

**Sunrise Structural and Engg. Vs. Cce**

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**Court :** Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

**Decided On :** Aug-27-2004

**Reported in :** (2004)(117)LC307Tri(Mum.)bai

**Judge :** S T S.S., K Kumar

**Appellant :** Sunrise Structural and Engg.

**Respondent :** Cce

**Judgement :**

1. M/s. Sunrise Structural and Engg. Ltd. E/3284/02 (herein after referred to as Sunrise) M/s. KEC International Ltd. E/3185/02 (herein after referred to as KEC) M/s. Ramson Alloys (P) Ltd. E/3269/02 (herein after referred to as RAP) Shri Sanjay Agrawal E/3188/02 (Director of M/s. Sanvijay Re-rolling & Engg. Works Ltd) Shri Puranlal Agrawal E/3189/02 (Managing Director of M/s. Sanvijay Re-rolling & Engg. Works Ltd.) Shri K. Ramkumar E/3190/02 (Vice President of M/s. KEC Ltd.) Shri Tushar Deshpande E/3191/02 (Manager of M/s. KEC Ltd.) M/s. Maharashtra Steel Rolling Mills E/3188/02 (herein after referred to as M/s. MSRM) Shri Janki Shah E/3183/02 (Director of M/s. Maharashtra Steel Rolling Mills) 2. Pursuant to a information that M/s. KEC Ltd. and M/s. Sunrise Ltd. were availing 'unlawful' (SIC) deemed export benefits, and had indulged in availment/passing on of irregular MODVAT CREDIT were visited by the officers and enquiries launched which resulted in the notice. The impugned order consequent thereto has found: 42. (ii) I observed that M/s. Maharashtra Steel Rolling Mills Pvt.

Ltd. Mumbai were aware that M/s. Sunrise Structural were not a re-roller and despite that they have allegedly entered into MOU with the Notice No. 1 who was a manufacturer of angles for supply of angles to the various parts of M/s. KEC International Ltd. and other TLT manufactures so as to raise invoice in their name so that Central Excise duty @ 16% should be passed on to M/s. KEC International Ltd. M/s. MSRM being themselves re-rollers of steel products allegedly knew that the products cleared by the re-rollers working under Section 3A of CEA 1944 carry 12% deemed modvat credit provided the goods are cleared direct from the manufacturers of input to manufacturers of finished goods and payment is made by cheque or draft to input manufacturers by the manufacturer of finished goods who availed modvat credit and that modvat rules do not permit a manufacture to receive inputs only for sale as such under Rule 57A. Hence they have allegedly abetted Noticee No. I to avail inadmissible Modvat credit of Rs. 3,65,92,114/-, Noticee No. II to avail irregular modvat credit of Rs. 1,46,47,561/- and also under TLT manufactures to avail of irregular modvat credit passed on by Noticee No. I. It is alleged that by their covert documentation like MOUs mentioned, they tried to mislead the department to believe that the dealings are normal commercial transaction whereas it was apparent that they have participated in a well planned and well-executed conspiracy with ulterior motive....

42(iii)b xii. When the noticee's unit was not in operation, and is not a manufacturer of Angles, but entering into an agreement to supply angles by the notice is nothing but trading of goods governed by different Modvat Rules such as Rule 57-GG. But entering into an agreement to supply angles not brought for manufacturing his final goods, is totally a fraudulent abuse of Rule 57A read with Rule 57G of the Central Excise Rules.

Therefore, the question of receipt of angles by the noticee does not arise. Accordingly availment of Modvat credit, is not permissible under Rule 57-G. Utilization of such wrongly availed of Modvat credit is not authorised and or legal under any Central Excise Rule.

So the utilization or passing on the benefits of such credit by issuing modvatable invoices is not legal. Therefore, the total inputs shown to have been received inter

factory and in respect of which modvat credit has been wrongly availed of are liable for confiscation under Rule 173Q(1)(bb) and Rule 173Q(1)(bb) of the erstwhile Central Excise Rules, 1944. The Modvat credit availed of is recoverable under Rule 571 and the Noticee is liable for penalty under Rule 173Q(1).

42. (iii)(c) As regards the plea that the demand of duty is barred by limitation, it is not correct to say on the part of the noticee because they did not inform the Department that their unit was not in operative w.e.f. 1.6.1999 and they availed of Modvat credit in a fraudulent manner with intent to evade payment of duty as discussed below: M/s. Sunrise Structural, Notice No. 1 supplied goods against MOU with M/s. MSRM, Notice No. XI and also on the basis of purchase orders. M/s. Sunrise's supply price, as per purchase order, was determined on the basis of market price prevailing at the time of clearance. The prices also varied for different quantities as per the purchase orders. The price varied from Rs. 12,915/- to Rs. 16,300/- pmt. Re-rollers price varied from Rs. 14,300/- to Rs. 14,600/-. The benefits accrued to M/s. Sunrise is illustrated as under: Purchase price of Angles from Re-rollers @ Rs. 15,180/- PMT (Gross)(Price Rs. 14,500 + Sales Tax Rs. 580 + Transport Rs. 100) = Rs. 15,180/-(-) Sales Tax = Rs. 580/-(-) Modvat @ 12% = Rs. 1,822/- \_\_\_\_\_ Sale price of Angles by M/s. Sunrise Structural and Engg. Ltd. Nagpur @ Rs.12,915/- PMT (Net)(+) Sales Tax Rs. 599/-(+Duty@16% Rs. 2,066/- \_\_\_\_\_ Rs. 15,580/- (-) Rs. 15,180/- Rs. 400/-Gross Difference = Diff. of Excise + Difference of + Profit duty Sale Tax M/s. Sunrise billed Rs. 12915 PMT to M/s. MSRM and M/s MSRM paid total bill to M/s. Sunrise Structurals and Engg. Ltd., Nagpur whereas M/s MSRM received Rs. 11365 PMT from M/s. KEC. Thus M/s. KEC paid less price of Rs. 1150 PMT. M/s. KEC also received Modvat credit on higher value and that too @ 16%. M/s. KEC is thus benefited by Rs. 244 per MT (Rs. 2066 -- Rs. 1822) in modvat credit.

Since the inputs were used in the export goods, the credit accumulated was utilised by them for other purposes. Further had M/s. KEC procured angles from M/s. MSRM, they would have incurred more transportation cost.

M/s. MSRM received advance licences of M/s. KEC invalidated in their favour for free import of steel in view of supply of angles procured locally and supplied to

M/s. KEC, for use in export goods, the total duty involved in duty free import is compensated for the above cited price difference.

M/s. MSRM was also a manufacturer of angles at Mumbai. On duty free import of steel they had to spend a nominal amount towards transportation to bring the said material to their unit. If they supply angles from Mumbai to M/s. KEC and others they had to incur extra transportation cost up to Nagpur. Therefore, they entered into MOU with M/s. Sunrise Structural and Engg. Ltd. Nagpur who were ready to supply angles at agreed price and ready to pay 16% duty. In this arrangement, M/s. Sunrise Structural and Engg., Ltd. Nagpur was manufacturer, M/s. MSRM, the buyer and M/s. KEC, the consignee.

Accordingly, M/s. MSRM being a middleman was treated as trader. M/s.

Sunrise Structural and Enggl Ltd., Nagpur was not manufacturers of angles. They had shown in their records that the angles were procured from re-rollers working under Section 3A and availed of 12% deemed modvat credit. In terms of conditions contained in Notification No. 58/97 dated 30.8.1997, the goods should go directly from the re-rollers to the manufacturer of finished goods and payment of the same should be made through cheque or draft for entitling the manufacturer of finished goods to get 12% deemed modvat credit. Had M/s. Sunrise Structural and Engg. Ltd., Nagpur paid duty equivalent to the credit availed of while clearing input, i.e. angles as such under Rule 57F(1)(ii), M/s. KEC would not have been eligible to avail of modvat credit. Therefore M/s. Sunrise Structural and Engg. Ltd., Nagpur paid standard rate of duty of 16% to make KEC entitled to avail of modvat credit as if the goods are manufactured by M/s. Sunrise Structural and Engg. Ltd., Nagpur. Had M/s. MSRM made contract with the re-rollers for supply of angles to M/s. KEC, in that case, the name of M/s. MSRM on the invoice as buyer would not have made M/s. KEC entitled to 12% deemed modvat credit and in the absence of the name of M/s. MSRM on the invoice would have made them ineligible to receive benefits of invalidation i.e. duty free import. The re-rollers, i.e. Noticee No. III to VI were benefited to the extent of transport charges shown in their fake invoices which they never incurred. Accordingly, all the Noticees were benefited.

Accordingly, all the Noticees have involved in a conspiracy to defraud revenue and evade duty and to derive undue and unjust benefits in contraventions of the Central Excise Rules with intent to evade duty.

Since the Noticees have sought to avail of the benefit of the Notification No. 58/97 which was not availed to them by suppressing the material facts and without following the procedures, the benefits of the decision of the Hon'ble CEGAT in the case of Geep Industrial Syndicate Ltd. wherein it was held that the omission to follow procedure was not suppression, would not be available being not applicable.

In view of the above, the extended period of time of 5 years under Rule 57I(I)(ii) is available in this case and hence the demand is not time barred.

42. (v) M/s. Ramson Alloys Pvt. Ltd., Nagpur, Noticee No. III have passed on irregular modvat credit of Rs. 99,360/- and thus issued fake Central Excise invoices for 60 Mts. M.S. Angles enabling M/s Sunrise to avail irregular modvat credit of Rs. 99,360/-. Further, they had deficient stock of excisable goods by 9,170 MTS at the time of visit by the Central Excise Officers on 30.3.2000. Thus Noticee No. III has clearly contravened the provisions of Rules 52A, 173Q and 226 (as existed then) of Central Excise Act, 1944 and made themselves liable for penalty under Rule 173Q of Central Excise Rules, 1944.

42 (vi) M/s. Snavijay Re-rolling and Engg. Works Ltd., Nagpur Noticee No. IV have passed on irregular modvat credit by issue of fake Central Excise invoices during the period 4/99 to 3/2000 in collusion with Noticee No. II to avail irregular modvat credit. They have issued mere documents without sending corresponding excisable goods along with such documents to Noticee No. 1. They showed transportation charges in their invoices without incurring the same and thus inflated the price and Noticee No. 1 i.e. M/s. Sunrise Structural and Engg. Ltd., Nagpur to take excess modvat credit. Thus they have contravened the provisions of Rules 52A of Central Excise Act, 1944. They have thus made themselves liable for penalty under Rule 173Q(I) of Central Excise Rules, 1944.

42 (vii) M/s. Prakash Ispat Udjoy, MIDC, Nagpur - Notice No. V have passed on irregular modvat credit by issue of fake Central Excise invoices during the period 4/1999 to 3/2000 in collusion with Noticee Nos. I, II, XI enabling M/s. Sunrise and TLT manufacturers like Noticee No. II to avail irregular modvat credit. They have issued mere documents without sending corresponding excisable goods along with such documents. They showed transportation charges in their invoices without incurring the same and thus inflated the price and Noticee No. 1 i.e. M/s. Sunrise Structural and Engg. Ltd. Nagpur, to take excess modvat credit. They have contravened the provisions of Rules 52A of Central Excise Rules, 1944.

42 (viii) M/s. Sanvijay Industries Pvt. Ltd., Nagpur - Noticee No. VI have passed on irregular modvat credit by issue of fake Central Excise invoices during the period 4/99 to 3/2000 in collusion with Noticee Nos. I, II, XI enabling M/s. Sunrise and TLT manufactures like Noticee No. II avail irregular modvat credit. They have issued mere documents without sending corresponding excisable goods along with such documents. They showed transportation charges in their invoices without incurring the same and thus inflated the price and Noticee No. I i.e. M/s. Sunrise Structurals and Engg. Ltd., Nagpur to take excess modvat credit. They have contravened the provisions of Rules 52A of Central Excise Rules, 1944.

42. (ix) Shri Sanjay Agarwal, (Noticee No. VII) Director of M/s.

Sunrise Structurals and Engg. Ltd., Nagpur (Noticee No. 1) was responsible for making overall arrangement for passing on irregular modvat credit to Noticee No. II amounting to Rs. 1,46,47,561/- and to other such manufacturers of TLT totally amounting to about Rs. 2.64 crores. Noticee No. VII enjoyed crucial position in the management and control of Noticee No. I. The Noticee was also a party in devising the scheme for rolling of material M.S. Angle at the rolling units of the Sanvijay Group working under Section 3A of the Central Excise Act, 1944 subsequently showing it as cleared to his unit i.e. M/s. Sunrise Structural and Engg. Ltd., Nagpur, Noticee No. I working under Section 3 of Central Excise Act, 1944 availing of 12% deemed modvat credit without receipt of inputs and issuing fake invoices to other TLT manufacturers by fabricating statutory records showing receipt of goods under question availing of irregular modvat credit @ 12% of

invoice price of the invoices issued by Noticees Nos. III to VI units working under Section 3A of Central Excise Act belonging to the Noticee and then showing 'inputs cleared as such' in their statutory record and RT12 returns (though not mentioned on invoices) on payment of 16% adv. duty. Thus Noticee No. VII appear to have generated fake modvatable documents without excisable goods actually accompanying so as to facilitate downstream manufacture Noticee No. II and others to avail of irregular modvat credit at their end. As discussed above the goods have been directly despatched from the re-rollers to Noticee No. II and other TLT manufacturers without receiving into the factory premises of M/s.

Sunrise. Noticee No. VII appears to have made fake Central Excise invoices showing bogus vehicle Nos. etc. and shown the goods as consigned to M/s. Sunrise. At M/s. Sunrise Structural and Engg.

Ltd., Nagpur, Noticee No. VII has organised fabrication of statutory records; this is evident also from the statements of the functionaries of Noticee No. I and the re-rollers. As already mentioned, there were instances of clearances of M.S. Angle from M/s. Sunrise Structural and Engg. Ltd., Nagpur to M/s. KEC and M/s.

Sanvijay to M/s. KEC in the same vehicle at about the same time indicating that the goods have actually been loaded from the premises of M/s. Sanvijay and were sent directly to Noticee No. II. Noticee No. VII has in furtherance of the conspiracy as already discussed in sub para (iii)(c) above, organised the above modus-operandi for passing irregular modvat credit to Noticee No. I and others. Further according to the statements of Shri Prakash Gajbhiye, authorised signatory of M/s. Sunrise Structurals and Engg.

Ltd., Nagpur recorded on 19.6.2000 and Shri Umashankar Mishra, authorised signatory of M/s. Sanvijay recorded on 22.6.2000 the Noticee Nos. VII was the person who directed to prepare take document, fabricate statutory and other records so as to let Noticee No. II to avail of irregular modvat credit as above. Thus Noticee No. VII has concerned himself in transporting, take selling and purchasing the contravening excisable goods which he had reason to believe were liable for confiscation under the Central Excise Act, 1944, or the rules made thereunder and has therefore rendered himself liable for penalty under Rule 209A

of the Central Excise Rules, 1944 read with Section 38A of the Central Excise Act, 1944.

42. (x) Shri Puralal Agarwal, (Noticee No. VIII) Managing Director of M/s. Sunvijay Re-rolling and Engg. Works Ltd., being the Chairman Sunvijay including M/s. Sunrise Structurals and Engg. Ltd., Nagpur, and Prop, of M/s. Prakash Ispat, Director of M/s. Sunvijay Industries and M/s. Ramson Alloys Pvt. Ltd., is responsible for making overall arrangements in passing on irregular Modvat credit to Noticee No. I amounting to Rs. 3,65,92,114/- and Rs. 99,360/-. The Noticee has devised a scheme for rolling of M.S. Angles at his units working under Section 3A of C.Ex. Act, 1944. This material was subsequently shown cleared o their own unit i.e. M/s. Sunrise Structurals and Engg. Ltd., Nagpur working under Section 3 of the C.Ex. Act, 1944. The Noticee issued fake Central Excise invoices showing bogus vehicle Nos. etc. and shown the goods as consigned to M/s. Sunrise. The Noticee has fabricated statutory records to show the clearance of goods in question and allowed irregular modvat credit @ 12% of invoice price issued by his units working ununder Section 3A of C.Ex. Act, 1944. The Noticee generated fake modvatable documents without excisable goods actually accompanying so as to facilitate the Notice No. 1 to avail irregular modvat credit at their end. As already mentioned there were instances of clearances of M.S. Angels from M/s. Sunrise Structurals and Engg. Ltd. Nagpur to M/s. KEC and M/s. Sunvijay to M/s. KEC in the same vehicle at about the same time. Thus Noticee cleared M.S. Angles to Noticee No. II and other TLT manufacturers directly from his units without issuing invoices in favour of TLT manufacturers. Noticee No. VIII has thus in furtherance of the conspiracy as already discussed in sub-para (iii)(c) above, organised the above modus operandi for passing irregular modvat credit to Noticee No. I. According to the statement of Shri Umashankar Mishra, authorised signatory of M/s.

Sunvijay recorded on 22.2.2000, the Noticee was the person who directed to prepare fake documents, fabricate statutory and other records so as to let Notice No. I to avail irregular modvat credit as above. The Noticee has concerned himself in transporting and selling. The contravening excisable goods which he has reasons to believe were liable for confiscation under the Central Excise Act, 1944

or the Rules made thereunder and thus rendered himself liable for penalty under Rule 209A of the erstwhile Central Excise Rules, 42. (xi) Shri K. Ram Kumar, Vice President, M/s. KEC International Ltd. Noticee No. IX. The Noticee stated that he was Vice President (Manufacturing) & an employee of the company and that he did not play any role in taking strategic decisions relating to procurement of steel. Shri Ram Kumar was Vice President (Manufacturing) of the factory of M/s KEC International Ltd. He was a responsible person having knowledge about M.O.U. M.O.U is between M/s MSRM & M/s. KEC. He also knew that M.S. Angles were being manufactured at Re-rollers' place, that inspection was done at re-rollers' place that before despatch of the goods to them, all operations including Straightening of Angles were done at the Re-rollers' place, and that after receipt of M.S. Angles at M/s. KEC the same were again subjected to straightening. Shri Milind Sardeshpande, Manager (Q.A.) of KEC in his statement dtd. 25.10.2000 has stated that M.S. Angles were directly received from the re-rollers without being routed through/processed at any other factory. Further, they were also receiving M.S. Angles not relating to the MOU in question from these re-rollers. Therefore his version that goods were taken to M/s.

Sunrise Structurals for Straightening of Angles, is not at all convincing.

Shri K. Ram Kumar further stated that he knew that the angles in their primitive form were manufactured by the re-rollers and he did not know that these were sent by the re-rollers. It is not correct to accept this version of the Noticee because Shri Milind Sardeshpande, Manager (QA) of M/s. KEC in his statement dt.

25.10.2000 stated that M.S. Angles were received in his factory in strapped condition duly colour coded and the same were directly received from the re-rollers without being routed through/processed at any other factory, Shri Pravin Pawar, Engineer (QA) of M/s. KEC in his statement dt. 25.10.2000 stated that M.S. Angles were received duly bundled and strapped with M.S. Strips, these bundles were sealed at the re-rollers premises and were bearing colour code given by their own C & D personnel at the re-roller's premises from where the goods were received; Shri Narendra Manusmare, Engineer (CQA) & Shri Gupta, Engineer (CQA) of M/s. KEC in their statement dt. 5.5.2000 have stated that M.S. Angles were finally

bundled and strapped after inspection.

M.S. Angles of which credit was taken by M/s. KEC were offending goods under Rule 173Q1(a)(bb)(bbb), they were liable for confiscation since M.S. Angles were cleared by the re-rollers to M/s. KEC directly but on the invoice of M/s. Sunrise who took deemed credit without receipt of goods in his factory. As such M/s. Sunrise was not eligible to take credit under Rule 57A & 57G & utilisation thereafter was again a contravention of Rule 57F. Even for taking credit, duty paid M.S. Angles received directly from re-rollers, there was no invoice from re-rollers in their favour, no payment was made by M/s. KEC to the re-rollers through cheque or draft as provided under Notification No. 58/97.

In fact the transaction in question involved well planned conspiracy as detailed in sub-para (iii)(c) above.

In furtherance of the said conspiracy to evade duty in contravention of Central Excise Rules with intent to evade duty, Noticee, who was overall incharge of Noticee No. II has concerned in acquiring, possession of purchasing, depositing, keeping and using the impugned excisable goods in further manufacture with the knowledge that the impugned goods were liable to confiscation under Central Excise Rules, 1944 and thereby rendered himself liable for penalty under Rule 209A of the Central Excise, 1944, read with Section 38A of the Central Excise Act, 1944.

42.(xii) Shri Tushar Deshpande, Sr. Manager (Commercial) of Noticee No. II on 21.9.2000 produced sets of Inspection Reports prepared by Noticees Nos. IV to VI for the period 5/1999 to 3/2000. These reports were kept on record. These reports were addressed to Noticee No. II by the re-rollers (i.e. Noticee No. IV and VI) and contained on offer for inspection of the goods against particular D/o or P/o No. date, at the Re-rollers' (i.e. Noticees Nos. IV to VI) premises.

It also emerged from the MOU dtd. 28.4.1999 between Noticees Nos. I & II contained in the records seized on 20.6.2000 that the goods M.S. Angles were to be inspected at Re-rollers' premises. Since the goods were offered for inspection at the Re-rollers premises and according to the statements of Shri Narendra P.

Manusmare, Engr.

(CQA) and Shri Gupta, Engr. (CQA) of M/s. KEC International Ltd. Butibori recorded on 5.5.2000 before the Superintendent (P), Central Excise Hqrs., Nagpur, such M.S. Angles were finally bundled and strapped after inspection, it appears the goods have been directly sent to Noticee No. II especially since there was no movement of goods between Noticees Nos. IV to VI to Noticee No. I. According to Shri Tushar M. Deshpande, who stated in his statement dt. 29.9.2000 that the inspection of goods was carried out at the premises at which the goods were offered to the company for inspection. He also stated that in case of Modvat availed on documents of Noticee No. I the inspection was carried out at Noticees Nos. IV to VI. There was no written offer from M/s. MSMR to M/s. KEC for inspection but it was from the Re-rollers to M/s. KEC. On questioning Shri Deshpande stated that during 4/1999 to 3/2000 they exported their goods under bond and also effected deemed export at Nil rate of duty under Notification No. 108/95 dtd. 28.8.1995.

Shri Tushar Deshpande, Sr. Manager (Commercial) has also defended his case on the line of Shri K. Ram Kumar, Vice President of M/s.

KEC. Shri Tushar Deshpande, Sr. Manager was concerned with Sales and purchase and Central Excise Matters. As a responsible officer in the firm on behalf of M/s. KEC looking after transactions and following the provisions of Central Excise Rules, he knew that the M/s.

Sunrise was not the manufacture of M.S. Angles. He knew that M.S. Angles were purchased from the re-roller in question but invoice was raised by M/s. Sunrise and credit @ 16% was being availed by them.

Being an officer looking after excise work he knew the implications of such transactions because they were also purchasing angles directly from re-rollers apart from the impugned transaction and availing deemed credit. Thus, Shri Tushar Deshpande, Notice No. X has therefore definitely concerned in acquiring, possession of purchasing, depositing, keeping and using the impugned excisable goods in further manufacture with the knowledge that the impugned goods were

liable to confiscation under Central Excise Rules, 1944 and thereby rendered himself liable for penalty under Rule 209A of the Central Excise, 1944 read with Section 38A of the Central Excise Act, 1944.

42. (xiii) M/s. Maharashtra Steel Rolling Mills Pvt. Ltd. Mumbai - Noticee No. XI. M/s. MSRM are also the manufacturers of Industrial products, having knowledge of Central Excise Rules and also the provisions of Section 3A of the Central Excise Act, 1944 and Notification No. 58/1997.

They also knew that M/s. Sunrise Structural and Engg. Ltd., Nagpur Structural are not the manufactures of Steel Angles. Still M/s MSRM entered into Memorandum of Understanding with M/s. Sunrise Structural and Engg. Ltd., Nagpur Structurals for supply of Angles at 16% duty. They also knew that the Angles were manufactured by re-rollers and inspection of the goods by M/s. KEC at re-rollers place before despatch of goods to M/s. KEC took place. However M/s.

MSRM entered into MOU with M/s. Sunrise Structurals and Engg. Ltd., Nagpur who would procure Angles only on paper from Re-rollers to avail deemed credit and to clear to them at 16% rate of duty by utilising the deemed credit. Had M/s. MSRM entered into MOU with re-rollers, the invoice would be in the name of M/s. MSRM and accordingly M/s. KEC would not have been eligible for deemed credit as per the conditions of Notification No. 58/97. To avail the benefit of deemed export, they got invoice in their name from M/s.

Sunrise Structurals and Engg. Ltd., Nagpur for purchase of Steel angles paying duty @ 16%. Thus making M/s. KEC to avail modvat credit @ 16% who had invalidated their advance licence in favour of M/s. MSRM. In reality steel angles were supplied by the re-rollers to M/s. KEC on the invoice of M/s. Sunrise Structurals and Engg.

Ltd. Nagpur. The conspiracy angle has been discussed in sub-para (iii)(c) above. Thus M/s. MSRM Notice No. XI were in the knowledge that their impugned transactions would make the goods liable for confiscation under the Central Excise Rules, 1944 and yet concerned themselves in purchasing and selling the impugned excisable goods which they knew were so liable to confiscation and

rendered themselves liable for penalty under Rule 209 of the erstwhile Central Excise Rules, 1944 read with Section 38A of the Central Excise Act, 1944.

Shri Janki Prasad Shah, Director of M/s. MSRM, Bhandup, Mumbai have stated that penalty cannot be imposed under Rule 209A as Rule 209A is applied to a person who acquires possession of any goods or concerned himself with the transporting, removing, etc. Whereas, they never acquired possession nor were in any way concerned with transportation or removing or depositing or keeping or any other manner dealing with the excisable goods.

Shri Janki Prasad Shah, Director of M/s. MSRM, being owner of a re-rolling Mills was well aware that if they entered into an agreement with M/s. Sanvijay, M/s. Prakash, etc., they would not get the required invoice in their name from re-rollers because if they get the invoice in their name, M/s. KEC would not get deemed credit as per the provisions of Notification No. 58/97 and accordingly the very purpose of MOUs between Ms MSRM and M/s. Sunshine Structural and Engg. Ltd., Nagpur Structural would stand defeated. Shri Janki Prasad Shah also knew that M/s. Sunshine Structural and Engg. Ltd., Nagpur is not the manufacturers of M.S. Angles and as per the Rule 57A read with Rule 57G of the erstwhile Central Excise Rules, 1944, M/s. Sunrise are not supposed to enter into an agreement for supply of M.S. Angles to them which act is nothing but trading.

Accordingly, Shri Janki Prasad Shah knew that such goods are liable for confiscation under Rule 209. The conspiracy angle has been dealt with in sub-para (iii)(c) above. Notice No. XII has concerned himself in purchasing and selling the impugned goods with the knowledge that the same were liable to confiscation under the Central Excise Rules, 1944 read with Section 38A of the Central Excise Act, 1944.

3. After hearing both sides and considering the submissions made, it is found: (a) During the period, pre 1999, M/s. KEC has taken credit of goods, of units later working under compound levy scheme under Section 3A when they sold the goods to M/s. MSRM and Revenue has no objection to the same.

(b) Denial of MODVAT Credit availed by Sunrise Ltd. and KEC has been arrived at on the grounds: (i) Inputs were never received in the factory by them, from the suppliers thus deemed credit at 12% under notification 58/97 was not entitled.

(ii) The factory of Sunrise during the period was not manufacturing any goods, therefore the credits and debits made of duty at 16% on inputs removed from that factory and credit thereafter availed at 16% by KEC as per these duty debits documents of Sunrise were not eligible.

The deemed credit of 12% on input declared by Sunrise cannot be denied, since they have availed the same on steel angles, a declared input.

Even if the factory was closed and no manufacture took place. The credit entry in RG 23A cannot be denied, as in this case, if there is temporary closure of the factory and there is no production. There is no specific rule permitting that. Credit can be availed under Rule 57A and kept in the books without any time limit. As regards the non-receipt of the inputs in the declared factory premises, it is found that the delivery of inputs was taken at the factory gate of the suppliers. Thereafter the same has been transported to KEC. There is therefore 'constructive receipt' of the inputs in question by Sunrise.

A three member bench of the Tribunal has held in the case of the Maruti Udyog Ltd. that credit was entitled on inputs even if the same are not received physically. Therefore violation, if any, is only in the goods not being physically unloaded in the factory of the recipient and then being reloaded and despatched as such, to the premises of KEC. The movement of inputs without physical receipt in the factory was not always required under the then existing MODVAT Rules.

If at all the physical receipt and unloading and dispatch on inputs as Inputs is only a hyper-technical procedural requirement, such procedural requirement non-compliance, cannot be a cause to deny the substantial benefit of credit when duty paid character at 16% and receipt by KEC is not question. The subsequent reversal of credit at 16% on inputs was not called for since law calls up on Sunrise for reversals of credit availed, when Inputs are removed as Inputs.

However, if the additional debits have been made, from PLA i.e. cash duties paid, that itself will not call for denial of credit under Rule 571(1) in the case to Sunrise. As regards the credits availed by KEC at 16% on invoices of Sunrise, since assessments as made by the suppliers end i.e. at Sunrise are not being impugned by the Commissioner in these proceedings, the credits availed by the receiver factory i.e. KEC cannot be altered by following the route of Rule 571(1)ii. The route to be followed in such case of altering the credits availed by KEC was of Rule 57E of then existing MODVAT Rules as has been held and well settled by a catena of decisions following the same, demands made under Rule 571(1) on Sunrise and KEC cannot be upheld. (c) That the conditions in the notification 58/97 granting deemed credit benefit of goods removed by Compounded Levy Scheme manufacturers and are procedural in nature, as held in case of Shivagrigo Implements Ltd. 2001 (44) RLT 853 : 2001 (97) ECR 32 (T).

In that case the Tribunal held that the provision of para 1 of the said notification (58/97) specifying the eligible inputs and the final products, and the provisions relating to the deemed rate of excise duty could be considered as substantial in nature, the rest of the provisions in the notification are in nature of procedural requirements. It was also observed by the bench, in that case, that prior to the introduction of Section 3A of the Act, the appellants thereunder were availing Modvat benefit and it was held that benefit which was earlier available could not be denied by introduction of payment of duty on inputs under Section 3A and following the Supreme Court decision in the case of M/s. Formica India .

No contrary decision, on this very same notification 58/97 applicable as in this case, or otherwise was shown to us. It is well settled that for technical/procedural lapse, benefit of Modvat credits cannot be denied. In the case of M/s. Associated Transmit Structurals Ltd., C-IV/309-11/WZB/2004 it has been held that the decision in the case of M/s. Shivagrigo Implements Ltd. 2001 (44) RLT 856 does not apply only to captive consumption as department representative contends. Therefore credits in this case cannot be denied merely for non compliance of procedure prescribed by notification 58/97, as arrived at in this case.

(d)(i) the Larger Bench of the CEGAT in 1984 (17) ELT 331 (Tri) : 1984 ECR 1409 (Cega) in the case of Atma Steels Pvt. Ltd. v. CCE has held in para 101 (d) as under: 101(d) Recourse can be had to provisions as prevailing at the time of initiation of proceedings, and the period available would be the one as permissible under the provisions of existing at the time of issuance of show cause notice, in spite of the fact that short-levy or non-levy refers to the period when different period of limitation was available.

Therefore, the law applicable on the date of show cause notice has to be invoked in this case. Rule 571 was not in existence in the statute book on the date of show cause notice namely 19.6.2001. Hence the present show cause notice is not sustainable.

(ii) The present case show cause notice has been issued on 19.6.2001 invoking the provisions of Rule 571. Rule 571 provided for recovery of Modvat credit taken wrongly by an assessee. The Modvat provisions contained in Rule 57A to and Rule 57I were substituted by Cenvat provisions, by Notification No. 27/2000-CE(NT) dated 31.3.2000.

Therefore, on the date of issue of the show cause notice, Modvat provisions were not in existence in the statute book having been substituted. There is no saving clause contained in the Notification No. 27/2000-CE(NT) dated 31.3.2000 when it substituted Modvat provisions with Cenvat provisions.

(iii) Board has issued Circular dated 18.10.2000 reported in 2000 (41) RLT M-129 clarifying as under: In the Budget-2000, the duties of excise under the Central Excise Act, 1944 has been amended to read as CENVAT and consequent thereof the provisions relating to MODVAT under the Central Excise Rules, 1944 were also amended to read as CENVAT Rules. In the context of the Supreme Court judgment cited above proceedings if any initiated under the old MODVAT ruled for recovery and/or for imposition of penalty cannot continue after the amendment. The matter was examined and an opinion was obtained from the Law Ministry as to the feasibility of amending the provisions of Section 6 of the General Clauses Act retrospectively to include the rules also. It has been advised by the Law Ministry that any amendment to General Clauses Act shall only be prospective and

retrospective amendment is not possible. Further to overcome the difficulty to continue the proceedings initiated under the erstwhile MODVAT rules, it has been advised to validate the action initiated at the Department through a separate legislation.

In order to continue the proceedings in such demands/show cause notice pending adjudication the Government is considering to promulgate appropriate legislation for validating the action taken under the erstwhile Modvat rules.

It is therefore advised not to finalize any proceedings in matters related to recovery and imposition of penalty under the erstwhile Modvat rules that are pending till such time an appropriate legislation to validate the action is enacted.

Section 6 of General Clauses Act, 1897 applicable only to repeal and the Constitution Bench of Supreme Court in Rayala Corporation (P) Ltd. v. Director of Enforcement , in para 15 at page 414, held that Section 6 of the General Clauses Act applies to repeal of a Central Act and will not apply to 'omission'. The relevant portion from the Supreme Court decision is reproduced below: 17. ...In the case before us, Section 6 of the General Clauses Act cannot obviously apply on the omission of Rule 132-A of the DIRs for the two obvious reasons that Section 6 only applies to repeals and not to omissions, and applies when the repeal is of a Central Act or Regulation and not of a rule....

The Supreme Court also held Section 6 applies only to Central Act and not to the rules framed thereunder. Another Constitution Bench of Supreme Court in Kolhapur Canesugar Works Ltd. v. UOI , following the decision of Supreme Court in Rayala Corporation, held that Section 6 of General Clauses Act will apply to repeal and not to omission. The Supreme Court in Kolhapur Canesugar held as under: 32. ...The decision of the Constitution Bench is directly on the question of applicability of Section 6 of the General Clauses Act in a case where a rule is deleted or omitted by a notification and the question was answered in the negative. The Constitution Bench said that "Section 6 only applies to repeals and not to omission, and applies when the repeal is of a Central Act or Regulation and not of a Rule" (Page 656 of the Supreme Court.).

34. ...With respect we agree with the principles laid down by the Constitution Bench in M/s. Rayala Corporation case (supra). In our considered view the ratio of the said decision squarely applies to the case on hand. General Finance Co. v. Assistant Commissioner of Income-tax, once again it was held by the Supreme Court that Section 6 of General Clause Act will apply to repeal and not to omission. Whereas it is found from the impugned order that the Commissioner has relied upon Section 38A of the Central Excise Act, 1944 to continue the proceedings in the present case. Section 38A of the Central Excise Act, 1944 applies only when a rule is 'amended', 'repealed', 'superseded' or 'rescinded'. Each of the expressions namely 'amendment', 'repeal', 'suppression' or 'rescinding' as are employed in Section 38A of the Act are intended to cover specific situations.

Therefore action can be taken, by virtue of Section 38A only in such cases by invoking the provisions of the law is amended, or repealed or superseded or rescinded by a new provision. Supreme Court held that repeal will not apply to omission, therefore, Section 38A will not apply to case of "substitution" of rule, since the word "substitution" has not been used therein. In other words, Section 38A cannot be invoked when a rule is "substituted" by a new rule, since none of these expressions used in Section 38A cover 'substitution' of the new rules in place of old rules.

(iv) Supreme Court has held that 'substitution' is one integrated and indivisible process of 'repeal' and 'enactment'. In State of Maharashtra v. The Central Provinces Manganese Ore Co. Ltd. in para 18 has held as under: 18 ...In other words, there could be no repeal if substitution failed. The two were a part and parcel of a single indivisible process and not bits of a disjointed operation.

The Commissioner has relied upon in the impugned order and has referred to plain English dictionary meaning of 'supersession' and has come to the conclusion that substitution is covered by the term 'supersession'.

This finding of the Commissioner is contrary to the decision of Supreme Court in Central Provinces Manganese Ore Co. Ltd. (supra), therefore cannot be upheld. 38A. Effect of amendments, etc., of rules, notifications or orders.-Where any rule, notification or order made or issued under this Act or any notification or order

issued under such rule, is amended, repealed, superseded or rescinded, then, unless a different intention appears, such amendment, repeal, suppression or rescinding shall not- (a) revive anything not in force or existing at the time which the amendment, repeal, supersession or rescinding takes effect; or (b) affect the previous operation of any rule, notification or order so amended, repealed, superseded or rescinded or anything duly done or suffered thereunder; or (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any rule, notification or order so amended, repealed, superseded or rescinded; or (d) Affect any penalty, forfeiture or punishment incurred in respect of any offence committed under or in violation of any rule, notification or order so amended, repealed, superseded or rescinded; or (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability penalty, forfeiture or punishment as aforesaid.

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced any such penalty, forfeiture or punishment may be imposed as if the rule, notification or order, as the case may be, had not been amended, repealed, superseded or rescinded.

Examining these Clauses (a) to (e) under Section 38A, it is found that an Act 'X' when repealed by another Act 'Y' and Act 'Y' is thereafter repealed by another Act 'Z', then Clause (a) of Section 38A, states that Act 'X' will not revive since on the date of repeal of Act V, Act 'X' is not in force or in existence. Similarly, Clause (b) of Section 38A provides that any action taken under the old act which is past and closed will not be affected. Therefore when a contract is declared as void under the old rule, on repeal of that rule, the void contract will not become a valid contract. Clause (c) applies to rights or privilege (hereinafter referred to as vested right for ease of understanding) accrued to anyone. The said Clause (c) also applies to obligation or liability incurred by a person. Again Clause (d) of Section 38A provides that on repeal of the rule, the punishment already incurred is not affected. Suppose a person has been remanded to judicial custody, say for a period of two years and during the currency of the said period, the rule under which the punishment awarded is repealed. Clause (d) of Section 38A stipulates that person will continue to be in judicial custody and he cannot claim that on

repeal of the rule, he should be released. Clause (e) applies to legal proceedings for enforcing the vested right or the liability referred to in Clause (c).

It was submitted by the Id. Advocate that Statutory Interpretation, Codified with a critical Commentary by F.A.R. Bennion, at page 438, stated as under: The right etc. must have become vested by the date of repeal, i.e.

it must not have been a mere right to take advantage of the enactment now repealed. *Abbott v. Minister of Lands* [1895] AC 425.

*Hamilton Gell v. White* [1922] 2 KB 422, at p 431. As to when a right 'accrues' for this purpose see *Lewis v. Hughes* [1916] 1 KB 831; *Costello v. Brown* (1924) 94 LJKB 220. Cf *Director of Public Works v. Ho Po Sang* [1961] AC 901. If a right to damages has accrued, it is immaterial that the amount has not been quantified. *Free Lanka Insurance Co. v. Ranasinghe* (1964) AC 541.

Being able to avail oneself of a statutory defense is not a 'right' for this purpose *Sifam Electrical Instrument Co. Ltd. v. Sangamo Weston Ltd.* [1971] 2 All ER 1074.

A liability was held to be 'incurred' when the debtor had committed an act of bankruptcy. *Re a Debtor (No. 490 of 1935)* [1936] Ch 237.

And on as to what is vested right, it was submitted, quoting the observations made by Privy Council in *Director of Public Works v. Ho Po Sang* 1961 All ER 721 at 731 the Supreme Court held in *M.S. Shivananda v. Karnataka State Road Transport Corporation* as under: 15. The distinction between what is, and what is not a right preserved by the provisions of Section 6 of the General Clauses Act is often one of great fineness. What is unaffected by the repeal of a statute is a right acquired or accrued under it and not a mere 'hope or expectation of', or liberty to apply for, acquiring a right....

And that the Bombay High Court in *Standard Mills Co. Ltd.* has held that the show cause notice issued by the Central Excise Department demanding duty from the assessee is not a liability accrued to the assessee, till such time it is adjudicated and an order is passed on the said show cause notice. Considering the same, it

has to be held that the issuance of a show cause notice is a mere hope or expectation of the department that some amount is payable by the assessee. Till such time an order is passed recovering the duty, no vested right is available to the department to recover the amount, as in this case.

(vi) Supreme Court in Kolhapur Canesugar Works Ltd., held that only an order passed by the department ordering the recovery of duty create a vested right to the department. The facts before the Supreme Court in Kolhapur Canesugar Works Ltd. may be summarised in the form of list of dates and events.

23.7.1976	Rebate of Rs. 61,14,930/- sanctioned by the department to assessee
27.4.1977	Show cause notice issued to assessee by the department for recovery for the rebate sanctioned.
6.8.1977	Rules 10 and 10A of Central Excise Rules, 1944 were omitted. New Rule 10 was introduced.
15.10.1977	Order passed by the Assistant Collector confirming the demand raised in show cause. The show cause notice therein proposing to recovery the rebate already sanctioned, was issued before the omission of Rules 10 and 10A. However, the order for recovery of the refund was passed after the omission of Rule 10 and 10A and after the introduction of Rule 10A.

Negating the contention of the Revenue that a vested right has accrued to the department by issuance of show cause notice, the Supreme Court held in para 35 as under: 35. ...It is relevant to note here that in the present case the question of divesting the Revenue of a vested right does not arise since no order directing refund of the amount had been passed on the date when Rule 10 was omitted.

The Supreme Court in the above para evidently refers to the order dated 15.10.1997 passed by the Assistant Collector confirming the demand and directing the recovery of the erroneous refund granted to the assessee, therefore it has to be held, in the present case no vested right accrued to the department on the date of issue of the show cause notice. Even if it is assumed, that a show cause notice had been issued by the department in the present case prior to 31.3.2000, i.e. before the substitution of Cenvat rules in place of Modvat rules, when the Supreme Court in Kolhapur Canesugar has held that show cause notice issued prior to omission of Rules 10 and 10A is not saved, since no vested right accrued to the department. Going by that ratio, laid down by the Supreme Court, even if the

show cause notice was issued by the department in the present case prior to substitution on 31.3.2000, still, the department could not proceed with the show cause notice, since no vested right accrued to the department. Similarly, no liability is incurred by the appellants. Hence, the present proceedings are not saved by Section 38A. The position will be no different when, no show cause notice at all was issued when the Cenvat rules were substituted w.e.f. 31.3.2000. In the present case, show cause notice was issued on 19.6.2001 after the 'substitution'. Therefore, no vested right accrued to the department, and the notice cannot be therefore upheld. (vii) The Ld. DR relied upon the decision of the Larger Bench of the CEGAT in , in the case of Kisan Sahkari Chini Mills Ltd. v. CCE to the effect that the Modvat cases are saved by Section 38A. On a perusal of the same it is seen that the submission of the Ld. Advocate that this decision was rendered by the Larger Bench based on the concessions given by the assessee as well as by the department, hence, it would not have a binding precedent, has force, since it is well settled that a decision based on a concessions is not binding See and . In any case, applicability of the decision of the Supreme Court in Kolhapur Canesugar Works has not been argued by the parties before the Larger Bench. In this view the present notice itself does not survive ab initio. Recovery ordered consequently and penalty cannot be upheld. (e) Considering the plea that Cenvat provisions cannot be invoked to recover the Modvat credit, it is found that 'Cenvat credit' is defined in Rule 57AB(1) as credit of specified duties paid on any inputs or capital goods received in the factory on or after the first day of April, 2000. In the present case, the credit was availed by the respective party i.e. Sunrise prior to April 2000 in respect of the inputs received prior to April 2000, the credit by definition cannot be Cenvat credit. Therefore, proviso 5 of CENVAT rules cannot be invoked.

(f) The duty paid, by Sunrise, on the clearance of angles effected to KEC is treated as reversal of credit by Sunrise. According to the department, Sunrise had ceased their operations during the period in question and the unit was lying closed and no operation was carried out. Rule 571 applies to credit wrongly utilised.

Utilization of credit as per Rule 57F(12) covers and permits debits to be made on payment of duty on the inputs or on the final products or on the waste arising in the course of manufacture of final products. There is no bar shown on availing

credit even when factory is closed. Consequently, Rule 571 is not applicable to the present case since there is no credit utilised wrongly.

(g) Sunrise had purchased the steel angles from various units working under Section 3A of the Act. Notification No. 58/97-CE (NT) allows deemed credit at the rate of 12% of the invoice price to the customer of the units working under 3A, who have purchased the steel angles from such units. Thus, in law, Sunrise are entitled for the credit at the rate of 12% in terms of Notification No. 58/97-CE. In terms of 57F(2), the inputs on which credit is taken can be removed as such for home consumption, on payment of duty. As per Rule 57F(12) the credit availed on the inputs can be utilised for payment of duty on the clearances of inputs themselves. Under Modvat Rules provisions, a manufacturer of final products is entitled to take credit on the inputs and utilise the said credit for reversal of duty due on clearance of inputs as inputs. They could utilise the credit availed by it for payment of duty in the said inputs and KEC will be entitled for the credit of duty paid by Sunrise on the goods received by them. The situation will not change even if Sunrise sends inputs directly to KEC as in para 107 of the speech made by the Finance Minister at the time of presenting the budget for the year 1987, it was stated as under: Receipt of inputs directly by the job worker will be permitted for all items under the Modvat scheme.

and in guide to Modvat published by the CBEC, it has been stated as under: Where the raw materials/semi-finished goods are sent directly from the supplier without first coming to factory of the applicant/manufacturer then the name of such supplier should also be indicated in the challan.

Thus the Central Government, envisaged and itself, permitted the movement of raw materials directly, without bringing the same into factory of the manufacturer. A three Member Bench of the CEGAT in the case of Matuti Udyog Ltd. v. CCE has held that the assessee therein was entitled to credit of duty paid on the inputs, even if the inputs physically were not received by them. In Thermax Ltd. (Final Order No. 742/93-WRB, dt. 25.5.1993), the CEGAT held that Modvat credit of duty paid on the inputs is available to the assessee even when the inputs were not received in the factory but received outside the factory. A reference application

filed by the department has also been dismissed by the CEGAT in . Therefore, not bringing the inputs within the factory premises and directly dispatching the same to the customers would not disentitle Sunrise to take credit. The observation of the Commissioner that without receipt of the inputs, Sunrise cannot avail credit under Rule 57A is to be viewed in light of the fact of receipt in law i.e. constructive receipt effected in this case, the understanding, and the law on 'Receipt of Inputs'. In any case, constructive receipt of the inputs, by Sunrise is established by placing reliance on the decision of the CEGAT in Associated Strips Ltd. wherein the CEGAT held that giving the goods to the transporter is a constructive receipt by the buyer. This decision of the CEGAT has been approved by Supreme Court in Escorts JCB Ltd. . In these decisions, Section 33 and 39(1) of the Sale of Goods Act, 1930 were referred to by the Ld.

Advocate. Therefore entry of credit in the RG23A book and subsequent debits cannot be objected and denied to Sunrise.

(h) The entire demand is beyond the normal period of limitation.

Proviso to Section 11A(1) has been invoked to demand duty from Sunrise. The entire demand is on account of non-following the procedure of physical receipt on the part of Sunrise. There is no case if the inputs were received by Sunrise and then cleared. In fact, it is the case of the department that the angles have been removed 'as such'. No assessee can suppress against themselves. The question of suppression will arise only when an assessee wants to grab an exemption benefit unavailable to him under the law. On the other hand, when the Modvat credit is otherwise admissible to Sunrise, which is being denied on account of non-following of procedure, failure to follow such a procedure can be attributed as an error or omission on the part of the assessee, that can never be a suppression or intention to evade. In the present case, the only violation is non-bringing of the steel angles into the factory premises of and by Sunrise. That cannot amount to suppression etc.

with an intent to evade payment of duty. Reliance placed in the following decision of the CEGAT in the case of Geep Industrial Syndicate wherein the CEGAT held in para 5 as 5. ...It is admitted that the caps manufactured in the torch unit were

transferred to the two battery units and hence the purpose for which the Notification stipulated Chapter X procedure to be followed, stands fulfilled. Further, failure to follow Chapter X procedure may be an error or omission on the part of the assessee, but it cannot amount to suppression and the question of suppression will arise only when an assessee wants to obtain a benefit not available to him under the law and will not arise when any exemption conferred by law is sought to be denied due to non-fulfillment of procedural requirement. The same position is applicable after 1.3.1986 when Modvat credit was available to the assessee. We, therefore, agree with the finding of the Commissioner that the demand on brass caps cleared by the torch units is barred by limitation....

Similarly, in *Mahindra & Mahindra Ltd. 2000 (125) ELT 477 (Tri)*, the CEGAT held as under: 6. ...In the present matter it cannot be said that suppression of facts was willful as the goods were totally exempted under both the Notifications Nos. 72/83 and 118/75. There was nothing to be gained by the appellants by suppressing the fact of manufacture and removal of impugned goods to their other units as there exempted from whole of the duty of excise leviable therein....*Sushripada Chemicals v. CCE 4*. ...There is no question of suppression of fact or non-declaration by the amalgamated unit. Moreover, what would be the gain to the amalgamated unit by non-declaration? By not filing the declaration, their intention cannot be towards evasion of duty. Because, even by filing the declaration, they would have got the Modvat benefit, which is otherwise available. Hence, this omission alleged on technicality cannot be construed to be a case of deliberate suppression, fraud or misdeclaration, justifying extended period....

by the appellants has force to hold the demands to be barred by limitation.

(i) The appellants have pleaded that there is no loss of revenue to the government. The entire modus operandi adopted by the parties was only to minimize business loss. If the re-rollers had sold the goods directly to KEC without routing through Sunrise, then KEC would be entitled for 12% deemed credit without any difficulty. On the other hand, if Sunrise had received the goods into their factory from the re-rollers they also would be entitled to 12% deemed credit and then cleared (or sold) the goods to KEC, then also KEC would be entitled credit of duties debited by

Sunrise. The reason, for adopting the modus, was submitted to be due to a bonafide belief entertained by Sunrise and others on the interpretation of Notification No. 58/97-CE. Another reason for adopting this modus was stated to be because KEC was not paid by the state Electricity Boards in time.

And in any case, the supplies made to KEC are treated as deemed exports since KEC in turn supplied the goods to projects financed by notified agencies in terms of para 10.2(d) of the import Export Policy. KEC is entitled to benefits specified in para 10.3 of EXIM Policy which are: Even the sub-contractors i.e. supplier of raw materials to KEC are also eligible for the above benefits. Thus, the duty paid on the angles, would be refunded by DGFT in the form of either refund of terminal excise duty in the form of drawback. Thus, there is no loss of revenue to the government, has force to consider sheltering the appellants from a penal consequence, if any.

(j) Inputs were received by KEC from Sunrise based on the duty paying documents issued by Sunrise. The invoices issued by Sunrise show that duty was paid by them on angles at 16% ad valorem. This is not disputed in the show cause notice. The show cause notice states that Sunrise has paid duty on the clearances of inputs at 16% ad val. In other words, duty payment @ 16% ad valorem on angles paid by Sunrise was accepted by the department in terms of Rule 1731 of the Central Excise Rules. KEC has taken the credit of duty paid by Sunrise accepted by the department, i.e. the duty amount reflected in the invoices issued by Sunrise. The department having accepted the said duty payment by Sunrise, cannot at this juncture deny the credit on the ground duty was wrongly paid by Sunrise or duty ought not to have been paid by Sunrise. It is well settled that department having jurisdiction over the input-user factory cannot question the assessment on the inputs by the department having jurisdiction over the input-manufacture's factory. The following decisions of the CEGAT are relevant for this proposition: CCE v. Industrial Cables (I) Ltd. and would lead to a conclusion that until the payments made by Sunrise are refunded to them KEC's credits cannot be denied. The Commissioners has observed in this regard that the department has not accepted the payment of duty at the rate of 16% ad valorem by Sunrise and consequently, the subsequent availment of credit by the appellants is also not

correct. The Commissioner has also observed that the department has not accepted the assessments of Sunrise. If the department has not accepted the payment of duty by Sunrise, the only method of denying the credit to the appellants is to refund the duty paid by Sunrise to them and then demand duty from KEC, the appellants.

This is what Rule 57E provided. Rule 57E(1) states that if a manufacturer of final products has taken credit on any inputs and subsequently it so happens that any refund of the duty paid by the manufacturer of inputs or importer of inputs, as the case may be, is allowed to him for any reason, then manufacturer of final products shall accordingly adjust the amount of credit in his credit account.

Therefore, in order to recover the credit from KEC, the department must first refund the duty paid by Sunrise to them and then only demand duty from KEC. (k) In any case, KEC is entitled to deemed credit in terms of Notification No. 58/97-CE (NT) as it is the case of the department that the steel angles were received by KEC directly from the re-rollers units working under Section 3A of the Central Excise Act, 1944. In terms of Notification No. 58/97-CE(NT), deemed modvat credit at the rate of 12% of the "invoice price" is available under Rule 57A to the inputs purchased from the units working under Section 3A. Invoice price has been defined in the Explanation to Notification. Para 4 of Notification No. 58/97-CE (NT) States that the provisions of this notification shall apply only to those inputs received directly by the manufacturer of the final products from the factory of the manufacturer of the inputs under cover of an invoice declaring the appropriate duty have been paid under Section 3A of the Act. This requirement is satisfied in the present case in as much as it the case of the department that the goods were received by us (sic KEC) from the units working under Section 3A. Therefore it cannot be said that the inputs were not received by us directly from the units working under Section 3A. Thus, the first portion of para 4 of Notification No. 58/97-CE (NT) is satisfied. The second portion of para 4 of the notification is also satisfied. The requirement of para 4 of Notification No. 58/97-CE (NT) is that the inputs should be received under cover of the invoice declaring appropriate duty has been paid under the provisions of Section 3A. Though the explanation defines 'invoice price' and not Invoice', the term 'invoice' has been defined in Explanation

to Rule 52A(1) as assessee's any documents such as invoice, Challan, advice etc. used for sale or removal of excisable goods and containing particulars require under the Act or the Rules. The definition of 'invoice' is applicable wherever the said term occurs in the Central Excise Rules, is clear from the Explanation itself. The explanation only ensures that the invoice price for the goods is not inflated. The Board vide circular dt. 30.8.1997 has clarified that invoice price, for the purposes of Notification No. 58/97-CE includes, freight, handling charges, sales tax, insurance etc. KEC received the angles under cover of Challan issued by the re-rollers, accompanied by weighment slip. These challans will have to be treated as invoices in terms of Rule 52A. It is also not in dispute that they contained the requisite details as required under the Rules. Hence, KEC is entitled to take deemed credit based on the challans received along with the steel angles. Since there is no time mentioned in the Explanation within which the buyer has to make the payment to the seller. The only requirement is that the invoice price should be paid to the manufacturer of inputs by way of cheque or bank draft.

Therefore, even as of today or even later, if KEC make the payment of the re-rollers for the angles sold by them, KEC is entitled for the deemed Modvat credit of 12% of that price. Therefore, the efforts to deny the credits cannot be upheld. (I) Modvat Rules were substituted by Cenvat Rules in 2000. The saving clause contained in Section 38A of the Central Excise Act, 1944 inserted by Finance Act, 2001 with retrospective effect has been relied upon in the present case to continue the proceedings.

Explanation to Section 132 of the Finance Act, 2001 states that no penalty is imposable on any person by virtue of Section 132 since the present proceedings are saved and being continued by virtue of Section 132 of the Finance Act, 2001. When Rule 9 and 49 was amended in 1982 retrospectively from 1944, the Supreme Court in JK Spinning & Weaving Mills Ltd. v. UOI in para 35, relying on a similar Explanation, held that no penalty could be imposed on the assessee for any action taken pursuant to the amended rule. Same view was taken by the Larger Bench in the case of Chemco Pulp & Tissue v. CCE . The CEGAT was concerned with Section 112 of the Finance Act, 2000 which held that HSD oil is not an input under Rule 57A or under Rule 57B retrospectively from 1995.

Relying on a similar Explanation to Section 112 of the Finance Act, the CEGAT held no penalty could be imposed on the assesseees who were denied the credit of duty paid on the HSD oil. This decision was followed in CCE v. Ranga Villas CS & W Mills 2002 (149) ELT 742 : 2002 (103) ECR 757 (T) and in Shaw Wallace Co. v. CCE . Therefore, when the notices ab initio are not valid, the credits are found to be eligible and special reasons exist to absolve the appellants from penal consequences. Penalty imposed are no sustained and are set aside.

4. Consequently the order is required to be set aside and appeals allowed.

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