

HIGH COURT OF TRIPURA
AGARTALA
Central Ex.App.No.01 of 2024
along with
Central Ex.App.No.02 of 2024
Central Ex.App.No.03 of 2024

Central Ex.App.No.01 of 2024

1. Union of India,
represented by the Commissioner of Central Excise,
CGST, CGST Bhawan, 1st Floor, Mantribari Road,
Netaji Chowmuhani, Agartala, Tripura West-799001

2. Assistant Commissioner of Central Excise,
CGST, CGST Bhawan, 1st Floor, Mantribari Road,
Netaji Chowmuhani, Agartala, Tripura West-799001

---- Appellant(s)

Versus

M/S Dharampal Premchand Ltd.,
Shed No.13, Khatian No.4325, Arundhutinagar
Industrial Estate, P.O. & P.S. A.D. Nagar, Agartala,
Tripura-799003

---- Respondent(s)

in Central Ex.App.No.02 of 2024

1. Union of India,
represented by the Commissioner of Central Excise,
CGST, CGST Bhawan, 1st Floor, Mantribari Road,
Netaji Chowmuhani, Agartala, Tripura West-799001

2. Assistant Commissioner of Central Excise,
CGST, CGST Bhawan, 1st Floor, Mantribari Road,
Netaji Chowmuhani, Agartala, Tripura West-799001

---- Appellant(s)

Versus

M/S Dharampal Satyapal Ltd.,
Shed Nos.14 & 15, Arundhutinagar Industrial Estate,
P.O. & P.S. A.D. Nagar, Agartala, Tripura-799003

---- Respondent(s)

in Central Ex.App.No.03 of 2024

1. Union of India,
represented by the Commissioner of Central Excise,
CGST, CGST Bhawan, 1st Floor, Mantribari Road,
Netaji Chowmuhani, Agartala, Tripura West-799001

2. Assistant Commissioner of Central Excise,
CGST, CGST Bhawan, 1st Floor, Mantribari Road,
Netaji Chowmuhani, Agartala, Tripura West-799001

---- Appellant(s)

Versus

M/S Satyapal Shivkumar Ltd.,
Shed No.26B, Arundhutinagar Industrial Estate,
P.O. & P.S. A.D. Nagar, Agartala,
Tripura-799003

---- Respondent(s)

For Appellant(s)	:	Mr. Paramartha Datta, Adv. Mr. Soumya Chaudhury, Adv.
For Respondent(s)	:	Dr. A. Saraf, Sr. Adv. Mr. Kousik Roy, Adv. Mr. Pritam Baruah, Adv.
Date of Hearing	:	26.11.2024
Date of Judgment & Order	:	27.11.2024
Whether fit for reporting	:	YES.

HON'BLE MR. JUSTICE T. AMARNATH GOUD
HON'BLE MR. JUSTICE BISWAJIT PALIT

Judgment & Order

[T. Amarnath Goud, J]

Heard Mr. Paramartha Datta, Learned counsel assisted by Mr. Soumya Chaudhury, Learned counsel appearing for the appellants as well as Dr. A. Saraf, Learned senior counsel assisted by Mr. Koushik Roy, Learned counsel and Mr. Pritam Baruah, Learned counsel appearing for the respondent.

[2] All these appeals being Central Ex.App.No.01 of 2024, Central Ex.App.No.02 of 2024 and Central Ex.App.No.03 of 2024 are combined together for a common judgment and order.

[3] The genesis of the case in short is that M/S Dharampal Premchand Ltd., the respondent in this case has obtained central excise registration No.AACD1952BXM004 for manufacture of flavoured

chewing tobacco. On the basis of an intelligence to the effect that the respondent has suppressed the fact of manufacture of an excisable commodity described by them as 'compound'. They cleared the said compound for captive consumption without payment of the duties of excise, additional duties of excise leviable under the said Central Excise Tariff Act, the additional duties of excise (Goods of Special Importance) Act and National Calamity Contingent Duty leviable thereon under sub-section (1) of Section 136 of the said Finance Act with the intent to evade duty leviable thereon, as they had full knowledge that they were availing benefit of exemption from the payment of whole of the duties as mentioned above under notification No.8/2004-CE, dated 21.01.2004 as amended, in respect of final product namely branded flavored chewing tobacco/jarda scented tobacco wherein the said compound has been used as an input and they were not eligible for exemption from excise duty under notification No.52/2002-CE, dated 17.10.2002 in respect of compound manufactured by them and captively consume.

[4] Show cause notice dated 14.01.2009 was issued against the respondent and subsequently on 31.05.2012 the order in original was passed directing the respondent to pay the duty amount due. Subsequently, the respondent preferred an appeal before the CESTAT, Kolkata and accordingly, the appellate tribunal in excise appeal No.553 of 2012 dated 30.07.2015 remanded the matter back to the adjudicating authority. The adjudicating authority conducted a denovo adjudication in pursuance to the order dated 30.07.2015 and on 28.01.2016 passed an order demanding payment of the due amount from the respondent.

[5] Aggrieved by the order dated 28.01.2016, the respondent in this case once again preferred an appeal before the Hon'ble CESTAT, Kolkata and by a common order dated 03.08.2023 the Hon'ble CESTAT set aside the order in original dated 28.01.2016 and rolled in favour of the respondent and therefore, the appellant herein challenged the said order by filing an appeal under Section 35G of the Central Excise Act, 1944.

[6] Taking part in hearing, Mr. P. Datta, Learned counsel appearing for the appellants first of all drawn the attention of the Court that there was suppression of fact by the respondent to evade excise duty for which the show cause notice was rightly issued by the authority concerned but the Learned Appellate Tribunal did not consider the grievances of the appellants for which being dissatisfied with the judgment and findings of the Learned Appellate Tribunal, the present appellant has preferred this appeal. Learned counsel for the appellants further submitted that the Learned Appellate Tribunal came to the observation that the demand of duty was not sustainable on the ground of limitation and as such, the demand of interest and penalty was also not sustainable. Learned Appellate Tribunal further came to the observation that all though, the audit was conducted in the past but discrepancy was not pointed out. So, according to Learned counsel, the judgment of the Customs, Excise & Service Tax Appellate Tribunal suffers from perversity and the interference of the Court is required. Learned counsel for the appellants also referred the notification No.8/2004-CE dated 21.01.2004, notification No.52/2002-CE dated 17.10.2002 issued by the Central Excise Department. At the time of hearing, in support of his submission Learned counsel for the

appellants also filed one written argument and in the written arguments, the following assertions were made :

"1. The intelligence was collected by the Officers of Central Excise, Shillong to the effect that the said respondents had suppressed the fact of manufacture of an accessible commodity, described by them as "compound". They cleared the said "compound" for captive consumption without payment of the duties of excise, additional duties of excise liable under the Central Excise Tariff Act, the Additional Duties of Excise (Goods of special importance) Act and National Calamity Contingent duty leviable there on under sub-section (1) of Section 136 of the Finance Act with the intent to evade duty leviable there on, as they had full knowledge that they were availing benefit of exemption from the payment of whole of the duties of excise, additional duties of excise liable under the Central Excise Tariff Act, the Additional Duties of Excise (Goods of special importance) Act and National Calamity Contingent duty leviable there on under sub-section (1) of Section 136 of the Finance Act under Notification No.8/2004-CE dated 21.01.2004, as amended, in respect of final product, namely, branded Flavoured Chewing Tobacco/Jarda Scented Tobacco where in the said compound has been used as an input and they were not eligible for exemption from excise duty under Notification No.52/2002-CE dated 17.10.2002 in respect of 'compound' manufactured by them and captively consumed.

2. The thorough investigation lead by the investigating Officers of Central Excise, Shillong came to know that there are two goods manufactured at Agartala Unit viz., 1) Flavoured Chewing Tobacco and 2) Quiman Composition of Flavoured Chewing Tobacco: Compound, Silver Leaves and Raw Tobacco.

Composition of Quimam: Compound, Lakhnoi Kuimam (Lakhnawi Kimam) and Silver Leaves.

3. The major raw materials used for manufacturing of Compound were Sandalwood Oil, Sada Kimam and Menthol.

4. The sample of compound which was sent to the Joint Director, Chemical Laboratory, Customs House, 15/1, Strand Road, Kolkata and the compound responded to the test for nicotine.

5. From the SCN it can be noted that the Baltis in which the Compound was kept were used as an item of Plant & Machinery for manufacturing the final product.

6. The said compound may appropriately may be termed as Chewing Tobacco Kimam which was manufactured by the respondents and used as an input for manufacturing chewing tobacco which indeed a marketable product, hence, excisable.

7. In terms of Notification No. 8/2004-CE dated 21.01.2004 (enclosed as Annexure-A) the final product manufactured by the respondents is exempt from whole of the duties of excise, additional duties of excise liable under the Central Excise Tariff Act, the Additional Duties of Excise (Goods of special importance) Act and National Calamity Contingent duty leviable there on under sub-section (1) of Section 136 of the Finance Act subject to certain conditions laid down in the said notification.

8. As discussed in the above notification, the exemption is subject to certain conditions which are not deniable for the final products, but in the instant cases, the respondents have enjoyed the benefits of the Notification No. 52/2002-CE dated 17.10.2002 (enclosed as Annexure-B) on the product called as Compound, which was described as an intermediate product by the respondents to take advantage of notification no.52/2002-CE dated 17.10.2002. Whereas the said product compound is a finished good used as an input for manufacturing their final product. Hence, notification no. 52/2002-CE is not available for the same. The relevant portion of the notification is reproduced below:

Provided that nothing contained in this notification shall apply to inputs used in or in relation to the manufacture of final products (other than those cleared either to a unit in a Free Trade Zone or to a 100% Export Oriented Undertaking or to a unit in an Electronic Hardware technology Park or Software Technology Parks), which are exempt from the whole of the duty of excise leviable thereon or are chargeable to "Nil" rate of duty.

9. The benefits of Notification No. 52/2002-CE dated 17.10.2002 cannot be denied on the Compound manufactured and captively consumed in manufacture of Chewing Tobacco which would have satisfied the conditions laid down in the notification no. 52/2002-CE but it failed to satisfy the conditions because they have not manufactured it in their factory and, as per available records, they have not manufactured "Raw Kimam" but they have purchased it as their purchase registers prove the same. If they had manufactured it in their factory, they would have intimated to the department as per the provisions prescribed under Rule 9 of the Central Excise Rules, 2002, which was not done by the respondents. Instead, they have submitted that their units were audited by the department. Generally, the auditing is to examine the records and documents maintained by the respondents in a statutory manner. No activities of preventive nature including examination of manufacturing process can be carried out by auditing officers. Hence, auditing has no significance in relation to the question of knowing to the department.

10. As per provisions under Rule 173B of the Central Excise Rules, 1944, the list of raw materials, manufacturing process and flow chart of the process of chewing tobacco was not declared by the respondents. In the list of critical raw materials, the respondents have not shown whether a compound is also a raw material or an intermediary product. This does not indicate whether the compound was manufactured in their factory or purchased from outside.

11. It may also be noted that the respondents have never given the cost of production of compound nor have they given the details of the proportion of raw materials mixed for the production of compound.

12. Reference of para no. 5.15.5 of Order-In-Original dated 31.05.2012 may be taken where the adjudicating authority has categorically mentioned about the malafide intentions of the respondent in the case of *Dharampal Satyapal* (supra) as mentioned in para no. 5.12.3 of the above mentioned Order-In-Original. From the available records, it may also be noted that the respondents or their respective representatives never produced the

required documents nor attended for the Summons and Personal Hearings at first instance, they kept on delaying in attending.

13. Relevant Definitions:

Intermediate Product: Intermediate goods are products that are used in the production process to make other goods, which are ultimately sold to consumers.

Intermediate goods are sold industry-to-industry for resale or to produce other products.

Input: Input means all goods used in the factory by the manufacturer of the final product;

Captive Consumption: Captive Consumption means the consumption of goods manufactured by one division and consumed by another division(s) of the same organization or related undertaking for manufacturing another product(s).

14. In the present cases the respondents tried to picturize the compound as intermediate product as their mere intention is to avail the benefits of Notification No. 52/2002-CE and thus can evade the tax. If they have not mentioned it as intermediate product then they have to clear it as finished/final product where the duty is leviable which indeed is exempted under notification no. 8/2004-CE. The main malafide intention of the respondents arises here, when the goods that are to be cleared as finished/final product, the event of levy of duty starts. For the payment of this duty, the respondents should have to utilize the Modvat/Cenvat they have got on their inputs used for manufacturing the finished/final product first and the rest of the duty is to be paid, but here it is exempted through notification no.8/2004-CE subjected to certain conditions.

15. If they have cleared the said compound as final product, then they should have utilized the Modvat/Cenvat Credit got from their inputs and the rest of the duty should be paid. Here in the present cases if it is done so then the respondents have to invest very less amount in plant and machinery in a manufacturing unit which is located in the States of North East or can be invested in infrastructure or civil works or social projects in the States of North East and under the conditions laid down under point F of the notification no.8/2004-CE there will be a loss to the respondents.

16. In order to avoid all this, the respondents with malafide intentions shown the compound as intermediate product and have availed the benefits of notification no.52/2002-CE and have cleared the same compound as final product by enjoying the benefits of notification no.8/2004-CE which might be called as double bonanza for the same product. The CESTAT, Kolkata while passing the judgment has wrongly appreciated the said notifications and gave double bonanza to the tax evaders.

17. It may also be noted that the respondents have filed number of cases in this Hon'ble Court. In one such case, they tried to nullify a notification which was issued to withdraw all the exemption notifications which they had enjoyed. The Hon'ble Court may be observed how malafide the intentions of the respondents are. M/s Dharampal Premchand & another filed an appeal with WPC No. 144/2010 which was registered on 03.04.2010 in the Hon'ble High Court of Tripura to strike down the notification no. 11/2007-CE dated 01.03.2007. The Hon'ble High Court of Tripura has set aside the notification no. 11/2007- CE dated 01.03.2007 through

Judgment/Order dated 08.01.2016. Upon aggrieved by the Order dated 08.01.2016 the department has filed an appeal with WA No.10/2016 in the Hon'ble High Court of Tripura. The Hon'ble High Court of Tripura has allowed the appeal and reversed the Order dated 08.01.2016 by passing an Order dated 10.02.2020. Further, M/s Dharampal Premchand filed a Review Petition No.57/2022 in the Hon'ble High Court of Tripura on 28.10.2022 as per the Order of the Supreme Court passed on 14.07.2022. The Hon'ble High Court has passed an Order dated 21.09.2023 by ordering that they do not find grounds made out to review the impugned judgment. Again, M/s Dharampal Premchand and another have filed SLP before the Hon'ble Supreme Court."

Finally, the counsel for the appellants prayed to allow the appeal.

[7] Per contra, Mr. A. Saraf, Learned senior counsel appearing on behalf of the respondent first of all drawn the attention of this Court that these present appeals are not maintainable in the eye of law and furthermore, the substantial questions of law as framed by this Court does not links in favour of the present appellants and as such, the appellants are not entitled to any relief in this appeal and as such, these appeals are liable to be dismissed with costs. He also referred different provisions of law and also few citations of the Hon'ble Apex Court and referred the written argument submitted on behalf of the respondent. The Hon'ble Court vide order dated 03.04.2024 admitted the appeals and framed the following substantial questions of law which provides as under:

"(i) Whether CESTAT has misinterpreted the Notification No.52/2002-CE dated 17.10.2002 under which the respondent claimed exemption for the intermediate product as the respondent has also again claimed exemption under Notification No.08/2004 dated 21.01.2004 and whether such exemption are permissible as per said two notifications ?

(ii) Whether the respondent can avail exemption benefit under Notification No.8/2004-CE, dated 21.01.2004 and also simultaneously avail exemption benefit under Notification No.52/2002-CE dated 17.10.2002 i.e. 'double benefit' for the same product in question ?

(iii) Whether the Hon'ble CESTAT committed gross error and illegality that the compound which was manufactured by the respondent was an

intermediate product and is eligible for availing the benefit under Notification No.52/2002-CE dated 17.10.2002 which is not permissible as the compound is a marketable commodity and hence excisable ?

(iv) Whether the order of the learned CESTAT suffers from perversity in the eye of law and on facts ?

[8] It was further submitted that the Central Excise Act of 1944 had not exempted the said product namely chewing tobacco from whole of the duty of excise leviable thereon nor the said product was chargeable to "Nil" rate of duty. In fact, in the Notification No. 08/2004-CE dated 21.01.2004, there was no exemption from the levy of the excise duty and the same only provided for that the eligible industrial units manufacturing specified tobacco products instead of making payment of the Central Excise leviable to the chewing tobacco, could utilize the entire amount of duty benefit for investment in plant and machinery or in infrastructure or civil works or social projects in any of North-Eastern States. Subsequently, the said Scheme was further amended vide Notification No. 28/2004-CE dated 09.07.2004 providing for that the beneficiary was required to deposit an amount equivalent to the duty payable in an escrow bank account and operation of such bank account, including withdrawal for investment in specified categories, was allowed only with prior permission of jurisdictional Commissioner of Central Excise.

[9] It was further submitted that the Act of 1944 had not exempted chewing tobacco from the levy of the Central Excise duty nor the chewing tobacco was chargeable to Nil rate of duty. It is only because of the Notification No. 69/2003-CE dated 25.08.2003 superseded by Notification No. 8/2004-CE dated 21.01.2004 read with amended by Notification No. 28/2004-CE dated 09.07.2004, which were issued to give effect to the Industrial Policy Resolution of the

Government of India, 1997 which exempts all industrial activities from excise duty (irrespective of intermediate or final goods) of certain eligible industries located in the State of Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland and Tripura who had commenced commercial production on or after the 24th day of December, 1997, but not later than the 28th day of February, 2001 and had availed of the benefit under the Notification of the Government of India, Ministry of Finance (Department of Revenue) No. 32/99-Central Excise dated 8th July, 1997 and had continued its manufacturing activities after the 28th day of February, 2001 were granted the exemption from payment of the excise duty equal to the difference between the sum of basic excise duty, special excise duty and additional excise duty, payable, but for the exemption in the said Notification and the sum of basic excise duty, special excise duty and additional excise duty, paid, was to be utilized by the manufacturer only for investment in plant and machinery in a manufacturing unit which is located in the State of Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland or Tripura a investment in infrastructure or civil works or social projects in the aforesaid states. The Notification clearly provided that the investment made in the said Notification shall not be allowed to be withdrawn before the expiry of ten years from the date on which the investment is made except in a case where the investment withdrawn is reinvested in the same manner as specified in the said notification, in any one of the States mentioned in the said Notification.

[10] The Notification No.8/2004-CE dated 21.01.2004 read with amended Notification No.28/2004-CE dated 09.07.2004 further provided that if the investment made under the said Notification is

withdrawn before the expiry of ten years and is not reinvested as mentioned above, the duty which is equal to the amount so withdrawn and not so reinvested, shall be paid by the manufacturer on the date on which the investment is withdrawn. As such, it is very clear from the Notification itself that the amount of the excise duty payable but for the exemption could be utilized for investment in the plant and machinery in a manufacturing unit which is located in the State of Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland or Tripura. Excise Duty can become payable only when there is a levy. The industries availing the benefits under the Notification No. 8/2004-CE dated 21.01.2004 read with amended by Notification No. 28/2004-CE dated 09.07.2004 were required to charge the excise duty in the invoices while clearing the goods from the factory and only the said excise duty instead of paying to the Government could have been utilised in plant and machinery in a manufacturing unit which was located in the State of Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland or Tripura or investment in infrastructure or civil works or social projects in the aforesaid states that was also amended vide Notification No. 28/2004-CE dated 09.07.2004 and by the said Notification, it was provided that the beneficiary were required to deposit an amount equal to the duty payable in an escrow bank account and operation of such bank account, including withdrawal for investment in specified categories, was allowed with prior permission of jurisdictional Commissioner of Central Excise.

[11] It is respectfully submitted that the duty was payable but for the Notification No. 8/2004-CE dated 21.01.2004 and in fact as per the amended Notification No. 28/2004-CE dated 09.07.2004,, the

said duty has also to be deposited in the escrow account and the same could have been withdrawn only for the purpose of making investment in specified category and that too on the prior permission of the jurisdictional authorities of the Central Excise. The Respondent submits that the Notification No. 8/2004-CE dated 21.01.2004 and the amended Notification No. 28/2004-CE dated 09.07.2004 nowhere reveals that the finished products manufactured namely 'chewing tobacco' manufactured by the Respondent was exempt from whole of the duty leviable thereon or were chargeable to "Nil" rate of duty. In fact, the similar product if manufactured by other manufacturers, who were not eligible to avail the benefit of Notification No. 8/2004-CE dated 21.01.2004 and the amended Notification No. 28/2004-CE dated 09.07.2004 would have been liable to pay the duty on the same product and thereby it cannot be said by any stretch of imagination that the product chewing tobacco manufactured by the Respondent was exempted from the whole of the duty of excise leviable thereon or are chargeable to "Nil" rate of duty. Rather, can be said that certain eligible manufacturing units are exempted from excise duty.

[12] The Notification No. 52/2002-CE dated 17.10.2002 issued in exercise of the powers conferred under sub-Section (1) of Section 5A of the Act of 1944 read with sub-Section (3) of Section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 and sub-Section (3) of Section 136 of the Finance Act, 2001. However, the proviso to the said Notification provided that the exemption was in respect of all goods falling under sub-heading No. 2106.00 and Chapter 24 of the First Schedule to the Central Excise Tariff Act, 1985 manufactured in a factory and used within the factory of production in or in relation to the manufacture of final products all

goods falling under Chapter 24 of the first Schedule to the said Tariff Act, from the whole of the duty of excise and additional duty of excise and national calamity contingent duty leviable thereon, which was specified in the respective Schedules to the said Tariff Act and the said Special Importance Act and the said Finance Act. Nothing contained in the notification was to apply to inputs used in or in relation to the manufacture of final products (others than those cleared either to a unit in a Free Trade Zone or to a 100% Export Oriented Undertaking or to a unit in an Electronic Hardware technology Park or Software Technology Parks), which are exempt from the whole of the duty of excise leviable thereon or are chargeable to "Nil" rate of duty.

[13] The Respondent further submit that the present Appeals are based on incorrect appreciation of the Notification No. 52/2002 Central Excise dated 07.10.2002) inasmuch as the Respondent's final product i.e. Chewing Tobacco did not fall in the category of "exempt from the whole of the duty of excise leviable thereon or are chargeable to "Nil" rate of duty.

[14] It was further submitted that there are three stages in the imposition of a tax, there is the declaration of liability, that is, the part of the statute which determines what persons in respect of what property are liable. Next, there is the assessment. Liability does not depend on assessment. That, ex hypothesis, has already been fixed. But assessment particularizes the exact sum which a person liable has to pay. Lastly comes the methods of recovery, if the person taxed does not voluntarily pay. In fact, the charge is made in consequence of the Act, upon the subject the assessment is only for the purpose of quantifying it. The Respondent submits that there is a distinction and difference between the two expressions "liable to pay duty" and "duty

shall be payable", for, a manufacturer may be liable for payment of duty but on account of exemption, duty may not be payable by him. The expression "liable to pay duty" does not mean that tax is payable by a manufacturer under the Act. The expression "exempt from the whole of the duty of excise leviable thereon or are chargeable to "Nil" rate of duty" would mean that a manufacture is not liable to duty at all and in such case, no duty can be levied or imposed and the manufacturer does not come within the purview at all.

[15] The Respondent further submits that the liability to pay duty and actual payment of duty are conceptually different inasmuch as for the exemption an assessee would be required to pay duty in terms of the provision of the Act of 1944. Exemption presupposes a liability and unless there is liability, the question of exemption does not arise. Only when there is a levy, the question of payment of any duty would arise.

[16] In course of his submission, Learned senior counsel for the respondent referred few citations. The Apex Court in the case of **CCE Vs. National Tobacco Co. of India Ltd.** reported in **(1972)2 SCC 560** in paragraph 19 held as under:

"19. The term 'levy' appears to us to be wider in its import than the term 'assessment'. It may include both 'imposition' of a tax as well as 'assessment'. The term 'imposition' is generally used for the, levy of a tax or duty by legislative provision indicating the subject matter of the tax and the rates at which it has to be taxed. The term 'assessment', on the other hand, is generally used in this country for the actual procedure adopted in fixing the liability to pay a tax on account of particular goods or property or whatever may be the object of the tax in a particular case and determining its amount. The Division Bench appeared to equate 'levy' with an 'assessment' as well as with the collection of a tax when it. held that 'when the payment of tax is enforced, there is a levy'. We think that, although the connotation of the term 'levy'

seems wider than that of 'assessment', which it includes, yet, it does not seem to us to extend to 'collection'. Article 265 of the Constitution makes a distinction between "levy" and "collection".

[17] The Apex Court again in the case of **Somaiya Organics (India) Ltd. Vs. State of U.P.**, reported in **(2001)5 SCC 519** at paragraph 29 held as under:

"The words used in Article 265 are 'levy' and 'collect'. In taxing statute the words 'levy' and 'collect' are not synonymous terms while 'levy' would mean the assessment or charging or imposing tax, 'collect' in Article 265 would mean the physical realization of the tax which is levied or imposed. Collection of tax is normally a stage subsequent to the levy of the same"

[18] In the case of **Peekay Re-Rolling Mills (P) Ltd. Vs. Asstt. Commissioner & Anr**, reported in **(2007) 4 SCC 30**, the Apex Court held that :

".....the collection and levy are distinct and that collection is not an essential facet of levy. The Apex Court held that absence of collection does not logically follow the absence of liability. The Apex Court in Peekay Re-Rolling Mills (P) Ltd.(supra) at paragraph 35 clearly held that exemption can only operate when there has been a valid levy, for if there was no levy at all, there would be nothing to exempt.

The Apex Court in **Associate Cement Companies Ltd. v. State of Bihar (2004) 7 SCC 642** was examining a case which involved an exemption notification issued by the State Government which reduced the liability to tax under the Bihar Finances Act, 1981 to the extent of tax paid under an earlier Ordinance in respect of entry of goods. The appellant claimed that it was entitled to adjust the entry tax paid under the Entry Tax Act while computing the tax payable under the Bihar Finances Act.

The respondent however argued that such adjustment could not be made since the same was exempted, which meant that there was no liability to tax. The Apex Court rejected the argument of Respondent by holding in para 17.

"17. Crucial question, therefore, is whether the appellant had any 'liability' under the Act.... The question of exemption arises only when there is a liability. Exigibility to tax is not the same as liability to pay tax. The former depends on charge created by the statute and the latter on computation in accordance with

the provisions of the statute and rules framed thereunder, if any. It is to be noted that liability to pay tax chargeable under Section 3 of the Act is different from quantification of tax payable on assessment. Liability to pay tax and actual payment of tax are conceptually different. But for the exemption the dealer would be required to pay tax in terms of Section 3. In other words, exemption presupposes a liability. Unless there is liability, question of exemption does not arise. Liability arises in terms of Section 3 and tax becomes payable at the rate as provided in Section 12. Section 11 deals with the point of levy and rate and concessional rate."

In CCE v. National Tobacco case reported in (1972) 2 SCC 560, the Apex Court was faced with certain questions relating to the refund of excise duty on the manufacture of cigarettes. In this context, the Court examined the scope of the term "levy" and made the following observations: (SCC p. 572, para 19)

"19. The term 'levy' appears to us to be wider in its import than the term 'assessment'. It may include both 'imposition' of a tax as well as 'assessment'. The term 'imposition' is generally used for the levy of a tax or duty by legislative provisions indicating the subject-matter of the tax and the rates at which it has to be taxed. The term 'assessment', on the other hand, is generally used in this country for the actual procedure adopted in fixing the liability to pay a tax on account of particular goods or property or whatever may be the object of the tax in a particular case and determining its amount. The Division Bench appeared to equate 'levy' with an 'assessment' as well as with the collection of a tax when it held that 'when the payment of tax is enforced, there is a levy'. We think that, although the connotation of the term 'levy' seems wider than that of 'assessment', which it includes, yet, it does not seem to us to extend to 'collection'. Article 265 of the Constitution makes a distinction between 'levy' and 'collection'."

Referring the same it was submitted that the above judgments makes it amply clear that exemption does (sic not) negate a levy of tax altogether. Despite an exemption, the liability to tax remains unaffected, only the subsequent requirement of payment of tax to fulfill the liability is done away with.

[19] The Respondent further submit that Compound is also covered by exemption under NEIP, 1997, which exempts all industrial

activities irrespective of intermediate goods or final goods, of an eligible units from excise duty as followed by Notification No. 69/2003-CE superseded by 8/2004-CE and therefore question of demanding duty on 'Compound' under Notification 52/2002-CE does not arise. Even if, for argument's sake, duty is demanded under 52/2002-CE, the amount payable would be ZERO. Notification No.8/2004-CE exempts all goods falling under sub-heading 2401.90, 2402.00, 2402.00, 2404.41, 2404.42, 2404.49, 2404.50 or 2404.99 of the Tariff from basic duty, additional duty and NCCD. Since 'Compound' falling under Heading No. 2404.41 during 2003-04 and 2004-05 (up to 28/2/2005) and under heading 24039990 with effect from 28.02.2005, it is eligible for the benefit of exemption Notification 8/2004-CE. The Respondent submits that the exemption under 8/2004-CE is applicable to compound as well. However, compound is not removed or cleared as such its identity gets merged in chewing tobacco. Thus, the compound gets cleared along with chewing tobacco. In fact Compound is classifiable as chewing tobacco and falls in the category of products specified under notification No.8/2004-CE. The Respondent further submit that the exemption of the intermediary product has been provided in Notification No. 52/2002-CE subject to the condition that the finished product is not exempted from whole of the duty of excise leviable thereon or are chargeable to "Nil" rate of duty. Since the finished products manufactured by the Respondent Company was not exempted from whole of the duty of excise leviable thereon or are chargeable to "Nil" rate of duty, the Respondent Company is entitled the benefit of Section 52 of the Act of 1944. The exemption in any case was a conditional exemption and thereby finished product namely chewing tobacco cannot be said to be

by any stretch of imagination said to be whole of the duty of excise leviable thereon or are chargeable to "Nil" rate of duty.

[20] It is respectfully submitted that the substantive condition for exemption under Notification specified amount should be invested in the North East for any of the notified purposes through the mechanism of Escrow Account deposit and withdrawal and this aspect of deposition of exempted duty amount into designated bank account, its withdrawal and investment is not disputed. Other conditions are purely procedural. It is also not disputed that the Respondent Company used the compound only for captive consumption and nothing was cleared from the factory as such, once the condition of deposit of an amount equal to the duty payable, but for exemption under Notification No. 8/2004-CE stands satisfied for chewing tobacco, the same condition gets automatically satisfied for compound captively consumed as well. This is for the reason that the amount of duty payable on compound, but for the exemption contained in Notification No. 8/2004-CE, is nothing but ZERO. When the amount to be invested for availing of exemption under Notification No. 8/2004-CE, is calculated, the amount is to be calculated as if compound and chewing tobacco are both taxable in a regime where Notification No. 8/2004-CE is not in existence. This follows quite clearly from the use of the words, "but for the exemption in this notification" used in Notification No. 8/2004-CE. Thus, the amount to be deposited/invested for compound keeping this in mind, comes to be ZERO because in a tax regime in which 8/2004-CE is non-existent, the intermediate-compound having been used captively in dutiable, chewing tobacco gets the benefit of duty exemption under Notification No. 52/2002-CE and thus no amount of duty is payable on compound.

Thus, the exemption to chewing tobacco under Notification No. 8/2004-CE automatically accompanies with it the exemption to captively used compound under the same very notification. In other words, exemption to compound travels along with exemption on chewing tobacco.

[21] The Respondent submit that there was no exemption as per Notification 8/2004-CE dated 21.01.2004 as amended inasmuch as duty on the finished product was leviable had with a condition that the same can be withdrawn for the purpose of investment in the specified categories. The Notification No. 8/2004-CE dated 21.01.2004 as amended cannot be said to be by any stretch of imagination to have exempted the finished product manufactured by the Respondent Companies from whole of the duty of excise leviable thereon nor the finished product was chargeable to Nil rate of duty and thereby the Notification No. 52/2002-CE dated 17.10.2002 is not applicable in the present case.

[22] The Respondent submit that the issues involved in the present case are squarely covered by the decision of the Division Bench of this Hon'ble Court in **Union of India Vs. M/s Dharampal Satyapal Ltd. (Central Excise Appeal No. 1/2019), decided on 22.03.2021** wherein this Hon'ble Court after examining the Notification No. 8/2004-CE dated 21.01.2004 clearly held that the said exemption was a conditional exemption and that the Notification No. 8/2004-CE dated 21.01.2004 as amended cannot be seen as the Notification granting full exemption for payment of duty. This Hon'ble Court held that the said exemption was conditional on various requirements which limited the scope of the assessee to utilize the duty element so exempted, for any purpose at all and such exemption did

not directly increase the profitability of the product since the assessee could not retain the sum equivalent to the duty payable and utilized it at will. The said finding was arrived at vide examining Rule 2(d) of the CENVAT Credit Rules which defined that "exempted goods" to mean excisable form of duty of excise leviable thereon or the goods which are chargeable nil rate of duty. The exact expression as utilized in Rule 2(d) of the CENVAT Credit Rules have been used in the Notification No. 52/2002 Central Excise dated 07.10.2002.

[23] The issues involved in the present Appeals centre around the question as to whether the Notification No. 8/2004-CE dated 21.01.2004 and the amended Notification, No. 28/2004-CE dated 09.07.2004, the whole of the duty of excise leviable on the finished product was exempt or the same was chargeable Nil rate of duty and thereby the Judgment of this Hon'ble Court is squarely applicable in the present case. The Respondent submits that since the issue has already been settled by this Hon'ble Court, no substantial question of law can be said to have been arisen on the same issue and thereby the present Appeal is liable to be dismissed.

[24] The Respondent further submit that as per the Notification, though the excise duty, additional duty of excise leviable under the said Central Excise Tariff Act, were exempted but the educational cess, which was payable by the Respondent was not exempted by the Notification No. 8/2004-CE dated 21.01.2004 and the amended Notification No. 28/2004-CE dated 09.07.2004. Having regard to the nature of duty or cess, which is an addition to duty of excise leviable under the Act of 1944 or additional duty of excise leviable under Section 85 of the Finance Act, 1985, which were nothing but levy of excise. The expression "exempt from whole of the

duty of excise leviable thereon" would also include other levies. It does not matter these additional duties or cesses are not to be traced to the Act or they are provided for by other enactments such as Finance Act or that they are levied as an increment, or are expressed as a proportion to an existing duty namely, basic duty of excise inasmuch as taxing power of the Union for these levies namely the additional duties of excise and/or education cess can traced only to Entry 84 of Schedule -VII to the Constitution of India which is 'tax on manufacture of goods', i.e. excise duty. Further the phrase "duties of excise" and "duty of excise" were used originally in the Act interchangeably, namely, sometimes in plural and sometimes in singular. When the new term "CENVAT" came to substitute these terms as on 12 May 2000, in order to overcome the difficulty of replacing these words in the entire Act, Section 2A was introduced in the Act with effect from 12 May 2000 by Finance Act 10/2000, whereunder the expressions "duty", "duties", "duty of excise" and "duties of excise" were to be construed to include a reference to "Central Value Added Tax (CENVAT)" and as such the same clearly indicated that there could be no distinction between the phrases "duty", "duties", "duty of excise" and "duties of excise". Section 2A of the Central Excise Act, 1944 that was inserted by Finance Act 10/2000 w.e.f. 12th May 2000 is reproduced below:

"24. Reference of certain expressions. In this Act, save as otherwise expressly provided and unless the context otherwise requires, references to the expressions "duty", "duties", "duty of excise" and "duties of excise" shall be construed to include a reference to "Central Value Added Tax (CENVAT)".

[25] It was respectfully submitted that the singular use of the word "duty" cannot be considered as a decisive basis for construing

the expression "exempt" from the whole of duty of excise" in Rule 2(d) of the CENVAT Credit Rules. The Respondent further states that the expression "duty of excise" is used in CENVAT Credit Rules, which itself includes the various duties and cesses referred to therein, including the education cess and auto cess, etc. as part of "CENVAT", which is an equivalent expression to "duty of excise" after the Act was amended by introducing Section 2A therein. The expression "duty of excise" used in CENVAT Credit Rules, thus, does not, by its own force or on its own logic, lend to a distinction between basic duty of excise under the Act and special excise duties or cesses or other duties leviable under other enactments. In this regard, it is pertinent to note the observation of the Hon'ble High Court of Punjab and Haryana in the case of **Commissioner, Central Excise Commissionerate Vs. M/s Malwa Industries, Etc. (2010)2 GSTR 413 (P&H) decided on 30.04.2009** wherein the High Court observed as under:

"We are further of the view that the amendment, which has been made in Rule 57 (AB) of the Rules by using the expression of 'any duty of excise' is significant and intentional. IN the earlier Notification No. 5/94-CE(NT), dated 1.3.1994, it was specifically provided that credit can be utilized only for payment of duty of excise leviable under the Excise Act. The amendment has been made with an intention to allow the dealer-assessee to utilize the credit of basic excise duty for payment of additional excise duty. The aforesaid view is supported by the Division Bench judgment of the Gujarat High Court rendered in the case of Maheshwari Mills Limited Vs. Union of India, (1992) 58 LT 9. It has been held that the narrow construction on the expression duty occurring in Rule 2(v) cannot be accepted to mean only 'duty' of excise leviable under the Excise Act because the language of Section 3 of Textile & Textile Article Act, is clear to include the additional duty. The Division Bench has further held that the word 'additional duty' embraces the idea of joining one thing to another, which means that the additional duty gets itself assessed."

That the **Bombay High Court in Mahindra & Mahindra Ltd.& Ors. Vs. The Commissioner of Central Excise, Mumbai [(2020) 11 GSTR-OL 60 Bom]** decided on 04.12.2019 while examining the issue as to whether the Tribunal was justified in holding that though auto cess and education cess were duties of excise, yet the goods on which they were paid, continued to be exempted goods as basic excise duty was not payable thereon held that the expression "duty of excise" as used in CENVAT Credit Rules itself includes the various duties and cesses including the education cess and auto cess, etc. as part of "Cenvat", which is an equivalent expression to "duty of excise" after the Central Excise Act was amended by introducing Section 2A therein. The Bombay High Court held that the expression "duty of excise" used in CENVAT Credit Rules does not, by its own force or on its own logic, lend to a distinction between basic duty of excise under the Act and special excise duties or cesses or other duties leviable under other enactments.

IMPUGNED SHOW CAUSE NOTICE AND THE ORDER IN ORIGINAL ARE BARRED BY LIMITATION:

The Respondents submit that the impugned show cause notice and the order in original are barred by limitation. The extension of period of limitation cannot be invoked in the present case as there was no suppression of facts with an intention to evade duty. The Respondent states that the process of manufacture was duly declared to the Department and the compound emerging as an intermediate product was fully within the knowledge of the Department. The records were duly maintained by the Appellants for the manufacture of Compound which was consumed captively and Audit was conducted in 2001, 2003, 2004, 2005 and 2007 and no objections were raised so all the facts were in the knowledge of the Department and thereby the extended period of limitation cannot be invoked on the ground that there was a suppression of facts with the intention to evade duty. The Respondent states that neither in the show cause notice nor in the order of original was stated as to how there was a suppression of facts with an intention to evade duty and the authority merely stated that there was a suppression of facts involved in the case, which cannot empower the authorities to invoke the extended period of limitation as provided under Section 11A of the Act of 1944. The Respondents state that as per proviso to Section 11A, for invoking extended period of limitation, the Department has necessarily to allege and prove that there was fraud, suppression etc. on the part of the assessee with an intention to evade payment of duty. The Respondent further submit that it is settled legal position that for the Excise Department to invoke extended period of limitation, the Department has to allege and prove that there was fraud, suppression etc. on the part of the assessee with an intention to evade payment of excise duty. In the show cause notice there was no allegation of any fraud, suppression etc. with an intention to evade payment of duty on the part of the Respondent Company and thereby the extended period of limitation is not invokable in the present case.

The contention of the Appellants that while chewing tobacco is exempted under Notification No. 8/2004-CE,

compound was not, even though both are products specified under the same Notification No. 8/2004-CE the Respondent Specifically submit that the substantive condition for exemption under Notification specified product should be invested in the North East for any of the notified purposes through the mechanism of Escrow Account deposit and withdrawal. Other conditions are purely procedural. It is not in dispute that the Respondent Companies used the compound only for captive consumption and nothing was cleared from the factory as such, once the condition of deposit of an amount equal to the duty payable, but for exemption under Notification No. 8/2004-CE stands satisfied for chewing tobacco, the same condition gets automatically satisfied for compound captively consumed as well. This is for the reason that the amount of duty payable on compound, but for the exemption contained in Notification No. 8/2004-CE, is nothing but ZERO, When the amount to be invested for availing of exemption under Notification No. 8/2004-CE, is calculated the amount is to be calculated as if compound and chewing tobacco are both taxable in a regime where Notification No. 8/2004-CE is not in existence. This follows quite clearly from the use of the words, "but for the exemption in this notification" used in Notification No. 8/2004-CE. Thus, the amount to be deposited/invested for compound keeping this in mind, comes to be ZERO because in a tax regime in which 8/2004- CE is non-existent, the intermediate compound having been used captively in dutiable chewing tobacco gets the benefit of duty exemption under Notification No. 52/2002-CE and thus no amount of duty is payable on compound. Thus, the exemption to chewing tobacco under Notification No. 8/2004-CE automatically accompanies with it the exemption to captively used compound under the same very notification. In other words, exemption to compound travels along with exemption on chewing tobacco.

It is further submitted that exemption granted in Notification No. 8/2004-CE dated 21.01.2004 was a conditional exemption and the same has not exempted finished product of the Respondent Company, from whole of the duty of excise leviable thereon or are chargeable to "Nil" rate of duty and thereby applicability of Notification 52/2002 in instant case is not attracted and Appellants were legally entitled to exemption under Notification No. 52/2002- CE dated 07.10.2002. The Respondent denies the statements contrary to the above, made in paragraph 9 of the Memorandum of Appeal.

The statements and contentions made by the Appellant on the basis of the pleadings of the Respondent Companies at the time of adjudication has no relevance in the Appeal filed under Section 35G of the Act of 1944 inasmuch as the Appeal has to be decided on the basis of the substantial question of law arising out of the order of the Tribunal. The pleading and submissions made before the adjudicating authority has no relevance in deciding the proposed substantial question of law inasmuch as the Tribunal is the final authority finding a fact and the fact as found by the Tribunal are final.

The Respondents submit that an Appeal to High Court under Section 35G of the Act of 1944, is not

automatic. The condition precedent for entertaining an Appeal is satisfaction of the High Court that the Appeal involves a substantial question of law.

Finally, it was submitted that as no substantial questions of law arises in the present Appeal, the issues involved in the present Appeal are fully covered by the Judgment of the Division Bench of this Hon'ble Court in *Union of India Vs. M/s Dharampal Satyapal Ltd. (Central Excise Appeal No. 1/2019)*, and thereby no substantial question can said to have been arises on the same issue and thereby the present Appeals are liable to be dismissed."

We have heard both the sides at length and gone through the relevant notifications and the citations referred by Learned senior counsel appearing on behalf of the respondents and also perused the written arguments.

[26] Here in the case at hand though substantial questions of law has been framed on the issue of exemption of excise duty or suppression of material facts before the assessing authorities looking the matter from the question of limitation or of any other technicalities, this Court feels that for whatever the reasons the inspecting or audit authorities who are supposed to conduct periodical/regular audits and inspections could have raised the demand and also issued show cause notice on yearly basis but not acting upon for years together and to the surprise of the respondent, notices are issued and demand is raised before a concern to this Court and a huge amount of excise duty is important. This Court on the ground of technicalities and for certain laches committed by the department officials as pointed out by the respondent counsel is not inclined to decide the case in favour of the respondent. But keeping in mind, the quantum of excise duty and its ancillary duties which are in total of Rs.98,03,22,312/- approx., this Court feels that the matter needs consideration as to where the things are properly attended or not.

[27] Considering the argument of the respondent Learned senior counsel that 'compound' i.e. kimam is purchased from the suppliers and the duty is paid and second time the duty is not payable appears to be logical and thus, it becomes immense necessary for enquiry into the matter and thus, the particulars of the supplier and the documents related to the transaction needs to be examined and accordingly, the duty has to be levied.

[28] For the reasons stated above, this Court feels that it is a case to remand back the matter to the Commissioner of Central Excise, Morellow Compound M.G. Road, Shillong-793001 in the respective cases for reconsidering the issue of purchase of the 'compound' i.e. kimam and the records relating to the same and make an enquiry as to who is the supplier and in the event if the supplier has already paid the sufficient excess due, the same need not be collected earlier from the respondent herein. The respondent is at liberty to place relevant records, if not already placed to the satisfaction of the Officers and the consequential duties raised in the show cause notice needs to be dropped in the light of payment, if already paid for the 'compound' i.e. kimam failing which the respondent herein is accountable for the excess duty payable in accordance with law.

[29] In view of the above, this Court is of the opinion that the issue of levy of excise duty and considering the exemption is concerned for the discussions made above, an opportunity needs to be given for ascertaining whether any due has been already paid by the supplier and the same needs to be considered by the Commissioner of Central Excise, Morellow Compound M.G. Road, Shillong-793001. Thus, this Court feels that the order passed by the

order dated 28.01.2016 and the consequential order in appeal dated 03.08.2023 needs to be set aside and the matter be remanded back to the Commissioner of Central Excise, Shillong with the above observation.

[30] Accordingly, the present appeal stands disposed of. The order of the appeal dated 03.08.2023 and the orders of the Commissioner of Central Excise, Morellow Compound M.G. Road, Shillong-793001 dated 28.01.2016 are set aside and the matter is remanded back to the Commissioner of Central Excise, Shillong.

Note : Mark a copy to the Department of Revenue, Office of the Commissioner of Central Excise, Morellow Compound M.G. Road, Shillong-793001.

JUDGE

JUDGE



**SABYASACHI
BHATTACHARJEE**

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