

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 20.12.2013

Coram

The Honourable Mrs.Justice CHITRA VENKATARAMAN
and

The Honourable Mr.Justice T.S.SIVAGNANAM

Civil Miscellaneous Appeal Nos.174 of 2008
and 582 to 593 of 2007
and M.P.Nos.1 of 2007 (12 MPs)

Commissioner of Central Excise
Chennai II Commissionerate
692, MHU Complex
Anna Salai
Nandanam
Chennai-600 035

... Appellant in
C.M.A.No.174/2008

-vs-

1.Customs, Excise and
Service Tax Appellate Tribunal
Chennai, South Regional Bench
Chennai-600 006

2.M/s.Sakthi Plastics
No.100, Sidco Industrial Estate
Chennai-600 098

... Respondent in
C.M.A.No.174/2008

C.M.A.No.174/2008 filed under Section 35G of the Central Excise Act, 1994 against the Final Order No.933/2006 dated 28.09.2006 on the file of Customs, Excise and Service Tax Appellate Tribunal, South Regional Bench, Chennai-600006.

For appellant : Mr.K.Mohanamurali

Central Government Standing Counsel

For respondents : Mr.K.Jayachandran for R2

C.M.A.Nos.582 to 593 of 2007:-

Commissioner of Central Excise
Pondicherry Commissionerate
Goubert Avenue, Beach Road
Pondicherry-605 001

... Appellant in
C.M.A.Nos.582 to 593/2007

..Vs..

- 1.Customs, Excise and Service Tax Appellate
Tribunal, Chennai South Regional Bench
Chennai-600 006 ..1st Respondent in
C.M.A.Nos.582 to 593/2007
- 2.M/s.Gothi Thermoforming Industries
17/3A, Vazhadavur Road, Kurumabet
Pondicherry-605 009 ..2nd Respondent in
C.M.A.No.582 of 2007
- 3.M/s.Syncaps (P) Ltd
B-38, Industrial Estate
Mettupalayam, Pondicherry. ..2nd Respondent in
C.M.A.No.583 of 2007
- 4.M/s.ShreeGothi Packaging Industries
17/B-5A Vazhadavur Road,
Kurumabet
Pondicherry ..2nd Respondent in
C.M.A.No.584 of 2007
- 5.M/s.Karthikeyan Plastic Industry
C-12A, PIPDIC Industrial Estate
Mettupalayam
Pondicherry-605 009 ..2nd Respondent in
C.M.A.No.585 of 2007
- 6.M/s.Polymac Industries
Plot No.B-3A, Industrial Estate
Thattanchavadi
Pondicherry-605 009 ..2nd Respondent in
C.M.A.No.586 of 2007
- 7.M/s.Hindustan Plastics
R.S.No.168/2, Villupuram Road
Pondicherry-605 110 ..2nd Respondent in
C.M.A.No.587 of 2007
- 8.M/s.Kohinoor Polypack
Pinnachikuppam Road
Pillaiyarkuppam
Pondicherry-607 402 ..2nd Respondent in
C.M.A.No.588 of 2007
- 9.M/s.Shiva Poly Pack Industries
Plot No.48, Rural Industrial Estate
Kattukuppam, Manapet Post
Pondicherry-607 402 ..2nd Respondent in
C.M.A.No.589 of 2007

10.M/s.Proppy Film Industries
C-28, PIPDIC Industrial Estate
Mettupalayam, Pondicherry

..2nd Respondent in
C.M.A.No.590 of 2007

11.M/s.Gothi Polypack Industries
17/3A, Vazhadavur Road, Kurumabet
Pondicherry-605 009

..2nd Respondent in
C.M.A.No.591 of 2007

12.M/s.Earnest Polymers (P) Ltd
141, Vilianur Road
Reddiyarpalayam
Pondicherry-605 010

..2nd Respondent in
C.M.A.No.592 of 2007

13.M/s.Pioneer Plastics
B-38, PIPDIC Industrial Estate
Mettupalayam
Pondicherry-605 009

..2nd Respondent in
C.M.A.No.593 of 2007

Appeal filed under Section 35G of the Central Excise Act, 1994 against the Final Order No.923 and 924 of 2006 (2)925/06 (3)927 and 928 of 2006 (4)935 of 2006 (5) 936 of 2006 (6) 937 of 2006 (7) 938 to 940 of 2006 (8) 941 & 942 of 2006 (9) 943 of 2006 (10) 926 and 929 of 2006 (11) 930 of 2006 and (12) 934 of 2006 respectively dated 28.09.2006 on the file of Customs, Excise and Service Tax Appellate Tribunal, South Regional Bench, Chennai.

For Appellant : Mr.S.Thirumavalavan
Central Govt. Standing Counsel

For Respondents : Mr.Lakshmi Kumaran for R2
in C.M.A.Nos.582 to 586 and
C.M.A.Nos.588 to 593 of 2007.

COMMON JUDGMENT

(The Judgment of the Court was made by CHITRA VENKATARAMAN, J.)

The Revenue is on appeals as against the order of the Customs, Excise and Service Tax Appellate Tribunal dated 28.09.2006 raising the following substantial questions of law:-
C.M.A.No.174 of 2008:-

" 1. Whether the Tribunal is right in holding that the aforesaid Explanation to Notifications 16/97CE dated 1.4.97 and 38/97 dated 27.6.97 would have prospective effect, in spite of settled position of law that any

Explanation to a Rule or Section is only clarificatory in nature and would have retrospective effect ?

2. Whether the Tribunal is correct in equating the provisions of Explanations II and III to Notification No.175/86 CE dated 1.3.86 to the Explanation to clause (c) of para 3 of Notification No.16/97 CE dated 1.4.97 and Explanation (G) to Notification 38/97 dated 27.6.97, since the former deals with the inclusion or exclusion of the value of the inputs used in the manufacture of final product in computing the aggregate value of clearances and whereas the latter notifications deal with computing the aggregate value of clearances and demand of duty on inputs ?

3) Whether the CESTAT's interpretation of the decision of Honourable Supreme Court in the case of Jalaram Wood Crafts case and Universal Electrical case is right and relevant to the instant issue? And

4) Is the Tribunal right in restricting the department while ordering remand proceedings question, in view of the wrong interpretations and without following the case laid down by the Apex Court as to the retrospective effect of an Explanation clause to the Notification ?"

C.M.A.Nos.582 to 593 of 2007:-

"1. Whether the Tribunal is right in holding that the aforesaid Explanation to Notifications 16/97 CE dated 01.04.1997 and 38/97 dated 27.06.1997 would have prospective effect, inspite of settled position of law that any Explanation to a Rule or Section is only clarificatory in nature and would have retrospective effect.

2. Whether the Tribunal is correct in equating the provisions of Explanations II and III to Notification No.175/86 CE dated 01.03.1986 to the Explanation to clause (c) of para 3 of Notification No.16/97 CE dated 01.04.1997 and Explanation (G) to Notification 38/97 dated 27.06.1997, since the former deals with the inclusion or exclusion of the value of the inputs used in the manufacture of final product in computing the aggregate value of clearances and whereas the latter Notifications deal with computing the aggregate value of clearances and demand of duty on inputs ?"

2. Since legal issues raised are common in all the above appeals, the facts in C.M.A.No.174 of 2008 alone are dealt with in the disposal of all the above Civil Miscellaneous Appeals. The second respondent/assessee herein are manufacturers of plastic bags/plastic cups (hereinafter referred to as the Final Products), excisable as goods classified under Chapter sub heading 39.23/39.24 of Central

Excise Tariff Act, 1985. For the manufacture of plastic bags, the assessee manufactured and consumed Lay Flat Tubes (hereinafter referred to as the intermediate products) falling under sub heading 3917.00 of Central Excise Tariff Act, 1985.

3. Notification No.67/1995 dated 16.03.1995 made in exercise of powers under Section 51(1) of the Central Excise and Salt Act, 1944 (1 of 1944), granted exemption from whole of the duty leviable in respect of (i) capital goods, as defined in Rule 57Q of the Central Excise Rules, 1944, manufactured in the factory and used within the factory of production and (ii) goods specified in the table given in the notification referred to as inputs manufactured in the factory and used within the factory of production in or in relation to manufacture of final products specified in the table. The Explanation defined 'inputs', which reads as follows:

"Explanation:- For the purposes of this notification, 'inputs' does not include -

"(i) packaging materials in respect of which any exemption to the extent of the duty of excise payable on the value of the packaging materials is being availed of for packaging any final products;

(ii) packaging materials or containers, the cost of which is not included in the assessable value of the final products under section 4 of the Central Excises and Salt Act, 1944 (1 of 1944)."

In respect of Clause (ii) specified goods and specified inputs, the table gives the list of inputs and final products, which fall for consideration under Notification No.67/95. The Table is as under:-

S. No.	Description of inputs	Description of final products
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1 All goods falling within the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), other than the following, namely, - (i) goods classifiable under any heading of Chapter 24 of the Schedule to the said Act; (ii) goods classifiable under heading Nos.36.05 or 37.06 of the Schedule to the said Act; (iii) goods classifiable under sub-heading Nos.2710.11, 2710.12, 2710.13 or 2710.19 (except Natural gasoline liquid) of the Schedule to the said Act; (iv) high speed diesel oil classifiable under heading No.27.10 of the Schedule to the said Act.	All goods falling within the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), other than the following, namely, - (i) goods classifiable under any heading of chapter 24 of the Schedule to the said Act; (ii) goods classifiable under heading Nos.26.05 or 27.06 of the Schedule to the said Act; (iii) woven fabrics classifiable under Chapter 52 or Chapter 54 or Chapter 55 of the Schedule to the said Act.
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4. Notification No.16/1997 CE dated 01.04.1997 is a specific Notification concerned with Small Scale Units which superseded Notification No.7/97-C.E., and introduced new scheme on duty concession from 01.04.1997. A reading of the Notification shows that it considered the exemption and granting concessional rate on the advalorem duty payable with reference to the clearance of aggregate value with reference to goods of the description specified in Annexure appended to the notification as is in excess of the amount calculated at the rate specified in the notification against such clearances. Thus for the assessee having (i) first clearances upto an aggregate value not exceeding Rupees Thirty Lakhs made on or after 1st day of April in a financial year, the rate is nil. However, in respect of (ii) clearances of aggregate value not exceeding Rupees twenty lakhs immediately following the clearances specified above viz., (i) the rate is given as three per cent advalorem and (iii) those clearances of aggregate value not exceeding Rupees fifty lakhs immediately following the clearances specified above viz., (ii) subjected to concessional rate of five per cent advalorem depending only. The Notification stipulated that those manufacturers, who are not willing to avail the Notification and desirous of paying the appropriate duty of excise leviable, are to exercise the option before effecting the first clearance in a financial year and if exercised, it would be effective from the date of first clearance in a financial year and could not be withdrawn in the same financial year under any circumstances. For the financial year starting from

1997-98, the provisions under the Notification listed out various cases and classes of assesseees to exercise the option as follows:-

" (ii) For the financial year 1997-98 -

(a) in respect of units for which the date of first clearance happens to be a date on or before the 1st day of May, 1997, the option shall be exercised on or before 1st day of May, 1997 and shall be effective from the date of exercise of such option;

(b) in respect of units for which the date of first clearance happens to be a date beyond the 1st day of May, 1997, options shall be exercised on or before the date of first clearances and shall be effective from the date of first clearance;

(iii) The manufacturer does not avail of the credit of duty under rule 57A of the Central Excise Rules, 1944, paid on inputs used in the manufacture of the specified goods cleared for home consumption, the aggregate value of first clearances of which does not exceed rupees one hundred lakhs in the relevant financial year. The manufacturer also does not utilise the credit of duty under rule 57Q of the said rules, paid on capital goods, for payment of duty, if any, on the aforesaid clearances, the aggregate value of first clearances of which does not exceed Rupees one hundred lakhs in the relevant financial year.

(iv) The aggregate value of clearances of all excisable goods for home consumption (including clearances for export to Butan or Nepal) by a manufacturer from one or more factories, or from a factory by one or more manufacturers, has not exceeded rupees three hundred lakhs in the preceding financial year.

(v) Where a manufacturer clears the specified goods from one or more factories, the exemption in his case shall apply for the total value of clearances mentioned against each of the serial numbers in the said table and not separately for each factory.

(vi) Where the specified goods are cleared by one or more manufacturers from a factory, the exemption shall apply for the total value of clearances mentioned against each of the serial numbers in the said Table and not separately for each manufacturer."

The Explanation in Clause 5, appended thereon defines certain terms, which reads as under:-

" Explanation.- For the purposes of this notification,-

(a) "brand name" or "trade name" shall mean a brand name or trade name, whether registered or not, that is to say a name or a mark, such as symbol, monogram, label, signature or invented word or writing which is

used in relation to such specified goods for the purposes of indicating, or so as to indicate a connection in the course of trade between such specified goods and some person using such name or mark with or without any indication of the identity of that person;

(b) where the specified goods manufactured by a manufacturer bear a brand name or trade name, whether registered or not, of another manufacturer or trader, such specified goods shall not, merely by reason of that fact, be deemed to have been manufactured by such other manufacturer or trader;

(c) "value" means the value as determined in accordance with the provisions of section 4 of the Central Excise Act, 1944 (1 of 1944), or the tariff value fixed under Section 3 of the said Act;

(d) in the determination of the value of clearances of Chinaware or Porcelainware or both, where a manufacturer gets Chinaware or Porcelainware or both fired in a klin belonging to or maintained by a Pottery Development Centre run by the Central Government or a State Government or by the Khadi and Village Industries Commission, the value of the Chinaware or Porcelainware or both, belonging to the said manufacturer and fired in such a klin shall be taken into account.

(e) where the specified goods are manufactured in a factory belonging to or maintained by the Central Government or by a State Government, or by a State Industries Corporation, or by a State Small Industries Corporation or by the Khadi and Village Industries Commission, then the value of excisable goods cleared from such factory alone shall be taken into account."

The annexure listed out the goods which fell for consideration under the notification. This Notification was amended by another Notification No.69/97 -C.E., dated 03.12.1997 by inserting clause (f) to paragraph 5 under the Explanation. The amended Notification inserting clause (f) reads as under:-

" (f) where the specified goods are chargeable to nil rate of duty or are already exempt from the whole of the duty of excise leviable thereon under any other notification, the clearances of specified goods used as inputs, shall not be deemed to be exempt under clause (c) of paragraph 3."

5. In the context of the Notification 16/1997 dated 01.04.1997 read with Notification No.69/97 dated 03.12.1997, the Joint Commissioner of Central Excise issued show cause notice dated 22.07.2002 and 03.10.2002 calling upon the assessee in C.M.A.No.174 of 2008 to show cause why a sum of Rs.1,67,465/- should not be demanded for the period from 01.04.1997 to 31.03.1998.

6. After hearing the assessee, the Deputy Commissioner of Central Excise, Chennai, by order dated 31.01.2005, dropped the proceedings initiated in the show cause notice. Aggrieved by this, Revenue went on appeal before the Commissioner of Central Excise (Appeals).

7. Referring to the Notification concerning the exemption, the Revenue held the view that the duty on the specified goods manufactured and captively consumed in a factory of production for further manufacture of excisable goods was governed by Notification No.67/95 dated 16.03.1995 and amended periodically. The Revenue contended that the polythene bags (finished goods) and the intermediate goods viz., lay flat tubings were classifiable under Chapter 39 of Central Excise Tariff Act, 1985 and covered under the schedule to the Notification No.67/95 dated 16.03.1995. The final product viz., polythene bags were exempted from duty by virtue of Notification No.4/97 CE dated 01.03.1997. Considering the import of Notification No.67/95 dated 16.03.1995 particularly the schedule, by reason of the final products being exempted under Notification No.4/97 CE dated 01.03.1997, the Revenue held the view that the assessee would not be eligible for exemption on the intermediate products manufactured.

8. The Department contended that by reason of the above said factual aspect, the proceedings dropped against the assessee was not correct. The assessee, however, contended that provisions of Notification No.16/1997 applicable to Small Scale Units granted exemption to specific goods used as inputs in the manufacture of specified goods within the factory of production. The Commissioner of Central Excise (Appeals) observed that Paragraph 3(c) of the Notification would not be applicable to the facts of the case, since, primarily paragraph 3(c) related to determination of the aggregate value of clearances and not to the duty of any product. However, having held so, the Commissioner of Central Excise (Appeals) pointed out that the Notification involved in the present case viz., Notification No.67/1995 dated 16.03.1995, which was issued after Notification No.175/86 CE dated 01.03.1986 was containing totally different conditions and had different scope. Referring to the subsequent Notification No.69/97 dated 03.12.1997 inserting clause (f) and (G) in Explanation, the Commissioner of Central Excise (Appeals), pointed out that even prior to the amendment vide Notification No.69/97 CE, the lay flat tubings were dutiable by virtue of Notification No.67/95 CE dated 16.03.1995 and the amendment Notification 69/95 CE only complemented the established position. Having held so, the First Appellate Authority held that the order passed by the lower authority was liable to be set aside, thereby, confirming the proposal to demand duty of Rs.1,07,465/- under Rule 9 (1) of Central Excise Rules, 1944 read with the proviso to sub section (1) of Section 11A of Central Excise Act, 1944. Apart from that, the Commissioner of Central Excise (Appeals) also confirmed the

proposal to demand interest under Section 11AB of Central Excise Act, 1944. However, on the imposition of penalty under Section 11AC of Central Excise Act, 1944 and under Rule 173Q of Central Excise Rules 1944/Rule 25 of Central Excise Rules 2002, the Commissioner of Central Excise (Appeals) dropped the proceedings. Thus, Revenue's appeal was allowed. Aggrieved by this, the assessee went on appeal before the Customs, Excise and Service Tax Appellate Tribunal (hereinafter called as "CESTAT"). Similarly, were the appeals preferred by other assesseees in C.M.A.Nos.582 to 593 of 2007, who had a similar problem in the matter of application of this Notification.

9. The CESTAT passed the common order after considering the scope of Notification in 16/1997 dated 01.04.1997 amended by Notification No.69/97 dated 03.12.1997 and ultimately held that clause (f) as amended in Notification No.69/97 dated 03.12.1997 in paragraph 5 to the Explanation, after clause (e), was a substantive provision rather than it being clarificatory of the existing provisions under the notification. The CESTAT viewed that inserted clause would have found itself in an eminent position as proviso to paragraph 3 of the Notification and to call "insertion" as "Explanation" was a misnomer. The CESTAT rejected the contention of the Revenue and held that the amendment brought under notification No.69/97 dated 03.12.1997 was not clarificatory and had only prospective effect. It viewed that in the absence of any material in the amending Notification (No.69/97) to indicate that clause (f) was introduced with retrospective effect, one cannot give retrospective effect, to hold that the provisions defeated the assessee's claim. The CESTAT held that the demand of duty based on wrong reading of the provision, hence, could not be sustained, particularly, after the period April 97 to November 97, on the value of clearances effected during that period. Having regard to the above, the Tribunal viewed that the amendment brought to para 3(c) of Notification 16/97-CE dated 01.04.1997 by Notification 69/97-CE dated 03.12.1997 was only prospective in operation. In the light of the above said findings, the demand was set aside and the CESTAT allowed the assessee's appeal and restored it to the files of the Adjudicating Authority to pass fresh orders in terms of the provisions of the Notification. Aggrieved by this, the present Civil Miscellaneous Appeals have been filed by the Revenue.

10. Learned Standing counsel appearing for the Revenue brought to our attention the scope of Notification No.16/1997 dated 01.04.1997 as well as Notification No.69/1997 dated 03.12.1997 inserting clause (f) and (G) in para 5 and submitted that having regard to the insertion to the Explanation under the amended notification clarifying the position, the same has to be read only as having retrospective effect. He submitted that the Notification brought out what was implicit in 3(c) of the Notification in 16/1997; consequently, the CESTAT committed a serious error in its reading on the scope of insertion in the Explanation. Referring to the decision

reported in 1999 (112) ELT 753 (SC) in the case of Union of India Vs. Indian Charge Chrome, he submitted that the Explanation inserted in Notification being clarificatory in nature is retrospective in nature. He thus contended that in these circumstances, the order of the CESTAT is to be set aside.

11. Per contra, learned counsel appearing for the assessee supported the order of the CESTAT and pointed out that when a specific Notification is introduced for Small Scale Units and when clause (c) of paragraph 3 of Notification 16/1997 points out to aggregate value of clearances, any restriction thereon to paragraph 3 (c) cannot be brought in by way of insertion to the Explanation; strictly speaking if the Revenue thought of steering clear the scope of para 3(c), the amendment ought to have been under para 3(c) of Notification 16/97 itself. He submitted that being new provision introduced in the matter of determining aggregate value of clearances, the scope of the inserted clause could not be held to be retrospective one but only as prospective.

12. Heard Mr.K.Mohanamurali, Mr.S.Thirumavalan, learned Standing Counsel appearing for Revenue and Mr.K.Jayachandran and Mr.Lakshmi Kumaran, learned counsel appearing for the assessee and also perused the materials placed on record.

13. Apart from the facts narrated above in C.M.A.No.174 of 2008, there are other assessee before us in C.M.A.Nos.582 to 593 of 2007, who are also similarly placed and treated before the Authorities below. On considering the common order of the CESTAT, the period covered in all these Civil Miscellaneous Appeals viz., during the period April 1997 to March 1998 and December 1997 to March 1998 and the questions of law arising in these Civil Miscellaneous Appeals, it is suffice to refer to the facts in one case.

14. We had already seen in the preceding paragraph the effect of Notification No.69/97 dated 03.12.1997, which is applicable to all assessee irrespective of it being a Small Scale Unit or not.

15. The assessee in C.M.A.No.174 of 2008 is engaged in the manufacture of plastic bags classifiable under Chapter sub heading 39.2324 of Central Excise Tariff Act, 1985 and inputs viz., Lay Flat Tubes or the intermediate products falling under Chapter Heading 39.17 of the Central Excise Tariff Act, 1985. It is not denied by the assessee that the final product is exempted under Notification No.175/86 CE dated 01.03.1986. Going by the facts herein, the assessee did not claim any benefit under Notification No.67/1995 dated 16.03.1995. However, when Notification No.16/1997 dated 01.04.1997 was issued covering Small Scale Units, the claim was made by the assessee for beneficial treatment. As is evident from the reading of the Notification 16/97 dated 01.04.1997 under S.No.1, the exemption granted in the Notification was in respect of cases of

assesseees having aggregate value of first clearances not exceeding Rs.30 lakhs on or after 1st April in a financial year. As per S.No.2, the assessee unit having aggregate value of clearances above Rupees twenty lakhs following the clearance specification in S.No.1 is unable to pay the advalorem and in the case of the assesseees having aggregate value of clearance of Rs.50 lakhs on the value exceeding S.No.2 are granted concessional rate of duty against such clearances. It is further seen from the Notification that even though it attempted to be a beneficial Notification to Small Scale Units, those Small Scale Units, who are not desirous of claiming the benefit of the notification on concessional rate must exercise the option before effecting the first clearances in a financial year; if once such an option is exercised, it cannot be withdrawn in the same financial year. It is further seen that in respect of units for which the date of clearances happened to be a date beyond the 1st day of May, 1997, option was to be exercised on or before the date of first clearances and would be effective from the date of first clearance. The Notification further pointed out that the aggregate value of clearances of all excisable goods for home consumption by a manufacturer from one or more factories, or from a factory by one or more manufacturers, does not exceed rupees three hundred lakhs in the preceding financial year. Apart from this, the Notification pointed out that when the specified goods are cleared by one or more manufacturers from a factory, the exemption must be applied for the total value of clearances mentioned against each of the serial numbers in the said Table and not separately for each manufacturer. Having thus prescribed the conditions, the Notification further pointed out the manner of determining the aggregate value of clearances. Paragraph 3 of the Notification on the determination of the aggregate value of clearances, as is relevant to our case, reads as under:-

"3. For the purpose of determining the aggregate value of clearances, the following clearances shall not be taken into account, namely : -

- (a) ...
- (b) ...
- (c) any clearances of the specified goods which are used as inputs for further manufacture of any specified goods within the factory of production of the specified goods. Such clearances of specified goods used as inputs shall be deemed to be exempt from the whole of the duty of excise leviable thereon;
- (d) ..."

16. The case of the Revenue is that under clause 3(c), there is a specific exclusion of the value of clearances in respect of specified goods used as inputs in the manufacture of any specified goods within the factory; such inputs are deemed to be exempt from whole of the duty and excise leviable thereon. According to the Revenue, the Government thought it fit to put an end to any

controversy with regard to such clearances of specified goods used as inputs and deemed to be fully exempt from the whole of the duty of excise leviable thereon, for the purpose of determining the aggregate value of clearances in respect of the specified goods which are chargeable to nil rate of duty or are already exempt from the whole of the duty of excise leviable thereon; thus Notification No.16/1997 dated 01.04.1997 was amended under Notification No.69/97-C.E., dated 03.12.1997. Learned Standing counsel appearing for the Revenue submitted that instead of bringing it as part of paragraph 3, the amendment was made by insertion as clause (f) as part of Explanation in paragraph 5, which defined the meaning of certain expressions like "brand name" or "trade name" and "value". According to the Revenue, the Explanation inserted in clause (f) and (G) clears all doubts that might be there as to the scope of Notification No.16/1997 dated 01.04.1997.

17. In the background of this, learned Standing Counsel appearing for the Revenue insisted that insertion of Explanation viz., clause (f) and (G) being clarificatory has to be read as having retrospective effect. We do not accept the contention of the Revenue that the insertion of clause (f) and (G) in paragraph 5 of the notification has to be read as having retrospective effect. It may be seen that the insertion is not part of the substantive clause in paragraph 3. The Explanation cannot be read as clarificatory of paragraph 3(c).

18. A reading of the inserted provision, namely, clause (f) shows that it is primarily concerned about the determination of aggregate value of clearance. This clause deals with cases of clearance of specified goods chargeable to nil rate of duty or exempt from duty under any of the provisions in the manufacture of which specified inputs are used. As per this newly inserted clause, clearance of specified goods used as inputs in the manufacture of specified goods suffering nil rate or exempted under any notification shall not be deemed to be exempt under clause (c) of paragraph 3, which means the aggregate value of clearance of the inputs will get into the computation and shall not be excluded as per paragraph 3(c).

19. As already pointed out in the preceding paragraphs, paragraph 3 is the only provision which deals about the determination of the aggregate value of clearance. Paragraph 3 lists out which shall not be taken into account in determining the value of clearance, excluded item given in paragraph 3(c). As per this, specified inputs used for manufacture of any specified goods within the factory of production of the specified goods are excluded from the aggregate value of clearance, such inputs are deemed to be exempt from the whole of the duty of excise leviable therein. The specified manufactured goods are of the description specified in the annexure appended to the notification.

20. A reading of paragraph 3 thus reveals that while for the purpose of paragraph 3, the specified inputs used in the manufacture of the specified goods given in the annexure are treated as exempt from the whole of the duty and hence, not taken into account in determining the aggregate value of clearance. It is only by an amendment through insertion of clause (f), we find that the specified goods used in as inputs shall not be deemed to be exempt under clause (c) of paragraph 3, when the specified goods manufactured are chargeable to nil rate of duty or already exempt from the whole of duty leviable thereon under any notification. Even herein, by such insertion, under notification No.69 of 1997 dated 03.12.1997, we do not find that the notification was given retrospective effect, quite apart from the fact it figures in under the Explanation and not one to be noted for the purpose of determining the aggregate value of clearance. The difference between Paragraph 3(c) and the newly inserted clause (f) in the Explanation is thus clear that while the former is concerned about specified goods manufactured as enumerated under the Annexure and hence the inputs are deemed as exempt for the purpose of excluding the same from the aggregate value of goods; in so far as Clause (f) is concerned, it specifically adverted its attention to cases of specified goods having nil rate of duty or exemption noted under any notification that the inputs not being considerable as exempt will not stand excluded for the purpose of computing aggregate value of clearance.

21. In the decision reported in 2003 (153) E.L.T. 266 (S.C)., in the case of Collector of C.Ex., New Delhi Vs. Universal Electrical Industries, the Apex Court had an occasion to consider a similarly worded provision figuring in Notification No.175/1986-C.E., dated 1st March, 1986. There the assessee was the manufacturer of electric toasters, room heaters, electric fans etc. It was a small scale industry claiming benefit of notification No.175/1986 - CE dated 01.03.1986. The assessee was clearing both inputs as well as finished goods under the notification. A show cause notice was issued to the assessee calling for explanation as to why the benefit of the notification should not be denied to the assessee. This was on the premise that Explanation III to the notification would be attracted only when the inputs as well as the finished goods were cleared under the notification and as the finished goods were granted exemption, the inputs could not be excluded from the aggregate value of clearance. The assessee contested that when there was a general exemption of clearance of finished goods, in computing the aggregate value of availing of the benefit of notification, Explanations II and III have to be read together. The Apex Court pointed out that on a plain reading of the notification, it was evident that it exempted excisable goods of the description specified in the annexure thereto. Explanations II and III, which fell for consideration reads as under:

"Explanation II.--For the purpose of computing the aggregate value of clearances under this notification, the clearances of any excisable goods which are

chargeable to nil rate of duty or, which are exempted from the whole of the duty of excise leviable thereon by any other notification (not being a notification where exemption from the whole of the duty of excise leviable thereon is granted based upon the value or quantity of clearances made in a financial year) issued under Sub-rule (1) of Rule 8 of the said Rules, 1944, or Sub-section (1) of Section 5A of the Central Excises and Salt Act, 1944 (1 of 1944) shall not be taken into account.

Explanation III.--Where any specified goods (hereinafter referred to as inputs) are used for further manufacture of specified goods within the factory of production of inputs, the clearances of such inputs for such use shall not be taken into account for the purposes of calculating the aggregate value of clearances under this notification."

22. In construing the effect of Explanations II and III, the Apex Court observed as under:

"6. A plain reading of the notification shows that the Government of India, in exercise of the powers conferred under sub-rule (1) of Rule 8 of the Central Excise Rules, 1944 (for short, 'the Rules'), has exempted excisable goods of the description specified in the annexure thereto and falling under the Schedule to the Central Excise Tariff Act, 1985 (hereinafter referred to as 'the specified goods').

7. It is not in dispute that the inputs as well as the finished goods manufactured by the assessee answer the description of the 'specified goods'. The short question remains to be resolved is, for the purposes of claiming exemption under the notification, how should the aggregate value be arrived at? It is in that context that a reference to Explanation II would be relevant. It says that for the purposes of computing the aggregate value of clearances under the notification, the clearances of excisable goods which are chargeable to 'nil' rate of duty or which are exempted from the whole of duty of excise leviable thereon by any notification issued under sub-rule (1) of Rule 8 of the Rules shall not be taken into consideration. In this case, as the finished goods are, admittedly, exempted under Notification Nos.155/1986, 160/1986 and 124/1988, the value of the exempted finished goods will have to be excluded in arriving at the aggregate value for the purposes of the notification.

8. Now, coming to Explanation III, it provides that where inputs which are specified goods, are used

within the factory of production for further manufacture of finished goods which are also specified goods, the clearance of such inputs for such use shall not be taken into account for the purposes of calculating the aggregate value of clearances under this notification. There appears to be a rationale behind this Explanation; firstly, when the value of the finished goods, which are exempted under different notifications, is to be excluded, having regard to the wording of Explanation II, on the same analogy, the value of inputs which are being used for manufacture of finished goods are also excluded as both are specified goods, subject, of course, to the limit of the notification. Secondly, the notification provides relief to small scale industries; when the inputs which enjoys the exemption under the notification have already been dealt with, there is no reason why the value of the same inputs again be added for the purposes of aggregate value. It follows that the assessee would be entitled to the benefit of Explanation III while computing the aggregate value for the purposes of availing exemption under the notification."

23. Applying the said decision to the present Notification No.69 of 1999 dated 03.12.1997, one may note that the rationale behind the insertion is that when the specified goods are chargeable to nil rate of duty or exempted under any notification, as the case may be, the specified goods used as inputs are not treated as exempt under clause (c) of Paragraph 3, in which event, they should form part of the aggregate value of clearance. Thus the question of further relief being granted by excluding the inputs from the aggregate value was sought to be set right, so that the notification prescribing the slabs would be more meaningful, but till such time such insertion was made and in the absence of any specific provision restricting the scope on the specified goods with reference to their chargeability to nil rate of duty or exempt from the whole of duty under any other notification, paragraph 3, as it existed during the relevant point of time, cannot, in any manner, be read down.

24. Thus, going by the notification terms that paragraph 3 alone deals with the manner of on determining the aggregate value of clearance, the Explanation added clause (f) in paragraph 5, strictly speaking, has the effect of a proviso to 3(c).

25. In the light of the view that we have taken, we do not accept the plea of the Revenue that the inserted clause (f) in paragraph 5 has to be given retrospective effect. Consequently, we hold that notification No.69 of 1997 dated 03.12.1997 inserting clause (f) in Explanation to paragraph 5 is only prospective in

nature and consequently would not be of any relevance to the case on hand.

26. We reject the plea of the Revenue that the amendment brought to the Explanation is always clarificatory in nature, hence, retrospective. For the reasons that we have already given, we once again reject this plea too.

27. Learned counsel appearing for the assessee placed reliance on the decisions reported in (2007) 9 SCC 665 (Virtual Soft Systems Ltd., Vs. Commissioner of Income Tax, Delhi-I), particularly to paragraphs 50, 51 and 53 and 2009 (14) STR 593 (S.C) (Union of India Vs. Martin Lottery Agencies Ltd.,) particularly paragraph 31, on the question when the amendment could be considered as declaratory and clarificatory.

28. Guided by the law declared by the Apex Court , we have no hesitation in holding that the amendment is only prospective, hence, would not govern the case of the assessee. Consequently, the Civil Miscellaneous Appeals fail and the same are dismissed. No costs. Consequently, connected Miscellaneous Petitions are closed.

Sd/-

Assistant Registrar (CS-iv)

Dated: 04.02.2014

//True Copy//

Sub Assistant Registrar

To

- 1.The Commissioner of Central Excise
Chennai II Commissionerate, 692, MHU Complex
Anna Salai, Nandanam, Chennai-600 035
- 2.Customs, Excise and Service Tax Appellate Tribunal
Chennai, South Regional Bench, Chennai-600 006
- 1 CC to Mr.K.Mohanamurali Advocate, SR.No.66566
- 2 CC to Mr.S.Thirumavalavan Advocate, SR.No.128
- 1 CC to Mr.Lakshmi Kumaran Advocate, SR.No.31

Civil Miscellaneous Appeal Nos.174 of 2008
and 582 to 593 of 2007 and M.P.Nos.1 of
2007 (12 MPs)

KSJ(CO)

JJM (05.02.2014)