IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD

FIRST APPEAL NO. 95 OF 2005

M/s Ban-Bro Metals (Pvt.) Ltd.
A Company incorporated under the
Companies Act, 1956 and having
its Office at L-4, M.I.D.C.
Ahmednagar ... **APPELLANT**

VERSUS

Commissioner of Central Excise
and Customs, Aurangabad
Town Centre, N-5, CIDCO,
Aurangabad 431 003. ... **RESPONDENT**.

Mr. A.P. Kolte, Advocate for the appellant.
Mr. D.S. Ladda, Advocate for the respondent.

CORAM: **R.D. DHANUKA &**
SUNIL K. KOTWAL, JJ.

RESERVED ON : 18th August, 2017
PRONOUNCED ON : 29th August, 2017

JUDGMENT (PER R.D. DHANUKA, J.)

1. The present appeal under Section 35G of the Central Excise Act, 1944 (hereinafter referred to as "the Act") arises out of the order dated 12.02.2004 passed by the Customs Excise and

Service Tax Appellate Tribunal, West Regional Bench at Mumbai, (For short the "Said Tribunal"), thereby upholding the demand of Rs. 3.73 Lakh made by the Superintendent, Central Excise and Customs, Town Range-I, Ahmednagar.

2. This appeal is admitted on the following substantial question of law.

> *"(a) Whether the Appellate Tribunal was right, under the facts and circumstances of the case, in denying the benefit of Deemed Credit in terms of the Government of India's Order No. TS/36/94/TRU, dated 01.03.1994 to the Appellants after their crossing the value of clearances of Rs. 75.00 Lacs under Notification No. 1/93-CE, dated 28.02.1993 as amended?"*

3. Some of the relevant facts for the purpose of deciding this Tax Appeal, which is numbered as First Appeal, are as under:-

4. The appellant is a Private Limited Company *inter alia* engaged in manufacturing of Rolled product of iron and steel falling under Heading No. 72.11 to 72.14 of Chapter 72 of the First Schedule to the Central Excise Tariff Act, 1985 and were availing the benefit of slab-wise exemption under Notification No. 1/93-CE, dated 28.02.1993 at the relevant time.

5. In exercise of the powers conferred on the Central Government under Rule 57G (2) of the Central Excise Rules, 1994, the Central Government issued order No. TS/36/94-TRU directing that ingots and re-rollable materials of iron or still purchased from outside and lying in stock on or after the first day of April 1994 with the rerollers, availing of the exemption under Notification No.1/93,-Central Excise, dated 28.02.1993 will be deemed to have paid duty, which may be allowed at the rate of Rs. 920 per Metric Tonne. It is the case of the appellant that the appellant is a registered Small Scale Unit holding S.S.I. Registration Certificate dated 20.09.1994 and started functioning for the first time in August 1994. The appellant started availing of Modvat Credit Facility in respect of the rerollable steel inputs used by the appellant in the manufacturing of its final products. The appellant availed of the exemption benefits as envisaged in Notification No. 1/93, dated 28.02.1993, as amended and also started availing deemed credit at the rate of Rs. 920/- per Metric Tonne with rerollable steel scrap as per the provisions of M.F. (D.R.) Order No.TS/36/94- TRU, dated 01.03.1994. It is the case of the appellant that the value of clearances made by the appellant during the financial year 1994-95 worked out to Rs. 1,29,88,185=18.

6. In exercise of the powers conferred under Sub-Section

(1) of Section 5A of the Act, the Central Government issued Notification No. 1/93-CE dated 28.02.1993 exempting clearances made by Small Scale Industrial Unit to the extent provided in the said Notification, having clearances not exceeding Rupees Two Crores in the preceding financial year. It is the case of the appellant that the appellant, on the basis of the said Notification, availed the benefit of deemed credit.

7. On 18.04.1995 the Superintendent of Central Excise, Town-1, Range Ahmednagar, issued show-cause notice to the appellant. In the said show-cause notice, it was stated that the appellant was availing facility of Modvat Credit under Rule 57-A and 57-G of Central Excise Rules, 1944, and had been paying Central Excise Duty at concessional rate from the beginning in view of the Notification No. 1/93-CE, dated 28.02.1993, as amended from time to time and was also availing facility of deemed credit at the rate of Rs. 920 per Metric Tonne without producing duty paying documents, on the input/raw material i.e. rerollable scrap, which was received by the appellant from scrap dealer i.e. M/s Viren and Company, Ahmednagar.

8. It was further stated that the Government of India had issued an order F. No. TS/36/94-TRU, dated 01.03.1994 and was circulated to the Trade by the Collector of Central Excise and

Customs vide Trade Notice No. 66/1994, dated 28.07.1994, clarifying that the facility of deemed credit would be availed by the Small Scale Industrial Units if the value of the clearances did not exceed Rs. 75,00,000/-. It was further stated that no deemed credit was allowed if the value by way of clearances exceeded Rs. 75,00,000/-.

9. In the said show-cause notice, it was alleged that on scrutiny of the records, it appeared that the value of clearances of Rs. 75,00,000/- was exceeded at invoice No. 92 dated 29.12.1994 and the appellant had started paying Central Excise Duty at nominal rate @ Rs. 15 % ad-valorum. The appellant had not raised deemed credit in R.G. 23A Part II Register and had continuously raised deemed credit in R.G. 23A Part II Register in contravention of the conditions of the said order dated 01.03.1994 issued by the Government of India. It was alleged that the total deemed credit for the period between January 1995 to March 1995 worked out at Rs. 3,73,303-80 as against 405.765 M.T. rerollable scrap obtained by the appellant without duty paying documents.

10. By the said show-cause notice, the appellant was directed to show cause as to why Central Excise Duty amounting to Rs. 3,73,303-80 should not be recovered from them under Rule 57-I

and the penalty should not be imposed on them under Rule 173-O of the Central Excise Rules, 1944, for the contravention of the said Central Excise Rules. The appellant was also called upon to produce at the time of showing cause all the evidences, upon which they intended to rely in support of their defence.

11. In response to the said show-cause notice, the appellant filed their reply contending that the appellant had not contravened any provisions of the Central Excise Law and Rules, made thereunder. It was contended that the deemed credit of Rs. 3,73,303-80 was legally available to them and that the said show cause notice was illegal and requested the learned Additional Commissioner, Central Excise and Customs, to withdraw the said show cause notice and demanded a personal hearing.

12. The learned Additional Commissioner, Central Excise and Customs, Aurangabad, passed an order on 31.03.1996 disallowing the Modvat Credit of Rs. 3,73,303-30 under Rule 57-I of Central Excise Rules and also imposed penalty of Rs. 30,000/- on the appellant under Rule 173Q of the said Central Excise Rules. The learned Additional Commissioner held that the Government of India by an order dated 01.03.1994 specifically laid down that deemed

credit facility was available only to such Small Scale Industrial Units which were availing of exemption on Notification No.1/93 dated 28.02.1993, making it clear that after crossing the clearances of Rs. 75,00,000/-, Small Scale Units no longer enjoy concessional rate of duty. It was held that the appellant will have to pay full rate of duty and was no longer exempted under Notification No. 1/93. It was held that only such units, which were availing of exemptions under Notification No. 1/93, dated 28.02.1993, were eligible to avail the facility of the deemed credit. The appellant had ceased to avail of exemption under the said Notification after crossing clearances value of Rs. 75,00,000/- though they continued to be Small Scale Unit as their total value of clearances was below Rupees Two Crore. It is held that since the appellant continued to avail Modvat Credit in violation of Central Excise Rules, they were liable for penalty quantifying at Rs. 30,000/-.

13. Being aggrieved by the said order passed by the learned Additional Commissioner, Central Excise and Customs, the appellant preferred appeal under Section 35 of the Act before the Commissioner of Central Excise and Customs (Appeals).

14. By an order dated 04.02.1997 the Commissioner (Appeals), Central Excise and Customs, allowed the said appeal filed

by the appellant herein. The learned Commissioner (Appeals) adverted to the judgment delivered by CEGAT in case of **Collector of Central Excise, Bombay Vs Sri Venkateshwara Steel Industries, 1996 (86) Excise Law Times 446 (T**) and held that the appellant would be entitled to deemed Modvat credit even after crossing the exemption limit of Rs. 75,00,000/- as long as their specified clearances were within the limit of Rupees Two Crore. The the said Tribunal, following the Judgment in the case of **Collector of Central Excise** Vs **Sri Venkateshwara** (supra), held that S.S.I Unit continues to be so even after it crosses Rs. 75,00,000/- turn over in a financial year provided if satisfies criteria set out in Notification No. 1/93.

15. Being aggrieved by the said order dated 04.02.1997 passed by the learned Commissioner (Appeals), Central Excise and Customs, Pune, the Commissioner of Customs and Central Excise, Aurangabad, preferred an appeal before the Customs, Excise and Service Tax Appellant Tribunal, West Regional Bench, Mumbai. By an order dated 12.02.2004 passed by the said Tribunal, the said Tribunal allowed the appeal filed by the Commissioner of Customs and Central Excise, partly, and upheld the demand of Rs.3.73 Lakh. The said Tribunal, however, was pleased to set aside the order

passed by the learned Additional Commissioner, Central Excise and Customs in so far as penalty of Rs. 30,000/- imposing in the order dated 31.03.1996 is concerned. The said Tribunal adverted to the decision of the Larger Bench of the Tribunal of Northern Bench, New Delhi in case of Digambar Foundry Versus Commissioner of Central Excise, Allahabad [2000 (118) ELT 85]. The Larger Bench of the Tribunal in the said case of Digamber (supra) had reversed the judgment of the Tribunal in case of Collector of Central Excise Versus Sri Venkateswar (supra). The Commissioner of Central excise and Customs did not file an appeal against the order passed by the said Tribunal allowing the said appeal filed by the appellant herein partly thereby setting aside the order passed by the Commissioner of Central Excise and Customs imposing penalty of Rs. 30,000/-.

16. Shri Kolte, learned Counsel for the appellant, submits that aggregate value of clearances of all excisable goods made by the appellant during the relevant preceding financial year i.e. 1993-1994 did not exceed Rs. two crores. It is submitted that the order dated 1st March 1994 issued by the Government of India, providing the Deemed Credit Facility had identified the categories of manufacturers, who were eligible to the benefit of the exemption

under the said Notification taking into consideration difficulties of the category of manufacturers i.e. Small Scale Rerolling Units in obtaining the raw materials directly from the primary manufacturers under the cover of gate passes, etc. and exempting them from the requirement of production of such duty paying documents, such as gate passes, etc., evidencing payment of duty in respect of their inputs in question.

17. Learned Counsel for the appellant placed reliance on the following judgments of various High Courts in support of his submissions:

(I) **Vinubhai Steel Co. Pvt. Ltd. Versus Commissioner of Central Excise { 2015 (330) E.L.T. 858 (Guj.)** **(**Paragraph 22)

(II) **Accurex Steel Rolling Mills Versus Commissioner of Ex. Panchkula {2016 (339) E.L.T. 5 (P & H)** (Paragraph 13)

(III) **Ganesh Steels Versus Cestat, Chennai { 2013 (294) E.L.T. 529 (Mad.)** (Paragraphs 13 to 16)

(IV) **Sood Steel Industrial (P) Ltd. Versus Commissioner of Central Excise { 2009 (241) E.L.T. 186 (H.P.)** (Paragraphs 13 and 14)

18. It is submitted by the learned Counsel for the appellant that issue involved in this appeal is already concluded by aforesaid four judgments delivered by four different High Courts, which are delivered after interpreting the Notifications in question. He submits that the impugned order passed by the said Tribunal allowing the appeal filed by the Commissioner of Customs and Central Excise, is based on the judgment of the Larger Bench in case of **Digambar Foundary (Supra),** which judgment has been set aside in aforesaid four judgments. He submits that this appeal filed by the appellant, thus, deserves to be allowed.

19. Learned Counsel for the appellant submits that Notification dated 1st March 1994 clearly indicates that the exemption was available in respect of Deemed Credit Facility under the Notification dated 28th February 1993 and the duty was to be considered as deemed to have been paid. He submits that the said Notification further clarifies that the small scale industries' limits were allowed exemption at the rate of Rs. 920/- per tonne, without production of documents evidencing payment of duty. He submits that the submissions made by the learned Counsel for the respondent is totally contrary to the said Notification dated 1st March

1994, clarifying earlier Notification dated 28th February 1993 and is also contrary to the view already expressed by the aforesaid four High Courts, specifically rejecting the contention raised by the learned Counsel for the respondent. He submits that the respondent is not able to distinguish the judgments of the aforesaid four High Courts. Moreover, he is not in a position to produce any other judgment of this Court or of any High Court or of Supreme Court taking a different view in the matter.

20. Mr Ladda, learned Counsel for the respondent, on the other hand, opposes this appeal on the ground that the appellant cannot be allowed to claim exemption in view of the fact that appellant has not produced any document evidencing the payment of duty. The learned Counsel could not seriously dispute the law laid down by the four High Courts in the aforesaid four judgments.

21. The respondent has not disputed that the appellant was registered as Small Scale Unit holding registration certificate dated 20th September 1994 and had been availing Modvat Credit Facility in respect of rerolling steel inputs used by the appellant in the manufacture of their final products and appellant had availed the exemption limits as envisaged by Notification No. 1/93-CE dated

28/02/1993 and availed Deemed Credit at the rate of Rs 920/- per metric tonne on the said rerollable steel scrap as per the said Notification dated 1st March 1994. The value of the clearances of the appellant during the financial year 1994-1995 was at Rs. 1,29,88,185.18, which was admittedly below the limit of Rs. two crores, specified in the Notification dated 28th February 1993.

22. The Larger Bench of the **CEGAT, Northern Bench, New Delhi,** in case of **Digambar Foundary,** (Supra**),** has reversed the view taken by the Tribunal in the case of **Collector of Central Excise, Coimbtore Vs. Sri Venkateswara Steel Industries** and had held that the rerollers having aggregate value of clearances in financial year had exceeded Rs. 75,00,000/- and when they were paying applicable excise duty on the clearances beyond the available limit of Rs. 75,00,000/-, were not eligible for the benefit of Ministry's Deemed Credit Order No. TS/36/94 TRU dated 1st March 1994. The Tribunal in the impugned order, which is subject matter of this appeal, followed the judgment of the Larger Bench of CEGAT, Northern Bench, New Delhi, in case of **Digambar Foundary,** (supra), and allowed the appeal filed by the respondent.

23. The High Court of Himachal Pradesh at Shimla in the case of **Sood Steel Industrial (P) Ltd. Versus Commissioner of Central Excise,** (Supra), considered the Notification dated 28th February 1993, Chandigarh Central Excise Collectorate Trade Notice dated 25th July 1994, and Deemed Credit Order dated 1st March 1994, and held that order of the Larger Bench of CEGAT in case of **Digambar Foundary** was not correct. It was held that the trade notice limiting the benefit to those manufacturers, whose clearances did not exceed Rs. 75,00,000/-, is totally illegal and against the said Deemed Credit Order issued by the Ministry. It is held that though the department is duty bound by its trade note, the industry is not bound by the same and has a right to challenge the same. It is held that trade note No. 81/94 dated 25th July 1994 cannot override the deemed credit order, and thus, the said trade note is illegal. It is further held that any manufacturer, whose total clearances did not exceed Rs. Two crores, was entitled to the benefit of exemption under the Notification No. 1/93-CE dated 28th February 1993.

24. The Madras High Court in case of **Ganesh Steels Vs. CESTAT, Chennai,** (supra), considered the identical facts and followed the judgment of the Division Bench of the Himachal

Pradesh High Court in case of **Sood Steel Industrial Pvt. Ltd., (**supra). The Madras High Court held that if the appellant in that case had not crossed value of clearances of Rs. two crores, during the preceding financial year and availed full exemption under the Notification No. 1/93-CE dated 28th February 1993, upto 24th December 1994 and thereafter started paying duty, the appellant could not be said to be not availing exemption under the Notification No. 1/93-CE dated 28th February 1993 during the year 1994-1995. The Madras High Court accordingly was pleased to set aside order of the Tribunal and decided the said appeal in favour of the assessee.

25. The Gujarat High Court in case of **Vinubhai Steel Co. Pvt. Ltd., (**Supra), considered the identical facts and after following the judgment of Himachal Pradesh High Court in case of **Sood Steel Industrial Pvt. Ltd.,** (supra)**,** Judgment of Madras High Court in case of **Ganesh Steels V. CESTAT (**supra) and the Judgment of Karnataka High Court in case of **Pashupati Steels Vs. Commissioner of Central Excise, Bengalore, {2012 (278) E.L.T. 59 (Kar.)},** allowed the Tax appeal preferred by the assessee and was pleased to set aside the impugned order of the Tribunal to the extent, the Tribunal had held that the assessees were not entitled to

the benefit of order dated 1st March 1994 after crossing the aggregate value of clearances of Rs. 75,00,000/-. The Gujarat High Court also considered the Government of India order dated 1st March 1994 and held that the Government, taking into consideration the ground realities in regard to purchase of material by rerollers from open market, by virtue of such order, had exempted them from the requirement of production of gate pass, etc., evidencing payment of duty in respect of ingots and rerollable materials of iron and steel purchased from outside and lying in stock on or after 1st day of April 1994.

26. The Punjab and Haryana High Court in case of **Accurex Steel Rolling Mills** (Supra), after following the judgment of Madras High Court in case **Ganesh Steels, (**Supra), and Judgment of Gujarat High Court in case of **Vinubhai Steel Co. Pvt. Ltd.** (Supra), has allowed appeals filed by the assessee and was pleased to set aside order of the Tribunal.

27. The learned Counsel appearing for the respondent also could not point out any contrary view taken by this Court or any other High Court for consideration of this Court. The learned Counsel also could not point out before this Court whether any of these four

judgments referred to above, were set aside by the Hon'ble Supreme Court or stayed in any matter.

28. The only contention raised by the learned Counsel for the Revenue for consideration of this Court is that the appellant has not produced any document evidencing payment of duty, and thus, on that ground, the appellant could not have cleared any exemption of payment of duty. In our view, the submission of the learned Counsel for the Revenue is devoid of merit and is contrary to the Notification dated 1st March 1994, issued by the Central Government, in exercise of the powers conferred under the second proviso to Rule 57-G(2) of the Central Excise Rules, 1944, directing that the ingots and rerollable materials of iron or steel purchased from outside and lying in stock on or after the 1st day of April, 1994, with the rerollers, availing of the exemption under Notification No. 1/93-Central Excises, dated the 28th February, 1993, will be deemed to have paid duty and the credit of duty in respect of such ingots and rerollable materials used without undergoing the process of melting, in the manufacture of goods falling under Chapter 72 of 73 of the Schedule to the Central Excise Tariff Act, 1985, may be allowed at the rate of Rs. 920/- per tonne, without production of documents evidencing the payment of duty. In our view, in view of this Notification dated 1st

March 1994, the appellant was not required to produce the documents evidencing the payment of duty while availing of exemption under the Notification No. 1/93 of Central Excise dated 28th February 1993. Our view is also supported by the view taken by the Gujarat High Court in case of **Vinubhai Steel Co. Pvt. Ltd.** **(**Supra).

29. In our view, the views expressed by the aforesaid four High Courts apply to the facts of this case. We are in agreement with the views expressed by the aforesaid four High Courts.

30. In our view, the impugned order passed by the Customs Excise and Service Tax Appellate Tribunal, West Regional, Bench at Mumbai, on 12th February 2004, in so far as demand of Rs. 3.73 lacks is upheld, is concerned, is contrary to the law laid down by the aforesaid four judgments, by which the judgment of Larger Bench of the Tribunal in the case of **Digambar Foundary,** (supra), has been set aside. Any manufacturer satisfying the conditions under the Notification No. 1/93 C.E. and whose total clearances did not exceed Rs. two crores, is entitled to the benefit of exemption under the said Notification No. 1/93 C.E. By Trade Note, the Central Government could not have restricted the exemption only to those manufacturers

whose clearances had not exceeded Rs. 75,00,000/-, contrary to the Deemed Credit Order issued by the Ministry.

31. For the reasons recorded aforesaid, the order of the Tribunal dated 12th February 2004 in Appeal No. E/850/97-Mum, allowing the appeal filed by the Commissioner of Excise and Customs in so far as demand of Rs. 3.73 lacs, made against the assessee is upheld, is set aside. Since there is no challenge to the order of the Tribunal setting aside imposition of penalty by the Revenue, the said part of the order is upheld.

32. We answer the substantial question of law formulated by this Court on 18th February 2005, in negative, in favour of assessee and against the Revenue.

33. First Appeal is allowed in aforesaid terms. No order as to costs.

(SUNIL K. KOTWAL)
JUDGE.

(R.D. DHANUKA)
JUDGE.

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