

Polychem Ltd. Vs. Collector of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Dec-27-1995

Reported in : (1997)(90)ELT156TriDel

Appellant : Polychem Ltd.

Respondent : Collector of Central Excise

Judgement :

1. This appeal is directed against the Order-in-Original dated 17-6-1993 passed by the Collector of Central Excise, Pune.

2. In this order, the learned Collector has drawn the following issues for his determination: (i) whether conditions of the Notification No. 53/88-C.E., dated 1-3-1988 as amended, are fulfilled; (ii) whether Modvat credit availed, on the duty paid VAM can be treated as duty paid or otherwise; (iii) whether company has an option to pay duty on their own in case the goods are fully exempted from payment of duty.

The Id. Collector has noted that the assessee had been availing duty concession under Notification No. 53/88-C.E., dated 1st March, 1988 as amended, for their product 'Polynol' i.e., Polyvinyl Alcohol and using VAM, the raw material, captively for the same. In view of this fact, the assessees are not required to pay any duty on VAM. Moreover, they were entitled for duty exemption under Notification No. 217/86-C.E., dated 2-4-1986, they have preferred to forgo the exemption for captive consumption on VAM available under Notification No. 217/86-C.E., dated

2-4-1986 and to pay the duty. It has been further noted that the assessees were well aware of this fact, which can be seen from Para 4 of their letter dated 18-1-1991, addressed to the Chairman, CBEC, New Delhi. In view of this, the Id. Collector has held that the assessees are not entitled for the benefit of Notification No. 53/88-C.E., dated 1-3-1988. He has further held that the assessees had availed Modvat credit on VAM when used captively, it means that duty paid VAM is retained by them by way of availing Modvat credit and hence, VAM cannot be treated as duty paid and, therefore, the concessional rate of duty under Notification No. 53/88-C.E., dated 1-3-1988 cannot be made available as it falls to fulfil the condition of notification.

The Id. Collector has held that if a person deposited any amount in the name of excise duty, which is not leviable, by law, the amount so deposited cannot be in the nature of duty. Therefore, the Id. Collector has held that the question of granting any credit in respect of duty paid inputs or in respect of finished goods which have used the goods in respect of which the duty has been paid, does not arise.

The Id. Collector has also held that the assessees have not disclosed about this fact in their Classification List No. BMT/2/90, dated 20-3-1990 about their availing Modvat credit on VAM when used as raw material, for Polynol, which is the prime condition of the Notification No. 53/88-C.E., dated 1-3-1988 to avail concessional rate of 20% Adv., with an intent to evade the payment of duty at Tariff rate of 60% Adv. willfully. Therefore, the Id. Collector has held that since the inputs/raw material VAM, was fully exempted from payment of duty, assessee could not have filed any declaration under Rule 57A of the Rules, and they could not have taken any advantage of Modvat credit in respect of input which were exempted. Therefore, the Id. Collector has held that the entire attempt of the assessee, is to somehow take the benefit of the Notification. In that view of the matters, the Id. Collector has held that the charge of suppression has been proved beyond doubt and therefore, the assessee has contravened the provisions of Rule 173B, 9(1) read with 173F, 173G of the Rules and duty amount of Rs. 92,93,422/- is rightly recoverable under Rule 9(2) read with proviso to Sub-section (1) of Section 11A of the Act. He has also imposed a penalty of Rs. 2 lakhs and redemption fine of Rs. 5 lakhs.

3. Addressing the argument for the assessee, the Id. Consultant, Shri Gautam D. Doshi submitted that they were entitled to the benefit of Notification No. 217/86-C.E., dated 2-4-1986. However, they had not availed the same and merely because the assessee had not availed the benefit, they cannot be denied the Modvat credit. Further he submitted that the department had not made this allegation in the show cause notice, nor they were asked them to address any arguments on that point and, therefore, the finding arrived at is unsustainable, as they had no occasion to explain their point. He submitted that there are two Notifications, which were available to the assessee . to avail and it is for the assessee to avail anyone of them. He submitted that the assessee had represented to the Board on this point. He submitted that the Assistant Collector has approved the classification list without granting the benefit of Notification No. 217/86. He submitted that the question of payment of duty for availing the Modvat credit and as to whether the goods are non-duty paid has not been answered by the Id.Collector. He submitted that the payment of duty does not make the goods non-duty paid and in this regard the Id. Consultant has relied on the ruling rendered in the following cases :Metrosyl, Jesidhi Industrial Area v. Collector of Central Excise - 1991 (53) E.L.T. 93Union Carbide India Ltd. v. Collector of Central Excise -1993 (63) E.L.T. 696 (iii) Indoswe Engineers Pvt. Ltd. v. Union of India -1989 (41) E.L.T. 217.

He submitted that the party had also filed Modvat declaration under Rule 57G for availing the credit of duty on inputs to be used for manufacture of their product 'Polyvinyl-Alcohol of various grades', by their letter dated 19-3-1990 and that the Assistant Collector had not disallowed the same. He submitted that the VAM is a dutiable commodity and the department cannot say that the duty paid thereon is only a deposit. The party had option to pay duty and they were not availing the benefit of Notification No. 217/86 and that by itself will not make the goods non-dutiable. He submitted that the option to pay duty and avail Modvat is discretionary and the same is left to the assessee. In this regard, he relied on the ruling rendered in the case of Collector of Central Excise v. SAIL as reported in 1990 (47) E.L.T. 389. He submitted that the Board has also reviewed the question of assessee's availing Modvat credit, in cases where the goods were fully exempted from duty by trade notice dated 3rd December, 1991. This trade notice also refer

to the Board's instructions dated 4-1-1991, wherein it was clarified that the assessee's availing Modvat credit by exercising their option to pay Central Excise duty as per Board's letter dated 15-2-1988 will have prospective effect only. The Id. Consultant submitted that the question of invoking the provision of Section 11A and alleging suppression does not arise, in view of the Board's understanding that the option to pay duty will have prospective effect.

4. Ld. SDR relied on the Collector's finding and submitted that the assessee had no option to pay duty when the goods were exempted. The party had also not indicated in the declaration that they were captively consuming inputs and, therefore, the declaration is incomplete. Had the party disclosed the details in the declaration, then the Assistant Collector would not have allowed the Modvat credit.

The Id. SDR relied on the ruling rendered in the case of Tirupati Foams (P) Ltd. v. Collector of Central Excise 5. Countering the arguments of the Id. SDR, the Id. Consultant submitted that the grounds alleged in the show-cause notice is different from what has been decided by the Ld. Collector. He has also relied on the following rulings: Mysore Metal Industries v. Collector of Customs -1988 (36) E.L.T. 369 (ii) Commissioner of Income Tax v. Shri Someshwar Sahakari Sakhar Karkhana Ltd. -1989 (178) ITR. 443 6. We have carefully considered the submissions made by both the sides and have perused the records and also the Notifications in question.

S.No. 8 of Notification No. 53/88-C.E., dated 1-3-1988 reads : As can be seen from the terms of the Notification, the product Polyvinyl Alcohol is entitled for exemption provided it has been manufactured from Vinyl Acetate Monomer on which appropriate amount of duty of excise under Section 3 of the Central Excises & Salt Act, 1944 or the additional duty under Section 3 of the Customs Tariff Act, 1975 as the case may be, has already been paid. It is the case of the department that VAM being exempted by a separate Notification No.217/86-C.E., dated 2-4-1986, the appellants could not have paid the duty on VAM and then taken the benefit of the Notification No. 53/88 and such availment of benefit is irregular and the payment of duty made on VAM is a mere deposit. This has been seriously contested by the appellant and they have brought to our notice various citations,

wherein it has been held that exemption from duty is not deniable in the absence of any such prohibition or restriction in the said notification. It has also been held that exemption should not be whittled down by importing limitations not specifically inserted by the language used in exemption clause. It has also been held that once Modvat credit is taken the inputs do not lose the character of duty paid inputs for the purpose of the Notification in the absence of restriction or prohibition, (Metrosyl, Jesidhi Industrial Area v. CCE). Union Carbide India Ltd. v. Collector of Central Excise, it has been held that inputs on which Modvat credit is availed of by itself will not lose the character of duty paid inputs and therefore, the benefit under the Notification No. 172/84 cannot be denied, as restrictions are not mentioned in the Notification and therefore, restrictions cannot be imported into the Notification.

8. In the case of Indoswe Engineers Pvt. Ltd. v. UO1 of the Bombay High Court has also held that in a case where exemption has been granted to input that by itself will not be a ground to deny the benefit on a final product. The reasoning arrived at in this judgment is "that it cannot be held that merely because the petitioner has availed of the proforma credit in terms of the benefit granted by Rule 56A (Notification No. 91/67). It is deprived of the concession and the rate of duty on the finished product provided under Notification No. 46/70." 9. In the case of IEL Ltd. v. CCE, Bombay as reported in 1988 (35), E.L.T. 142, a similar provision was in existence in Notification No.101 /66-C.E., dated 17-6-1966, under S. No. 4 of the said Notification.

The Tribunal has held that although the inputs has not suffered any duty as they had paid 'Nil' rate of duty, the said 'Nil' rate of duty has to be taken as appropriate duty for the purpose of granting the exemption under this notification. In this regard, the Tribunal has relied on the ruling rendered in the case of Tata Yodogawa Ltd. and Anr. v. Union of India and Ors. as reported in 1987 (32) E.L.T. 521, wherein the Patna High Court has gone into this aspect of the matter in great detail and in similar circumstances has held that inputs which has not suffered any duty on account of any exemption has to be considered as to have been cleared vinder 'Nil' rate of duty, which is also deemed to have suffered duty and in that view of the manner, the Patna High Court has held that the final product gets exemption in the relevant notification.

10. In the case of CCE v. SAIL as reported in 1990 (47) E.L.T. 389 wherein Para 5, the Tribunal has referred to the clarification contained in the Publication ICE Trade Digest March, 1988, brought out by the Directorate of Publications, Customs and Central Excise, New Delhi, wherein it has been clarified that it is the option of the assessee either to avail of the full exemption available or to pay duty leviable on the goods manufactured by them. In the latter event, Modvat credit cannot be denied on such duty paid inputs if used in the manufacture of final product. The Tribunal also referred to the Trade Notice issued by the Bhubaneswar Collectorate itself bearing No.39/GI/20/88 dated 17th March, 1988, which clarifies to the effect that Modvat credit is admissible to the assessee who chooses to pay the duty in respect of the goods being fully exempt from use in manufacture of final products. Therefore, taking these materials into consideration, the Tribunal held that the Revenue had not made out a case and therefore, accepted the assessee's contentions.

11. In view of the ratios laid down by the Courts/Tribunal in the above noted cases, we uphold the appellant's contention that they had a choice to pay the duty on the input VAM and take the benefit on the final product under Notification No. 53/88. The issue can be viewed in a different light also and that is even if they had not availed of the benefit of Notification for the input VAM, even then the benefit of Notification No. 53/88 cannot be denied on the final product, 'Polyvinyl Alcohol', in the light of the ratio of the above judgment, as the input VAM is deemed to have suffered duty, as 'Nil' rate of duty, is also payment of duty.

12. The appellants have also argued that the demands are barred by time. In this context, they have referred to the correspondence and also to the approval of the classification list besides the approval of the Modvat declaration in their case. On a perusal of the correspondence and material before us, it is clear that there is no suppression and misdeclaration in this case and that the larger period cannot be invoked in this matter. Therefore, even the demands also are barred by time. The penalty and redemption fine is also set aside.

13. In that view of the matter, the appellant succeeds in this appeal.

The impugned order is set aside and the appeal is allowed.

Sd/- Sd/-(S.K. Bhatnagar) (S.L. Peeran) Vice President Member (J)Date : 13-1-1995 With due respects to Hon'ble Member (J) my views and orders are as follows :- 15. The appellants have apparently taken duty credit with reference to initial input and utilised it for payment of duty (sic) suo moto in spite of exemption available on captively consumed VAM and thereafter claimed benefit of 55/38 in respect of the final product that is the Polyvinyl Alcohol; And a question has arisen whether they were justified and legally right in doing so.

16. In this connection, I find that Rule 57A is available only for utilising the credit towards payment of duty of excise leviable on the final products.

17. In this case VAM is only an intermediate product and therefore, the credit of duty could not be availed with reference to VAM. It could, if otherwise due, be availed of only with reference to the final product namely the POA.18. Even otherwise no credit could be utilised with reference to VAM as it was wholly exempted from duty under [Notification No.] 217/86 and this position is not altered by the fact of the appellants depositing any amount as duty on the ground that they do not intend to claim benefit of [Notification No.] 217/86. This is because of the fact that such a utilisation is permissible only with reference to the duty leviable or payable in accordance with an assessment; And the concerned officer was duty bound to take the relevant exemption notification into account while determining the duty payable.

19. In the above circumstances, the appellants are required to reverse the credit taken by them. Once they had done so they would be entitled to the Modvat benefit with reference to the final product namely Polyvinyl Alcohol if otherwise due.

20. The appellants are not eligible for benefit of Notification No.55/38 because it is available only in respect of that quantity of VAM on which appropriate amount of duty has been paid-duty being an amount duly assessed by the proper officer authorised to do so (and not any amount which may be deposited suo moto by an appellant) in accordance with law including an exemption notification and in the present case no amount was payable on exempt VAM.21. I further consider that the appellants were fully aware that they would run into difficulty in view of

simultaneous existence of [Notification No.] 217/86 as well as 53/88 and had addressed the Board and the officers in this regard and pleaded for amendment. Since their request for amendment was however, not accepted, therefore, they ought to have been careful and ought not to have proceeded in the manner in which they have. At the same time, the department having been put to notice ought to have taken the appropriate action during the normal period of time. Further more, the Board itself had been vacillating and considering at one stage that the assessee had option to avail of benefit of exemption notification but [adopted] a different view that the assessee had no such option at another stage. However, the Board Circular No. 21/91-CX-3, dated 4-1-1991 having come into force (prospective-ly) from thereon the assessee was required to follow the instructions contained therein.

22. In view of the above position, the extended period of time is not available to the department and the demand beyond the normal period of time is time barred.

23. Further confiscation of land, building, plant, machinery etc. was not called for as sufficient justification for the same was lacking.

24. However, the appellants were liable to penalty in view of the action consciously taken by them contrary to the law - knowingly going their own way in spite of the fact that their request for amendment of the notification has not been granted by the Government and Board had issued Circular No. 21/91-CX. 3, dated 4-1-1991; And further knowingly availing Modvat benefit with reference to an intermediate product which was even otherwise fully exempt.

25. The case law cited by the appellants does not come to their rescue in the circumstances.

26. In view of the above position and looking to the totality of facts and circumstances, I set aside the impugned order and remand it for re-consideration and re-determination of duty liability and penalty in the light of above observations and the law.

In view of the difference of opinion between Hon'ble Member (J) and the Vice President, the matter is submitted to the Hon'ble President for reference to a third Member on the following point :- 1. Whether in the facts and circumstances of the case, the impugned order is required to be set aside and the appeal allowed as proposed by Hon'ble Member (J) or the matter is required to be remanded for de-novo consideration in accordance with law in view of the observations of the Vice President. (S.L. Peeran) (S.K. Bhatnagar) Member (J) Vice President 27. With difference of opinion between the two members [the Vice President and the Member (J)] who heard the appeal, the matter is referred to the third Member, on the point whether the impugned Order-in-original No. 45/CEX/1993, dated 17-3-1993 of the Collector of Central Excise & Customs, Pune confirming the demand of duty of Rs. 92,23,422/- vide Rule 9(2) of the Central Excise Rules, 1944 read with Section 11A of the Central Excises and Salt Act, 1944, raised on the ground that though the appellants were not eligible, they had paid duty at concessional rate vide Notification No. 55/88-C.E., dated 1-3-1988 and also imposing penalty of Rs. 2.00 lacs on the appellants, vide Rule 173Q(1) of the Rules, should be set aside as proposed by Member (Judicial) or that the matter should be remanded back for de novo consideration and decision according to law, as proposed by the Vice President.

28. The adjudicating authority had also ordered confiscation of plant and machinery vide Rule 173Q(2) of the Rules. Both the Members have however concurred that such an order is unwarranted. The said aspect therefore is not a point arising for consideration by the third Member.

29. Heard Mr. Gautam Doshi, the Id. Chartered Accountant appearing for the appellants and Shri K. M. Mondal, SDR for the Respondent.

30. For proper exposition of the reasonings adopted, in due determination of the points referred to, it appears to briefly re-project the factual position, over which there is no dispute.

31. The appellants were initially manufacturing Vinyl Acetate Monomer (VAM). However, from October, 1989, they also started manufacturing Polyvinyl Alcohol, known as "Polynol", by using VAM. Both Polynol and VAM were the items

specified under Rule 57A of the Rules for availment of Modvat credit. VAM manufactured in the factory and captively used for manufacture of Polynol was exempt from whole of the duty payable thereon, vide Notification No. 217/86-C.E., dated 2-4-1986 as amended from time to time. Vide Notification No 53/88-C.E., dated 1-3-1988, Polyvinyl Alcohol, was chargeable to concessional rate of duty at 20% ad valorem, if manufactured from VAM on which appropriate amount of duty or additional duty was already paid. With a view to avail benefit of duty concession available, vide Notification No. 53/88, the appellants, instead of availing benefit of duty exemption under Notification No. 217/86, paid duty on VAM captively consumed. In doing so, they also availed of credit, under the Modvat scheme, for the duty-paid on inputs used in manufacture of VAM, and utilised the said credit for payment of duty on VAM. Further, while availing of the benefit of payment of duty at concessional rate on 'Polynol' they also avail of credit for duty paid on VAM. Objection was raised that VAM when used captively was exempt from whole of the duty and hence, it was not open to the appellants to voluntarily pay the duty thereon and avail of the benefit of concessional rate, vide Notification No. 53/88.

The demand was accordingly raised for a period from 1-4-1990 to 10-1-1991 by issuance of show cause notice dated 3/6-4-1992. The appellates contested the same, by pleading that they had an option available not to claim exemption under Notification No. 217/86 and when they had actually paid the duty and used duty paid VAM in manufacture of Polynol, benefit under Notification No. 53/88 could not be denied.

The contention of the appellants was not accepted, and the impugned order was passed.

32. Appeal preferred by the appellants, to the Tribunal, came up for hearing and the disposal before Special Bench 'C (as it then existed).

In the order, numbered as Misc. Order No.63/95-C, the Id. Member (Judicial) is of the view that the appellants had a choice to pay the duty on VAM and avail of benefit of concessional rate vide Notification No. 53/88 and has proposed allowing of the appeal. He has also observed that even otherwise, the demand raised is hit by period of limitation, and is time barred. The Id. Vice President, however, is of

the view that such a concession is not available. He has also concluded that appellants could not avail of Modvat credit for duty paid on inputs for purpose of payment of duty on VAM and hence the same ought to be reversed, but could be utilised for payment of duty on the final product. He is also of the opinion that the appellants are liable to imposition of penalty. Though in his opinion, extended period of limitation is not available to the department, duty demand, for the period falling within six months, before the issuance of show cause notice, could be confirmed. He has therefore proposed that the matter ought to be remanded.

33. The entire demand for duty is undisputedly beyond the regular period available under Section HA of the Act, as is evident from the fact that the demand relates to the period 1-4-1990 to 10-1-1991 and show cause notice is issued on 3/6-4-1992. Both the Members concur that there is no suppression on the part of the appellants and hence the extended period is not invokable. Independently examining, the appellants have, as early as 4-10-1989, written a letter to the Central Board of Excise and Customs, explaining their position and requesting the Board to make necessary amendment in Notification No. 53/88. In furtherance thereof, the appellants seem to have met jurisdictional Assistant Collector on 20-6-1990, which meeting is followed by a letter from them dated 23-6-1990, addressed to the jurisdictional Assistant Collector, specifically mentioning that they were paying duty on VAM taken in use for manufacture of Polynol. There is also a letter dated 1-10-1990 from the jurisdictional Superintendent informing the appellants, the inability of the Board to make any amendment. A show cause notice dated 8-7-1991 also seems to have been issued by the Superintendent, raising the demand, which is not adjudicated upon, and instead, appears to have been replaced by the subject show cause notice dated 3-4-1992. These facts clearly establish that the excise authority was well aware of the stand taken, as also of duty payment made on VAM, and availment of concessional rate of duty vide Notification No. 53/88 and there was not even an attempt on the part of the appellants to keep anything concealed. None of the requirements laid down in Section 11A of the Act, enabling the department to invoke extended period, thus existed. The demand beyond the period of six months, prior to issue of the subject show cause notice, therefore, has to be held as hit by time bar.

34. With the entire demand being beyond the period of six months has, therefore, to be held as not sustainable, and the Order-in-Original, to that extent has to be held as not sustainable. Ordering remand for de novo consideration, in regard to duty demand, for such period which is within six months would be infructuous, and is not warranted.

35. The next point to be considered is whether, the order of imposition of penalty vide Rule 173Q(1) of the Rules, should be set aside, or that the matter ought to go back for reconsideration. Mr. Gautam Doshi, the Id. C.A., appearing for the appellants has pleaded that when no mala fide exists and when demand of duty is held to be not sustainable, there is no scope for imposing penalty. He has referred to the decision of the Supreme Court in Collector of Central Excise v. HMM Ltd. - 1995 (76) E.L.T. 497 (SC), to the effect that the question of penalty would arise only if the department is able to sustain its demand. Mr. Doshi has submitted that in the case before the Supreme Court, also, the demand was hit by time bar and the said court held the penalty as not imposable. Mr. K.M. Mondal, the Id. SDR, on the other hand, pleads that, penal liability has arisen on account of appellants intentional act of gaining some monetary benefit, which was not available to them, and the same would principally rest on the outcome on the main issue under consideration.

36. Appreciating same rational in the submission of the Id. SDR and deferring on the aspect of penal liability, till the main issue (which in view of demand being held as hit by time bar, may remain more of academic interest, but examination whereof has become essential in the present set of circumstances), the points to be considered are (i) whether the appellants could have paid duty on VAM manufactured by them, and consumed captively, in spite of the fact that the same was exempt from payment of duty vide Notification No. 217/86-C.E., dated 2-4-1986; (ii) whether the appellants could avail of the benefit under Modvat scheme, and could take credit for duty paid on inputs used in manufacture of VAM and utilised in payment of duty on VAM taken for captive consumption; (iii) whether the appellants could pay duty on captively consumed VAM, though same was exempt from duty vide Notification No. 217/86 and avail of benefit of concessional rate of duty vide Notification No. 53/88.

37. As has been rightly submitted by Mr. Doshi, the availment or otherwise, of the Modvat benefit is not a point directly at issue here, as the subject show cause notice does not refer to it, and is restricted only to non-availability of concessional rate of duty on the final product. However, entire issue poised for determination is such that consideration of availment of Modvat benefit becomes essential for due determination.

38. Shri Gautam Doshi, the Id. C.A. has submitted that the issue as to availment of Modvat benefit by not claiming exemption, has been duly determined by various decisions, the latest being of the Tribunal in Everest Converters v. Collector of Central Excise - 1995 (80) E.L.T. 91 (Tribunal) categorically holding that option is available to the assessee to claim or not to claim benefit of exemption notification under Section 5A(1) of the Act. He pleads that though Notification No.217/86 is issued vide Rule 8 of the Rules, which has been deleted, w.e.f. 1-7-1988 on insertion of Section 5A in the Act, vide Sub-section (4) of said Section, this Notification is deemed to have been issued under Section 5A of the Act. He has also referred to another decision of the Tribunal in Bajaj Tempo Ltd. v. Collector - 1994 (69) E.L.T. 122 (Tribunal) where examining the provisions of Notification No. 217/86 and of Rule 57C of the Rules, it is held that the said Notification is intended to merely avert payment of duty at the intermediate stage. He then refers to the Board's letter F.No. 267/16/89-CX. 8, dated 15-2-1988 permitting option to the manufacturers of paying duty on fully exempted goods and submits that the same has been withdrawn vide Board's Circular No. 2/91-CX. 3, dated 4-1-1992 for which Trade Notice No. 30/91 dated 28-2-1992 has been issued by Pune Collectorate. He pleads that such withdrawal of the facility could only be prospective, and is issued much after the period covered under the subject demand.

He has also produced Finance Ministry Circular No. 125/36/95 and has pleaded that the said circular is specified to be of general applicability. In his submission, even if the exemption under Notification No. 217/86 was availed of, the clearance of VAM for captive consumption would have been deemed to be under payment of duty at 'Nil' rate and thus also concessional rate of duty- under Notification No. 53/88 would be available.

39. Mr. K.M. Mondal, the Id. SDR, has submitted that Modvat is a self contained scheme, and has to be implemented accordingly and it is not open to the appellants to deviate from the scheme as laid down. He points out that the appellants have taken credit for inputs used in manufacture of VAM and have utilised the same in payment of duty on VAM itself, and hence could not be said to have availed of the provisions of Rule 57D(2) of the Rules, by treating VAM as intermediate product.

In his submission, VAM could also not be termed as intermediate product, as term 'intermediate product' has got its own connotation to only cover up items which come into existence during the process of manufacture of final product from the raw material, and VAM, which the appellants treat as their final product could not fall within that category, and would stand governed by provisions of Rule 57C of the Rules, where no option could be available to pay the duty when final product is wholly exempt. In his submission the appellants, in order to avail of benefit of concessional rate, intentionally adopted the course of action not permissible and have thus, rendered them liable to pay the duty demanded and merely because of some legal impediment duty cannot be recovered, their penal liability has to be taken as subsisting.

40. Examining first, the submission made by the Id. SDR in relation to VAM being not acceptable as intermediate product in relation to Polynol as final product, in context of the provisions of Rule 57D(2) of the Rules, the term 'intermediate product' has nowhere been defined in the Rules and hence interpreting the same as understood in commercial parlance, the same has to be read in context of manufacturing process undertaken by particular manufacture, and any material which by itself may be a complete product, when used in manufacture of another product as final product has to be accepted as intermediate product. Though ordinarily it may come out in continuous process of manufacture of final product, merely because it comes into existence by separate process, till the same is used for manufacture of another final product, the same does fall within the category of intermediate product. In *Jain Spun Pipe Co. v. Collector* -1992 (62) E.L.T. 753 (Tribunal), wires manufactured out of re-rollable material have been held as intermediate product for manufacture of cement spun pipes VAM in relation to

manufacture of Polynol has therefore, to be treated as intermediate product.

41. Viewed from this angle, so far as availment of Modvat credit in relation to the inputs used in manufacture of VAM is concerned, the same could have been used in payment of duty on final product Polynol vide Rule 57D(2) of the Rules, that the appellants have actually done, could have stood condoned as mere procedural irregularity with virtually no major financial implication and might not have been viewed as attracting any penal consequences.

42. The main issue is whether, it was open for the appellants to pay duty on VAM captively consumed, though, the same was exempt from payment of duty vide Notification No. 217/86, and avail of benefit of concessional rate vide Notification No. 53/88. The same is held as not permissible, vide Government Circular dated 4-1-1992 followed by Pune Collectorate Trade Notice dated 28-2-1992. The said circular is neither specified to be having retrospective effect, nor could be read as such, not only because such instructions could not normally have retrospective effect, but also because, the Government themselves, had vide Board's letter dated 15-2-1988 granted option to the manufacturers in that regards. Further, vide order of the Tribunal in Re: Everest Converters (supra), such notification vis-a-vis availment of Modvat credit, have been held as optional. Besides this order, in Re : Bajaj Tempo Ltd. (supra) the Tribunal have specifically dealt with Notification No. 217/86. Other Benches of the Tribunal, have, in relation to some other notifications of like nature, in Facit Asia Ltd. v. Collector - 1991 (54) E.L.T. 347 (Tribunal) and Collector v. SAIL -1990 (47) E.L.T. 389 (Tribunal) taken similar view.

43. Now, if notification is granting conditional exemption to a product, and the Notification No. 217/86 falls within that category, it is open for the assessee not to avail of exemption and pay the duty, and if the duty is duly paid, notwithstanding any other aspect, so far as applicability of Notification No. 53/88 is -concerned, the item used have to be held as duty paid. To put it other way, Notification No.217/86, issued under Rule 8 of the Rule (as it then existed), VAM used captively is exempt from whole of duty, which by virtue of the decisions referred to above, when said notification is held to be optional for the assessee to take recourse to, and the option is not availed of by the appellants who have chosen to pay duty, the VAM,

used as input in manufacture of Polynol, becomes a duty paid input vis-a-vis the final product Polynol, and such final product becomes eligible to avail of benefit vide Notification No. 53/88.

44. The appellants, thus are eligible for availment of concessional rate of duty vide Notification No. 53/88, and irrespective of the same being time barred, the order confirming demand would have to be set aside even on merits.

45. This being the position, the question of imposition of penalty would not arise at all. Even assuming that the case, on merits, was against the appellants, the judgment of the Supreme Court in Re: HMM Ltd. (supra) may stand attracted. In any case, this does not appear to be the case, where any penalty is called for.

46. In this view of the matter, I concur with the conclusion drawn by the Id. Member (Judicial) that the order in original has to be set aside and appeal be allowed. Bombay : 11-12-1995 P.K. Desai Member (J) 47. In view of the majority opinion, the impugned order is set aside and the appeal is allowed.

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