CASE NO.:
Appeal (civil) 8529-8531 of 2001

PETITIONER:
M/s Modipon Fibre Company,Modinagar, U.P.

RESPONDENT:
Commissioner of Central Excise,Meerut

DATE OF JUDGMENT: 25/10/2007

BENCH:
S. H. Kapadia & B. Sudershan Reddy

JUDGMENT:
J U D G M E N T

CIVIL APPEAL NOS. 8529-8531 OF 2001
with
Civil Appeal Nos. 2008-2010 of 2002

KAPADIA, J.

Delay condoned.

2. These cross appeals are filed by M/s Modipon Fibre Company and the Department under Section 35L of Central Excise Act, 1944 against order dated 3.7.2001 passed by the Customs Excise & Gold (Control) Appellate Tribunal ("CEGAT") holding that the assessee was entitled to deduction in respect of turnover tax ("TOT") only at 0.5% and not at 2% as claimed.

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3. The appellant-assessee is engaged in the manufacture of Nylon and Polyester Yarn which is manufactured in its factory in U.P. and cleared to its various Depots situated all over India including Surat from where the Yarn is sold to dealers. The assessee used to pay duty during the relevant period, at the time of removal of yarn, on the basis of the depot sale price, after claiming permissible deductions under section 4 of the Central Excise Act, 1944 ("1944 Act"). One such deduction was TOT in respect of yarn cleared and despatched to Surat depot from the factory of the assessee in U.P.. In respect of such despatch, the assessee claimed deduction at 2% on account of TOT. This was on the footing that the Government of Gujarat vide Notification dated 19.10.1993 had exempted sale of Yarn of all kinds by a registered dealer to a special manufacturer of processed Yarn or to an eligible unit to the extent to which the rate of TOT exceeded 0.5% of the total turnover. This was provided the specified manufacturer furnished to the selling dealer a certificate in Form 26 and if the processed Yarn stood sold within the State of Gujarat.

4. On 19.3.1999, a show cause notice was issued by the Department to the assessee in which it was alleged that the assessee had filed its price declaration under Rule 173-C in regard to the goods transferred to its depot in Surat for sale therefrom; that in the said price declaration, the assessee had indicated variety-wise ex-depot sale price, amount of various deductions for sales tax, freight, discount, TOT, excise duty etc.; that in the price declaration, the assessee had also declared the assessable

value arrived at by deducting the abovementioned elements from ex-depot sale price; that, however, in the price declaration, the assessee had suppressed from the Department the fact that there were two types of sales, one in the backward area as notified by the Gujarat Government and the other in areas other than the backward area; that the assessee had failed to declare that the TOT was leviable on sale of goods during the period March, 1994 to March, 1997 at the dual rate of 0.5% (for sales in backward areas) and at 2% (for sales in areas other than backward areas) respectively. According to the show cause notice, the assessee had claimed deduction for TOT at 2% from ex-depot sale price in order to arrive at the assessable value; that although sales stood effected from the depot at two different rates, the assessee claimed deduction for TOT at the full rate of 2% in respect of entire clearances of Nylon Yarn sent to its Surat depot without mentioning that in the State of Gujarat on account of Notification dated 19.10.1993 two rates of TOT existed and, therefore, according to the show cause notice, the assessee had claimed wrongfully the deduction at a higher rate of 2% as against the rate of 0.5%. According to the show cause notice, since the assessee had deducted TOT at a higher rate to arrive at the assessable value, it had lowered the assessable value to the extent of 1.5% and, as such, a demand for difference was made on the assessee. According to the show cause notice, in the peculiar facts of this case, there should have been different assessable values in respect of Normal Areas Sales and Backward Areas Sales, particularly when the rate of TOT was different for the two types of sales; that in the case of Normal Areas Sales, the assessable value should have been arrived at allowing a deduction of 2% on account of TOT and in the case of Backward Areas Sales, the assessable value should have been arrived at by deduction of 0.5% on account of TOT. However, according to the Department, in the price declaration filed by the assessee, the assessee has claimed deduction at 2% on account of TOT in respect of the entire clearance and thus, according to the Department, the assessee had claimed wrongfully a larger deduction than what he was entitled to. Therefore, according to the show cause notice, the difference between the amount of TOT actually paid should have formed part of the assessable value and accordingly, the Department called upon the assessee to pay excise duty on the differential value. According to the Department, the assessee had wrongfully claimed deduction on account of TOT; that the assessee had claimed wrongfully deduction on the entire clearances at 2%; that the assessee had claimed in the price declaration deduction on account of TOT at 2% when it had actually paid TOT @ 0.5% in respect of backward area sales and, to that extent, the assessee had evaded excise duty by wrongfully claiming excess amount of deduction on the amount of deduction on account of TOT as compared to what was actually paid by it. The demand has been confirmed by all the authorities. Hence, these civil appeals.

5. Mr. S.K. Bagaria, learned senior counsel, appearing on behalf of the assessee, submitted that the word "payable" in section 4(4)(d)(ii) is a function of charging duty. If there is a charge, payability exists. If there is a charge, liability exists. That, levy of duty is the legislative function. The first step is liability, whereas the second step is when the tax becomes due. On completion of assessment, the tax becomes due. Till such assessment,

liability may exist but tax does not become due till quantification takes place. According to the learned counsel, the expression "payable" in section 4(4)(d)(ii) is "time related concept" as the assessable value has got to be determined at the time of clearance/removal. Learned counsel submitted that, therefore, the word "payable" in section 4(4)(d)(ii) should not be given a notional meaning. According to the learned counsel, assessable value is a matter relatable to chargeability. That, liability to be assessed is not the same as payability as under the 1944 Act, "payability" has to be decided at the time of clearance of goods and, therefore, from the ex-depot price, assessee was required to deduct under section 4(2) the cost of transportation as well as elements enumerated in section 4(4)(d)(ii). According to the learned counsel, on the date of the clearance of the goods, it was not possible for the assessee to visualize as to how many sales would be Normal Area Sales and how many sales would be Backward Area Sales as it depended on eligibility of special manufacturers. According to the learned counsel, on the date of clearance, the assessee was only aware of the fact that the turnover tax was 2%. Therefore, there was no mis-declaration as alleged by the Department. According to the learned counsel, the assessee used to manufacture variety of yarns. The factory of the assessee was in U.P.. These different varieties of yarns were despatched from the factory in U.P. to various sales depot of the assessee all over India. One such sales depot of the assessee was in Surat. Learned counsel pointed out that under the exemption Notification sales in backward areas were subject to certain eligibility criteria and compliance of the procedure mentioned in the exemption Notification issued by the Gujarat Government in 1993. According to the learned counsel, it was impossible for the assessee to have visualized as to how many dealers in Surat in future would be entitled to the benefit of exemption Notification, particularly at the time when the yarn was cleared at the factory gate of the assessee in U.P. and, therefore, according to the assessee, eligibility of the dealers in Surat, who were liable to pay TOT constituted post-clearance event. According to the learned counsel, such post-clearance events are assumptions; that chargeability of excise duty cannot depend on such assumptions; that liability did not depend on assessment as it is fixed ex-hypothesis and, consequently, according to the learned counsel, the assessee was right in claiming deduction on account of TOT at 2% as that was the only rate which existed on the date when the goods were cleared at the factory gate. According to the learned counsel, at the time of filing the price declaration under Rule 173-C, the assessee had no means of knowing whether ultimately the TOT would be payable at 2% or at 0.5% and, therefore, the assessee was justified in claiming deduction of TOT at 2% being the prescribed tariff rate. According to the learned counsel, 0.5% was the concessional rate which depended upon fulfilment of conditions and eligibility criteria and, therefore, it was not possible for the assessee to visualize whether ultimately TOT would be payable at 2% or at 0.5%. According to the learned counsel, section 4 of the 1944 Act provides for deduction of tax "payable" and since TOT was normally payable at the prescribed rate of 2%, the assessee was justified in deducting TOT at 2% from the normal price in order to arrive at the assessable value at the factory gate (place of removal). According to the learned counsel for the assessee, in terms of section 4(4)(d)(ii) and the Explanation thereto, the concept of

"effective duty of excise" payable on the goods was restricted only to excise duty. It was not extended to sales tax/TOT payable and, therefore, the assessee was justified in deducting the TOT payable in the State of Gujarat at the normal prescribed tariff rate of 2% from the normal price of the yarn to arrive at the assessable value instead of deducting the concessional rate of TOT at 0.5% prescribed by Notification dated 19.10.1993, which exempted the processors in backward areas in the State of Gujarat from paying TOT at 2% and instead provided for payment of TOT at 0.5%. According to the learned counsel, under the above circumstances, at the time of sale, the assessee was not aware whether ultimately the TOT would be payable at 2% or at 0.5%, therefore, the learned counsel urged that the assessee was justified in claiming deduction for TOT at 2% from the normal price. In this connection, learned counsel placed reliance on the judgments of this Court in the cases of IDL Chemicals Ltd. v. Collector of Central Excise reported in (1997) 5 SCC 311; MRF Ltd. v. Collector of Central Excise, Madras reported in (1997) 5 SCC 104; J.K. Synthetics Ltd. v. Commercial Taxes Officer reported in (1994) 4 SCC 276; Harshad Shantilal Mehta v. Custodian and ors. reported in (1998) 5 SCC 1 and Associated Cement Companies Ltd. v. State of Bihar and ors. reported in (2004) 7 SCC 642.

6. Dr. R.G. Padia, learned senior counsel appearing on behalf of the Department, submitted that on the date when the assessee had filed price declaration under Rule 173-C, the assessee was aware of Notification dated 19.10.1993 issued by the Gujarat Government; that the assessee was also aware that there existed backward area sales and normal area sales on the date when it filed the price declaration; that the assessee had never informed the Department that there were two separate rates prevalent under the above Notification dated 19.10.1993; that if the amount of TOT paid by the assessee was less than the amount claimed as TOT deduction at the time of ex-factory clearances, the assessee should have paid the differential excise duty but the assessee never disclosed to the Department that there were two types of sales, namely, backward area sales and normal area sales and nor did the assessee inform the Department about the TOT actually paid by it and, therefore, Department was right in confirming the show cause notice dated 19.3.1999 for the period March, 1994 to March, 1997.

7. The question to be answered is the meaning of the word "payable" in section 4(4)(d)(ii). The said word is descriptive. One has to see the context in which the said word finds place in the aforestated section 4(4)(d)(ii). We quote hereinbelow section 4(4)(d)(ii), which reads as under:

"4. Valuation of excisable goods for purposes of charging of duty of excise.-

(1) to (3) xxx xxx xxx

(4) For the purposes of this section, -

(a) to (c) xxx xxx xxx

(d) "value", in relation to any excisable goods,-

(i) xxx xxx xxx

(ii) does not include the amount of the duty of excise, sales tax and other taxes, if any, payable on such goods and, subject to such rules as may be made, the trade discount (such discount not being refundable on any account whatsoever) allowed in accordance with the normal practice of the wholesale trade at the time of removal in respect of such goods sold or contracted for sale.

Explanation.- For purposes of this sub-clause, the amount of the duty of excise payable on any excisable goods shall be the sum total of \026

(a) the effective duty of excise payable on such goods under this Act; and

(b) the aggregate of the effective duties of excise payable under other Central Acts, if any, providing for the levy of duties of excise on such goods, and the effective duty of excise on such goods under each Act referred to in clause (a) or clause (b) shall be, -

(i) in a case where a notification or order providing for any exemption (not being an exemption for giving credit with respect to, or reduction of duty of excise under such Act on such goods equal to, any duty of excise under such Act, or the additional duty under Section 3 of the Customs Tariff Act, 1975 (51 of 1975), already paid on the raw material or component parts used in the production of manufacture of such goods) from the duty of excise under such Act is for the time being in force, the duty of excise computed with reference to the rate specified in such Act, in respect of such goods as reduced so as to give full and complete effect to such exemption; and

(ii) in any other case, the duty of excise computed with reference to the rate specified in such Act in respect of such goods."
(emphasis supplied)

As can be seen from the above quoted section, excise duty can be deducted if it had not been included in the invoice price. According to the Explanation, what is deductible is the effective rate of duty. Where any exemption has been granted, that exemption has to be deducted from the ad valorem duty. In other words, it is only the net duty liability of the assessee that can be deducted in computing the assessable value. The said principle stands incorporated in the Explanation. For example, if the assessee recovers duty at the tariff rate but pays duty at confessional rate, then excise duty has to be a part of the assessable value. Similarly, refund of excise duty cannot be treated as net profit and added on to the value of

clearances. There is no provision in section 4 of the 1944 Act to treat refund as part of assessable value. If excise duty paid to the Government is collected at actuals from the customers and if, subsequently, exemption becomes available, such excise duty which is not passed on to the assessee, would become part of assessable value under section 4(4)(d)(ii).

8. In the case of TOMCO v. Union of India reported in 1980 ELT 768 (Bom.) the assessees were manufacturers of vegetable product known as 'Pakav'. The prices were fixed by the Controller, who fixed the prices statutorily under the Vegetable Control Order, 1947. These prices were fixed by the Controller, net of any tax during the period March, 1969 to December, 1969. The prices so fixed by the Controller included the element of excise duty payable thereon. TOMCO contended that it was entitled to claim rebate of duty by virtue of Notification No. 6/62-CE dated 10.2.1962. TOMCO further contended that, it was declaring the assessable value after deducting the element of duty at 5% from the price fixed by the Controller and, therefore, entitled to deduct from the selling price the duty payable at 5% ad valorem. At this stage, it may be noted that TOMCO showed the deduction at 5% from the price fixed by the Controller on the duty payable under the above Notification whereas, according to the Department, the correct method to arrive at the assessable value ("a.v.") was to deduct from the selling price not the duty payable under the Notification but the duty actually payable after the rebate, which the assessee was entitled to on account of cotton seed oil content. In other words, according to the Department, the duty element of the rebate was also admissible for deduction from the selling price in order to arrive at the correct a.v.. This was the controversy before the Bombay High Court. Therefore, the main issue, which arose before the High Court was whether TOMCO was entitled to deduction of 5% ad valorem or whether it was entitled to the deduction of 5% ad valorem minus the rebate which it was entitled to receive under exemption Notification No. 6/62-CE dated 10.2.1962. According to TOMCO, the rebate of 6 paise was admissible to the manufacturers who used indigenous cotton seed oil in the manufacture of vegetable product, namely, Pakav (ghee) and, therefore, according to TOMCO, what was given by rabate/exemption under the above Notification was not deductible from the excise duty. In short, as in the present case, TOMCO claimed higher deduction of 5% whereas Department contended that the assessee was entitled to deduction of 5% minus 6 paise (rebate). On behalf of TOMCO, as in the present case, it was argued that exemption was given under the Notification by way of an encouragement to a manufacturer to make use of cotton seeds in the manufacture of Pakav. The rebate in duty was not a general rebate. It was a rebate admissible only to the manufacturer satisfying certain conditions. Therefore, the position, in the present case, and the position prevalent in TOMCO's case were identical. In the present case also the TOT deduction was available only on fulfilment of certain conditions. Rejecting the arguments of TOMCO, the Bombay High Court held that the rebate of 6 paise had to be deducted from 5% ad valorem duty as the exemption under the Notification was not by way of a windfall for the manufacturer but it was admissible only on account of the use of cotton seed oil in the manufacture of Pakav.

9. At this stage, we may note that there was a conflict of views at the relevant time when TOMCO case was decided by Bombay High Court on 24.7.1980. It is precisely in order to avoid the conflict that the Legislature inserted the above Explanation in section 4(4)(d)(ii) of the 1944 Act by using the words "the effective duty of excise payable on goods under this Act."

10. In the case of B.K. Paper Mills Pvt. Ltd. v. Union of India and ors. Reported in 1984 (18) ELT 701 (Bom.) the assessee was the manufacturer of various types of papers at their factory in Bombay. The papers manufactured by the assessee was liable to excise duty under Tariff Item 17 of the First Schedule to the 1944 Act (as it then stood) at the rate specified therein. Under Notification No. 45/73 dated 1.3.1973 an exemption from excise duty to the extent mentioned in the Notification was given in respect of certain types of papers cleared by the assessee (manufacturer). In preparing the invoices, the assessees did not give the benefit of exemption Notification to their customers. The assessees contended that the exempted duty of excise was, in fact, a subsidy and, therefore, they were not required to pass on the benefit of exemption to their customers. The assessees filed their price lists for the period July, 1976 to July, 1979 under Rule 173-C. The Department issued a show cause notice stating that the assessees were paying duty at a concessional rate while, in fact, they were charging full tariff rate of duty to their buyers and, therefore, they were liable to pay the differential duty calculated on the revised a.v. by applying section 4 of the 1944 Act. The Department directed the a.v. to be determined by deducting from the normal price the actual value of the duty payable. This determination was challenged by the assessee. The Bombay High Court, speaking through Sujata V. Manohar, J., as she then was, held vide para 25 that looking to the provisions of section 4(4)(d)(ii) of the 1944 Act and the language used therein, it was clear that only the reduced rate of duty was excludible from the value of the goods. That, the Explanation did not add something extra to section 4(4)(d)(ii) as it merely explained what was implicit in that Section.

11. In our view, the above two judgments of the Bombay High Court lay down the correct principle underlying the Explanation to section 4(4)(d)(ii). As held in TOMCO's case (supra), the exemption was not by way of a windfall for the manufacturer-assessee but on account of cotton seed oil used by TOMCO in the manufacture of Pakav. Similarly, in the case of B. K. Paper Mills (supra), the Bombay High Court has correctly analysed section 4(4)(d)(ii) with the Explanation to say that only the reduced rate of duty can be excluded from the value of the goods and that Explanation explains what was implicit in that Section. That, the said section 4(4)(d)(ii) did not refer to duty leviable under the relevant tariff entry without reference to exemption Notification that may be in existence at the time of clearance/removal. That, section 47 of the Finance Act, 1982 which inserted the Explanation expressly sets out what is meant by the expression "the amount of duty of excise payable on any excisable goods." By the amount of duty of excise what is meant is the effective duty of excise payable on such goods under the Act and, therefore, effective duty of excise is the duty calculated on the basis of the prescribed rate as reduced by the exemption

notification. This alone is excluded from the normal price under section 4(4)(d)(ii).

12. It is true that the Explanation to section 4(4)(d)(ii) only refers to the amount of duty of excise payable on excisable goods, however, as held by the Bombay High Court in the case of B.K. Paper Mills (supra), the Explanation expressly sets out what is implicit in section 4(4)(d)(ii) which states that "value" in relation to excisable goods does not include the amount of duty of excise, sales tax and other taxes if payable on such goods. Therefore, the test to be applied is that of the "actual value of the duty payable" and, therefore, there is no merit in the argument advanced on behalf of the assessee that the Explanation is restricted to the duty of excise. This principle can therefore apply also to actual value of any other tax including TOT payable. Even without the Explanation, the scheme of section 4(4)(d)(ii) shows that in computing the assessable value, one has to go by the actual value of the duty payable and, therefore, only the reduced duty was deductible from the value of the goods.

13. To the same effect is the judgment of the Division Bench of the Bombay High Court in the case of Central India Spinning, Weaving and Manufacturing Co. Ltd. and ors. v. Union of India and ors. reported in 1987 (30) ELT 217 (Bom.). We quote hereinbelow para 7 of the said judgment, which reads as follows:

"It is true that according to Section 4(4)(d)(ii) of the Central Excises Act, the value does not include the amount of duty of excise, if any payable on such goods, but in view of Explanation to Section 4(4)(d)(ii), the 'duty of excise' means the duty payable in terms of the Central Excise Tariff read with Exemption Notification issued under Rule 8 of the Central Excise Rules. In this view of the matter, the only deduction that is permissible is of the actual duty paid or payable while fixing the assessable value. Thus where the company/ manufacturer whose goods were liable to excise duty at a reduced rate in consequence of an exemption notification, while paying duty at reduced rate collected duty at a higher rate i.e. tariff rate from its customers the authorities were justified in holding that what was being collected by the company as excise duty was not excise duty but the value in substance of the goods and therefore, the excess value collected by the petitioner from the customers was recoverable under Section 11A of the Central Excises and Salt Act, 1944."

14. Applying the above tests to the facts of the present case, it is clear that on the date when the assessee filed its price declaration under Rule 173-C the assessee was aware that there was an exemption Notification dated 19.10.1993 in the State of Gujarat; that there were depot sales in Surat; that there were two types of sales, namely, backward area sales and normal area sales and that the rate of TOT in respect of backward area sales was 0.5% whereas the rate of TOT for normal area sales was at 2% and yet the assessee after suppressing the aforestated data claimed the

TOT deductions at the rate of 2% across the board for all clearances and, therefore, the Department was justified in calling upon the assessee to pay differential excise duty. We accordingly confirm the demand.

15. Before concluding, we may add that every efficient manufacturer has to plan his operations sufficiently carefully to know what raw materials he will use and in what proportion he will use the raw materials in the manufacture of his final product. Generally, such manufacturers maintain what is called as Order Book. A manufacturer who is prudent would ordinarily worked out on estimation, the extent of exemption which he is likely to get, in which event, the uncertainty to which the learned counsel has made reference would in fact hardly arise. In the present case, we are concerned with the amount of deduction. That deduction has been claimed by the assessee-manufacturer (appellant). The burden is on such manufacturer to maintain proper records, as the burden is on it to file a proper price declaration under Rule 173-C. The burden to claim deduction is on the manufacturer. In the present case, the assessee has filed a declaration under the said Rule 173-C without disclosing to the Department any of the aforestated details. We are, therefore, of the view that the Department was right not only in raising the demand for differential duty but also for invoking the extended period of limitation.

16. For the aforestated reasons, we find no merit in these civil appeals and the same are accordingly dismissed with no order as to costs.

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17. This batch of civil appeals have been filed by the Department against order dated 3.7.2001 passed by the CEGAT ("the Tribunal") which order stands confirmed by our above judgment in civil appeal Nos. 8529-8531 of 2001 in favour of the Department.

18. By the impugned order, the Tribunal has confirmed the demand made on the assessee vide show cause notice dated 19.3.1999 for the period March, 1994 to March, 1997. However, the Tribunal found that the demand made by the Department was beyond limitation after the assessee had categorically informed the Department vide letter dated 14.1.1997 that there were two types of sales, namely, backward area sales and normal area sales. According to the Tribunal, therefore, there was no suppression after the Department had acquired the knowledge for the first time vide the assessee's letter dated 14.1.1997 and, therefore, it was not open to the Department to claim suppression after 14.1.1997.

19. We see no reason to interfere with the findings recorded by the Tribunal on the question of suppression.

20. Accordingly, civil appeal Nos. 8529-8531 of 2001 filed by the assessee and the cross civil appeal Nos. 2008-2010 of 2002 filed by the Department stand dismissed with no order as to costs.