PETITIONER:
Commissioner of Central Excise, Chandigarh-II
Commissioner of Central Excise, Chandigarh-II
Commissioner of Central Excise, Delhi

RESPONDENT:
M/s. Steel Strips Ltd.
M/s. Steel Strips Ltd.
M/s. Perfect Strips & others

DATE OF JUDGMENT: 22/04/2003

BENCH:
S.N. VARIAVA & B.P. SINGH.

JUDGMENT:

J U D G M E N T

B.P. SINGH, J.

This batch of appeals involve common questions and, therefore, they have been heard together and are being disposed of by a common judgment.

The revenue is the appellant in all the appeals impugning the order passed by the Customs, Excise and Gold (Control) Appellate Tribunal in the appeals preferred by the respective respondents.

In C.A. No. 7165 of 2000 the Commissioner of Central Excise, Chandigarh-II, has impugned the order of the Customs, Excise and Gold (Control) Appellate Tribunal (hereinafter referred to as the Tribunal) dated 29th June, 2000 whereby the Tribunal while upholding the plea of the respondent that the process of cold rolling of steel strips from hot rolled strips does not amount to manufacture of a new excisable commodity, remitted the matter to the Assistant Commissioner so that the respondent may be able to satisfy the Assistant Commissioner on the question whether they had not passed on the burden of duty to their customers.
In C.A. Nos. 7706-7711 of 2002 in which the respondent is the same as in C.A. No. 7165 of 2000, the Tribunal following its earlier decision dated 29th June, 2000 (which is impugned in C.A. No.7165 of 2000) allowed the appeal preferred by the respondent and held that the revenue had failed to discharge the burden of showing that the manufacture had taken place by the process of cold rolling of steel strips from hot rolled strips. However, it remitted the matter to the Assistant Commissioner to decide the question as to whether it had not passed on the incidence of duty to the customers.

In C.A. Nos.439-442 of 2000 the Tribunal following its earlier decision in the case of Steel Strips Ltd. (impugned in C.A. No. 7165 of 2000) held that cold rolled strips produced out of duty paid hot rolled steel strips do not undergo a process of manufacture and hence are not chargeable to excise duty.

We may at the threshold observe that while in C.A. No. 7165 of 2000 and C.A. Nos. 7706-7711 of 2002 the dispute arose when the respondent filed applications for refund of excess excise duty paid, in C.A. Nos. 439-442 of 2002 the question arose in the context of a show cause notice issued to the respondent alleging clandestine removal of cold rolled steel strips produced out of duty paid hot rolled steel strips without payment of duty. The

Commissioner found that there had been clandestine removal of cold rolled strips without payment of excise duty and, therefore, ordered recovery of duty, interest, penalty etc. The Tribunal on appeal set aside the order of the Commissioner, Central Excise (Adjudication), Delhi holding that since no duty was payable on cold rolled strips, there was no evasion of excise duty.

The representative facts may be taken from C.A. No. 7165 of 2000.

M/s. Steel Strips Ltd., respondent herein, held Central Excise Registration for the manufacture of cold rolled steel strips. It had paid central excise duty on cold rolled steel strips made from hot rolled steel strips between the period 19.6.1996 to 29.6.1996 amounting to Rs.42,07,977/-. It filed an application for refund of the excise duty so paid on cold rolled steel strips relying upon the decision of this Court in its own case reported in 1995 (77) E.L.T. 248 (S.C. ) : Collector of Central Excise, Chandigarh vs. Steel Strips Ltd. According to the respondent this Court held in the aforesaid decision that hot rolled strips upon which excise duty had admittedly been paid did not undergo the process of manufacture at the hands of the assessee which resulted in the production of cold rolled strips and, therefore, no excise duty was payable on such cold rolled strips. Consequently it claimed refund of the excise duty paid on cold rolled strips. The application for refund was examined by the department and ultimately a show cause notice was issued by the Assistant Commissioner, Central Excise Division, Patiala, on August 14, 1996 calling upon the respondent to show cause why the refund application should not be rejected for the reasons stated in the notice. In the show cause notice it was stated that the judgment of the Supreme Court referred to in the application for refund related to the period prior to 28th February, 1986 when the old Central Excise Tariff was applicable which classified under Tariff Item 26AA all kinds of strips without making any distinction between cold rolled and hot rolled strips. The tariff had undergone a change and the Central Excise Tariff as applicable after 28th February, 1986 classified hot rolled strips and cold rolled strips separately as they were distinguishable from each other. Separate sub-headings have been provided and while hot rolled strips come under sub-heading 7211.52 cold rolled strips come under sub-heading 7211.51. The notice further stated that the respondent had passed on the burden of the excise duty to the buyers and, therefore, under Section 11-B of the Central Excise and Salt Act, 1944, (hereinafter referred to as the Act) the respondent was required to prove beyond doubt that the burden of excise duty had not been passed on to the buyers so as to entitle it to claim refund.

In its reply dated 24th August, 1996 the respondent denied that the excise duty had been correctly paid and, therefore, they were not entitled to claim refund. They reiterated their claim for refund and prayed for further time to furnish a detailed explanation. However, it appears from the order of the Assistant Commissioner that no further explanation was furnished by the respondent.

The Assistant Commissioner by order dated 10th January, 1997 rejected the claim of the respondent following an order passed by the Assistant Commissioner, Central Excise Division, Patiala in a case of the respondent. A similar claim for refund on the same ground was rejected after considering the judgment of the Supreme Court on which reliance was placed by the respondent. The order of the Assistant Commissioner on which reliance had been placed has been annexed as Annexure P-III. He held that on account of the amendment of the Central Excise Tariff with effect

from 28th February, 1986, hot rolled strips and cold rolled strips must be treated as two separate items which have been dealt with separately in the tariff. Under the old tariff all strips were classified under tariff item No. 26AA, but that the legal position having changed after the amendment of the tariff, the two manufactured commodities were distinguishable and different from each other being covered by two separate sub-headings and, therefore, excise duty was payable on the cold rolled strips as well as on hot rolled strips. It was further held in the facts of that case that since the claimant had passed on the burden of excise duty to the buyers, it was not entitled to claim refund under Section 11-B of the Act. The Assistant Commissioner, therefore, held that the judgment of the Supreme Court, which was in respect of period prior to 28th February, 1986 was not applicable to the claim for refund which pertained to the period after the amendment of the tariff. In the said order the Assistant Commissioner also observed that cold rolled strips are a different product from hot rolled strips. There is difference in price on account of the fact that properties of the material completely gets changed after cold rolling. It observed

"It is evident from the examination of manufacturing process of cold rolled strips and their use. Cold rolled strips are being manufactured out of hot rolled strips by the process as mentioned below."

The Assistant Commissioner then went on to describe the process of manufacture and the use to which cold rolled strips are put. He came to the conclusion that cold rolled strips are entirely different commodity from hot rolled strips and that is why different sub-headings were provided in the Central Excise Tariff for hot rolled strips and cold rolled strips.

It is not clear from the order of the Assistant Commissioner whether any evidence was produced by the respondent in that case regarding the process of manufacturing undertaken by the claimant, or whether the observations made in the order were based on authoritative publications or on his personal knowledge.

The respondent preferred an appeal before the Commissioner of Excise (Appeals). The said appeal was dismissed by the Commissioner who fully agreed with the reasoning of the Assistant Commissioner and also held that the judgment of the Supreme Court referred to in the claim application was not relevant in view of the introduction of the new tariff which classified separately hot rolled and cold rolled strips. It also agreed with the finding of the Assistant Commissioner that the application for refund deserved to be rejected also on the ground of unjust enrichment as the burden of duty had been passed on to the buyers.

We may observe that though the Commissioner of Excise (Appeals) rejected the claim also on the ground of the respondent having passed on the burden of duty to the buyers, the Assistant Commissioner did not record any finding in this case on that question, having regard to the provision of Section 11-B of the Act.

The respondent preferred an appeal before the Tribunal impugning the order passed by the Commissioner of Excise (Appeals). Relying upon the judgment of this Court in 1995 (77) E.L.T. 248 (S.C. ) : Collector of Central Excise, Chandigarh Vs. Steel Strips Ltd. (supra). The Tribunal held that the department was required to adduce evidence that the process undertaken by the respondent resulting in the production of cold rolled steel strips

from hot rolled strips amounted to manufacture. No evidence had been brought on record to show that such process amounted to manufacture giving rise to duty liability. It further held that the mere fact that hot rolled steel strips and cold rolled strips fall under two different sub-headings under the same chapter was not sufficient to conclude that the process of cold rolling from hot rolled strips amounted to manufacture. The burden was cast upon the revenue to show that the manufacture had taken place but the department had failed to discharge that burden. On these findings the Tribunal held that the refund claim was admissible on merits. However, it remitted the matter to the Assistant Commissioner to enable the respondent to satisfy him that they had not passed on the burden of duty to their customers as required by Section 11-B of the Act.

In the connected appeals this order of the Tribunal has been noticed and followed.

Learned counsel for the appellant submitted before us that the fact that hot rolled strips and cold rolled strips were classified under two distinct sub-headings under the amended tariff was itself sufficient to hold that they were two distinct excisable commodities. In any event, it was submitted, the Assistant Commissioner considered the material on record and came to the conclusion that the respondent undertook the process of manufacture which resulted in the manufacture of cold rolled strips, a new excisable commodity, from hot rolled strips, also an excisable commodity. Therefore, the Tribunal erred in holding that the department had failed to discharge the burden cast upon it to establish that a new excisable commodity was the result of the process of manufacture undertaken by the respondents.

On the other hand learned counsel for the respondents submitted that there was no material whatsoever on record to establish that the respondents undertook a process of manufacture, which resulted in the manufacture of another excisable commodity. The department had not produced any evidence in this regard and the observations made by the Assistant Commissioner it its order are based either upon his own knowledge or knowledge derived from text-books or publications, which were not relevant. Relying upon the earlier decision in Steel Strips (supra) it was submitted that in a case where the excise authorities contend that an article is the result of the process of manufacture and it is commercially distinct and known as such, it is for the excise authorities to lay evidence in this behalf before the first adjudicating authority regardless of the fact that he is an officer of the excise department. There should, ordinarily, be no difficulty in establishing that the article is the result of a process of manufacture; in the event of difficulty, it would be open to the excise authorities to seek a direction requiring the assessee to set out in writing what it does to obtain the article. Failure to lay the requisite evidence cannot be made up by reference to authoritative publications.

In the instant case we find that while in the order of the Assistant Commissioner there is a reference to a process of manufacture undertaken by the respondents and there is also some discussion about the manner in which the manufacture of cold rolled strips takes place, but the order is not clear as to whether any evidence was led by the department to satisfy the adjudicating authority on this issue. The Tribunal on the other hand has observed that no evidence has been brought on record to show that such process amounted to manufacture so as to give rise to duty liability. In this state of the record placed before us, it is not possible for this Court to express its considered opinion on this issue and it has, therefore, become necessary to remit this matter

for fresh consideration on the basis of material on record.

Before us, it was also contended on behalf of the respondents that the show cause notice issued to the respondents was defective inasmuch as the show cause notice, apart from referring to the fact that the two items were covered by two separate and distinct sub-headings, did not state that the process undertaken by the respondents resulted in the manufacture of a new product. Since that was not stated in the show cause notice, the department cannot be permitted to go beyond the facts stated in the show cause notice. This aspect of the matter has also not been considered by the authorities under the Act.

It was then contended by the respondents before us that reliance upon two distinct sub-headings under the amended excise tariff itself was not conclusive and good enough to hold that there was manufacture of cold rolled strips by the respondents. Learned counsel for the respondents placed reliance on the following decisions :
Hyderabad Industries Ltd. Vs. Union of India : 1999 (108) ELT 321 (S.C.) ,
Hyderabad Industries Ltd. Vs. Union of India : 1995 (78) ELT 641 (S.C.).
Prabhat Sound Studios Vs. Additional Collector of Central Excise : 1996 (88) ELT 635 (S.C.).

In view of these decisions it is submitted that the observations made in Lal Woollen & Silk Mills (P) Ltd., Amritsar Vs. Collector of Central Excise, Chandigarh : (1999) 4 SCC 466 towards the end of paragraph 1 in the said decision is neither correct nor conclusive. This question is no longer res-integra, as this Court has in Commissioner of Central Excise, Chandigarh-I etc. etc. vs. M/s. Markfed Vanaspati & Allied Industries etc. etc. (C.A. Nos. 77-80 of 2001 etc. etc. decided on April 9, 2003) upheld the contention urged on behalf of the respondents. In the aforesaid judgment this Court, after noticing the observations in Lal Woollen & Silk Mills (P) Ltd., Amritsar (supra) held :

" However, it appears to us that the observation made in this authority are "per incuram". In so observing, the decision of a larger Bench of this Court in the case of Collector of Central Excise, Indore vs. Universal Cable Ltd. Reported in 1995 Supp (2) SCC 465, has not been noted or considered. In this case an argument that a good become excisable because it is covered by Tariff Entry, has been negatived. In the case of B.P.L. Pharmaceuticals Ltd. Vs. Collector of Central Excise reported in 1995 Supp (3) SCC 1 it has also been held that merely because there is a change in the tariff Item the goods does not become excisable. Subsequently in a judgment dated 13th February, 2003 in Civil Appeal No. 6745 of 1999 it has been held that merely because an item falls in a Tariff Entry, it does not become excisable unless there is manufacture and the goods is marketable. In Lal Woolen & Silk Mills' case (supra) it has not been held that the twin test of manufacture and marketability is not to apply. It is not possible to accept the contention that merely because an item falls in a Tariff Entry it must be deemed that there is manufacture. The law still remains that the burden to prove that there is manufacture and that what is manufactured is marketable is on the revenue. In this case no new evidence is placed to show that there is manufacture. "Spent earth" was "earth" on which duty

has been paid. It remains earth even after the processing. Thus if duty was to be levied on it again, it would amount to levying double duty on the same product."

In the result these appeals are disposed of by remitting to the Tribunal in Civil Appeal 7165 of 2000 and Civil Appeal Nos. 7706-7711 of 2002, and to the Commissioner of Excise (Appeals) in Civil Appeal Nos. 439-442 of 2002 to consider and record findings on the following questions and dispose of the matters before them in accordance with law. The consideration of these questions shall be on the basis of the material on record, and no further evidence shall be allowed to be adduced.

1. Whether the excise authorities have led any evidence before the first adjudicating authority on the question as to whether cold rolled strips are the result of a process of manufacture undertaken by the respondents, or whether the material referred to in the order of the Assistant Commissioner is based upon his own personal knowledge or is based on authoritative publications? The burden is on the department to prove that the process of manufacture resulted in emergence of a commercially distinct commodity.

2. Whether the show cause notice issued to the respondents was defective inasmuch as it did not state, apart from referring to the two sub-headings under the amended Central Excise Tariff, that there was manufacture of a new product, namely cold rolled strips from hot rolled strips?

3. In Civil Appeal Nos. 7165 of 2000 and 7706-7711 of 2002 the question whether the respondent has passed on the duty of excise to its buyers is remitted to the Assistant Commissioner concerned for his consideration and finding having regard to the provision of Section 11-B of the Act.

In the Appeals in which we have remitted the matters to the Assistant Commissioner to consider the question as to whether the respondents have passed on the burden of duty of excise to their buyers, which question has to be considered in the light of the provisions of Section 11-B of the Act, it is only appropriate that the Assistant Commissioner concerned should first record a finding on that question. If the finding is against the respondents, their claim applications shall have to be rejected. This, of course, is subject to the order that may be passed in appeal by the appellate authority and ultimately by the Tribunal. Only if it is ultimately found that the respondents have not passed on the burden of excise duty to their buyers, the other questions which we have remitted to the Tribunal may require consideration. We, therefore, direct that in the first instance those appeals shall stand remitted to the concerned Assistant Commissioners to hear the parties and decide only the question of unjust enrichment having regard to the provisions of Section 11-B of the Act. It will be open to the respondents to challenge the finding if it goes against them before the appellate authority and/or before the Tribunal. If no appeal is preferred against an adverse finding by the Assistant Commissioner, that will be an end of the matter and no further consideration by the Tribunal will be necessary. However, if it is ultimately found that the respondents have not passed on the burden of excise duty to their buyers then the Tribunal will consider the other questions, which we have remitted to it for its consideration and the Tribunal shall thereafter dispose of the

matters in accordance with law. To enable the Tribunal/ Commissioner to pass fresh orders, we set aside the impugned judgments and orders of the Tribunal in all the appeals, as also the Order of the Commissioner in Civil Appeal Nos. 439-442 of 2002.

These appeals are disposed of accordingly. There shall be no order as to costs.