CASE NO.:
Appeal (civil) 4090 of 1995

PETITIONER:
COLLECTOR OF CENTRAL EXCISE, MEERUT

Vs.

RESPONDENT:
MODI RUBBER LTD.

DATE OF JUDGMENT: 09/10/2001

BENCH:
B.N. Kirpal, N. Santosh Hegde & P. Venkatarama Reddi

JUDGMENT:

P.VENKATARAMA REDDI, J.

In this appeal filed under Section 35 L (b) of the Central Excise and Salt Act by the Revenue, the order of CEGAT dated 21.2.1994 in its final order No. 73/94-C is under challenge. By that order, the Tribunal rejected the Departments appeal following inter alia its earlier order in Vikrant Tyres Ltd. Vs. CCE Bangalore (1988 (38) ELT 301), the appeal against which filed by the Revenue was dismissed by us on 13.9.2001 on the ground that it became infructous in the light of subsequent event.

Let us now take stock of the material facts giving rise to this appeal. The respondent herein is manufacturer of tyres, tubes and flaps. The respondent was availing the proforma credit of duty on inputs viz. Synthetic rubber, carbon black and rubber processing chemicals. The proforma credit on those inputs to the tune of Rs.62,53,023/- for the period 1.3.1984 to 14.3.1986 and Rs.5,64,236/- for the period November 1984 to February 1986 utilised in respect of tyres, tubes and flaps cleared at nil rate of duty was reversed/debited under protest, presumably at the instance of Excise Authorities. Later, the respondent claimed refund thereof. The case of the respondent was that the Notification No.95/79 (as amended from time to time) nowhere prescribed that the proforma credit of duty paid on the inputs was available only in relation to duty-paid outputs. The respondent contended that the relevant Notification did not envisage any link between inputs and outputs. By a reasoned order dated 11.12.1989, the Assistant Collector of Central Excise, Meerut, rejected the assessees claim for refund. He held that the assessee was not entitled to avail of the benefit of proforma credit on the inputs used in the manufacture of final products i.e. tyres, tubes and flaps which were cleared at nil rate of duty. The Assistant Collector concluded that the proforma credit was correctly debited/reversed by the assessee and, therefore, the question of refund did not arise. In this context, the following crucial finding in the order of the Assistant Collector deserves to be noted for the proper appreciation of the core issue involved:-

In the present case, on examination of record, it is noticed that during the relevant period (for which refund has been preferred), the final product, namely, tyres, tubes and flaps were cleared by the party at nil rate of duty as the same were cleared as original equipment or

ADV.

The appeal filed by the assessee against the said order was allowed by the Collector (Appeals) based on the Tribunals decision in Vikrant case (supra). Aggrieved thereby, the department filed an appeal before CEGAT. The CEGAT, by the impugned order, rejected the appeal, after quoting in extenso its earlier order in Vikrant Tyres case. In that case, the Tribunal while construing the Notification No 95/79 held that the Notification did not have any condition that there should be nexus between the inputs and outputs. According to the Tribunal, the only question that can arise while examining the question of eligibility to this Notification is whether the inputs described in column (3) have been used in the outputs described in column (5). The Tribunal further observed: the learned JDRs argument that goods mentioned in column (5) (final products) are only those which pay duty is not supported by the wording of the Notification. No condition regarding payment of duty is contained anywhere in the Notification. The correctness of this view taken by the CEGAT is being assailed in this appeal.

In order to rationalise the overall impact of the duties of excise on the cost of the final manufactured product, the Central government framed certain rules such as Rule 56A and issued certain Notifications in exercise of the powers conferred on it under sub-rule (1) of Rule 8 of the Central Excise Rules. For instance Rule 56A which is a pre-cursor to the MODVAT scheme now in vogue provided for allowance of credit of duty already paid on the materials or component parts used in the manufacture of finished excisable goods subject to certain conditions. The Notification with which we are concerned in the present case is yet another instance of Central Governments endeavour to reduce the duty otherwise payable on the finished products. That Notification is No. 95/83 dated 1.3.1983. It provides for input duty relief to specified goods. The Notification is extracted hereunder:-

In exercise of the powers conferred by sub-rule (1) of rule 8 of the Central Excise Rules, 1944, and in supersession of the notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 95/79-Central Excises, dated the 1st March, 1979, the Central Government hereby exempts excisable goods of the description specified in column (5) of the Table hereto annexed (such goods being hereinafter referred to as final products) and falling under such Item No. of the First Schedule to the Central Excises and Salt Act, 1944 (1 of 1944), as is specified in the corresponding entry in column (4) of the said Table from so much of the duty of excise leviable thereon under the said Act, as is equivalent to the duty of excise leviable under the said Act, or the additional duty leviable under the Customs Tariff Act, 1975 (51 of 1975), as the case may be, already paid on the goods of the description specified in the corresponding entry in column (3) of the said Table (such goods being hereinafter referred to as inputs) and falling under such Item No. of the said First Schedule as is specified in the corresponding entry in column (2) of the said Table:

Provided that

(i) the inputs specified in column (3) of the said Table against a particular serial number in column (1) thereof are used in the manufacture of the final products specified in the corresponding entry in column (5) of the said Table against the said serial number;

(ii) in relation to the exemption under this notification, the procedure set out in rule 56A of the aforesaid rules is followed.

The columns in the Table and relevant items therein are given below :

S.No.	Item No. of the said First Schedule	Description of inputs	Item No. of said First Schedule	Description of final products
(1)	(2)	(3)	(4)	(5)
19	16AA	Synthetic rubber	16	Tyres, tubes & flaps
20	64	Carbon black	16	Tyres, tubes & flaps
21	65	Rubber processing chemicals	16	Tyres, tubes & flaps

Be it noted that this Notification dated 1.3.1983 was issued in supersession of the Notification No.95/79 dated 1.3.1979. Reference has been wrongly made to this Notification of 1st March, 1979 both by the Assistant Collector and the Tribunal, as if that is the Notification applicable for the relevant period. However, it must be mentioned that the Notification No. 95/79 is substantially similar to the Notification dated 1.3.1983 except with this difference, i.e., the following proviso was omitted :-

(ii) where the duty of excise leviable on any final product is less than the amount of duty of excise (including special duty of excise aforesaid) of the amount of additional duty aforesaid, as the case may be, paid on the inputs used in the manufacture of such final product, the extent of exemption shall be restricted to the duty of excise leviable on such final product.

One more point of detail to be referred to at this juncture is that the inputs, namely, synthetic rubber, carbon black and rubber processing chemicals did not find place in column (3) of the table appended to the Notification No 95/79, but they were subsequently added by means of Notification No. 58/82 dated 28.2.1982. This Notification No. 95/79 (as amended from time to time) was ultimately superseded by the Notification No. 95/83 dated 1.3.1983. It is that Notification which is relevant to the period for which the claim has been preferred by the assessee. It is common ground that the answer to the controversy arising in the present case depends on the interpretation of that notification.

The interpretation of the Notification No. 95/83 does not present any difficulty. The Notification provides for exemption of excisable goods described in column (5) of the Table (extracted supra), referred to as final products. The extent and amplitude of exemption is set out in clear terms. The exemption is to the extent of duty of excise already paid on the goods of the description specified in column (3) of the Table, that is to say, on inputs. Proviso I in explicit terms enjoins that the inputs specified in column (3) of the Table should have been used in the manufacture of final products specified in corresponding entry in column (5). What is exempted is so much of the duty of excise leviable thereon. The expression thereon is referable to excisable goods described in column (5) known as final products. The extent to which it is exempted is limited to the duty of

excise leviable and already paid on the goods of the description specified in column (3) known as inputs. In other words, the duty paid on the inputs is adjusted against the duty payable on the final products manufactured out of the said inputs and the balance only is liable to be paid on the finished products. Thus, the excise duty payable on the final products or outputs has inextricable nexus with the duty paid on inputs for which the credit of duty is allowed in accordance with the procedure laid down in Rule 56A. The exemption Notification pre-supposes that the duty is otherwise payable on the finished products specified therein. There is no question of applying this Notification to the finished products (in this case tyres, tubes and flaps) if they are not subjected to any duty.

It is contended that the omission of clause (ii) of the proviso contained in the earlier Notification No. 95/79 is significant. It is pointed out that the extent of exemption was in restricted terms as it was made clear that it could not exceed the amount of duty paid on the inputs. That clause having been removed in 1983, the exemption should be construed widely and without regard to the question whether the inputs go into the manufacture of dutiable or non-dutiable finished products. We find it difficult to accept this contention. The omission of provision similar to clause (ii) of the proviso to Notification No. 95/79 does not, in our view, advance the case of the respondent. Even the words employed in the opening part of the Notification No. 95/83 are sufficient enough to take care of a situation which was provided for expressly in the proviso to Notification No. 95/79. We, therefore, see no force in this contention.

Having thus understood the true scope and purport of the Notification, we shall proceed to consider whether the claim of the respondent assessee is sustainable. We have already adverted to the finding of the Assistant Collector that during the relevant period for which refund had been preferred, the final products were cleared by the assessee at nil rate of duty. Thus, during the crucial period, none of the inputs for which proforma credit had been taken by the assessee went into the production of dutiable goods i.e., tyres and tubes. This finding remains unrebutted. If so, in our view, the respondent cannot take advantage of the Notification No. 95/83 and claim to avail of the credit of input duty during that period. Once the entire inputs (for which the credit has been claimed) are utilised in non-dutiable tyres, the credit lapses to that extent. There is no difficulty in pin-pointing that all the inputs were utilised only in the manufacture of non-dutiable finished products because no dutiable tyres and tubes were cleared at all during the relevant period. If so, the respondent cannot derive any benefit under the Notification No.95/83. The Notification issued under Rule 8 (1) deals with duty exemption on final products. The exemption is worked out with reference to the duty paid on the inputs by adjusting the input duty against the duty payable on final products. Such adjustment is not possible when no duty at all is payable on the finished product. Input duty relief and the duty payable on finished goods are thus inter-linked. There is nothing in the notification which enables input duty credit to be maintained and availed of merely because the inputs are used in the manufacture of specified finished products. The further premise is that the finished products are such that are subjected to duty. Any other interpretation would confer an unintended benefit on the assessee. The idea underlying the Notification No. 95/83, as already noted, is to check or minimise the cascading effect of duties which are otherwise payable at various stages. It could not be the underlying intention of notification to grant the relief of duty on inputs as well as the corresponding outputs. Exemption notification cannot be unduly stretched to produce unintended results in derogation of the plain language employed therein.

The arguments of learned senior counsel for the respondent have throughout proceeded on the basis that there need not be correlation between the inputs and the finished products for claiming credit of duty paid on the inputs. Strong reliance is placed to support this argument on the decision of this Court in H.M.M. Ltd. Vs. Collector of Central Excise, New Delhi (1996, 87 E.L.T., 593). While construing a somewhat similar

notification No. 201/79, it was observed therein :-

The rules do not require any exact correlation between the inputs and the finished products for claiming credit for the duty ;paid on the inputs. It is not a condition-precedent for claiming set-off that the manufacturer must prove that

(a) the credit was taken in respect of inputs; and that

(b) these very inputs were utilised in the manufacture of the goods on which duty is payable.

Rule 2 merely provides that the manufacturer may take credit of the duty already paid on the inputs and utilise such credit for payment of duty of excise on the manufactured goods. The exact correlation of inputs with the manufacture of the goods is not contemplated by this rule.

(emphasis supplied)

This Court relied on Rules 9 and 10 appended to the notification to infer the absence of correlation between the inputs and the finished goods. It was observed at paragraph 9 :-

All these rules really go to show that there was no requirement of actual utilisation of the inputs in the manufacture of the goods for the purpose of claiming set-off of duty paid on the inputs against the duty payable on the goods manufactured by the manufacturer.

(emphasis supplied)

The ratio of the decision will best be understood by noting the illustration given therein indicating the scope of controversy :-

The manufacturer (Respondent) purchases 100 tons of barley malt on which the duty paid is Rs.10,000/-. By using the said 100 tons of barley malt, the respondent manufactures one thousand tons of Horlicks. Out of this one thousand tons, it clears 250 tons of Horlicks from the Rajahmundry factory on paying duty. The remaining 750 tons is sent to the factory situated at Bangalore without paying duty under a bond. The 750 tons is put in unit containers and packages at the Bangalore factory and cleared from there on payment of excise duty. According to the appellant, he is entitled to take credit for the entire duty of Rs.10,000/- (paid on 100 tons of barley malt) from out of the duty payable on 250 tons of Horlicks cleared from Rajahmundry factory, whereas according to the Revenue, since the quantity cleared at Rajahmundry on payment of duty is only 1/4th of the total quanity manufactured using 100 tons of barley malt, the appellant is entitled to take credit of only Rs.2,500/- against the duty payable at Rajahmundry. Revenue also says that the respondent is not entitled to take credit of balance of Rs.7,500/- (duty paid on 75 tons of barley malt) from out of the duty paid on 750 tons at Bangalore. The question is who is right?

It is obvious that in that case, duty was payable on the entirety of finished product, namely, Horlicks, whether cleared at Rajahmundry factory or despatched to Bangalore factory under a bond. The controversy arose as

to the point of time and the quantity in respect of which the input duty credit could be taken. In the instant case, as already noted, no duty was liable to be paid on any part of the finished goods viz. tyres and tubes cleared during the relevant period. The issue of correlation on one-to-one basis does not really arise for consideration here. The question of correlation has some importance where excise duty is payable on part of the goods and no duty is payable on the remaining part. The issue in the present case is quite different, the issue being whether the credit of duty on inputs could be availed of notwithstanding the fact that the inputs were utilised only in the manufacture of duty-free finished products. That issue has to be answered against the respondent - assessee in the light of the foregoing discussion. The decision in H.M.M. Ltd. Case (supra) does not come to the aid of the respondent. On the other hand, the underlined portions in the passages extracted supra would indicate that the interpretation placed by the Court on the notification is no different.

We may add that it has never been the case of the respondent that there was reasonable likelihood of the credit being set-off against the dutiable finished products in the near future. In fact, contentions of the parties have not focussed on the modalities/procedure of claiming credit on inputs in the given situation and the maintainability of refund applications. We need not therefore go into these procedural aspects.

The decision of the Delhi High Court in Good Year India Ltd. Vs. Union of India (1990, 49 ELT 39) and that of the Bombay High Court in Jaysynth Dyechem Pvt. Ltd. Vs. Union of India (1991, 51 ELT 246) referred to by the learned counsel are not of any help to the respondent. The High Court of Delhi after referring to the Notification No. 201/79 (which was interpreted by this Court in H.M.M. case, supra) laid down the proposition as follows:-

Under the present notification, a manufacturer is required to take proforma credit of the duty, paid on inputs, as soon as, the inputs are brought into the factory. This credit is then utilised and the manufactured goods are cleared and is not linked to any particular item of the manufactured product. The language of the new notification, does not require the inputs to be correlated with end-product.

It was then observed :-

In fact, the scheme provides that the credit can be utilised for payment of duty, against any excisable products, that are brought from the factory. No debit can be claimed after the credit has been taken on goods, brought into the factory. Once raw materials enter the factory of petitioner company, credit is to be taken in accordance with the procedure, prescribed in the Rules, without any correlation to the end product. The credit can be utilised by petitioner, for the payment of duty on any goods, for which credit is taken. These goods need not be exempted goods, but will be those goods, on which duty is payable under the Act.

Far from coming to the aid of the respondent the view expressed by the Delhi High Court makes it clear that the question of utilising the credit on inputs would arise only where the duty is payable on finished product.

In the case of Jaysynth Dyechem Pvt. Ltd. Vs. Union of India (1991, 51 ELT 246), the Bombay High Court was construing an exemption notification in which a proviso similar to the one which is contained in Notification No. 95/83 was construed by the High Court. The High Court held that the said proviso deals with the procedure to be followed in availing

of set off of countervailing customs duty paid on imported intermediaries, but does not import the substantive provision of Rule 56A so as to defeat the exemption. It is not necessary, in the present case, to go into the question of interplay of Notification No. 95/83 and Rule 56A. The view taken by us does not rest on any substantive provision of Rule 56A.

For the reasons aforesaid, we are of the view that the impugned order of the CEGAT is erroneous in law and liable to be quashed.

However, before parting with the case, it is necessary for us to advert to the preliminary objection raised on behalf of the respondent. It is contended that in the instant case the appeal under Section 35-L(b) does not lie for the reason that no question arises in the present appeal which has a relation to the rate of duty of excise or to the value of goods for purposes of assessment within the meaning of clause (b) of Section 35-L. Reference is made to the decision in Navin Chemicals Mfg. & Trading Co. Ltd. Vs. Collector of Customs (1993, 68 ELT 3). In that case, this Court pointed out that the question to be decided must have direct and proximate relationship to the rate of duty and to the value of goods for the purposes of assessment. The contention is that no such question is involved in the present case. However, the following observations in the same case deserve notice :

A dispute as to the classification of goods and as to whether or not they are covered by an exemption notification relates directly and proximately to the rate of duty applicable thereto for purposes of assessment.

Based on the above dicta, it is possible to contend, as has been contended before us, that the question as to rate of duty is involved in the present case. However, we need not express any opinion on this aspect. Notwithstanding the initial omission on the part of the appellant in invoking the jurisdiction of this Court under Article 136, at least by way of abundant caution, the learned Additional Solicitor-General appearing for Union of India did make an oral prayer to treat this appeal as one filed under Article 136 as well. A formal application in this behalf has been filed after the conclusion of the arguments in the case. The respondent has filed a reply opposing the application. We are of the view that in the interests of justice and in order to put an end to this long-standing litigation, we deem it just and proper to allow the application. It is not advisable at this stage after a lapse of six years to reject the appeal as not maintainable and relegate the appellant to the course of seeking remedy by way of reference to the High Court, assuming that the appeal under Section 35-L(b) does not lie. Incidentally, it may be pointed out that in Commissioner of Central Excise & Customs vs. Venus Castings (P) Ltd. (2000 4 SCC 206), this Court did allow such application at the time of hearing of appeal. We do not think that there is anything in the decisions of this Court in Steel Authority of India Ltd. Vs. Collector of Central Excise [1996 (82) ELT 172] and Ferro Alloys Ltd. Corporation Vs. Collector of Central Excise [1996 (82) ELT 173] which stands in the way of the application, though belated it is, being allowed. In the first case, the appeal was rejected at the admission stage on the basis of concession and the appeal in the second case was also rejected at the threshold itself. Apparently, no request was ever made to permit the appellant to invoke the jurisdiction of this Court under Article 136 of the Constitution.

The appeal is allowed and the impugned order of CEGAT is set aside. Parties to bear their own costs.

..J
(B.N. Kirpal)

..J
(N.Santosh Hegde)

..J
(P.Venkatarama Reddi)

October 09, 2001.