to the earlier one which had already been decided by him, and that it would be superfluous for him to repeat the arguments of both sides. He held that the appellants were not entitled to the set off of duty in question as they had not satisfied the conditions of Notification No. 201/79. Accordingly he disallowed the entire proforma credit of duty amounting to Rs. 1,13,308.65 taken by the appellants during the relevant period.

9. An appeal was then made to the Collector of Central Excise (Appeals), who in his order dated 2-6-83 upheld the Assistant Collector's order and rejected the appeal. In his order, apart from discussing the provisions of Notification No. 201/79 and the Appendix thereto, the Collector (Appeals) also discussed the point regarding the use of the inputs for manufacturing goods like air bags, curing bags and bladders, which according to the appellants were intermediate products in the manufacture of tyres. On this point he held against the appellants, but he seems to have done so more on the basis of their failure to properly allocate the inputs to various finished goods, and did not record a specific finding on the question of eligibility of credits taken on inputs used in the manufacture of such goods. The Collector (Appeals) does not appear to have observed that this specific point was not discussed or decided by the Assistant Collector.

10. We have had to set out in considerable detail the grounds specified and discussed at various stages, in order to define the scope of the appeals before us. From what has been said above, it will be seen that the questions on which a definite finding was given by the Assistant Collector (in his order dated 18-5-82) were only two, namely, (a) whether the assessee was required to furnish full details of inputs used in the manufacture of each of the finished goods; and (b) whether the set-off (more correctly, proforma credit) was available in respect of outputs cleared under 'nil' rate of duty. To these could be added the finding at the end of his order, namely, (c) whether it was justifiable, on the basis that a part of the proforma credit was ineligible for utilisation, to disallow the entire proforma

credit.

11. In order to appreciate the questions involved and the arguments advanced by the learned representatives of both sides, it would be useful to set out the relevant provisions of the notifications under consideration. Notification No. 178/77, dated 18-6-77 read as follows :- "In exercise of the powers conferred by Sub-rule (1) of rule 8 of the Central Excise Rules, 1944, the Central Government hereby exempts all excisable goods (hereinafter referred to as the "said goods") on which the duty of excise is leviable and in the manufacture of which any goods falling under Item No. 68 of the First Schedule to the Central Excises and Salt Act, 1944 (1 of 1944) (hereinafter referred to as the inputs) have been used, from so much of the duty of excise leviable thereon as is equivalent to the duty of excise already paid on the inputs : Provided that where the duty of excise leviable on the said goods is less than the amount of duty of excise paid on the inputs the extent of exemption shall be restricted to the duty of excise leviable on the said goods." The above notification was superseded by Notification No. 201/79, dated 4-6-79. The notification subsequently underwent several amendments, but both sides agreed that those amendments do not affect the matters before us, which need be considered only in the light of the notification, as originally issued. The substantive part of this notification (which is still in force) reads as follows : 'In exercise of the powers conferred by Sub-rule (1) of rule 8 of the Central Excise Rules, 1944, and in supersession of the notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 178/77- Central Excises, dated the 18th June, 1977, the Central Government hereby exempts all excisable goods (hereinafter referred as "the said goods"), on which the duty of excise is leviable and in the manufacture of which any goods falling under Item No. 68 of the First Schedule to the Central Excises and Salt Act, 1944 (1 of 1944) (hereinafter referred as "the inputs") have been used, from so much of the duty of excise leviable thereon as is equivalent to the duty of excise already paid on the inputs : Provided that the procedure set out in the Appendix to this notification is followed : Provided further that nothing contained in this notification shall apply to the said goods which are exempted from the whole of the duty of excise leviable thereon or are chargeable to nil rate of duty.' The appendix to the notification lays down a detailed procedure to be followed by the manufacturer and at present we need

reproduce only paras 1 and 2 of this Appendix which read as under :- "1. A manufacturer of the said goods shall give a declaration to the Superintendent of Central Excise having jurisdiction over his factory, indicating the full description of the said goods intended to be manufactured in his factory and the full description of the inputs intended to be used in the manufacture of each of the said goods.

2. A manufacturer may take credit of the duty already paid on the inputs which are received by him after submitting the declaration, and utilise such credit for payment of duty of excise on the said goods." 12. Appearing for the appellants, Shri Ravinder Narain submitted that provision for relief of the input duty in such cases was originally made through Notification No. 178/77. Under that notification it was necessary to link the duty relief on the outputs with the duty paid on the inputs used in the manufacture of those very outputs. According to Shri Ravinder Narain it was found not practicable to have such allocation and it was with a view to obviating this difficulty by avoiding the need for such allocation that notification No. 201/79 was issued by Government in supersession of Notification No. 178/77. In this connection Shri Ravinder Narain drew our attention to a newspaper report in the Bangalore edition of the Indian Express for 7-6-79, with the heading "Procedure on excise duty renewed". Shri Ravinder Narain particularly drew our attention to the following extracts from the above newspaper report :- "The Union Finance Ministry yesterday announced revamping of the procedure for granting excise duty set-off in respect of commodities falling under Item 68 of the tariff rules.

When excise duty under Tariff Item 68 was increased from 2 per cent to 5 per cent ad valorem in 1977, excisable goods manufactured out of the Item 68 commodities used as inputs were exempted from that part of the excise duty which was paid at the input stage.

The exemption was restricted to the duty payable on the finished goods, when the duty paid on the inputs was more than that oh the finished goods.

However, because of the cumbersome procedure, under which the trade and industry was required to furnish the requisite input-output ratios for claiming the exemption, the intended benefit could not be availed of by them fully.

Now, under a notification issued on Monday, the procedure has been given up and a self-contained procedure for claiming the exemption has been prescribed.

This procedure is basically on the lines of the proforma credit system prescribed under Rule 56-A of the Central Excise Rules, 1944.

A Finance Ministry press note issued here said that this major procedural simplification was expected to 'fully resolve' the problems of the trade and industry experienced in the past.

The diflicutlies were aggravated where innumerable varieties of finished excisable goods were being manufactured and in the production of which goods falling under Tariff Item 68 were used not necessarily in relation to any formula but in a particular ratio that could change from time to time and from variety to variety." Shri Ravinder Narain submitted that this would bear out his submission that the intention of Government in issuing Notification No. 201/79 was to do away with the allocation of outputs to inputs in respect of individual items manufactured.

13. Shri Ravinder Narain laid stress on the definition of "the said goods" in the notification. This expression had been equated to "all excisable goods". Therefore, the expression used in Paras 1 and 2 of the Appendix should be taken as referring to all excisable goods, whether or not they had been exempted from duty, as was the case with tyres for animal-drawn vehicles and "O.E." tyres, that is, tyres used as original equipment of motor vehicles. Shri Ravinder Narain submitted that under Para 1 of the Appendix, the manufacturer was required to give the full description of the excisable goods intended to be manufactured in his factory and the full description of the inputs intended to be used in the manufacture of each of the excisable goods.

This the appellants had duly done. Under Para 2, the manufacturer was permitted to take credit of the duty already paid on the Item 68 inputs which were received by him after submitting the declaration. This also the appellants had duly done. They were permitted, in terms of the same Para 2, to utilise such credits for payment of duty of excise on the excisable goods manufactured by them. This also they had done. There was of course no question of paying duty on goods

which had been fully exempted, and they had not purported to do so. What they had done was to utilise the credits taken by them towards payment of duty wherever such duty was payable. It was his contention that there was nothing in the notification to prevent them from utilising the proforma credit in this manner.

14. Shri Ravinder Narain submitted that the same raw materials were used for a variety of tyres, some of which were dutiable and some exempted. At the time of taking the inputs into the factory and taking credit of the duty paid on them, the appellants could not possibly say which of the raw materials would be used for manufacturing dutiable tyres and which of exempted tyres. No fault could be found with them for taking credit of the entire duty on the inputs. Once credit had been taken, there was also no bar to its being utilised on any of the dutiable outputs, which fell within the definition of "the said goods".

15. With reference to the second proviso to the notification, namely that nothing contained therein shall apply to goods exempted from the whole of the duty or chargeable to nil rate of duty, Shri Ravinder Narain submitted that the appellants had not sought to utilise the credits in respect of such goods (as indeed there was no need for them to do), and, therefore, they were not hit by the proviso. Further, with the reference to one of the grounds taken in the show cause notices, that the inputs had been used in the manufacture of goods falling under Item 68, Shri Ravinder Narain submitted that no goods falling under Item 68 had been cleared from the factory. He also, at our request, clarified the reference in the first show cause notice to some matter before the Delhi High Court. He explained that this referred to the question of classification of "dip fabric" or "tyre cord warp sheet".

However, as we have pointed out above, the decisions of the Assistant Collector and the Collectors (Appeals) which are actually before us do not touch on this aspect and it need not therefore be pursued.

16. Shri Ravinder Narain also placed reliance on the decisions of the West Regional Bench and the South Regional Bench of the Tribunal which have been referred to earlier. Which agreeing that in the case of Warner Hindustan Ltd., decided by the South Regional Bench, the Bench had directed allocation of the duty on the raw material based on its utilisation in dutiable and exempted finished

products, he submitted that the appellants in that case had implicitly conceded the point, and had not taken the grounds (as the present appellants have done) that proforma credit does not become inadmissible on the ground of use of the inputs in the manufacture of exempted goods. He, therefore, submitted that the above decision should not be taken as deciding the issue before us or as adverse to the present appellants.

17. Shri Ravinder Narain placed reliance on the decision of the West Regional Bench in the case of Bajaj Tempo Ltd. The basic issues in that case have been stated in the subsequent order dated 6-8-84 of the same Bench on a Reference Application filed by the Collector of Central Excise, Pune. We give below relevant extracts from that order : "The objection raised by the department was that after Notification No. 166/79 was rescinded, M/s. Bajaj Tempo ought to have sought fresh permission to continue to avail of the proforma credit under the Notification No. 201/79, dated 4-6-79. It has never been the contention that M/s. Bajaj Tempo were not entitled to avail of the proforma credit or to utilise the proforma credit so availed, but the only objection was that they should have sought fresh permission in terms of Notification No. 201/79. The Bench found that M/s. Bajaj Tempo Ltd., were throughout following the procedure prescribed in Rule 56-A for availing the proforma credit. The Bench further found that the procedure prescribed in the Appendix to Notification No. 201/79, dated 4-6-79, was more or less similar to the procedure prescribed in Rule 56-A. In the said circumstances, the Bench observed that one could, therefore, reasonably take the view that if there had been substantial compliance with the procedure prescribed in the Appendix to Notification No. 201/79, dated 4-6-79, the appellants would not be debarred from availing themselves of the proforma credit procedure even after Notification No. 166/79 was rescinded on 1-8-80.

In our opinion, the Bench did not interpret either Notification. No. 166/79 or 201/79, but on the facts and in the circumstances of the case, the Bench found that the sanction of the Central Government for remission or adjustment of duty paid on parts and accessories of motor vehicles contained in Notification No. 166/79 continued to be operative and valid by virtue of Notification No. 201/79, dated 4-6-79, even after Notification No. 166/79 was rescinded on 1-8-80.

The above finding was based more on the appreciation of the facts estabished in the appeal and not on the interpretation of any provisions of the rules or the notification. . ." Shri Ravinder Narain submitted that in that case, the West Regional Bench had been satisfied with substantial compliance with the procedural provisions. In the present case also, even if it was held that there was a technical defect on the part of the appellants, there was clearly substantial compliance with the requirements of the notification and they should not therefore be penalised by being deprived of the benefit of proforma credit.

18. It was pointed out to Shri Ravinder Narain that the lower authorities had apparently been prepared to allow the benefit of the proforma credit on inputs used in the manufacture of dutiable outputs.

However, at various stages, the appellants had expressed their inability to furnish even an approximate allocation of the inputs (and the duty paid thereon) used in the manufacture of exempted goods vis-a-vis the inputs used in the manufacture of dutiable goods. The Bench pointed out to Shri Ravinder Narain that the manufacturers must be having a system of materials control and cost accounting, and it was difficult to understand why they could not make at least an approximate allocation, in which case they could have obtained the benefit of utilisation of the proforma credits to a substantial extent, if not the major extent. Shri Ravinder Narain replied that, in the absence of his clients, he was not able precisely to explain what their difficulty was in this regard. He submitted, however, that even if it was held that a part of the proforma credit was not utilisable, whatever benefit the appellants were entitled to on the basis of utilisation of the inputs in the manufacture of dutiable goods should be given to them.

19. Replying on behalf of the Department, Shri Verma submitted that there was no dispute that some of the goods manufactured with the Item 68 inputs were exempted from duty. Had the appellants quantified the inputs used in the manufacture of such exempted goods, only the proforma credit on those inputs would have been disqualified. However, the appellants had consistently expressed their inability to quantify those inputs.

20. Shri Verma submitted that the basic question was regarding the interpretation of Notification No. 201/79. According to him, it was clear from the notification that proforma credit of duty could not be taken or utilised in respect of inputs used in the manufacture of exempted goods. He submitted that the notification should be read as a whole and no undue stress laid on particular paragraphs. The main part of the notification, which was an exemption under Rule 8(1) of the Central Excise Rules, clearly laid down that exemption was admissible on the manufactured goods "from so much of the duty of excise leviable thereon as is equivalent to the duty of excise already paid on the inputs". This clearly showed that the exemption in respect of any goods was relatable to the inputs used in the manufacture of those very goods.

21. In this connection, Shri Verma relied on the order of the South Regional Bench in the case of Warner Hindustan Ltd. (vide Para 15 above) in support of his above contention. Shri Verma submitted that since the exemption was relatable to the inputs actually used, allocation of the inputs to the output goods was essential. This was also clear from the notification and its Appendix. He drew attention to Para 1 of the Appendix to the notification (vide Para 11 above), wherein the manufacturer was required to furnish the full description of the inputs intended to be used in the manufacture of each of the said goods.

22. Shri Verma submitted that without the input-output ratio, the quantum of exemption admissible to the manufacturer could not be worked out. It was not correct for the appellants to express inability to make the allocation and throw the burden on the Excise authorities. Shri Verma submitted that since the appellants were seeking the benefit of an exemption notification, the burden was on them to establish their entitlement to the benefit. Shri Verma also submitted that under Rule 173B of the Central Excise Rules there was an obligation on the assessee to furnish the necessary information to the proper officer. He also submitted that the information necessary for allocation of the inputs to the output goods should be available with the appellants, since they must be maintaining the necessary records for costing purposes.

23. Referring to the argument of Shri Ravinder Narain that there could be no objection to the appellants taking proforma credit on all the inputs brought into the factory, since they were entitled to do so under Para 2 of the Appendix, and at that time they could not know which inputs would be used in the manufacture of dutiable and exempted goods, Shri Verma pointed out that the necessary provision for disallowing the proforma credit wrongly taken on inputs subsequently used in the manufacture of exempted goods existed in Paras 4 and 8 of the Appendix to Notification No. 201/79, which read as follows : "4. If the credit of duty paid on inputs has been taken wrongly, the credit so taken may be disallowed by the proper officer and the amount so disallowed shall be adjusted in the credit account or the account-current or if such adjustment is not possible for any reason, by a cash recovery from the manufacturer of the said goods.* * * * * 8. If any inputs in respect of which credit has been taken are not duly accounted for as having been disposed of in the manner specified herein, the manufacturer shall, upon a written demand being made by the proper officer, pay the duty leviable on such inputs within ten days of the notice of demand." 24. The Bench drew Shri Verma's attention to Para 9(a) of the Appendix to the Notification which reads as follows : "9. (a) The credit of duty taken in respect of any inputs may be utilised towards payment of duty on any said goods for the manufacture of which such inputs were declared by the manufacturer to be brought into the factory, or where such inputs are cleared from the factory as such, on such inputs." Since the reference in this para was to said goods for the manufacture of which such inputs were declared by the manufacturer, and no reference was made to utilisation, he was asked whether the benefit would not accrue solely on the basis of the declaration, which had been made in the present case. On this, Shri Verma submitted that it was quite clear from the second proviso to the notification that it had no application to exempted goods and, therefore, no such benefit could be claimed by the manufacturer. Further, in view of the second proviso, Para 8 could also be invoked where any credit of duty taken . in terms of Para 2 of the Appendix had been wrongly utilised.

25. Shri Verma accordingly submitted that the appellants were not entitled to proforma credit of duty on the inputs used in the manufacture of output goods which were exempted from duty; that it was the responsibility of the appellants to

furnish the necessary information to enable the allocation of the inputs (and the duty thereon) between dutiable and exempted output goods; and that subject to their doing so, they could be granted the benefit of taking and utilising the proforma credit of duty on inputs used in the manufacture of dutiable goods.

26. Replying to Shri Verma, Shri Ravinder Narain referred to the declaration filed by the appellants. In this declaration all the inputs had been duly listed. These inputs were common to both the exempted and the dutiable goods. It could not therefore be contended that the declaration was in any way incorrect, nor had the Excise authorities raised any objection to the declaration when it was filed. Under Para 2 of the Appendix, the appellants were entitled to take credit of the duty on the inputs, on the basis of their declaration. Accordingly, credit of duty could not be said to have been taken wrongly, and could not, therefore, be disallowed in terms of Para 4 of the Appendix.

27. Regarding the South Regional Bench decision in the case of Messrs Warner Hindustan Ltd., Shri Ravinder Narain again submitted that the point raised by him that the proforma credit was available even in respect of inputs used in the manufacture of exempted goods, had not been raised in that case and, therefore, the decision there could not be taken as relevant to the present case.

28. It was put to Shri Ravinder Narain by the Bench that the substantive part of the notification appeared to limit the benefit granted thereunder to whatever duty had been paid on the inputs actually used in the manufacture of the output goods. In view of this, he was asked whether it would be proper to read the Appendix to the notification as conveying a greater benefit in respect of dutiable goods by allowing utilisation of the credit taken in respect of inputs used in the manufacture of other (exempted) goods. Shri Ravinder Narain submitted that the Appendix set out in detail how the benefit of the notification was to be given, and it had reference to the first proviso to the notification. Therefore, the appellants would be entitled to whatever benefit could be derived by the application of the Appendix.

29. We have carefully considered the submissions made by the learned representatives of both sides. As mentioned above, a number of grounds were taken in the two show cause notices, but ultimately in the order dated 18-5-82 of

the Assistant Collector (followed by him in his order dated 20-11-82) only two of these grounds were discussed and decided (vide Para 10 above). We do not propose to go into any of the grounds taken in the show cause notices but not specifically decided, although one of them (relating to air bags, etc.) was referred to in the second order of the Collector (Appeals).

30. The basic question for consideration is whether proforma credit of duty on inputs used in the manufacture of goods which were exempted from duty could be utilised for payment of duty on goods which were not exempted from duty. This question has to be decided on an interpretation of Notification No. 201/79.

31. Shri Ravinder Narain had placed strong reliance on the provisions of the Appendix to the above notification, particularly Para 2. As against this, Shri Verma placed reliance on the provisions of the substantive part of the notification. The first submission made by him was that the operative clause of the notification exempts the output goods from so much of the duty of excise leviable thereon as is equivalent to the duty of excise already paid on the inputs. He had drawn our attention to Para 1 of the Appendix which requires a manufacturer in his declaration to give the full description of the "said goods" intended to be manufactured and the full description of the inputs intended to be used in the manufacture of each of the said goods. He had argued that this clearly implied allocation of the inputs to each of the output goods.

32. It appears to us that there is substance in Shri Verma's contention. Shri Ravinder Narain had argued that under the predecessor Notification No. 178/77 (vide Para 11 above), there was need for allocation and correlation of the inputs to each of the output goods.

However, appreciating the difficulties which had resulted from this procedure, Government had replaced the procedure in Notification No.178/77 by that in Notification No. 201/79. He had also referred to the newspaper report of 7-6-71 referring to this notification (vide Para 12 above).

33. It appears to us that the argument based on the replacement of Notification No. 178/77 by Notification No. 201/79 actually goes against the the appellants.

From a comparison of the wording of the operative part of these two notifications, as given in Para 11 above, it will be seen that the operative clause in both of them is exactly the same. In each case, the exemption is on the "said goods". In each case, the extent of exemption is "from so much of the duty of excise leviable thereon as is equivalent to the duty of excise already paid on the inputs". If, as admitted by Shri Ravinder Narain, Notification No.178/77 required allocation of the inputs to each of the output goods, it should follow that the effect of Notification No. 201/79, whose operative clause is identically worded, should be the same.

34. Shri Verma had also drawn our attention to the second proviso to the notification, to the effect that nothing contained in the notification shall apply to the said goods which are exempted from the whole of the duty of excise leviable thereon or are chargeable to nil rate of duty. Shri Ravinder Narain submitted that, on his interpretation, this proviso would be satisfied because it would only require that we should simply leave the exempted goods out of consideration, but should not preclude the appellants from utilising the proforma credit of duty on inputs used in the exempted goods from being utilised for payment of duty on the dutiable goods. We, however, find it difficult to accept this argument. The proviso makes it clear that nothing, that is, no provision either in the substantive part of the Appendix, would have reference to exempted goods. This being so, inputs used in the manufacture of such exempted goods would also have to be ignored for the purpose of operating the exemption notification.

In other words, the duty paid on such inputs should not be taken into account at all for the purpose of granting the exemption in terms of the notification.

35. We may point out that in the case of exempted or nil rated goods, the question of paying duty does not arise. If the second proviso only means, as Shri Ravinder Narain has contended, that the proforma credit taken on input goods cannot be utilised for payment of duty on exempted goods, the proviso becomes meaningless and superfluous. An interpretation which leads to such a result obviously has to be avoided.

36. Shri Ravinder Narain had laid stress on the porovisis of on the Appendix to the notification, particularly Paras 1 and 2. No doubt the Appendix has to be taken into

account, as it is specifically referred to in the first proviso to the notification. However, what the proviso says is that the procedure set out in the Appendix should be followed.

Essentially, therefore, the Appendix sets out the procedure. The procedure necessarily has to be consistent with the substantive part of the notification and cannot be read in such a way as to conflict with the main part, which would be the result if the interpretation put forward by the appellants were to be adopted.

37. Shri Ravinder Narain had submitted that at the time of taking the inputs into the factory and taking credit for duty thereon, the appellants would not be in a position to know which part of the inputs would be used for manufacturing dutiable goods and which for exempted goods. This is no doubt correct. However, is does not follow that even after the position becomes clear, and the inputs can be allocated as between dutiable goods and exempted goods, the validity of the proforma credit remains unaffected. It has already been seen that Para 4 of the Appendix makes a provision for disallowing credit of duty wrongly taken, and Para 8 makes a provision for repayment of credits of duty wrongly utilised. Therefore, even if the proforma credit has been taken in a regular manner in the first instance, in the absence of advance knowledge about utilisation, this can be corrected when the position about utilisation becomes known. (In view of our finding on the basic question before us and our observation that the procedural provisions of the Appendix cannot overrule the substantive provisions of the main part of the notification, we do not also think that the provisions of Para 9(a) of the Appendix could be read as contrary to the view we have arrived at).

38. Apart from what we have said based on the wording of the notification, we may observe that the interpretation advocated by Shri Ravinder Narain would lead to anomalous results. According to that interpretation, if a manufacturer produces only exempted goods, he cannot get the benefit of duty relief on the inputs, through the proforma credit procedure. However, a manufacturer who produces a small quantum of similar dutiable goods could take credit for the entire amount of duty paid on the inputs for all the goods, and utilise that credit for the payment of full duty on the dutiable goods. An interpretation which would lead to such an

anomalous situation does not commend itself.

39. Reference has been made earlier to the orders of the West Regional Bench and the South Regional Bench on similar issues. The order of the South Regional Bench in the case of Warner Hindustan Ltd., was relied upon by Shri Verma (vide Para 20 above). So far as this decision is concerned, we accept Shri Ravinder Narain's contention that the issue which has been raised in this case was implicitly conceded by the appellants there, and that accordingly that decision would not be of assistance in deciding the present case. The case of Bajaj Tempo Ltd., which was decided by the West Regional Bench (vide Para 16 above) was relied upon by Shri Ravinder Narain. The extracts from the order of the West Regional Bench, which have been reproduced in Para 16 above, show clearly that the facts of that case were different, as they related to the position consequent on the rescission of a notification, whereas, in this case, Notification No. 201/79 was the only one in force during the material period. It has been clearly stated by the West Regional Bench in its order quoted above that its finding was based on an appreciation of facts and not on the interpretation of any provisions of the rules or the notification. Therefore, this decision also is of no assistance in deciding the present case.

40. The appellants had argued that they were not in a position to make an allocation of the inputs as between the dutiable and exempted goods.

When we questioned Shri Ravinder Narain about their precise difficulty in this regard, he was not able to explain the difficulty. As pointed out by us in Para 17 above, in a factory like that of the appellants there has to be a system of control of raw materials for the purpose of maintaining inventories. There also has to be a system of cost accounting, for the purposes of costing their products. It is, therefore, difficult for us to accept that, even by using modern management and accounting practices, the appellants would not have been in a position to make at least an approximate calculation of the ratio of inputs to outputs, by broad categories of dutiable goods and exempted goods. In view of our finding on the first issue, such an allocation was necessary. We, therefore, uphold the findings of the lower authorities on this issue.

41. We, therefore, find that the orders of the lower authorities on both of the basic questions set out in Para 10 above were correct.

However, we cannot uphold the further finding of the Assistant Collector that because a part of the proforma credit was ineligible for utilisation and the appellants did not furnish the allocation required, the entire amount of proforma credit should be disallowed. It is clear that the appellants were, in terms of Notification No. 201/79, entitled to the benefit of proforma credit in respect of a part (in all probability the major part) of their inputs. It is true that a part of the proforma credit was ineligible for utilisation, and that the appellants did not co-operate by furnishing the information (which was within their special knowledge) necessary for making the allocation.

Even so, instead of disallowing the entire proforma credit, it would have been proper for the Assistant Collector, on the basis of his best judgment, to arrive at the quantum of the proforma credit which was allocable to the exempted goods, and to allow only the balance of the proforma credit. We consider, therefore, that on this aspect the appellants are entitled to relief.

42. We, therefore, modify the two orders before us to the extent that the proforma credit shall be disallowed only to the extent of the inputs calculated as having been used in the manufacture of goods which were exempted from the whole of the excise duty or were chargeable to nil rate of duty. The appellants shall be permitted, within a period of two months from the date of communication of this order, to furnish to the proper officer the allocation of raw materials and duty thereon necessary for the purposes of the above calculation. The proper officer shall, in his best judgment, and after taking into account the calculations, if any, furnished by the appellants, determine the quantum of credit to be disallowed in terms of this order, and shall allow the balance of the proforma credit which is allocable to dutiable goods. The appellants shall be entitled to consequential relief. With this modification, we confirm the two orders of the Collector (Appeals).

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