

M/s. Swadeshi Polytex Ltd.

Vs

Collector of Central Excise

Civil Appeal Nos. 3988-90 of 1988

(B. C. Ray, Sabyasachi Mukharji JJ)

23.11.1989

JUDGMENT

SABYASACHI MUKHARJI, J. -

1. This is an appeal under Section 35-L of the Central Excises and Salt Act, 1944 (hereinafter referred to as 'the Act') against the judgment and order dated August 18, 1988 passed by the Customs, Excise & Gold (Control) Appellant Tribunal, New Delhi (hereinafter referred to as 'the tribunal').
2. The appellant was at all relevant times engaged in the manufacture, inter alia, of polyester fibre (manmade) falling under Tariff Item 18 of the erstwhile Central Excise Tariff. In the manufacture of the aforesaid, the appellant was using, amongst other inputs, ethylene glycol and DMT (Dimethyl Tetraphthalate) - duty paid ethylene glycol falling under Tariff Item 68 of the erstwhile Central Excise Tariff received by the appellant and used in the manufacture.
3. The Notification No. 201/79 dated June 4, 1979, mentioned hereinafter, exempted, according to the appellant, all excisable goods on which duty of excise was leviable and in the manufacture of which any goods falling under Tariff Item 68 had been used, from so much of the duty of excise as was equivalent to the duty of excise paid on the inputs. The appellants claimed set off of duty on ethylene glycol used in the manufacture of polyester fibre under Notification No. 201/79 dated June 23, 1979. In response to the appellant's seeking set off of the duty paid on ethylene glycol, they received a letter from the Assistant Collector of Central Excise, Ghaziabad, dated August 6, 1980 by which the Assistant Collector held that no pro forma credit was allowable in respect of ethylene glycol for the following :
 - (a) Methanol which is not excisable and is cleared without payment of duty; (b) Glycol residual waste which was being destroyed by the appellants by throwing in the field; and (c) Polyester fibre waste which was used in the recovery of DMT and exempt from payment of duty under Central Excise Notification dated May 19, 1976.
4. The appellants were further directed to furnish the exact percentage of ethylene glycol content used/consumed in the methanol, the ethylene glycol residual waste and polyester fibre waste; and not to utilise the pro forma credit or set off credit till the date was furnished and the same was authenticated by the Chemical Engineer. The classification list submitted by the appellants was modified in terms of the said letter.
5. Thereafter, classification list was filed claiming set off of duty on ethylene glycol falling under

Tariff Item 68 under exemption Notification No. 201/79 as amended by Notification No. 102/81 dated May, 13, 1981. By this amended notification, a second proviso was added which provided that the credit of the duty allowed in respect of inputs could not be denied or varied on the ground that part of the input was contained in any waste, refuse or by-product arising during the manufacture, irrespective of the fact that such waste, refuse or by-product was exempt from the whole of duty of excise leviable thereon or was chargeable to nil rate of duty.

6. Hence, it is the case of the appellants that from April 11, 1981 even though some part of the input may be contained in any waste, refuse or by-product which is chargeable to nil rate of duty, the credit of the duty paid on the inputs could not be denied. By this order the set off of duty in respect of duty paid ethylene glycol was allowed from April 11, 1981 onwards except in the case of ethylene glycol used/consumed in polyester waste used for recovery of DMT on the ground that this polyester waste was chargeable to nil rate of duty. Similarly, duty paid on ethylene glycol which was used for recovery of DMT was held not to be allowable while paying duty on polyester fibre.

7. Aggrieved thereby, an appeal against the said order to the Collector of Central Excise, Ghaziabad was filed.

8. The main contentions of the appellants were that the ethylene glycol received in the factory after payment of duty was consumed in the manufacture of polyester fibre only. During the course of manufacture of polyester fibre, two basic raw materials DMT and glycol interact and thereby certain waste comes into existence. This waste is recycled with glycol for the recovery of DMT in DMT recovery plant, within the factory. Hence, the entire set off of duty was to be allowed since no part of DMT produced was diverted for any other use other than production of polyester fibre nor was it taken outside the factory. The appellants contended that in case of pro forma credit procedure under Rule 56-A of the Central Excise Rules, clarification had been issued by the Collector of Central Excise, under trade notice No. 72-CE/80 dated July 19, 1980 to the effect that pro forma credit is permissible even where at an intermediate stage of manufacture, a final product which is fully exempt from duty comes into being, provided that the fully exempted product is consumed in the production or manufacture of the finished product. This trade notice categorically states that this clarification would also be applicable to exemption Notification No. 201/79.

9. By an order dated November, 17, 1981 the Assistant Collector held that the appellants were entitled to credit of duty paid on the ethylene glycol only to the extent of the percentage content as determined by the Chief Chemical Engineer, CRCL, New Delhi. The order covered the period from July 17, 1979 to April 10, 1981.

10. As mentioned before, the notification was amended from April 11, 1981 whereby the credit of the duty on any inputs was not to be denied in any waste, refuse or by-product arising during the manufacture of the output irrespective of the waste, refuse or by-product was charge-able to nil rate of duty.

11. By a letter dated November 27, 1981 the appellants were informed that set off for Rs. 15,41,673.60 was inadmissible. By a subsequent letter of the Superintendent of Central Excise, Ghaziabad, dated December 17, 1981 it was stated to the appellant that they had received Rs. 15,42,740.16 as set off which was inadmissible. The period mentioned was July 17, 1979 to April 10, 1981. The appellant case was that this related only to ethylene glycol content in methanol.

12. There was a second appeal preferred to the Collector of Central Excise, Delhi, against the order

dated November 17, 1981 of the Assistant Collector disallowing the set off of duty credit paid on ethylene glycol content in methanol and ethylene glycol waste and polyester fibre waste. A third appeal was filed before the Collector (Appeals) against the duty demand of Rs. 15,42,740.16.

13. Thereafter, the appellants received a letter dated April 23, 1983 from the Superintendent of Central Excise which stated that the stand of the appellants that the ethylene glycol contribute only H positive and not OH negative, had been accepted by the Chief Chemical Engineer, CRCL, New Delhi. Consequently, since the ethylene glycol content in the menthol, wherein the ethylene glycol contribute only H positive and not OH negative ions, the amount of inadmissible set off would stand reduced to Rs. 90,749.76.

14. The aforesaid three appeals were decided by the Collector of Central Excise (Appeals), by passing a single order dated December 15, 1983, wherein he observed that the procedure under Notification No. 201/79 was materially the same as the procedure under Rule 56-A and in the circumstances allowed all the appeals and set aside the Assistant Collector's order and the demands.

15. Aggrieved thereby, the revenue went up in appeal before the tribunal. The tribunal after examining the aforesaid contentions noted the contention of the parties. It was the case of the revenue that prior to April 11, 1981 there was no provision in Notification No. 201/79 entitling the manufacturer to obtain credit of the duty of excise already paid on the inputs resulting in waste or by-product or refuse which arose in the manufacture of excisable products which used the inputs. Hence, it was argued that the duty element in the quantity of glycol which was contained in the glycol residual waste, polyester fibre waste and methanol (by-product) which was non-excisable, did not qualify for credit which could be subsequently used for discharging duty liability on dutiable finished product. The provision contained in Notification No. 102/81 was not available prior to April 11, 1981 it was submitted on behalf of revenue. It was further submitted that the trade notice issued by Pune Collectorate pertained to Rule 56-A only and not to the notification. It was further submitted that the rule and notifications are different enactments and the provisions of one cannot be read into another even after April 11, 1981 and the exemption was only in respect of duty on inputs in the manufacture of excisable goods and their waste, by-product or refuse. It was submitted that since methanol was not excisable, it was not eligible for set off of duty on the glycol content in its manufacture. On behalf of the appellants, however, it was contended that glycol is used totally in the production of polyester fibre. Methanol results out of the reaction of DMT and glycol; and that the government always maintained parity between Rule 56-A and Notification No. 201/79, hence, the appellants were eligible to full set off. On behalf of the appellants reliance was placed on the decision of the High Court of Bombay in *Indian Aluminium Co. Ltd v. A. K. Bandyopadhyay* ((1980) 6 ELT 146 (Bom HC)). The question that the tribunal had to decide was whether the set off of duty paid on inputs was admissible only if the finished excisable goods manufactured therefrom, was not exempted from duty. The process of manufacture and the outcome of ethanol are not in dispute. The tribunal was of the view that the judgment of the Bombay High Court had held that dross skimmings thrown off in the process of manufacture and aluminum sheets were not end products or finished or by-products merely because such refuse might fetch some price in the market. The High Court had further held that proviso to sub-rule (2) of Rule 56-A will have no application and the skimmings cannot be said to be finished excisable goods. These were not exempted from the whole of duty of excise or chargeable to nil rate of duty whereas the sub-rule prescribed that the credit is admissible if the material is used in the manufacture of finished goods which are exempt from duty or are chargeable to nil rate of duty. The tribunal was of the opinion that the factual background of the case before the Bombay High Court was different and therefore, it was of the opinion that the said decision was not applicable in the instant case.

16. The tribunal was of the opinion that the revenue was right that Rule 56-A and Notification No. 201/79 were different enactments and the amendment to one could not be read into the other. In that view of the matter, the tribunal was of the view that the Collector's observation that the procedure under Notification No. 201/79 was materially the same as the procedure under Rule 56-A and consequently the amending notification deemed to have retrospective effect was not, in the absence of any such indication, acceptable. In the premises, the tribunal allowed the appeals and rejected the cross-objection.

17. The question involved in these appeals, is whether the Tribunal was right. On behalf of the appellant, Shri V. Lakshmikumaran contended that the tribunal failed to appreciate that the provisions of Rule 56-A and Notification No. 201/79 were pari materia. It appears to us that the provisions of Rule 56-A and the Notification No. 201/79 are identical. The relevant provisions of Rule 56-A are as follows :

#"56-A. (1) * * * *##

(2) The Collector may, on application made in this behalf and subject to the conditions mentioned in sub-rule (3) and such other conditions as may, from time to time, be prescribed by the Central Government, permit a manufacturer of any excisable goods specified under sub-rule (1) to receive material or component parts of finished product (like asbestos cement), on which the duty of excise or the additional duty under Section 3 of the Customs Tariff Act, 1975 (51 of 1975) (hereinafter referred to as the countervailing duty), had been paid in his factory for the manufacture of these goods or the more convenient distribution of finished product and allow a credit of the duty already paid on such material or component parts or finished product, as the case may be :

Provided that no credit of duty shall be allowed in respect of any material or component parts used in the manufacture of finished excisable goods -

(i) if such finished excisable goods produced by the manufacture are exempt from the whole of the duty of excise leviable there on or are chargeable to 'nil' rate of duty, and

##(ii) * * * *##

Explanation. - Credit of the duty allowed in respect of any material or component parts shall not be denied or varied on the ground that part of such material or component parts is contained in any waste, refuse or by-product arising during the process of manufacture of the finished excisable goods irrespective of the fact that such waste, refuse or by-product is exempt from the whole of the duty of excise leviable thereon or is chargeable on nil rate of duty or is not notified under sub-rule (1) : ..."

18. The Notification No. 201/79 prior to April 11, 1981 insofar as relevant for the present purpose was as follows :

"Set off of duty on all excisable goods on use of duty paid goods falling under Item 68 (Tariff Items 1 to 68) : 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. 178/77-Central Excises, dated June 18, 1977, the Central Government hereby exempts all excisable goods (hereinafter referred to as "the said goods"), on which the duty of excise is leviable and in the manufacture of which any goods falling under Item 68 of the First Schedule to the Central Excises and Salt Act, 1944 (1 of 1944) (hereinafter referred to as "the inputs") have been used, from so much of the duty of excise leviable thereon as is equivalent to the duty of excise already paid on the inputs :

Provided that the procedure set out in the Appendix to this notification is followed :

Provided further that nothing contained in this notification shall apply to the said goods which were exempted from the whole of the duty of excise leviable thereon or are chargeable to nil rate of duty".

19. The amending Notification No. 102/81 dated April 11, 1981 is as follows :

"Provided also that credit of the duty allowed in respect of the inputs shall not be denied or varied on the ground that part of such inputs is contained in any waste, refuse or by-product arising during the process of manufacture of the said goods, irrespective of the fact that such waste, refuse or by-product is exempt from the whole of the duty of excise leviable thereon or is chargeable to nil rate of duty or is not mentioned in the declaration referred to in the Appendix to this notification."

20. Central Board of Excise & Customs issued Circular No. 6/81-CX. 6 dated January 31, 1981, which reads as follows :

"Central Excise - Rule 56-A - Pro forma credit of duty paid on material/component parts contained in waste, refuse or by-product arising during the process of manufacture - Regarding.

A doubt has been raised whether pro forma credit of duty paid on material/component parts used in manufacture of the finished excisable goods notified under Rule 56-A of the Central Excise Rules, 1944, is to be denied to the extent such material or component parts are contained in any waste, refuse or by-product arising during the process of manufacture of the notified finished excisable goods on the grounds that such waste, refuse or by-product is either fully exempt for duty or not notified under sub-rule (1) of Rule 56-A.

2. Since the government's intention has been not to deny the benefit of pro forma credit in such situation, an Explanation has been added to sub-rule (2) of Rule 56-A, so as to remove the ambiguity in the rule. Notification No. 8/81-CE dated January 31, 1981 amending Rule 56-A is enclosed. It may, however, be noticed that such credit cannot be utilised for payment of duty leviable on such waste, refuse or by-product."

21. On an analysis and comparison of aforesaid, it is clear that the clarification in the form of trade notice issued by the Pune Collectorate in respect of Rule 56-A was as much applicable to that rule as to Notification No. 201/79. In the premises, it is clear that the tribunal should have held that even though a part of the ethylene glycol was contained in the by-product methanol, yet the credit of duty

could not be reduced to the extent of the ethylene glycol contained in the methanol as ineligible. It is true that when in a fiscal provision, if benefit of exemption is to be considered, this should be strictly considered. But the strictness of the construction of exemption notification does not mean that the full effect to the exemption notification should not be given by any circuitous process of interpretation. After all, exemption notifications are meant to be implemented and trade notices in these matters clarify the stand of the government for the trade. It is clear, therefore, that the tribunal failed to interpret the words of the exemption Notification No. 201/79 properly and fully. The said notification exempted all excisable goods on which the duty of excise was leviable and in the manufacture of which any goods falling under Tariff Item 68 (i.e. inputs) had been used from so much of the duty of excise leviable thereon as was equivalent to the duty of excise already paid on the inputs. It is clear, however, that ethylene glycol was used in the manufacture of polyester fibre. It appears that methanol arises as a part and parcel of the chemical reaction during the process of manufacture when ethylene glycol interacts with DMT to produce polyester fibre. It is not possible to use a lesser quantum of the ethylene glycol to prevent methanol from arising for producing a certain quantity of polyester fibre. Thus, the quantity of ethylene glycol required to produce a certain quantum of polyester fibre is determined by the chemical reaction. It may be mentioned here that it is not as if the appellants have used excess ethylene glycol wantonly (sic wantonly) to produce the methanol. It is clear that the appellants are not engaged in the production of methanol but in the production of polyester fibre. That position is undisputed. Therefore, it appears that the Tribunal erred when it held that the appellants were not entitled to a part of the credit of duty since ethylene glycol when it interacts with DMT also gives rise to methanol. This construction would frustrate the object of exemption if something which (sic) evidently arises out of the interaction. Even prior to amendment to Notification No. 201/79 with effect from April 11, 1987, the only situation where the credit of the duty paid on the inputs could be denied was only where the final products were wholly exempt from the duty of excise or chargeable to nil rate of duty. In the present case, the excisable goods, namely, polyester fibre were not wholly exempt from duty nor chargeable to nil rate of duty. It cannot be read in the notification that the notification would not be available in case non-excisable goods arise during the course of manufacture. In fact, the tribunal seems to have erred in not bearing in mind that exemption notification was pressed in service in respect of polyester fibre which is excisable goods and not in respect of methanol which arises as a by-product as a part and parcel of chemical reaction. It appears further on a comparison of the Rule 56-A and the Notification No. 201/79 that these deal with identical situations.

22. In this connection, reference may be made to the decision of the Bombay High Court in *Indian Aluminum Co.* ((1980) 6 ELT 146 (Bom HC) In that case, the High Court came to the conclusion that dross and skimmings were merely the refuse, scum or rubbish thrown out in the process of manufacture of aluminum sheets and could not be said to be the result of treatment, labour or manipulation whereby a new and different article emerged with a distinctive name, character or use which can ordinarily come to the market to be bought and sold. The High Court further held in that case that merely because such refuse or scum may fetch some price in the market does not justify it being called a by-product, much less an end product or a finished product. In the light of that fact, the High Court was of the view that in that case the end product was aluminum sheets manufactured from aluminum ingots and dross or skimmings. Therefore, the High Court was of the view that these were neither 'goods' nor 'end' products' nor 'finished products' liable to duty under Item 27 of Central Excise Tariff. The High Court was of the view that under proviso to Section 56-A (2), pro forma credit was not admissible if the material is used in the manufacture of finished excisable goods which are exempt from duty or chargeable to nil rate of duty. Since dross and skimmings are mere 'ashes', these could not be said to be finished excisable goods, nor they were exempt from the

whole of duty of excise on or chargeable to 'nil' rate of duty. Therefore, proviso to sub-rule (2) of Rule 56-A would not have any application. The High Court was of the view that refuse or scum thrown off during the process of manufacture could not by any stretch of imagination be considered as a by-product and merely because such refuse or scum may fetch some price in the market they could not be said to be 'finished excisable goods'. Under Rule 56-A, the High Court was of the view, if the material is used in the manufacture of any finished excisable goods, and during the course of manufacture any non-excisable by-product emerged, then it could not be said that the raw material was not used in the manufacture of the finished excisable goods.

23. In our opinion, the same analogy and reasoning would apply when the methanol arises as a result of chemical reaction and not as a result of any by-product. In the instant case, the methanol was non-excisable. Just because methanol arises as a part and parcel of the chemical reaction during the process of manufacture, it cannot be said that methanol was not used in the manufacture of polyester fibre. The intention of the government is evident furthermore, from the trade notice of Pune Collectorate No. 31/81. The Tribunal, therefore, should have taken into consideration the trade notice for interpretation of exemption Notification No. 201/79, which was *pari materia* with Rule 56-A.

24. In the aforesaid view of the matter, we are of the opinion that the Tribunal was in error in coming to the conclusion it did. The appeals are, therefore, allowed and the order and the judgment of the Tribunal are set aside and the combined orders of the Collector (Appeals) Nos. 284-286/CM/MT/83 dated December 15, 1983 are restored. In the facts and the circumstances of the case, there will be no order as to costs.

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