

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

CENTRAL EXCISE APPEAL NO. 210 OF 2006

The Commissioner of Central Excise,
Pune III, having his office at
ICF House, 41/A, Sasoon Road,
Opp. Wadia College, Pune- 411 001.

... Appellant..

V/s.

1. M/s. Prakash Foods Ltd.,
Comet House, 691/A-10,
Pune Satara Road,
Pune 411 037.

2. Shri Prakash Parekh.

3. Shri M.S.S. Prasad.

... Respondents.

Mr.Swapnil Bangur for the appellant.

Mr.V.Sridharan, Senior Advocate with Mr.Jas Sanghvi i/b.
PDS Legal for the respondents.

CORAM : A.S.OKA AND A.K.MENON, JJ.

RESERVED ON : 11th October 2017.

PRONOUNCED ON : 24th February 2018.

JUDGMENT : (Per A.S.Oka, J.)

By this appeal, the appellant- Revenue has taken an exception to the judgment and order dated 10th November 2005 passed by the

Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench at Mumbai (for short “CESTAT”) in the appeal preferred by the respondents-assesseees. The respondents are engaged in the manufacture of vegetable oil, soap stock, acid oil, industrial mono-carboxylic fatty acid, distilled fatty acid etc. falling under Chapters 15 and 38 of the Central Excise Tariff Act, 1985. The respondents were clearing the said goods on payment of duty after availing Modvat credit of duty paid on the inputs used in the manufacture of the products. According to the case of the appellant, during the period from March 1997 to August 2001, the respondents availed Modvat credit to the tune of Rs.1,54,71,283/- and utilized the same for payment of duty which was to the extent of Rs.1,62,80,444/-. Balance amount of Rs.11,25,600/- was paid by them through PLA.

2. A show-cause-notice dated 9th April 2002 was issued to the respondents calling upon them to show cause as to why the credit taken on the inputs and capital goods should not be denied on the ground that the same have been used in the manufacture of final products which were wholly exempted from duty in terms of Notification No.115/75. It was the case of the appellant- Revenue that the fixed vegetable oils account for approximately 99% of the total production and all other by-products account for remaining 1%. It was alleged that even though the by-products which account for 1% are exempted, the respondents have not availed the exemption and opted to pay duty on those products. The respondents availed Modvat credit on inputs and capital goods used for the manufacture of final products and utilized the same for payment of duty on the by-products. The show-cause-notice was replied by the

respondents. Apart from merits, an issue of limitation was also raised by the respondents. The Commissioner of Central Excise, Pune-III by order dated 7th August 2003 disallowed the Modvat credit amounting to Rs.1,54,71,283/- and directed the respondents to pay the said amount. He imposed penalty of the same amount. He imposed penalties of Rs.30,00,000/- on the second respondent and Rs.15,00,000/- on the third respondent. Being aggrieved by the said order, three separate appeals were preferred by the respondents herein which have been decided by the common impugned judgment and order. In the impugned order, the CESTAT relied upon the decision of the Apex Court in the case of *Commissioner of Central Excise(A) v. Narayan Polyplast*¹; *Commissioner of Central Excise v. Narmada Chematur Pharmaceuticals Ltd.*²; and *Punjab Tractors Ltd. v. Commissioner of Central Excise*³. The Tribunal observed that the Apex Court has held that if the assessee has chosen to pay duty in respect of exempted goods, he cannot be denied the benefit of the Modvat credit inasmuch as the entire exercise was revenue neutral.

3. This appeal was admitted on 13th September 2007 framing two substantial questions of law which read thus:

“A) Whether on the facts and in the circumstances of the case, the Tribunal was justified in allowing the appeal of the respondents by relying upon the decisions of the Apex Court reported in 179 E.L.T. 20, 197 E.L.T. 276 and 181 E.L.T. 380 when admittedly some of the duty paid inputs were used in the manufacture of final products on which

1 2005 (179) ELT 20 (SC)

2 2005 (197) ELT 276 (SC)

3 2005 (181) ELT 380 (SC)

no duty was payable and in fact no duty was paid on such final products ?

B) Where the Modvat credit availed on inputs is Rs.1,54,71,283/- and the inputs are used in the manufacture of non dutiable final products and dutiable by-products, the fact that the assessee has paid duty on by-products amounting to Rs.1,62,80,444/- and paid Rs.11,25,000/- through PLA, would absolve the assessee of its obligation to pay interest and penalty for wrongfully taking credit on inputs used in the final products on which no duty was payable and in fact no duty was paid ?”

4. The learned counsel appearing for the appellant- Revenue has taken us through the impugned order, the allegations in the show-cause-notice and the order passed by the Commissioner of Central Excise. His submission is that the three decisions of the Apex Court, which are referred and relied upon by the CESTAT, could not have been applied to the facts of the case. He relied upon the decision of the Apex Court in the case of *Escorts Ltd. v. Commissioner of Central Excise, Delhi-II*⁴. He pointed out that in the three cases, the Apex Court has dealt with the matters where revenue is neutral and has held that it is the option of the assessee to pay duty on the exempted products and avail Modvat/ Cenvat credit as it is revenue neutral. He submitted that the Apex Court has dealt with the cases where no revenue implications were involved.

5. He submitted that in the present case, the first respondent- assessee has paid excise duty only on by-products i.e. soap stock, acid oil, distilled fatty acid etc. He submitted that the main final product of the

first respondent is fixed vegetable oil which contributes 99% of the production. The submission is that the first respondent is otherwise required to pay 8% of the value of the main dutiable goods cleared by them under the CENVAT Rules. He submitted that the CESTAT has not even adverted to the facts of the three cases before the Apex Court to the facts of the present case.

6. The learned senior counsel appearing for the respondents supported the impugned judgment and order. He invited our attention to Sections 5A and 5B of the Central Excise Act, 1944 (for short “the said Act”). He relied upon the decision of the Apex Court in the case of *Commissioner of Central Excise v. Narmada Chematur Pharmaceuticals Ltd.* (supra). He relied upon the decision of the Gujarat High Court in the case of *Commissioner of Central Excise, Ahmadabad v. Nahar Granities Limited*⁵. He relied upon the decision of the Apex Court in the case of *Union of India v. M/s.Ind-Swift Laboratories Ltd.*⁶ Lastly, he invited our attention to what is held in paragraph-3 of the decision of the Apex Court in the case of *Commissioner of Central Excise, Ahmedabad v. Reliance Industries Ltd.*⁷ He submitted that the assessee is allowed to forgo benefits under the exemption notification as everyone has a right to waive and agree to waive the advantages of law or rule made solely for his protection. He submitted that no interference is called for as the decisions of the Apex Court are squarely applicable to the facts of the present case.

5 Tax Appeal No.1155/2013 decided on 24th April 2014

6 2011 TIOL 21 SC-CX

7 2015 (321) ELT 392 (SC)

7. We have already noted what is held by the CESTAT in the impugned order. It is necessary, firstly, to refer to the decision of the Apex Court in the case of ***Commissioner of Central Excise v. Narayan Polyplast*** (supra). Paragraph-6 of the said decision, reads thus:

“6. The issue in this case is similar to the one which this court had dealt with CA. Nos.4877-4880 of 1998 today. Here also the Modvat credit which according to the appellant had been wrongly availed by the respondent-assessee was Rs20,01,728 which is the exact amount paid by the assessee by way of the excise duty during the relevant period. It is further stated by the assessee that the determination of the issue would be revenue neutral. The appeal is, accordingly, dismissed. If upon verification the submission of the respondent is found to be incorrect, liberty is granted to the appellant to mention the matter for recall of this order.”

8. This was a case where a Modvat credit was wrongly availed by the assessee. However, the amount of credit availed was paid by the assessee towards excise duty. This was in the facts of one of the two cases before the Apex Court which were decided together. In the other case before the Apex Court which was decided by the same decision, the question involved was whether an assessee is bound to avail an exemption or can forgo the same in order to avail the Modvat credit. The trade notice dated 11th March 1988 stated that it was the option of the assessee either to avail of the full exemption available or to pay the duty leviable on the goods manufactured by him. It provided that if the assessee chose to pay the duty in spite of exemption, Modvat credit could

not be denied on such duty paid inputs, if used in manufacture of final product. The show cause notice was issued for recovery of Modvat credit amount. The demand was confirmed by the Assistant Collector. It was also confirmed by the Collector of Central Excise. However, the Appellate Tribunal reversed the findings and held that the assessee had the option not to avail of exemption but to pay the duty and avail of Modvat credit. The appeal preferred by the revenue was dismissed by the Apex Court on the ground that it had no revenue implications. At this stage, it will be necessary to make a reference to the decision of the Apex Court in the case of *Union of India v. M/s.Ind-Swift Laboratories Ltd.* (supra). The Apex Court held thus:

“10 In order to appreciate the findings recorded by the High Court by way of reading down the provision of Rule 14, we deem it appropriate to extract the said Rule at this stage which is as follows:

“Rule 14. Recovery of CENVAT credit wrongly taken or erroneously refunded: - Where the CENVAT credit has been taken or utilized wrongly or has been erroneously refunded, the same along with interest shall be recovered from the manufacturer or the provider of the output service and the provisions of Sections 11A and 11AB of the Excise Act or Sections 73 and 75 of the Finance Act, shall apply mutatis mutandis for effecting such recoveries.”

2 A bare reading of the said Rule would indicate that the manufacturer or the provider of the output service becomes liable to pay interest along with the duty where CENVAT credit has been taken or utilized wrongly or has been erroneously refunded and that in the case of the aforesaid nature the provision of Section 19 11AB would apply for effecting such recovery.

3 We have very carefully read the impugned judgment and order of the High Court. **The High Court proceeded by reading it down to mean that where CENVAT credit has been taken and utilized wrongly, interest should be payable from the date the CENVAT credit has been utilized wrongly for according to the High Court interest cannot be claimed simply for the reason that the CENVAT credit has been wrongly taken as such availment by itself does not create any liability of payment of excise duty. Therefore, High Court on a conjoint reading of Section 11AB of the Act and Rules 3 & 4 of the Credit Rules proceeded to hold that interest cannot be claimed from the date of wrong availment of CENVAT credit and that the interest would be payable from the date CENVAT credit is wrongly utilized. In our considered opinion, the High Court misread and misinterpreted the aforesaid Rule 14 and wrongly read it down without properly appreciating the scope and limitation thereof. A statutory provision is generally read down in order to save the said provision from being declared unconstitutional or illegal. Rule 14 specifically provides that where CENVAT credit has been taken or utilized wrongly or has been erroneously refunded, the same along with interest would be recovered from the manufacturer or the provider of the output service. The issue is as to whether the aforesaid word “OR” appearing in Rule 14, twice, could be read as “AND” by way of reading it down as has been done by the High Court. If the aforesaid provision is read as a whole we find no reason to read the word “OR” in between the expressions ‘taken’ or ‘utilized wrongly’ or ‘has been erroneously refunded’ as the word “AND”. On the happening of any of the three aforesaid circumstances such credit becomes recoverable along with interest.**

4 We do not feel that any other harmonious construction is required to be given to the aforesaid expression/provision which is clear and unambiguous as it

exists all by itself. So far as Section 11AB is concerned, the same becomes relevant and applicable for the purpose of making recovery of the amount due and payable. Therefore, the High Court erroneously held that interest cannot be claimed from the date of wrong availment of CENVAT credit and that it should only be payable from the date when CENVAT credit is wrongly utilized. Besides, the rule of reading down is in itself a rule of harmonious construction in a different name. It is generally utilized to straighten the crudities or ironing out the creases to make a statute workable. This Court has repeatedly laid down that in the garb of reading down a provision it is not open to read words and expressions not found in the provision/statute and thus venture into a kind of judicial legislation. It is also held by this Court that the Rule of reading down is to be used for the limited purpose of making a particular provision workable and to bring it in harmony with other provisions of the statute. In this connection we may appropriately refer to the decision of this Court in *Calcutta Gujarati Education Society and Another v. Calcutta Municipal Corporation and Others* reported in (2003) 10 SCC 533 in which reference was made at Para 35 to the following observations of this Court in the case of *B.R. Enterprises v. State of U.P. and Others* reported in (1999) 9 SCC 700: -

“81. It is also well settled that first attempt should be made by the courts to uphold the charged provision and not to invalidate it merely because one of the possible interpretations leads to such a result, howsoever attractive it may be. Thus, where there are two possible interpretations, one invalidating the law and the other upholding, the latter should be adopted. For this, the courts have been endeavouring, sometimes to give restrictive or expansive meaning keeping in view the nature of legislation, maybe beneficial, penal or fiscal etc. Cumulatively it is to subserve the object of the legislation. Old golden rule is of respecting the wisdom of legislature that they are 24 aware of the law and would never have intended

for an invalid legislation. This also keeps courts within their track and checks individual zeal of going wayward. Yet in spite of this, if the impugned legislation cannot be saved the courts shall not hesitate to strike it down.

Similarly, for upholding any provision, if it could be saved by reading it down, it should be done, unless plain words are so clear to be in defiance of the Constitution. These interpretations spring out because of concern of the courts to salvage a legislation to achieve its objective and not to let it fall merely because of a possible ingenious interpretation. The words are not static but dynamic.

This infuses fertility in the field of interpretation. This equally helps to save an Act but also the cause of attack on the Act. Here the courts have to play a cautious role of weeding out the wild from the crop, of course, without infringing the Constitution. For doing this, the courts have taken help from the preamble, Objects, the scheme of the Act, its historical background, the purpose for enacting such a provision, the mischief, if any which existed, which is sought to be eliminated

..... This principle of reading down, however, will not be available where the plain and literal meaning from a bare reading of any impugned provisions clearly shows that it confers arbitrary, uncanalised or unbridled power.”

(emphasis added)

9. We have carefully perused the order of the Commissioner of Central Excise, Pune which was challenged before the CESTAT. There are various findings of fact recorded by the Commissioner. One of the findings of fact recorded by the Commissioner is in paragraphs-26 and 27 which read thus:

“26. Obviously, M/s.Parekh Foods Ltd. had not maintained separate inventory and accounts of the inputs meant for use in the manufacture of fixed vegetable oil which was chargeable to nil rate of duty. M/s.Parekh Foods Ltd. also did not pay an amount equal to eight percent of the total price of the exempted final product (fixed vegetable oil). Therefore, even if it is considered for arguments sake (not conceded) that the by-products manufactured by them are dutiable, M/s Parekh Foods Ltd. are not entitled to avail of credit of duty on any of the inputs used in their factory.

27. From the above discussions, it is clear that M/s Parekh Foods Ltd. were not entitled to avail of MODVAT / CENVAT credit on all the inputs used by them in their factory, as all the end products manufactured by them were either exempt from the whole of the duty of excise leviable thereon or were chargeable to nil rate of duty. Even otherwise, since they have not maintained separate inventory and accounts of the inputs used in the manufacture of fixed vegetable oil which was chargeable to nil rate of duty and also since they had not paid eight percent of the price of the fixed vegetable oil cleared, M/s. Parekh Foods Ltd. were not entitled to avail of MODVAT / CENVAT credit on all the inputs used by them in their factory.”

10. On the aspect of penalty also there are findings of fact recorded by the Commissioner. There is a clear cut finding of suppression of material facts in paragraph-33. The relevant part of the said finding reads thus:

“33. From the above, it is clear that M/s Parekh Foods Ltd., by resorting to the aforesaid modus operandi, had contravened different provisions of the Central Excise

Rules, 1944 and the CENVAT Credit Rules, 2001 with intent to evade duty (availment of ineligible MODVAT/CENVAT credit and passing on the same to the customers to enable them to make use of such credit for payment of duty on their final products amount to evasion of duty.) **They suppressed the manufacture of fixed vegetable oil while applying for registration. In the various classification declarations filed by them, they did not declare the manufacture of fixed vegetable oil by them. Similarly, in the declarations filed by them under rule 57G and 57T, giving particulars of the inputs and capital goods on which they were availing of MODVAT / CENVAT credit, M/s Parekh Foods Ltd. did not make any mention of the main product i.e., fixed vegetable oil as final product manufactured by them. All these exercises were done by them intentionally to give the impression to the department that the inputs and capital goods were used exclusively for the manufacture of the by-products on which they had chosen to pay duty. From the above, it is clear that M/s Parekh Foods Ltd. had given misleading and wrong information in the various declarations filed by them to give the impression that the inputs/ capital goods on which MODVAT / CENVAT credit was availed was for the manufacture of the by-products such as soap stock, acid oil, fatty acids etc. There was no mention in any of those declarations that they were engaged in the manufacture of fixed vegetable oil attracting nil rat of duty and that the aforesaid inputs and capital goods were used for the manufacture of fixed vegetable oil. This was done intentionally to avoid payment of eight percent of the price of exempted goods in or in relation to the manufacture of such goods the credit availed inputs were used."**

(emphasis added)

Now turning to the impugned order, we must note that it is a very cryptic. The first two paragraphs contain statement of facts. The third paragraph

refers to three decisions of the Apex Court. The only finding recorded by the Tribunal reads thus:

“The ratio of the above decisions is that in case the assessee has chosen to pay duty in respect of the exempted goods, he cannot be denied the benefit of the modvat credit inasmuch as the entire exercise was revenue neutral.”

11. Firstly, the Commissioner has not recorded a finding of fact that the entire exercise was revenue neutral. No reasons have been assigned by the CESTAT for coming to the conclusion that entire exercise was revenue neutral. None of the specific findings of fact recorded by the Commissioner have been dealt with by the CESTAT. In our view, when the CESTAT was the final Court of fact, the same ought to have dealt with the findings recorded by the Commissioner and ought to have recorded findings one way or the other. There is complete absence of findings of fact. Perusal of three decisions relied upon by the CESTAT show that same were rendered in the facts before the Apex Court. We have already quoted the decisions in the case of ***Commissioner of Central Excise(A) v. Narayan Polyplast*** (supra) and in the case of ***Commissioner of Central Excise v. Narmada Chematur Pharmaceuticals Ltd.*** (supra). There was a finding of fact that the exercise was revenue neutral. It was not a case where allegation of the suppression of material fact by the assessee was made. In the present case, a specific finding is recorded to that effect by the Commissioner. The said finding is not dealt with by the CESTAT. In the case of ***Punjab Tractors Ltd. v. Commissioner of***

Central Excise (supra), again there is no finding regarding suppression of material fact.

12. Therefore, in our view, as the CESTAT which is the final fact finding authority has not done its duty, we have no option but to remand the matter for fresh consideration to CESTAT. Accordingly, we pass the following order:

- (i) The impugned judgment and order dated 10th November 2005 is hereby quashed and set aside and the Appeal Nos.E/3309 to 3311/03 are remanded to CESTAT for fresh hearing;
- (ii) We are sure that considering the fact that the appeals are of the year 2003, the CESTAT shall give necessary priority to the hearing of the appeal;
- (iii) All contentions on merits are kept open;
- (iv) The appeal is partly allowed on the above terms with no order as to costs.

(A.K.MENON, J.)

(A.S.OKA, J.)