CASE NO.:
Appeal (civil) 3387-88 of 1992
Appeal (civil) 9947 of 1999

PETITIONER:
Collector of Central Excise, Chandigarh

RESPONDENT:
M/LstdS.miatnhdklOirnse. Beecham Consumer Health Care

DATE OF JUDGMENT: 20/12/2002

BENCH:
SYED SHAH MOHAMMED QUADRI & ARIJIT PASAYAT.

JUDGMENT:

JUDGMENT

ARIJIT PASAYAT, J.

These appeals are directed against common judgment of the Customs Excise & Gold (Control) Appellate Tribunal, New Delhi (in short 'the Tribunal').

Background factual matrix involved is undisputed and is essentially as follows:

M/s H.M.M. Limited (subsequently known as M/s. Smithkline Beecham Consumer Health Care Ltd.), (hereinafter referred to as 'the assessee') was availing set off under notification No.201/79 dated 4.6.1979 in respect of inputs, namely, Malt and Malt extract under T.I. 68, received by it from M/s Malt & Co. (India) Pvt. Ltd., M/s Barmalt Ltd. and M/s A.K. Malt (P) Ltd. during the years 1977 to 1985. The said notification was issued in exercise of powers conferred by sub-rule (1) Rule 8 of the Central Excise Rules, 1944. By the said notification, all excisable goods on which duty of excise is leviable and in the manufacture of which any goods falling under Item No. 68 of the First Schedule to the Central Excises and Salt Act, 1944 (presently Central Excise Act, 1944, in short 'the Act') have been used as raw materials or components parts from so much of the duty of excise leviable thereon as is equivalent to the duty of excise already paid on the inputs. The excisable goods, and the raw materials and the component parts were referred to as "the said goods" and "the inputs" respectively in the notification. In the Appendix to the notification, in paragraphs 3 and 5 (d) and (e) it was, inter alia, provided as follows:

XXX XXX XXX

"3. If the duty paid on the inputs (on which credit has been taken) is varied subsequently due to any person resulting in payment of refund to, or recovery of more duty from, the manufacturer of the inputs, the credit taken shall be varied accordingly by adjustment in the credit account maintained under paragraph 5 of this Appendix or in the account-current maintained under

sub-rule (1) of rule 9, or sub-rule (1) of rule 173-G, of the Central Excise Rules, 1944, or, if such adjustment be not possible for any reason, by refund to, or as the case may be, cash recovery from the manufacturer of the said goods.

XXX XXX XXX

5. A manufacturer of the said goods shall

(d) maintain an account in Parts I and II of Form R.G. 23 in Appendix I to the Central Excise Rules, 1944;

(e) maintain in respect of the duty payable on the said goods an account-current with the Collector of Central Excise with adequate credit balance to cover payment of Central Excise duty leviable on the said goods cleared at any time."

The scope and ambit of the afore-said paragraphs form subject matter of consideration in these appeals. Sellers of the inputs as described above, filed writ applications before the Delhi High Court and took the stand that Malt and Malt Extracts were not dutiable in terms of notification no. 55/75. The High Court accepted this stand of the Sellers. The Sellers had paid excise duty on the inputs, and, therefore, the assessee had taken credit in respect of the amount of duty paid on the inputs. Pursuant to the High Court's order appellant had refunded the duty. Barmalt took refund of the amounts paid on 8.11.1985 and 14.11.1985, while Malt India was refunded the amount involved on 8.5.1987. On 7.9.1987 a Demand show-cause notice was issued by the Assistant Collector requiring it to show-cause as to why the amount of duty involved in the set off be not recovered from it under paragraph 3 of the Appendix to the notification no.201/1979. Assessee submitted its reply taking the stand that the notice was issued beyond the prescribed period of limitation under Section 11A of the Act. In any event, cash recovery was not permissible and what at the most the authorities could do was to adjust the amount from the credit account maintained in terms of paragraph 5. The plea did not find acceptance and by order dated 22.12.1987 the Assistant Collector confirmed the demand. Appeals before the Collector of Central Excise (Appeals) did not bring any relief to the assessee who carried the matter in further appeals before the Tribunal. By the impugned judgment, Tribunal set aside the orders of the authorities holding that the case was covered under Section 11A of the Act and, therefore, the actions initiated were beyond the prescribed period of limitation.

In support of the appeals, Mr. A.K. Ganguli, learned senior counsel, submitted that the Tribunal's conclusions are indefensible. Paragraph 3 of the Appendix and Section 11A operate in different fields. While Section 11A relates to non-levy or short-levy, paragraph 3 of the Appendix deals with situations where there is variation of duty paid on the inputs of which credit has been taken subsequently due to "any reason"

In any event, according to him, Section 38A of the Act

introduced by Act 14 of 2001 holds the field, and even if the notification no. 201/79 was rescinded w.e.f. 1.3.1986, the same is of no consequence. Particular reference is made to clause (c) of the said provision. According to him assessee had an obligation fixed statutorily to pay the difference in case of a variation of the duty paid on the inputs. There was a corresponding crystalised right available to the authorities to make necessary changes. It was pointed out that in a given situation the assessee could also benefit from the change.

Learned counsel for the assessee on the other hand contended that Section 11A of the Act is clearly applicable because what was paid by the assessee was less than what was payable by it because of the set off availed and it is a case of short-levy. What was collected was less than the amount collectable, and, therefore, there is short-levy. As the notification itself has been rescinded w.e.f. 1.3.1986, no action could be taken in terms of paragraph 3 of the Appendix to the notification. Though this point was taken before the Tribunal, no finding specifically was recorded by it in this regard. With reference to Clause (a) of Section 38A, it is submitted that there was nothing in existence which could be revived, as the set-off had been rightly granted. The refund in terms of the High Court's order was granted much after 1.3.1986. Therefore, the provision does not assist the appellant. Alternatively, it was submitted that the assessee is placed in a piquant situation, because the sellers of the inputs have taken the refund and duty burden is being fastened on the assesseee. With reference to the decision of this Court in the case of one of the sellers i.e. Barmalt in Union of India and Ors. vs. Barmalt (India) Ltd. Gurgaon and Ors. (1997 (5) SCC 748) it was submitted that the ratio is applicable so far as other parties are concerned and the procedure adopted in terms of that judgment applied. It is to be noted that the present dispute has become academic so far as Barmalt is concerned, because of the aforesaid judgment. In any event it was contended there was no scope for demanding payment of duty when paragraph 5 to the Appendix permits adjustment.

Mr. D.A. Dave, learned senior counsel appearing for the sellers who were added as parties as per this Court's order dated 1.8.2001, submitted that the procedure adopted in Barmalt case (supra) cannot be applied to others in view of what has been specifically stated by this Court in the said case.

From the impugned order it is noted that the Tribunal referred to an earlier judgment by it in the case of Bakeman Home Products vs. Collector of Central Excise (1990 (48) ELT 518) and held that Section 11A was applicable.

The said provision reads as follows:

"11A. Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded; (1) When any duty of excise duty has not been levied or paid or has been short-levied or short-paid or erroneously refunded, whether or not such non-levy or non-payment, short-levy or short payment or erroneous refund, as the case may be, was on the basis of any approval,

acceptance or assessment relating to the rate of duty on or valuation of excisable goods under any other provisions of this Act or the rule made thereunder, a Central Excise Officer may, within one year from the relevant date, serve notice on the person chargeable with the duty which has not been levied or paid or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:

Provided that where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of fraud, collusion or any wilful misstatement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, by such person or his agent, the provisions of this sub-section shall have effect.

Provided further that where the amount of duty which has not been levied or paid or has been short-levied or short-paid or erroneously refunded is one crore of rupees or less a notice under this sub-section shall be served by the Commissioner of Central Excise or with his prior approval by any officer subordinate to him;

Provided also that where the amount of duty which has not been levied or paid or has been short-levied or short-paid or erroneously refunded is more than one crore rupees, no notice under this sub-section shall be served without the prior approval of the Chief Commissioner of Central Excise;

Explanation Where the service of the notice is stayed by an order of a court, the period of such stay shall be excluded in computing the aforesaid period of one year or five years as the case may be."

A bare reading of the provisions makes it clear that it deals with recovery of duty not levied or not paid or short-levied or short-paid or erroneously refunded. The scheme under the notification no.201/79 operated in a different field altogether. There was no short-levy or non-levy. The levy was made as per the applicable statutes. Only a benefit was granted to the manufacturer in respect of the duty already paid on the inputs which constitute raw materials or component parts in the excisable goods. The benefit was granted by exercise of powers conferred by sub-rule (1) of Rule 8 of the Rules providing exemption of all excisable goods on which duty of excise is leviable and in the manufacture of which some other goods have been used as inputs. If the inputs have suffered duty, the quantum thereof was allowed to be set-off. There is no variation of the duty leviable. That is invariable. What is determined is the quantum of duty payable after adjustment of the duty

paid on the inputs. Section 3 is the charging Section and Section 4 deals with valuation of excisable goods for the purposes of charging duties of excise. Section 11A, which was introduced with effect from 17.11.1980, provides for recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded. It is to be noted that the scheme under the notification is essentially linked with quantification and collection. The method of collection does not affect the essence of duty, but only relates to the machinery of collection for administrative convenience. As noted by this Court in Assistant Collector of Central Excise, Calcutta Division vs. National Tobacco Co. of India Ltd. (1972 (2) SCC 560), the term "levy" is wider in its import than the term "assessment". It may include both "imposition" as well as "assessment". Imposition is generally used for levy of a duty or tax by legislative provisions indicating the subject matter of levy and rate of levy. Levy of duty does not mean actual collection, there is a conceptual difference. The charging provision Section 3(1) specifically says: "There shall be levied and collected in such a manner as may be prescribed the duty of excise....". Both the expressions "levy" and "collected" are used. Therefore, lesser collection of duty because the adjustment of duty paid on inputs is not a case of short-levy as contended by learned counsel for assessee. The notification in question was issued under sub-rule (1) of Rule 8. Said Rule, omitted vide Notification No.19/88 CE dated 1.7.1988 dealt with power to authorize exemption from duty in special cases. If exemption is granted under Rule 8(1), goods do not cease to be excisable goods and levy of duty is not erased. Emphasis was on the duty of excise leviable on the manufactured item and duty of excise paid on the inputs available for adjustment. Therefore, Section 11A had no application to such a situation. To that extent the Tribunal was not justified in its conclusions; but that is not the end of the controversy. It appears that the assessee had specifically questioned applicability of the notification after same was rescinded. Tribunal has not recorded any finding in this regard. The effect of Section 38A, which was introduced with retrospective effect, is also to be considered. We, therefore, deem it proper to remand the matter back to the Tribunal for consideration of these aspects. If the Tribunal holds that after the notification was rescinded w.e.f. 1.3.1986; paragraph 3 of the Appendix became inoperative, then the position would be different. While considering that aspect the effect of Section 38A has to be kept in view. In case the Tribunal comes to the conclusion that paragraph 3 of the Appendix was applicable because of Section 38(A)(C), it has to consider the further stand of the assessee about adjustment in the credit account maintained under paragraph 5 of the Appendix.

Needless to say that the Tribunal shall consider these aspects after due notice to the parties. Liability, if any, of the sellers of inputs except Barmalt is a controversy with which we are not presently concerned and, therefore, we do not think it necessary to express any opinion in that regard. The appeals are accordingly disposed of.