

Machine Builders Vs. Collector of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Feb-02-1996

Reported in : (1996)(83)ELT576TriDel

Appellant : Machine Builders

Respondent : Collector of Central Excise

Judgement :

1. Since common questions arise in these appeals, they have been heard together and are being disposed of by a common order. Appellants in the Appeal No. E. 72/88, E. 384/88 and E. 252/90 have not appeared nor arranged representation in spite of notice of hearing. We have heard learned counsel Shriyuts P.K. Das, Krishna Srinivasan, V. Sridharan and Mrs. Archana Wadhwa appearing for the various private parties and Shri Sanjiv Sachdeva, SDR.2. These appeals have been referred to Larger Bench in view of conflicting decisions of the Tribunal and the present larger Bench has been constituted to hear and dispose of these appeals.

3. In all these cases, the manufacturers of various products utilising certain inputs exempted from duty, claimed deemed credit on the basis of Government orders issued under second proviso to Rule 57G(2) of the Rules. The stand of the Revenue is that since in these cases there are clear materials to show that the inputs did not suffer duty, they are outside the pale of the Government orders and, therefore, deemed credit was not admissible.

[E/72/88]. - Appellant, manufacturer of stranded steel wires and other products vising inputs including iron wires, steel wires, opted for Modvat credit in respect of iron wire, steel wire falling under Pleading 7213.90 of Schedule to Central Excise Tariff Act (for short, Tariff Act) and purchased from manufacturer who avail exemption under Notification No. 208/83 and started taking credit on the input and utilising the credit. Appellant, when directed to do so, could not produce documents to establish that the inputs received were duty paid.

The Assistant Collector held that the credit availed of was not admissible and should be refunded or adjusted in the PLA. This was on the ground that under Notification No. 208/1-8-1983, goods under sub-heading 7213.90 are exempt from duty if manufactured from ingots, billets etc. falling under particular Tariff headings and, therefore, iron wire/steel wire used as input was clearly recognizable as charged to nil rate of duty and as such, the benefit of Government order dated 17-4-1986 issued under the second proviso to Rule 57G(2) of the Central Excise Rules, 1944 (for short, the Rules) would not be available. This order was confirmed by the Collector (Appeals). Hence the appeal to the Tribunal.

[E/384/88]. - Respondent, manufacturer of bolts and nuts falling under 83.13/8313.10 of the Tariff Act, uses as input, steel wires falling under 7213.90 purchased by the respondent and made by units redrawing the same from wire rods falling under 7209.90. The redrawn wire drawn from duty paid wire rods is exempt from duty under Notification No.208/83, dated 1-8-1983. Assistant Collector held that appellant was not entitled to deemed credit in respect of the input under Government order dated 7-4-1986 since steel wire used as input is clearly recognizable as nil duty paid goods. The Collector (Appeals) set aside the order holding that the process of redrawing steel wires did not amount to "manufacture" and Modvat credit would be available to redrawn wires bought from the market and the position would not alter merely because the appellant purchased the same directly from the drawing units. This order is challenged by the Revenue.

[E/221/89] - Appellant, manufacturing weld mesh, falling under Chapter 73 of Tariff Act, opted for Modvat scheme on 10-3-1988 and availed credit of duty on input,

i.e., steel wire, which was manufactured out of duty paid billets and, therefore, enjoyed exemption from payment of excise duty. Appellant had no documents to prove payment of duty on steel wires. The Assistant Collector denied appellant Modvat benefit on the basis of Government order dated 7-4-1986 since steel wire is clearly recognizable as being non-duty paid or charged to nil rate of duty. This order was confirmed by the Collector (Appeals). Hence the present appeal.

[E/190/90] - Respondent, a manufacturer of automobile pistons, gudgeon pins and piston rings falling under Chapter 84.09 of Tariff Act, opted for Modvat with effect from 26-3-1986 and was availing Modvat credit on inputs such as Aluminium Alloy ingots, Aluminium ingots and Aluminium castings etc. without duty paying documents. Aluminium Alloy ingots had been procured from converters who manufactured them from duty paid unwrought Aluminium and as such were found to be exempted under Notification No. 100/88 during the period in question. The exemption continued under Notification No. 181/88, dated 13-5-1988. The Assistant Collector noticing the changes brought about in Government order dated 7-4-1986 by Govt. order dated 2-11-1987 held that respondent was not eligible to deemed credit on Aluminium Alloy ingot falling under 76.01 of the Tariff Act since the input was exempted by Notification No.100/88, dated 1-3-1988 and, therefore, was clearly recognizable as being non-duty paid input or as exempted from duty or charged to nil rate of duty. This order was set aside by the Collector (Appeals) with regard to credit availed during the period 1-3-1988 to 19-5-1988 on the ground that there was no evidence to show that the Aluminium ingots were manufactured out of non-duty paid goods and the exemption in Government order dated 2-11-1987 did not take in inputs "wholly exempted" from duty. He also held that for the period from 20-5-1988 to 12-9-1988 it has to be verified if the respondents' supplier was availing exemption under exemption Notification No. 100/88 on Aluminium Alloy ingot and for this purpose remanded the case to that extent.

Revenue has filed the appeal and the assessee has filed cross-objection.

[E/252/90] - Appellant, manufacturer of parts and accessories of Arms and Ammunition under Chapter 93, claimed Modvat credit in respect of duty on purchased Aluminium Alloy ingots under Govt. order dated 7-4-1986 without

producing documents evidencing payment of duty. The Assistant Collector held the input (Aluminium Alloy ingot) was clearly recognizable as non-duty paid and as such benefit of the Govt. order dated 7-4-1986 was not available. The order was confirmed by the Collector (Appeals). Hence this appeal.

[E/125/91, E/130/91, E/208/92] - The common appellant received duty exempted mint scrap from Government unit and scrap is melted and made into unwrought ingots or slabs which are used as inputs in the manufacture of unwrought aluminium products and availed credit of the duty on the scrap. The Assistant Collector held that the scrap was clearly recognizable as non-duty paid as it was wholly exempt having been made from duty paid sheets tender Notification No. 182/84, dated 1-8-1984 and hence, in terms of Govt. order dated 7-4-1986, not eligible for deemed credit. Two orders were passed for different periods. The Collector (Appeals) set aside one of the orders in part on account of bar of limitation. This order had led to Appeal E/125/91 and E/130/91 filed by each party. The order of the Assistant Collector for another period was confirmed by the Collector (Appeals) and this order is challenged in appeal E/208/91.

[E/4019/91] - Appellant, manufacturer of valves and locks falling under 8481.80 of Tariff, was availing Modvat credit in terms of Govt. order dated 2-11-1987 issued under second proviso to Rule 57G(2) of the Rules. It was found that appellant had received input from factory, namely, copper alloy ingots without producing any gate pass or documents. The manufacturer of the input had availed of exemption for the product. The Assistant Collector, therefore, denied Modvat credit to the appellant. The Collector (Appeals) set aside the order on the ground that Revenue has failed to prove non-duty paid character of goods.

5. The question arising for consideration in these appeals is whether, in the circumstances referred to above, deemed Modvat credit was allowable to the manufacturers in these cases.

6. Section AA containing Rules 57A to 57-1 and incorporated in the Rules in 1986 introduced the Modvat Credit Scheme. Rule 57A enables the Central Government to specify "finished excisable goods" (final products) in the manufacture or in relation to the manufacture of which "goods" specified by the Government (inputs)

are used. In respect of such inputs credit of specified excise duty or countervailing duty paid thereon is allowed to be used towards payment of excise duty on the final product subject to the provisions of Section AA and such conditions and restrictions as may be specified in the notification.

Rule 57C mandates that no credit of the specified duty paid on the specified inputs used in the manufacture of a final product shall be allowed if the final product is exempt from the whole of the excise duty leviable thereon or is chargeable to nil rate of duty. Rule 57D provides against denial or variation in credit of duty in respect of inputs contained in waste, refuse, or byproduct in certain circumstances. Rule 57F deals with manner of utilization of the inputs and the credit. Rule 57G prescribes the procedure to be followed by the manufacturer who seeks to avail the benefit of the scheme.

7. The requirements prescribed in Sub-rules (1), (2) of Rule 57G with first proviso are as follows :- (a) The Manufacturer shall file declaration with the jurisdictional Assistant Collector indicating the description of manufactured final products, the inputs intended to be used in each of the said final products and such other information as' the Assistant Collector may require (Sub-rule. 1).

(b) The Manufacturer shall obtain a dated acknowledgment from the Assistant Collector (Sub-rule 2).

(c) The inputs, at the time of their receipt in the factory, are accompanied by a Gate Pass, an. AR-1, a Bill of entry or any other document prescribed by CBCE in this behalf evidencing the payment of duty on such inputs (first proviso).

If these procedural requirements and documentation conditions are satisfied, the Manufacturer may take credit of duty paid on the inputs so received. Thus it is seen that pivotal to the Modvat Scheme is the receipt of specified inputs on which specified duty has been paid, the documentation of payment of duty and the use of such, inputs in the manufacture of or in relation to the manufacture of specified final products. Credit is to be taken of specified duty paid on inputs.

Naturally Rule 57 G takes care to ensure that credit is taken only of duty actually paid. The method adopted in the first proviso is by insisting that the inputs, at the time of their receipt are accompanied by a Gate Pass, an AR-1, a Bill of entry or any other specified documents evidencing payment of duty on the inputs. Therefore, unless there are specified documents which could be evidence of duty having been paid on the inputs, Modvat credit is not admissible. Where it is admissible, the third proviso requires the manufacturer to take all reasonable steps to ensure that the inputs received are goods on which appropriate duty has been paid as indicated in the documents accompanying the goods. Manufacturer is required to maintain an RG-23A account in Parts I and II and an account-current in respect of duty payable on final products.

8. The second proviso to Sub-rule (2) of Rule 57G which makes a departure from the rigour of the first proviso reads as follows :- "Provided further that having regard to the period that has elapsed since the duty of excise was imposed on any inputs, the position of demand and supply of the said inputs in the country and any-other relevant considerations, the Central Government may direct that with effect from a specified date, all stocks of the said inputs in the country, except such stocks lying in a factory, customs area (as defined in the Customs Act, 1962 (52 of 1962) or a warehouse as are clearly recognisable as being non-duty paid, may be deemed to be duty-paid and credit of duty in respect of the said inputs may be allowed at such rate and subject to such conditions as the Central Government may direct, without production of documents evidencing the payment of duty".

(a) The Central Government must have regard to the period that has elapsed since excise duty was imposed on any inputs, or the position of demand and supply of the said inputs in the country, or other relevant considerations.

(b) Having regard to one or more of the aforesaid conditions, the Central Government may issue a direction as contemplated.

(i) with effect from a specified date, all stocks of the said inputs in the country may be deemed to be duty paid, and (ii) credit of duty in respect of such inputs may be allowed at such rate and subject to such conditions as may be imposed without

production of documents evidencing payment of duty; (d) The Central Government cannot issue a direction in regard to stocks lying in a factory, customs area or a warehouse as are clearly recognizable as being non-duty paid.

9. Let us examine the three Government orders issued under the aforesaid second proviso and referred to in one or the other impugned orders.

[Government order dated 7-4-1986]. - The table to the order describes various metal inputs i.e. iron, steel and articles thereof, unwrought copper, aluminium, lead and zinc in any form and waste and scrap of such metals (col. 2), their respective tariff headings (col.

3) and corresponding rate of duty (col.

4) "deemed" to have been paid and may be allowed as credit. The order directs that inputs specified in column

(2) of the Table and falling under the heading numbers of the Tariff Schedule specified in the corresponding entry in column

(3) of the table purchased from outside and lying in stock on or after 1-3-1986 with the manufacturers of final products specified in the Notification No. 177/86-C.E., dated 1-3-1986 may be deemed to have been paid specified duty of excise or countervailing duty, as the case may be, at the rate specified in column

(4) of the Table. Credit of the specified duty in respect of such inputs used in the manufacture of the said final products on which excise duty is leviable either in whole or in part may be allowed at the rate specified in column

(4) of the Table without production of documents evidencing payment of duty. No such credit will be allowed :- (i) if in respect of any inputs the credit of specified duty has already been availed of under any Rule or Notification granting such credit; (ii) if such inputs are clearly recognizable as being non-duty paid or charged to nil rate of duty; or (iii) if in respect of any inputs where the reduction of duty as provided under the proviso to Notification No. 55/86-C.E., dated 10-2-1986 is claimed on the ground that the inputs have been manufactured with the aid of

electric furnace and documentary evidence exists to show that the reduced duty has been paid on such inputs. In such case, the actual duty paid should be allowed.

This Government order was issued on the basis of representations of Manufacturers of final products specified in Notification No.177/86-C.E., dated 1-3-1986 issued under Rule 57A that they are not able to avail of credit on inputs, i.e. iron or steel, copper, aluminium, zinc, lead and articles of such metals because of their inability to produce duty-paying documents. This Govt. order superseded earlier order dated 14-3-1986.

[Government order dated 2-11-1987]. - Annexed to the order is a table specifying inputs in column (2) iron, steel, unwrought copper, aluminium, lead and zinc in any form and waste and scrap of copper, aluminium, lead and zinc, the heading No. of Tariff Schedule (Column 3) and the rate of duty deemed to have been paid and may be allowed as credit (col. 4). The order is similar in terms to the order dated 7-4-1986 in regard to certain inputs. In regard to other inputs, similar relief is given in respect of inputs lying in stock on or after 2-11-1987 with manufacture of final products. However, of the three exceptions in Govt. order dated 7-4-1986, exception (iii) has been deleted and exception (ii) has been modified to read as follows :- "(ii) if such inputs are clearly recognizable as non-duty being paid." This order was issued on the basis of representations of Manufacturers of final products specified in Notification No. 177/86-C.E., dated 1-3-1986 that they are not able to avail of specified input credit on Iron, Steel, Copper, Aluminium, Zinc and Lead under Rule 57A because of their inability to produce duty paying documents in respect of goods used by them as inputs.

[Government order dated 20-5-1988]. - The table annexed to this order describes inputs as Iron, Steel, Steel of not exceeding 5 mm thickness, Refined Copper and Copper Alloys, Unwrought, Copper, Lead and Zinc, Aluminium, Waste and scrap, unwrought Aluminium whether or not alloyed, unwrought lead and zinc. Headings are given in column (3) and rate of duty deemed to have been paid and may be allowed as credit is stated in column 4. The contents of this order are similar to the contents of the order dated 1-3-1986 save in two respects. One change is that the

order relates to stock in the country on or after 1-3-1988. The second change is that out of the three exceptions, the third one is deleted and the second exception is changed as follows : "(ii) if such inputs are clearly recognizable as being non-duty paid or wholly exempted from duty or charged to nil rate of duty". The controversy in these appeals relates to the content and contours of the second exception.

10. The appellant in Rapsri Engineering Industries Pvt. Ltd. v. Collector of C. Excise - 1989 (43) E.L.T. 577 (T-SRB) was manufacturing machined and unmachined copper-base Alloy Castings and components rising unwrought copper and waste and scrap of Copper and Aluminium as inputs. The assessee opted for Modvat Scheme with effect from 11-6-1986 and the credit as per Government order dated 7-4-1986 for duty deemed to have been paid on unwrought copper and waste and scrap of copper and aluminium till 10-11-1986. The manufacture of these inputs was wholly exempt from duty as per Notification No. 170/84, No.182/84 and No.149/86. These two notifications of 1984 were held to grant unconditional exemption unlike Notification No. 149/86. The Tribunal held that where the exemption is total and unconditional, the inputs are clearly recognizable as non-duty paid and deemed credit would not be available and where the exemption is conditional, deemed credit cannot be denied unless the Revenue establishes by enquiries that the particular materials came from non-duty paid stream. The SRB agreed with a similar view taken by a single Member Bench in Collector of C.Ex. v. Kapsons Electro Stampings(T-NRB) In UMS Radio Factory Pvt. Ltd. v. Collr. of C. Ex. - 1991 (52) E.L.T. 579 (T-SRB), dt. 22-8-1990 the Manufacturer availed deemed credit on Aluminium Castings used as inputs, though the same were exempt from duty by a notification. The assessee had purchased castings from the Manufacturer of castings and had no duty paying documents. It was clear that the Manufacturer of the inputs had cleared the same without payment of duty as they were exempt from duty. It was held that the fact that Aluminium Castings had been manufactured from duty paid Aluminium ingot has no relevance in the context of the second proviso to Rule 57G(2) of the Rules and Government order dated 7-4-1986. It was further held that the expression "non-duty paid" refers to goods when no duty has been paid and if the inputs are exempted goods, no credit is available in respect of the same. In Arun Auto Spring

& Mfg. Co. v. Collector of Central Excise & Customs. 1990 (48) E.L.T. 543.(T-WRB) the inputs were supplied by a manufacturer who was entitled to avail exemption under Notification No.208/83. Cases of exemption cannot fall under the description "charged to nil rate of duty". Hence, the assessee who used such inputs was held to be entitled to "deemed credit" under Government order dated 7-4-1986. Support was drawn from the changes brought about in the subsequent Government order in respect of exception (ii). In Auto Piston Manufacturing Co. Ltd. v. Collector of Central Excise - 1992 (60) E.L.T. 342 (T-NRB) it was held that inputs cleared under an exemption notification cannot be treated as 'non-duty paid' or "charged to nil-rate of duty" and in the case of conditional exemption, it was for the Revenue to prove satisfaction of the conditions in the given case. In Ma Tara Rope Works v. Collector of Central Excise - 1991 (54) E.L.T. 360 (T-ERB) the manufacturer of inputs had availed exemption under Notification No. 208/83. It was held that the expression "non-duty paid" means 'not duty paid' and does not relate only to goods clandestinely removed and where duty is exempt by notification it means nil-duty is paid. The purpose of the Govt. order is to waive the production of gate passes in respect of certain, inputs. It was also held that the words "charged to nil rate of duty" have connotation different from that of the words "charged to nil rate of duty" and the former only mean that nil rate has been applied, be it under the Tariff or by virtue of an exemption notification and the change brought about in the Government order dated 20-5-1988 was only to make explicit what was implicit in the earlier orders. The words "charged to nil rate of duty" have no relation to chargeability under the Schedule to the Tariff Act. There was also an observation that the burden was on the assessee to show that conditions in the exemption notification were not satisfied, based on the decision of the Punjab and Haryana High Court in Upper India Steel Manufacturing and Engineering Co. Ltd. v. Collector of Central Excise 13. The dispute relates to the correct construction of exception (ii) in the Government order dated 7-4-1986, 2-11-1987 and 20-5-1988.

Exception (ii) in the three orders are :- Order dated 7-4-1986 - No credit shall, however, be allowed :- (ii) if such inputs are clearly recognizable as being Order dated 2-11-1987 - No credit shall, however, be allowed :- (ii) if such inputs are clearly recognizable as Order dated 2-5-1987.- No credit shall, however, be

allowed :- (ii) if such inputs are clearly recognizable as being These orders have been issued by the Central Government on the basis of the enabling provision in the second proviso to Rule 57G(2) to extend the benefit of Modvat credit to certain manufacturers who would otherwise be not entitled to it. Therefore, the scope, meaning and intent of the Government orders must be considered in the backdrop of parent Rule and the Rules in Section AA which incorporates the Modvat Credit Scheme.

14. The Government order dated 7-4-1986 used two sets of words, "clearly recognizable as being non-duty paid" and "charged to nil rate of duty". The second Government order deleted the words 'charged to nil rate of duty'. The third order restored the deleted words and also introduced new words "wholly exempt from duty". The words "clearly recognizable as being non-duty paid" are seen in the second proviso to Rule 58(G)(2) of the Rules while referring to "except such stocks lying in a factory, customs area or a warehouse as are clearly recognisable as being non-duty paid". The provision of deemed payment does not apply to this category of inputs which are clearly recognizable as being non-duty paid. While in the proviso, these words qualify only stocks in the three specified places, these words used in all the three Government orders qualify all stocks. This of course is a condition introduced by the Govt, which is within its competence according to the language of the proviso which enables Govt. to issue directions subject to conditions and restrictions as deemed fit. The second proviso qualifies the first proviso which requires the manufacturers claiming modvat credit to be able to produce Gate Pass, AR I or other documents (as may be prescribed by CBEC) evidencing payment of duty on inputs.

The Modvat Scheme itself postulates duty paid specified, inputs brought into a factory for use in the manufacture or in relation to the manufacture of specified final products and credit of duty paid on such product being utilized for payment of duty on final product. Pivotal to the scheme is payment of duty on inputs. It is to ensure this pivotal requirement that the first proviso mandates that inputs must be received in the factory under the cover of gate pass, AR I or Bill of entry or other prescribed documents evidencing payment of duty. Yet, there could be inputs in respect of which duty has been paid but it may not be possible to possess such

documentary evidence of payment of duty and manufacturers who use such inputs might be deprived of the benefit of Modvat Scheme. It is to give relief to the class of users of such inputs that second proviso has been introduced. There is nothing in the Section AA of the Rules or second proviso to Rule 57G(2) to show any intention to extend benefit to those persons who use inputs in the manufacture of which excise duty has actually not been paid.

15. The purpose of the second proviso is to empower the Government to implement a deeming provision, i.e. provision to deem that the inputs are duty paid. The intention is not to deem that inputs which actually did not suffer duty are inputs which suffered duty. The purpose is to ensure benefit to those who use inputs in the manufacture of which duty has actually been paid, but it might not be possible to produce duty paying documents which will unerringly connect the documents or duty payment with the particular inputs. Any other view would go against the pivotal element of the scheme, namely, duty has been paid on the inputs. In *Consolidated Coffee Ltd. v. Coffee Board*, 1980 (46) STC page 164 the Supreme Court has explained that the expression "deemed" is used in different senses, namely, it may be used to indicate what is obvious, or to indicate what is uncertain or to impose an artificial construction in a word or phrase which will not otherwise be available.

16. In this connection it is necessary to find the mischief sought to be avoided by the deemed proviso to Rule 57G and the Government order.

The mischief is disentitlement to Modvat credit on duty paid inputs brought to the factory on account of non-possession or inability to produce documents like gate pass etc. evidencing payment of duty. The mischief could not have been overcome by stipulating that credit is available even if duty has not been paid on inputs, for that would be against the pivotal element of the Scheme. If duty need not be paid and has not been paid, the question of duty paid being earned as credit does not arise. The only way of overcoming the mischief is to dispense with the requirement of documents evidencing payment of duty. If there is a general dispensation of such documents, that will affect the vitality of the first proviso and can be misused also. Therefore, it became necessary to ensure that concession

would apply in cases where the circumstances are such that it is safe to proceed on the basis that duty must have been paid. This is the reason why the second proviso indicates the factors which must be considered before the Govt. can issue a direction. The factors are : (a) period that has elapsed since the imposition of excise duty on any input.

(b) the position of demand and supply of the said inputs in the country.

The factors (a) and (b) have a bearing in suggesting the duty must have been paid on the input. Factor (c) refers to considerations which are relevant to the dispensation of production of documents evidencing the payment of duty and the consequential deeming of duty payment. So it was necessary for the Central Government in issuing the direction to ensure that duty must have been paid and at the same time relieve the claimants from the consequence of their inability to produce duty-paying documents. It is to effectuate such purpose that the Government orders declare that deemed credit will not be available to the inputs are clearly recognizable as being not duty paid.

17. There is some controversy regarding the meaning of the words "non-duty paid". The words plainly and clearly mean "duty not paid".

The contention is that the words "non-duty paid" can apply only in cases where according to the Schedule to the Tariff Act some duty is payable but has not been paid. Reference is made to these words used in Rules 56B, 191B, 196A(1) of the Rules. The words "non-duty paid" do not postulate the requirement of specification of duty in the Tariff Act.

The words only mean "when duty is not paid", whatever be the reason for non-payment. When the plain and unambiguous meaning is clearly discernable, there is no warrant to go in search of complex and hidden meanings. If it is clearly recognizable that duty has not been paid on the inputs, it is a clear case of duty not having been paid, the pivotal requirement of Modvat Scheme, namely, duty having been paid on inputs is absent and, therefore, deeming is not effectuated.

18. There is divergence of opinion regarding the meaning of the words "charged to nil rate of duty". According to the assessees, the words comprehend only those goods in respect of which nil rate duty is shown in the Schedule to the Tariff Act, so that the bar in this regard applies only to inputs in respect of which nil duty is shown in the Schedule to the Tariff Act. According to the Revenue, such an interpretation can be given if the words used are "chargeable to nil rate of duty" as in Rule 57C, but the words used "charged to nil rate of duty" have to be understood in a broad sense so as to comprehend all inputs in respect of which duty is not actually collected for any reason, be it on account of mention of nil rate of duty in the Schedule to the Tariff Act or on account of exemption. The same words have been used in Rule 57C, in Rule 57D(1) in relation to final product or waste or by-product, as the case may be, in second proviso to Rule 57H(1), first proviso to Rule 57H(1A), Rule 57L and Rule 57M. The word "charge" is not used in Section 3 of the Central Excises and Salt Act, 1944 which is the charging section for excise duty. On the other hand, the word "chargeable" is used in Section 4 in the sense of "leviable". The word "charged to nil rate of duty" would, in the context mean no duty is actually charged by the Revenue i.e. not charged to any duty. There is no justification to give a restricted scope to the words as suggested by the assessees. The three sets of words have been used in the exceptions to the three Govt. orders in the excise parlance and not with meticulous legal precision. The question of allowing credit or deemed credit in respect of duty on inputs chargeable to nil rate of duty under the Schedule to Tariff Act would not arise at all since in such an event the inputs are not dutiable. The question of credit and deemed credit on inputs would arise only in the case of inputs which are dutiable for the time being under the Schedule to the Tariff Act.

It cannot be that such an obvious and patent proposition would have been sought to be incorporated in the exception clause (ii) of the Govt. orders dated 7-4-1986 and 20-5-1988. For this reason also it is clear that the words "charged to nil rate of duty" have been used not in any technical sense, but in a broad sense by way of abundant caution. These words were evidently thought to be superfluous while passing the order dated 2-11-1987. Again by way of abundant caution, the Rule-making authority incorporated the three sets of words "charged nil rate of duty", "wholly exempted ..." and "charged ..." are used in the order dated 20-5-1988.

19. There can be only four contingencies in which duty is not paid on goods, They are : (i) No duty is prescribed, or nil rate of duty is prescribed for the goods in the Schedule to the Tariff Act.

(ii) Schedule to the Tariff Act prescribes rate of duty but duty is wholly exempted.

Contingency (i) need not be provided for as it is clear beyond any doubt that duty is not payable and will not be paid. Contingency (ii) is one in which it is recognizable that duty payable according to Schedule to the Tariff Act, is not to be paid, unless the particular notification gives an option to the manufacturer to avail or not to avail the benefit of the exemption and he has chosen not to avail it.

In such a case, he is required to pay duty and. if goods are cleared, it can be deemed that duty has been paid. Contingency (iii) is not relevant since the goods not cleared could not have been used by another. It is difficult to accept that the Rule-making authority intended to protect the Revenue only against clandestine clearances for in such cases it is unlikely that the actual user would have shown use of such clandestinely cleared goods.

(i) The words "inputs are clearly recognizable as being not duty paid" comprehend all inputs on which it is patent that duty has actually not been paid for any reason i.e. rate of duty is stated to be nil rate in the Schedule to the Tariff Act, or the inputs are wholly exempt from duty or for any other reason (all the three Government orders).

(ii) The words "charged to nil rate of duty" must be understood not in the narrow sense of nil rate of duty being stated for the inputs in the Schedule to Tariff Act, but in the general sense that actually no duty has been, demanded or paid. The case of inputs wholly exempt from duty would also be attracted (Government order dated 7-4-1986 and 30-5-1988).

(iii) The words "wholly exempt from duty" would take in cases of unconditional exemption of whole of the duty payable and also conditional exemption of such duty where conditions are shown to have been satisfied.

21. An incidental question arising in relation to cases of conditional exemption is, on whom, is the burden of establishing the fact-situation In CCE v. Decent Dyeing Co. 1990 (45) E.L.T. 201 (S.C), the Supreme Court dealt with the case of a notification granting exemption of so much of the duty as is in excess of the duty on base yarn if not already paid plus Rupees ten per Kg. The assessee had disclosed the names of traders from whom he made the purchases of base yarn and names of manufacturers and also enclosed copies of relevant record. The Revenue did not verify the facts and proceeded on the basis that it was for the assessee to prove actual payment of base yarn duty. The Supreme Court held this was not a proper approach. It was not as if the assessee alone should have special knowledge of the fact of payment of duty. It was therefore for the Revenue to prove non-payment. This principle has been followed by the Tribunal in Kapsons Electro Stampings -1988 (37) E.L.T. 323 and Rapsri Engineering Industries Pvt.

Ltd. - 1989 (43) E.L.T. 577. In Upper India Steel Manufacturing and Engineering Co. Ltd. v. Union of India -1990 (49) E.L.T 22 (P & H), the Punjab and Haryana High Court observed :- "It has been stated that the notification P-3 is in the nature of an exception. The normal rule of construction is that if a person wants to avail of the exception, it is for him to make out a case showing that he is covered by the exception. The issuance of the notification Annexure P-3, dated April 7, 1986, and the prescription of the three exceptions reproduced above, clearly indicates that the matter has not been left to presumptions. It is regulated by positive rules, inter alia, by notification issued under Rule 57G(2). The petitioner in order to avail of the deemed credit has to take a stand in the various returns which are required to be filed.

It is for the department to verify the stand thus taken and either to allow or contest the same. I am of the considered view that there is no general rule that the burden is on the department to show that a certain input is recognizable as being non-duty paid or charged to nil rate of duty. In my view, the initial burden is on the manufacturer claiming deemed credit to take a definite stand with regard to a certain input. It is then open to the department to accept that claim or to contest the same".

The above observations have been explained by the appellate Division Bench of the Court in the judgment reported in 1995 (75) E.L.T. 735 (P & H) in the following words :- "The grievance of the appellant is that the learned single judge has placed the burden on the manufacturer is totally misconceived.

According to the learned single judge, the manufacturer has to take a definite stand. We find that the view taken by the learned single judge is wholly unexceptionable".

The Punjab and Haryana High Court was not, in the above case, dealing with a notification exempting goods from excise duty subject to conditions.

22. A manufacturer who seeks the benefit of the Government order issued under proviso to Rule 57G(2) must naturally say so, that is, take a definite stand and to the extent necessary produce documents and marshal arguments and logic to show that he is so entitled to the benefit of the order. He should also take a definite stand that his case does not fall within the exceptions enumerated in the explanation to the Government order. Where there is an exemption notification, and if ex facie the exemption is attracted in regard to the inputs used by him, he should take a stand as to why the notification is not attracted. It is then for the Revenue to verify the claim by conducting such enquiry as is necessary, and pass appropriate orders. Where the exemption notification is conditional, the assessee has to take a stand that the conditions are not satisfied in the instant case and it is for the Revenue to conduct enquiry and arrive at a correct conclusion. The first exception in the Government order dated 7-4-1986 is where the credit has already been availed of under any Rule or notification. To show that credit has not been taken, he has to rely on documents in his custody or power. If the reasons show that he has already availed credit, it will be for the Revenue to show that the claimant has already availed credit. The second exception is where the inputs are recognizable as being non-duty paid or charged to nil rate of duty. In this regard also, the assessee has to take a stand and it is for the Revenue to satisfy itself that the exception is not attracted. The third exception, turns specifically on the existence of documentary evidence to show that the reduced duty has been paid and it is for the assessee to produce the documents and prove the positive fact

required to be proved. But, basically it is for the person who sets up an exception to prove it.

23. The mere existence of an exemption, notification is not sufficient to show that the input is wholly exempt from duty or clearly recognised as not being duty paid or charged to nil rate of duty . This consequence may automatically follow in the case of unconditional exemption once it is shown that the inputs in question are attracted by the notification. In the case of conditional exemption, unless it is shown that all the conditions are satisfied in a given case, it cannot be stated with certainty that the inputs are wholly exempt or are clearly recognizable as non-duty paid or charged to nil rate of duty.

It is therefore for the Revenue by conducting necessary enquiry (and it shall be the duty of the assessee to cooperate) to see if the conditions are satisfied and the exemption notification has fully taken effect in regard to the inputs in question. Revenue cannot be heard to say that it is for the assessee to show that the conditions are not satisfied and since he had failed to do so, the exemption must be regarded as having taken effect. It has to be appreciated that in the generality of such cases, the person who clears the inputs is not the assessee, but the manufacturer of the inputs and the assessee might not have purchased the same directly from the manufacturer but might have purchased from the Bazar. When the controversy arises in the appellate forum it is for the Revenue to satisfy the appellate forum that the conditions are satisfied in the given, case and that the exemption has taken effect.

24. It is contended for the assessee that even if the inputs used by them were not duty paid on account of exemption, if the inputs were manufactured from duty paid goods, they are entitled to deemed credit on their inputs. The provision in Rule 57A definitely requires that a person, in order to be entitled to credit on duty paid on specified inputs brought to his factory, must use the inputs in or in relation to the manufacture of specified final products. If the inputs are exempted from duty, they are not duty paid and hence no credit is admissible.

Credit of duty paid not on inputs of the assessee but on raw materials by using being which the inputs are manufactured may be admissible to the manufacturer

of inputs. No credit can be enjoyed by the user of the inputs, of duty not paid on the inputs, but on the raw materials of the inputs. Duty paid on the raw materials of inputs cannot be credited to the account of purchaser of the inputs. Assessee in these cases cannot seek credit for duty paid not on their inputs but on raw materials for the inputs. Payment of duty down the line at some earlier stage cannot go to the benefit of the assessee.

[Appeal E. 72/88]. - The appellant produces "stranded wire" from steel wire. There is no doubt duty was not paid on steel wire manufactured by the supplier on account of exemption under Notification No. 208/83 and therefore Government order dated 7-4-1986 is not attracted. But the Revenue has to cross another hurdle by showing that conversion of steel wire into stranded wire is "manufacture" and stranded wire is an excisable article within the meaning of Section 2(f) of the Central Excises and Salt Act, 1944. It has been held in Aluminium industries Ltd. v. Collector of Central Excise -1987 (30) E.L.T. 442 (T) that stranding of wire does not amount to manufacture. The appeal has to be allowed on this ground.

[Appeal E. 384/88]. - Respondent purchases steel wire from units redrawing the same from duty paid wire rod which is exempt from duty under Notification No. 208/83. Respondent uses the steel wire to manufacture bolts and nuts. The input used by the respondent definitely enjoyed duty exemption and hence the case attracts the second exception in the Government order dated 7-4-1986. Collector (Appeals) was in error in holding that the benefit which respondent would have enjoyed had he purchased the steel wire from the market cannot be denied to him.. The order of the Collector (Appeals) has to be set aside and the appeal by Revenue has to be allowed.

[Appeal No. E. 221/89]. - Appellant manufactures weld mesh from steel wire manufactured out of duty paid billets. Steel wire is wholly exempt from duty. The case is attracted by the second exception to the Government order. Hence appeal has to be dismissed.

[Appeal E. 190/90]. - Respondent manufactures automobile pistons, gudgeon pins and piston rings from unwrought Aluminium Alloy ingots, unwrought Aluminium ingots, unwrought Aluminium castings etc procured from smelters who

manufacture the same from duty paid Aluminium. By Notification No. 100/88, unwrought Aluminium, alloyed or not and castings were wholly exempt from duty if manufactured from goods falling under Chapter 76 or 83 on which duty had been paid. The first proviso to the notification, stated that such exemption shall not be applicable, if the goods were manufactured by producers who produce the same from Bauxite or Aluminium or both, whether in the same factory or different factories in India. Thus, it is seen that the exemption on respondent's inputs was a conditional exemption. In order that the inputs are to be regarded as falling within the second exception to the Government orders dated 2-11-1987 or 20-5-1988 the question whether the manufacturer of the inputs satisfied the conditions referred to above imposed by Notification No. 100/88 has to be investigated. If the manufacturer satisfied the conditions and had availed of the exemption, the inputs have to be regarded as "wholly exempted" from duty and as such "clearly recognizable as being non-duty paid" or "charged to nil rate of duty" and hence respondent would not be entitled to deemed credit for the period from 1-3-1988 to 19-3-1988 and from 20-5-1988 to 12-9-1988. If, on the other hand, the manufacturer could not and did not avail the benefit of Notification No. 100/88, respondent would be entitled to deemed credit. The appeal has to be allowed and the case remanded and the Cross-objection has to be dismissed.

[Appeal No. E. 252/90]. - Appellant manufactures parts and accessories of Arms and Ammunition under Chapter 93 from purchased unwrought Aluminium Alloy ingots which were manufactured from Aluminium ingots.

The question is whether the manufacturer of unwrought Aluminium Alloy ingots could avail or availed the benefit of Notification No. 100/88.

Without examining this aspect the lower authorities were in error in holding that the inputs were wholly exempt from duty and that the appellant was not entitled to deemed credit. The appeals has to be allowed and the case has to be remanded for fresh consideration.

[Appeals E. 125/91, E. 130/91 and E. 208/92]. - These appeals cover periods prior and subsequent to 20-5-1988. Appellant mines Bauxite Ore, manufactures unwrought Aluminium (T.I. 76.01) out of the ore and uses the unwrought

Aluminium to manufacture Aluminium sheets falling under T.L 76.05. After clearing Aluminium sheets on payment of duty, the same are sent to Government Mint where they are used for punching coins. The remnants of sheets taken back by the appellant as scrap are melted and made into unwrought slabs, ingots or billets which, in turn are used to manufacture wrought products such as sheets etcetera. The Assistant Collector held that since scrap was wholly exempt from duty, the user of the scrap is not entitled to deemed credit as scrap is clearly "not duty paid". The Collector (Appeals) set aside the order of the Assistant Collector in relation to a particular period as barred by time. Revenue challenges this point of the order in Appeal E. 125/91.

Since the bar of time has been correctly invoked, Appeal E. 125/91 has to be dismissed. The period involved in Appeals E.130/91 and 208/92 is after 1-3-1988 and also after 20-5-1988. In view of our finding on the interpretation of the exceptions in the three Government orders, if the inputs are wholly exempt from duty, deemed credit is not admissible.

The scrap input is clearly and wholly exempt from duty. That being so, appellant is not entitled to deemed credit. Appeals E. 130/91 and 208/92 are liable to be dismissed.

[Appeal E. 4019/91] - Copper Alloy ingots used by the appellant as input were procured from the manufacturers who availed exemption.

Therefore appellant is not entitled to deemed credit. The appeal is liable to be dismissed.

(a) Appeal E. 72/88 is allowed and the order impugned in the appeal is set aside.

(b) Appeal E. 384/88 is allowed and the order impugned in the appeal is set aside.

(d) Appeal E. 190/90 is allowed and the order impugned in this appeal is set aside. The case is remanded to the jurisdictional Assistant Commissioner for fresh decision in the light of the observations in this order. Cross-objection is dismissed.

(e) Appeal E. 252/90 is allowed and the order impugned in the appeal is set aside. The case is remanded to the jurisdictional Assistant Commissioner for fresh decision in the light of the observations in this order.

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