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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

CENTRAL EXCISE APPEAL No. 20 of 2005

M/s Essel Packaging Limited
(now known as Essel Propack Limited) ..**Appellants.**

Versus

Commissioner of Central Excise,
Mumbai V ..**Respondent.**

Mr Prakash Shah a/with Mr Jas Sanghavi and Ms Niyati Hakani i/by M/s P.D.S. Legal for the Appellant.
Mr A.S.Rao a/with Mr Jitendra B.Mishra for the Respondent.

CORAM : S.C. DHARMADHIKARI &
SUNIL P. DESHMUKH, JJ.
DATE : 29th JANUARY,2015.

P.C.

1) This appeal of the assessee challenges the order passed by the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench, Mumbai dated 18th August, 2004. By that order passed on 18th August, 2004 received by the appellants on 23rd September, 2004, the appeal of the appellants was partly allowed. The part that has been held in favour of the appellants is in relation to penalty. The penalty has been reduced from Rs.10,00,000/- to Rs.1,00,000/-. However, the substantial relief sought by the appellants assessee came to be denied.

2) The appeal has been admitted by this Court on four substantial questions of law which read as under:-

> (a) Whether goods supplied to a unit in free trade zone are exempted goods within the meaning of Rule 57C of the erstwhile Central Excise Rules, 1944?
>
> (b) Whether the amendment to Rule 57C of the erstwhile Central Excise Rules, 1944 by Notification No.4/92 dated 1.3.1992 was clarificatory and retrospective in nature?
>
> (c) Whether goods supplied to a unit located in free trade zone without payment of duty under Notification No.272 of 1979 against the imprest licence is covered Rule 57C of the erstwhile Central Excise Rules, 1944 or Rule 191BB of the erstwhile Central Excise Rules, 1944?
>
> (d) Whether the goods cleared to a unit located in free trade zone are intermediate produces and as such not covered by Rule 57C of the erstwhile Central Excise Rules, 1944?

3) The facts necessary for appreciating the arguments of Mr Shah, learned counsel appearing for the appellants are that the appellants manufacture, *inter alia,* Multilayer Plastic Laminates Tubes falling under Chapter Nos. 39 and 76 of the Central Excise Tariff Act, 1985 (for short “the Tariff Act”). The appellants rely upon the Import Export Policy 1990-93 under which any supplies made in India / Kandla Free Trade Zone are considered as exports as per paragraph 206 (G) Chapter XVI of the Import Export Policy

1990-93. The appellants rely upon the duty exemption scheme under this policy. The appellants claim to have been the beneficiary of a Special Imprest Licence for import of exempt material for manufacture and supply of products to Kandla Free Trade Zone as per paragraph 204 (G) falling in Chapter XIX of the above Import Export Policy. Having obtained this licence on 18th September, 1991 the appellants rely upon Notification No. 33/90 Central Excise (NT) dated 5th September, 1990. The appellants submit that they received an order for supply of 320 lacs tubes to Hindustan Lever Limited at its Unit situate at Kandla Free Trade Zone. The appellants submit that HUL received the final product for home consumption as also for exports. They cleared the goods under bond or on nil rate of duty. The appellants further submit that after complying with the procedure prescribed under the Central Excise Rules, 1944 they availed of the benefit of credit of duty paid on the inputs received by them for being used in or in relation to the manufacture of final product. However, a show cause cum demand notice was issued to the appellants dated 1st July, 1991. That called upon the appellants to show cause why credit of duty paid on the inputs, which are used in the manufacture of final product and cleared to Kandla Free Trade Zone from December 1990 to April, 1991 should not be reversed and demanded because the same was not admissible. The revenue placed reliance upon Rule 57I read with section 11AA (1) (proviso) of the then Central Excise Rules, 1944. The show cause notice, copy of which is at annexure "A" was replied by the appellants on 3rd

November, 1991 and they denied all the allegations. There is a further show cause cum demand notice dated 13th November, 1991 but with similar allegations. The appellants rely upon these notices and which were adjudicated by the Assistant Commissioner of Central Excise. He passed an order on 14/20th October, 1997 confirming the demand of Rs.25,26,207.66 and Rs.6,19,987.91 pursuant to the two show cause notices referred to above. The Assistant Commissioner held in the order-in-original that the inputs used in the manufacture of final products were cleared to Kandla Free Trade Zone. However, under the scheme enabling availing of MODVAT credit and prevailing at the relevant time, such credit was not admissible. The clearances were not permitted in terms of the Rule as applicable and when the show cause notices were issued. The amendment to the rule came later on and with effect from 1st March, 1992. The benefit of this amendment cannot be availed of by the appellants-assessee.

4) The credit has been reversed pursuant to the order passed by the Assistant Commissioner. The assessee, however, appealed against the order-in-original to the Commissioner of Central Excise (Appeals). He passed an order on 26th May, 1998 rejecting the appeal and agreeing with the Assistant Commissioner that the amendment to Rule 57C was effective from 1st March, 1992. It was not of a clarificatory nature. Hence, it did not have any retrospective effect. Holding thus he dismissed the appeal of the assessee on

26th May, 1998.

5) Being aggrieved by the orders of the Assistant Commissioner and the Commissioner of Central Excise (Appeals) the assessee preferred the appeal to the Tribunal and which has been allowed partially by the impugned order.

6) Mr Prakash Shah, learned Counsel appearing on behalf of the appellants, firstly took us through Rule 57C as was prevailing when the show cause notices were issued. He points out that though the amendment has been incorporated on 1st March, 1992 it is clarificatory in nature. The intent was not to disallow credit on clearances to a Unit in Free Trade Zone or to a Hundred per cent export-oriented unit. In that regard, he relied upon Rule 191BB of the Central Excise Rules 1944. Mr Shah relied upon General Exemption No.21 which is applicable to excisable goods when brought into Kandla Free Trade Zone. He submits that this General Exemption No.21 has been in force and the intent thereof is very clear. The impact of the amendment to Rule 57C cannot but be held to be clarifying the position. In other words, according to Mr Shah, Kandla Free Trade Zone being notified as such and together with a export-oriented unit, the appellants having aided and facilitated an export, they were entitled to the benefit of Rule 57C as amended. The amendment was clarificatory in nature and hence had retrospective effect.

7) Mr Shah has, then, contended that the assessee did not clear

exempted goods. The assessee cleared goods but the recipient of this goods received them duty free. This duty free receipt is subject to the bond being executed. That bond undertook utilization of the duty free goods received in Kandla Free Trade Zone in manufacture of a product or goods meant for export. Thus, the goods were received duty free for use in export. This is a conditional exemption. In these circumstances, the duty element is not completely extinguished. The duty liability is merely deferred and is conditional upon the utilization of the received goods in export. For all these reasons, Mr Shah would submit that this appeal be allowed and the impugned orders be quashed and set aside.

8) Mr Shah has fairly brought to our notice the view taken by the Tribunal in the case of Reliance Industries Ltd Vs. Collector of Central Excise, **1995 (78) E.L.T** 595 and the view taken to the contrary in S.H. Kelkar and Co. Ltd Vs. Commissioner of Centrtal Excise, **1998 (102) E.L.T 418**. Mr Shah submits that a larger Bench was constituted by the Tribunal to resolve this conflict and the Larger Bench decision is also referred by Mr Shah which is rendered in the case of L & T Limited Vs. Collector of Central Excise, Mumbai reported in **2000 (119) E.L.T. 51**

9) Lastly, Mr Shah relies upon a Notification No. 217/86 issued by the Central Excise Department dated 2nd April, 1986. He would submit that in the case of this Notification as well and the proviso of the same being worded

identically, it was held by the Hon'ble Supreme Court in the case of Indian Transformers Ltd Vs. Commissioner of Central Excise Cochin that the revenue has accepted the Tribunal verdict. The Tribunal verdict is reported in **2002 (146) ELT 309**. For the principle that a clarificatory amendment will have a retrospective effect, Mr Shah places strong reliance on a judgment rendered by three Judge Bench of the Supreme Court in the case of WPIL Limited Vs. Commissioner of Central Excise **2005 (181) ELT 359.**

10) On the other hand, Mr Rao appearing for the Revenue would submit that there is no merit in this appeal. The view taken by the Tribunal is the only view possible. The order of the Tribunal may not be elaborate and detailed but it does make reference to the relevant material. It also makes reference to the order of the Tribunal in the case of Kelkar & Co. Ltd (supra) and distinguishes it. Mr Rao would submit that once the assessee is relying upon the amendment brought to Rule 57C with effect from 1st March, 1992 and terming it as clarificactory, then, it would not be open for it to argue that the exemption which the recipient HUL (Hindustan Uniliver Limited) was conditional. The recipient admittedly, received the goods duty free. The recipient received the goods, cleared from the factory or manufacturing unit of the assessee before us. The assessee cleared it as duty free. In such circumstances, any argument to the contrary and now canvassed should not be permitted. He submits that the amendment cannot be held to be clarificatory as

exemption or exception in case of clearances to Free Trade Zone or export oriented unit was introduced for the first time in Rule 57C on 1st March, 1992. Any prior clearance and intended to be for use in this Free Trade Zone was not subject matter of the Rule earlier. Therefore, the amendment cannot be given retrospective effect. He would, therefore, submit that the appeal be dismissed.

11) With the assistance of Mr Shah and Mr Rao, we have perused the memo of appeal and annexures thereto. The two compilations handed over by Mr Shah have been perused by us with his assistance.

12) There is no dispute about the facts. The show cause notices primarily allege that the credit was availed of by the assessee wrongfully. That wrongful availment is on the footing that the goods manufactured by the assessee in which the inputs were utilized were cleared for consumption in Kandla Free Trade Zone. Such clearances would not enable the assessee to claim credit because the Rule 57C did not contain the specific words at the relevant time. These words were inserted or introduced on 1st March, 1992. The amendments, therefore, were prospective in nature.

13) It is in relation to that argument and which we find to be principally canvassed that we have referred to the material relevant for our decision. Rule 57C, at the relevant time, read thus :

> "**Rule 57C**. Credit of duty not to be allowed if final products are exempt. No credit of the specified duty paid on the inputs used [in the manufacture of a final product shall

> be allowed if the final product is exempt from the whole of the duty of excise leviable thereon or is chargeable to nil rate of duty.”

14) Thus, credit of duty not to be allowed if the final products are exempt. Such intent is evident if one peruses unamended Rule 57C, reproduced above, no credit of the specified duty paid on the inputs used in the manufacture of a final product shall be allowed if the final product is exempt from the whole of the duty of excise leviable thereon or if chargeable to nil rate of duty. We would not allow the assessee, now, to canvass an argument before us that though the clearance effected by it to M/s Hindustan Lever Ltd. is for purpose of their unit located in Kandla Free Trade Zone, as far as the appellants go, their final product is not exempted from whole of the duty of excise leviable thereon or is chargeable to nil rate of duty. That argument of Mr Shah is premised on the fact that the clearance is to Hindustan Unilever Limited (HUL). That HUL may have a unit and located in Kandla Free Trade Zone. That HUL may receive the final product of the assessee as inputs for the HUL's final product intended to be exported. But HUL executed a bond which would denote that the exemption in favour of HUL was conditional. In other words, the export of goods by HUL was not entirely duty free. The receipt of inputs by HUL for manufacture in use and export may be duty free but all this is conditional. The condition is, if this goods received by HUL as duty free are not used in export, HUL would have to be pay duty on

the same as if they have been cleared for home consumption. Such an argument, now forthcoming, would go somewhat contrary to the principal argument, namely, that the amendment and by which the words have been inserted in Rule 57C with effect from 1st March, 1992 are retrospective and not prospective.

15) The appellants cannot now fall back on any of the liabilities that were allegedly incurred or invited by HUL. It is the assessee's case of availment of credit and which is termed as wrongful or erroneous by the revenue that we are dealing with. In such circumstances, the alternate argument of Mr Shah need not be considered and should not detain us.

16) Now about his principal argument, Rule 57C, with effect from 1st March, 1992 reads as under:

> "Rule 57C Credit of duty not to be allowed if final products are exempt. No credit of the specified duty paid on the inputs used [in the manufacture of a final product (other than those cleared either to a unit in a free Trade Zone or to a hundred per cent Export-Oriented Unit)] shall be allowed if the final product is exempt from the whole of the duty of excise leviable thereon or is chargeable to nil rate of duty."

17) A bare reading of these words which are inserted by amendment and with effect from 1st March, 1992, would indicate that prior to their insertion clearances to a unit in a free Trade Zone or a hundred per cent export oriented unit were not taken to be a exemption

from the whole of duty of excise leviable or subjected to nil rate of duty. In other words, the final product which is manufactured even if cleared to a unit in a Free Trade Zone or hundred per cent export oriented unit prior to 1st March, 1992, which is the period with which we are concerned, that was not an act by which the credit could be availed of. The credit was available only if the final product is dutiable. The insertion by the amendment is only in relation to clearance to the units in Free Trade Zone or to hundred per cent export oriented unit. That was because such clearances were intended to facilitate and aid exports. The policy being to encourage exports and earn valuable foreign exchange for the country that the framers of the Rule brought in this amendment. Mr Shah would term this as merely clarificatory.

18) We are unable to agree with him. His reliance on Rule 191BB will not assist the assessee. Rule 191BB deals with excisable goods whose removal from the place of manufacture or storage was permitted without payment of duty. There, the Central Government is empowered to notify from time to time the excisable goods whose removal may be permitted by the Collector without payment of duty from the place of their manufacture or storage if that goods are supplied for the manufacture or articles specified in the said notification

to be exported. In execution of one or more export orders or for replenishment of duty paid excisable goods used in the manufacture of the articles already exported for the execution of such orders or both. This would not denote that a distinct availment or benefit and of credit on inputs has no relation to the removal without payment of duty envisaged by Rule 191BB. That is only facilitating removal from place of manufacture without payment of duty. Rule 57C enables availment of credit on inputs in the manufacture of final product. Thus, this Rule will not assist the argument that amendment to Rule 57C was retrospective.

19) Then, reliance placed upon Exemption Notification, General Exemption No.21 also cannot be of any assistance. In exercise of the powers conferred by Rule 8 (1) of the Central Excise Rules, 1944 read with sub-section (3) of Section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 and in supersession of the Notification of the Government of India in the Ministry of Finance dated 11th December, 1971, the Government being satisfied that in public interest it is necessary to do so exempted excisable goods when brought into Kandla Free Trade Zone from the factories of their manufacture or warehouses situated in other parts of India for use by the industries

located in the said zone for the production of goods or in connection with the production of goods or for packaging of goods intended for export or for supply to units situated in another free trade zone, export processing zone or hundred percent EOU. This is for manufacture of goods solely meant for export. That is to enable claiming exemption from duty of excise leviable on such goods under Section 3 of the Central Excise and Salt Act, 1944 and the Additional Duties of Excise (GSI) Act, 1957. This general exemption, therefore, may contain conditions and a appendix. That may regulate 'in bond' movement of duty free excisable goods for use in Kandla free trade zone but that procedure in the Appendix is for availment of the exemption under General Exemption No.21. We do not find any nexus of the same with that of availment of a distinct credit on inputs and claimed under Rule 57C. Thus, barring insertion of the words and which is claimed to be a clarificatory amendment, we do not find any assistance which can be derived by the assessee from either Rule 191BB or General Exemption No.21.

20) Now, the settled principle is that if any amendment is clarificatory in nature the same is retrospective in operation. What is material to note is the application thereof to the given facts and circumstances.

That general principle is no doubt laid down in several decisions but whether a particular amendment is clarificatory or substantive will depend on the amendment, the statute in which it is brought in and the object and purpose sought to be achieved.

21) In the present case, the Tribunal itself in a decision delivered in the case of M/s Reliance Industries and in the Larger Bench decision delivered in the case of M/s L & T, held that this amendment is not retrospective but prospective. The reasons, therefor, may not be very elaborate but cryptic and somewhat unconvincing but the conclusion can, still, be supported.

22) The amendment itself has been brought to our notice. That is contained in the Notification copy of which is at page 42 of the additional compilation Volume No.1 handed in by Mr Shah. The same reads as under :

> **Notification : 4/92-CE (NT) dated 1 March 1992**
>
> **Central Excise (3rd Amendment)Rules, 1992 – Modvat rules**
>
> In exercise of the powers conferred by section 37 of the Central Excises and Salt Act, 1944 (1 of 1944), the Central Government hereby makes the following rules further to amend the Central Excise Rules, 1944, namely :-
>
> 1. (1) These rules may be called the Central Excises (Third Amendment) Rules, 1992.

(2) These rules shall come into force on the date of their publication in the Official Gazette.

2. In the Central Excise Rules, 1944 (hereinafter referred to as the said rules), -

(i) in rule 57C, for the words "in the manufacture of a final product", the words "in the manufacture of a final product (other than those cleared either to a unit in a Free Trade Zone or to a hundred per cent Export-Oriented Unit)" shall be substituted;

(ii) in the proviso to rule 57D, for the words "in the manufacture of a final product", the words "in the manufacture of a final product", the words "in the manufacture of a final product (other than those cleared either to a unit in a Free Trade Zone or to a hundred per cent Export-Oriented Unit)" shall be substituted;

(iii) in rule 57F,-

(a) after sub-rule (1), the following sub-rule shall be inserted, namely:-

"(1A) Notwithstanding anything contained in clause (ii) of sub-rule (1), the inputs in respect of which a credit of duty has been restricted in terms of proviso to rule 57A, may be removed subject to prior permission of Collector of Central Excise from the factory for home consumption on payment of duty of excise equivalent to the credit availed on such inputs.";

(b) after the second proviso to sub-rule (3), the following proviso shall be inserted, namely:-

"Provided also that the credit of specified duty in respect of inputs used in the final products cleared either to a unit in a Free Trade Zone or to a hundred per cent Export-Oriented Unit under bond shall be allowed to be utilized towards payment of duty of excise on similar final products cleared for home consumption on payment of duty."

23) A bare reading of the same would denote as to how after the words or rather for the words “in the manufacture of a final product”, the words “in the manufacture of a final product (other than those cleared either to a unit in a Free Trade Zone or to a hundred percent Export-Oriented Unit)” were substituted. Once their substitution is read and in the light of the unamended rule, it would clearly emerge as to how credit of duty was not to be allowed if the final products are exempt. The intent was not to allow any such credit on the inputs used in the manufacture of a exempted final product. If the final product is exempted from whole of duty leviable thereon or is chargeable to nil rate of duty. However, upon manufacture if such final product is cleared either to a unit in a free trade zone or to hundred percent export oriented unit then the prohibition in rule 57C does not apply. This is really a substantive amendment. This is to facilitate availment of credit of duty paid on the inputs used in a final exempted product which was otherwise inadmissible or non-exigible. If that is now permitted then the clearances have to be and of such manufactured final product to a unit in a free trade zone or hundred per cent oriented unit. This is a substantial departure from the earlier position. Now, the credit is not to be denied if the clearances are in the above terms. Thus,

not all clearances but specific and to units in free trade zone or hundred per cent export-oriented unit, which would enable the assessee and parties like it to claim credit of duty paid on inputs used in the manufacture of final products which are exempt from payment of duty of excise. The intent and purpose was obvious. A free trade zone or units therein or export-oriented unit undertake activities which would facilitate the country in earning foreign exchange and which is considered extremely valuable. In that regard and to encourage such units to undertake the activities noted above, frequently, that this rule was amended. That was also enabling the suppliers of such duty free products and received in the free trade zone to claim credit on the basis of the clearances made. If such is the intent and purpose and the departure is specifically made from a particular date, then, such amendment cannot but be held to be prospective.

24) Reliance placed by Mr Shah on a similar attempt and made in relation to another Central Excise Notification No.217 of 1986 with effect from 1st March, 1992 will not be of any assistance. There Notification No.217 of 1986 was granting exemption to inputs manufactured in a factory of production in or in relation to the manufacture of final products from the whole of the duty of excise

leviable thereon. This notification contained a proviso and namely that nothing contained in the notification shall apply to inputs used or in relation to the manufacture of final products which are exempt from the whole of duty of excise leviable thereon or is chargeable to nil rate of duty with effect from 1st March, 1992. Similar wording as to be found in Rule 57C was inserted and what we find is the inputs used in or in relation to the manufacture of final product other than those cleared either to a unit of free trade zone or hundred percent export-oriented unit which are exempt from the whole of the duty leviable thereon or chargeable to nil rate of duty were the words inserted. We do not find that any judgment of any court would and while interpreting the above can be of any assistance. The reliance on the judgment of the Tribunal in Indian transformers Vs. Commissioner of Central Excise Cochin is therefore misplaced. Once the distinction and difference between two benefits and two availment is noted, then, the confirmation of the view taken in Indian Transformers by the Supreme Court also is of no assistance. Apart therefrom the judgment of Tribunal has not been confirmed as is contended. The appeal is merely dismissed by the Supreme Court because in Indian Transformers the Tribunal placed reliance on earlier decision in the case of Indian Aluminium Co. Vs. Collector of Central Excise, Cochin. That judgment in Indian Aluminium was not appealed by the Department in the Supreme Court but was accepted. Hence, departmental appeal was dismissed. We do not find that the intent and the purpose sought to be achieved by the two notifications is identical. Therefore, the amendments thereto also cannot assist the appellants before us.

25) In the light of the above discussion, we find that the Tribunal was justified in dismissing the appeal of the assessee. The Tribunal rightly held that the credit was inadmissible and could not have been availed of in the light of the legal provision prevailing at the time at which the credit was availed by the appellant assessee. In such circumstances and the view taken, not being perverse or vitiated by any error of law apparent on the face of the record, this appeal fails. It is dismissed but without any order as to costs.

(SUNIL P. DESHMUKH, J.) **(S.C. DHARMADHIKARI, J.)**