1988 (36) ELT 563 : 1989 (23) ECR 123

GUJARAT HIGH COURT

Hon'ble Judges:I.C.Bhatt and S.B.Majmudar JJ.

Mehendra Mills Limited Versus Union Of India

Special Civil Application No. 3779 of 1980 ; *J.Date :- DECEMBER 05, 1987

- CENTRAL EXCISE ACT, 1944 Section - 4 , 6 , 12 , 37
- CENTRAL EXCISE RULES, 1944 Rule - 96V, 96W

CENTRAL EXCISE ACT, 1944 - S.4 - S.6 - S.12 - S.37 - VALUATION OF EXCISABLE GOODS FOR PURPOSES OF CHARGING OF DUTY OF EXCISE - REGISTRATION OF CERTAIN PERSONS - APPLICATION OF THE PROVISIONS OF ACT 52 OF 1962 TO CENTRAL EXCISE DUTIES - POWER OF CENTRAL GOVERNMENT TO MAKE RULES - CENTRAL EXCISE RULES, 1944 - R.96V - R.96W.

KeyWords: **Assessable value - Bona fide - intermediate product - Period of limitation - Short levy -**

Cases Referred to :

1. Amit Processors Pvt. Ltd. V/s. U.O.I. & Ors., 1986 ECR(Guj) 46
2. Commr. Of St V/s. Sarjoo Prasad, 37 STC 533
3. Empire Industries Ltd. & Ors. V/s. U.O.I. & Ors., 1985 ECR 1169
4. Kamala Mills Ltd. V/s. U.O.I. & Ors., 1983 ECR 133
5. Kolhapur Cane Sugar Works Ltd. And Anr. V/s. U.O.I. & Ors., 1986 ELT(Del) 205
6. Rayala Corpn. (P) Ltd. & Anr. V/s. Director Enforcement, AIR 1970 SC 494
7. U.O.I. & Ors. V/s. Bombay Tyres International Ltd., 1983 ECR 2233

Cited in :

1. (Referred to) :- Krishna Processors Vs. Union Of India, 2012 (2) GCD 1607 : 2012 (280) ELT 186 : 2012 JX(Guj) 188 : 2012 GLHEL_HC 226690
2. (Approved) :- Kolhapur Cane Sugar Works Limited Vs. Union Of India, 2001 (1) GLR 1 : 2000 (2) SCC 536 : 2000 (1) Scale 369 : 2000 (2) LLJ 942 : JT 2000 (1) SC 453 : 2000 AIR SC 811 : 2000 (1) SCR 518 : 2000 AIR SCW 364 : 2000 (119) ELT 257 : 2000 (1) Supreme 412 : 2000 (2) RCR(Civ) 674 : 2000 (4) SCT 952 : 2000 (2) MLJ 141 : 2000 (2) SRJ 391 : 2000 (89) ECR 22 : 2000 (68) ECC 1 : 2000 (1) LRI 648 : 2001 (1) CalLT 18 : 2000 WLC(SC)CVL 293 : 2000 GLHEL_SC 14744
3. (Referred To) :- Saurashtra Cement And Chemical Industries Limited Vs. Union Of India, 1994 (2) GCD 249 : 1992 GLHEL_HC 214136
4. (REFERRED TO) :- Saurashtra Cement And Chemical Industries Limited Vs. Union Of India, 1991 (2) GLH 426 : 1991 (55) ELT 467 : 1990 GLHEL_HC 211019

Equivalent Citation(s):

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JUDGMENT :-

S.B.Majmudar, J.

1 In this group of Special Civil Applications certain common questions under the Central Excises and Salt Act, 1944 (hereinafter called as the Act) are raised and hence they were heard together and are being disposed of by this common judgement. All the petitioners are running composite textile mills in this city. They have got both the spinning and weaving departments in their mills. In their spinning department, they manufacture yarn. This yarn is taken out from the spindles and shifted to the weaving department where it is utilised for manufacturing fabrics. The respondent authorities exercising power under the Act and the rules framed thereunder insisted that during the relevant time while preparing the price lists of manufactured fabrics the concerned petitioners mills companies should have included the excise duty payable by them on yarn which was earlier manufactured by them in the spinning department and which was captively consumed by them for manufacturing the end product viz. fabric, in the assessable value of the manufactured final product i.e. the fabric. As they had not done so, they were liable to pay difference in duty which would have been paid on the final product if the excise duty on manufactured yarn was included, and the duty which they actually paid on the fabric, by not including this excise duty. Accordingly show cause notices were issued to the concerned mill companies under the then prevailing Rules 10 and 10A of the rules and in most of the cases the dispute was adjudicated upon. In some cases, the petitioners carried the matters in appeal, but the appeals failed. Under these circumstances, some of the petitioners have challenged the final adjudication order and appellate orders while some of them have challenged such show cause notices under Rules 10 and 10A before adjudication and have straight come to this court at notice stage itself. The issuance of these notices was challenged on diverse grounds which will be indicated hereinafter. Before we do so, it will be necessary and appropriate to have a quick glance at the relevant statutory provisions, holding the field at the relevant time in the light of which these proceedings will have to be decided. Statutory Backgrounds :-

2 Excise duty is payable on manufactured articles at the rates indicated against the concerned article in the schedule to the Act. The relevant sections of the Act read as under :-

> Section 4. Valuation of excisable goods for purposes of charging of duty of excise. - (1) Where under this Act, the duty of excise is chargeable on any excisable goods with reference to value, such value shall, subject to the other provisions of this section, be deemed to be -
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> (a) The normal price thereof, that is to say, the price at which such goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal, where the buyer is not a related person and the price is the sole consideration for the sale : Provided that -
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> (i) where in accordance with the normal practice of the wholesale trade in such goods, such goods are sold by the assessee at different prices to different classes of buyers (not being related persons) each such price shall, subject to the existence of the other circumstances specified in clause (a), be deemed to be the normal price of such goods in relation to each such class of buyers;

(ii) where such goods are sold by the assessee in the course of wholesale trade for delivery at the time and place of removal at a price fixed under any law for the time being in force or at a price, being the maximum, fixed under any such law, then, notwithstanding anything contained in clause (iii) of this proviso, the price or the maximum price, as the case may be, so fixed, shall, in relation to the goods so sold, be deemed to be the normal price thereof;

(iii) where the assessee so arranges that the goods are generally not sold by him in the course of wholesale trade except to or through a related person, the normal price of the goods sold by the assessee to or through such related person shall be deemed to be the price at which they are ordinarily sold by the related person in the course of wholesale trade at the time of removal, to dealers (not being related persons) or where such goods are not sold to such dealers, to dealers (being related persons) who sell such goods in retail;

(2) .....

(3) .....

(4) For the purpose of this section, -

(d) "value" in relation to any excisable goods, -

(i) where the goods are delivered at the time of removal in a packed condition, includes the cost of such packing except the cost of the packing which is of a durable nature and is returnable by the buyer to the assessee. Explanation - In this sub-clause "packing" means the wrapper, container, bobbin, pirn, spool, reel, or warp beam or any other thing in which or on which the excisable goods are wrapped contained or wound :

(ii) does not include the amount of the duty of excise, sale tax and other taxes, if any payable on such goods and, subject to such rules as may be made, the trade discount (such discount not being refundable on any account whatsoever) allowed in accordance with the normal practice of the wholesale trade at the time of removal in respect of such goods or contracted for sale;

3 Sec. 6 reads as under :- Section 6 : Certain operations to be subject to licence - The Central Government may, by notification in the Official Gazette, provide that, from such date as may be specified in the notification, no person shall except under the authority and in accordance with the terms and conditions of a licence granted under this Act, engage in -

(a) the production or manufacture or any process of the production or manufacture of (any specified goods included in the First Schedule) or of saltpetre or of any specified component parts or ingredient of such goods or of specified containers of such goods, or

(b) the wholesale purchase or sale (whether on his own account or as a broker or commission agent) or the storage of (any specified goods included in the First Schedule).

4 Sec. 12 also empowers the Central Government by notification to declare that any of the provisions of the Customs Act, 1962 relating to the levy of and exemption from customs duties, drawback of duty, warehousing, offence and penalties, confiscation and procedure relating to offences and appeals shall, with such modifications and alterations as it may consider necessary or desirable to adapt them to the circumstances be applicable in regard to like matters in respect of the duties imposed by Sec. 3. Sec. 37 deals with the general rule making power of the Central Government and authorities the Central Government to make rules and carry into effect the purpose of the Act. Sub-section (2) of Sec. 37 gives a list of items on which in particular, and without prejudice to the generality of the fore-going power, such rules can be framed by the Central Government. The Central Excise Rules, 1944 have been framed by the then Central Government in exercise of the said powers and these rules have continued in operation with modifications from time to time.

5 First Schedule to the Act at Serial No. 18 provides for excise duty payable on man-made fabrics other than minerals fibres, man-made filament yarns, cellulosic spun yarn and non-cellulosic wastes, all sorts, Item 18A of the Schedule provides for ad valorem duty on cotton yarn, all sorts. It, therefore, becomes clear that the yarn manufactured by the concerned petitioners in their spinning departments is dutiable and they are bound to pay excise duty as per the aforesaid items in the schedule. As per Items 19 and 22 of the First Schedule the final product is also liable to excise duty. Item 19 provides for the levy of ad valorem excise duty on cotton fabrics mentioned therein. Item 22 deals with ad valorem on man-made fabrics. It, therefore, becomes clear that both the yarn manufactured by the petitioners in their spinning department and the fabric which they ultimately manufacture in the weaving department by captively consuming the yarn are able to excise duties. It also becomes obvious that the moment yarn is manufactured on the spindles it is liable to excise duty. As per Items 18 and 18A these petitioners mill companies had to pay separate excise duty on yarn and if the yarn was captively consumed, they had, ultimately to pay the requisite excise duty on the final product viz. fabric also.

6 Now it is necessary to note the exact scope and ambit of the then existing Rule 96V and W around which the controversy in the present cases turns. The relevant portion of Rule 96V provided that "where a manufacturer who manufactures cotton yarn.... and...uses the whole or part of the yarn manufactured by him in the manufacture of cotton fabric in his own factory, makes in the proper form an application to the Collector in this behalf the special provisions contained in this section, on such application being granted by the Collector apply to such manufacturer in substitution of the provisions contained elsewhere". Rule 96W provided that "having regard to the average production of cotton fabrics from one kilogram of cotton yarn... the Central Government may by notification in the Official Gazette, fix from time to time a rate per square metre of the cotton fabrics.... and if a manufacturer whose application has been granted under Rule 96V pays a sum calculated according to such rate.... such payment shall be a full discharge of his liability for the duty leviable on the quantity of cotton yarn manufactured by him and used in the manufacture of fabrics in his factory." Sub-rule 3 of Rule 96W permitted the manufacturer to pay the duty as aforesaid in respect of cotton yarn alongwith the duty on fabrics in the manner prescribed. Accordingly, the Central Government issued notifications from time to time fixing the rate of duty payable on yarn under these provisions on the basis of square metre of the fabric manufactured out of this yarn.

7 It is pertinent to note that Rules 96V and 96W were omitted from the statutory book with effect from 18th June, 1977. In these petitions, we are concerned with the situation which prevailed prior to 18th June, 1977 when the SC rules were in force and whereunder

compounded-levy procedure was permitted to the concerned manufacturers of cotton fabric. While submitting the price lists, reflecting the assessable value of fabrics for the relevant period which stretches back from 16-3-1976 till 15-5-1977, the concerned petitioners did not include therein the duty of central excise on captively consumed yarn which they paid by utilising the concessional procedure available under Rules 96V and W. It is under these circumstances that the departmental authorities came to the tentative finding that the duty on fabric was short levied on account of the aforesaid omission of the concerned assessees and that triggered off various show cause notices under Rules 10 and 10A. Adjudications that resulted from these notices and in some cases notices themselves have been directly brought in challenge in this court as indicated earlier. So far as Rules 10 and 10A are concerned prior to 6th August, 1977 these rules existed in the following form :

> 10. Recovery of duties or charges short-levied, or erroneously refunded.
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> (1) When duties or charges have been short-levied through inadvertance, error, collusion or misconstruction on the part of an officer, or through mis-statement as to the quantity, description or value of such goods on the part of the owner, or when any such duty or charge, after having been levied, has been owing to any such cause, erroneously refunded the proper officer may, within three months from the date on which the duty or charge was paid or adjusted in the owner's account-current, if any, or from the date of making the refund, serve a notice on the person from whom such deficiency in duty or charges is or are recoverable requiring him to show cause to the Assistant Collector of Central Excise why he should not pay the amount specified in the notice.
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> (2) The Assistant Collector of Central Excise, after considering the representation, if any, made by the person on whom notice is served under sub-rule (1), shall determine the amount of duty or charges due from such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined within ten days from the date on which he is required to pay such amount or within such extended period as the Assistant Collector of Central Excise may, in any particular case, allow.
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> 10-A. Residuary powers for recovery of sums due to Government. -
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> (1) Where these Rules do not make any specific provision for the collection of any duty, or of any deficiency in duty if the duty has for any reason been short-levied, or of any other sum of any kind payable to the Central Government under the Act or these Rules the proper office may serve a notice on the person from whom such duty, deficiency in duty or sum is recoverable requiring him to show cause to the Assistant Collector of Central Excise why he should not pay the amount specified in the notice.
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> (2) The Assistant Collector of Central Excise, after considering the representation, if any, made by the person on whom notice is served under sub-rule (1), shall determine the amount of duty, deficiency in duty or sum due from such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined within ten days from the date on which he is required to pay such amount or within such extended period as the Assistant Collector of Central Excise may, in any particular case, allow."

Shri K. S. Nanavati
Sr. Advocate

These two rules were amalgamated and a new Rule 10 was enacted with effect from 6th August, 1977. New rule 10 read as under :-

Rule 10. Recovery of duties not levied or not paid or short levied or not paid in full or erroneously refunded. - (1) Where any duty has not been levied or paid or has been short levied or erroneously refunded or any duty assessed has not been paid in full, the proper officer may, within six months from the relevant date, serve notice on the person chargeable with the duty which has not been levied or paid or which has been short levied, or to whom the refund has erroneously been made; or which has not been paid in full, requiring him to show cause why he should not pay the amount specified in the notice :

Provided that -

(a) where any duty has not been levied or paid, has been short-levied or has not been paid in full, by reason of fraud, collusion or any wilful mis-statement or suppression of facts by such person or his agent, or

(b) where any person or his agent, contravenes any of the provisions of these rules with intent to evade payment of duty and has not paid the duty in full, or

(c) where any duty has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts by such person or his agent, the provisions of this sub-section shall, in any of the cases referred to above, have effect as if for the words "six months", the words "five years" were substituted.

Explanation. - Where the service of the notice is stayed by an order of a court the period of such stay shall be excluded in computing the period of six months or five years, as the case may be.

(2) The Assistant Collector of Central Excise shall, after considering the representation, if any, made by the person on whom notice is served, under sub rule (1), determine the amount of duty due from such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined.

For the purpose of this rule -

(i) 'refund' includes rebate to in rules 12 and 12A

(ii) 'relevant date' means -

(a) In the case of excisable goods on which duty has not been levied or paid or on which duty has been short levied or has not been paid in full, the date on which the duty was required to be paid under these rules;

(b) in the case of excisable goods on which the value or the rate of duty has been provisionally determined under these rules, the date on which the duty is adjusted after final determination of the value or the rate of the duty, as the case may be;

(c) in the case of excisable goods on which duty has been erroneously refunded, the date of such refund."

Even this new rule 10 was omitted with effect from 17.11.1980 but with effect from 17-11-1980 itself sec. 11A was introduced in the act by the Amending Act 25 of 1978. The said sec. 11A read as under :

Section 11A. Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded. - (1) when any duty of excise has not been levied or paid has been short levied or short paid or erroneously refunded, a Central Excise Office may within six months from the relevant date, serve notice on the person chargeable with the duty which has not been levied or paid or which has been short-levied or short-paid or to whom the refund has erroneously been made requiring him to show cause why he should not pay the amount specified in the notice :

Provided that where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, by such person or his agent, the provisions of this sub-section shall have effect, as if the words "six months", the words "five years" were substituted.

Explanation :- Where the service of the notice is stayed by an order of a Court, the period of such stay shall be excluded in computing the aforesaid period of six months or five years, as the case may be.

(2) The Assistant Collector of Central Excise shall, after considering the representation, if any, made by the person on whom notice is served under sub-section (1), determine the amount of duty of excise due from such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined

(3) For the purposes of this section -

(i) "refund" includes rebate of duty of excise on excisable goods exported out of India or an excisable materials used in the manufacture of goods which are exported out of India;

(ii) "relevant date" means -

(a) in the case of excisable goods on which duty of excise has not been levied or paid or has been short-levied or short-paid -

(A) where under the rules made under this Act a monthly return, showing particulars of the duty paid on the excisable goods removed during the month to which the said return relates, is to be filed by a manufacturer or producers or a licensee or a warehouse, as the case may be, the date on which such return is so filed;

(B) where no monthly return as afore-said is filed, the last date on which such return is to be filed under the said rules;

(C) in any other case, the date on which the duty is to be paid under this Act or the rules made thereunder;

(b) in a case where duty of excise is provisionally assessed under this Act or the rules made thereunder; the date of adjustment of duty after the final assessment thereof;

(c) In the case of excisable goods on which duty of excise has been erroneously refunded the date of such refund.

It is in the background of the aforesaid statutory settings that we have to consider the various points canvassed by the learned counsel for the petitioners. Points Canvassed :-

8 Mr. S. I. Nanavati, learned counsel appearing for some of the petitioners raised the following contensions :

(i) Stand of the department in the show cause notices issued to the concerned petitioners to the effect that the assessable value of the fabric must include duty paid on captively consumed yarn as per the procedure permitted under Rules 96V and W, is patently illegal, that the insistence of the department that the assessable value of the fabric must also include the excise duty paid on captively consumed yarn which ultimately resulted into the manufacturing of the fabric, was unauthorised inasmuch as it would result in charging duty on duty and hence the impugned show cause notices are patently illegal and void and consequently the adjudications based on such notices were equally bad in law.

(ii) It was alternatively contended that in any case the impugned show cause notices issued under Rule 10 or 10A could not have been legally processed further and could not have validly resulted into adjudications after 17th November, 1980, as by that date, new Rule 10 was itself omitted from the rules and even though with effect from that date Sec. 11A was added in the Act, in the absence of any saving clause, the proceedings pending on 17-11-1980 under the omitted Rule 10 automatically lapsed. Hence also the orders of adjudications made by the concerned authorities after 17-11-1980 on the basis of old show cause notices issued under the erstwhile Rule 10 or for that matter Rule 10A were rendered incompetent and illegal.

(iii) Even apart from that Rule 10A could never have been pressed in service by the authorities against the concerned petitioners and Rule 10 only applied and in that case the authorities had no jurisdiction to reopen the question of payment of excise duties for a period prior to one year from the relevant date. Consequently the adjudications in connection with periods beyond the scope of Rule 10 had become time barred and to that extent the adjudication are required to be quashed in any case. Mr. K. M. Mehta, learned Advocate appearing for some of the petitioners raised the following two additional contentions.

(iv) As original Rules 10 and 10A were deleted with effect from 6th August, 1977 and as new Rule 10 was substituted from that date onwards, the show cause notices issued to the concerned petitioners prior to 6th August, 1977 would not have been adjudicated upon by the authorities after 6th August, 1977 under new Rule 10 and

hence the orders of adjudication passed after 6-8-1977 in connection with the show cause notices issued under old Rule 10 were patently illegal and ultravires.

(v) In any case the Assistant Collector has no jurisdiction to review the orders passed by the appropriate officers approving the price-lists under relevant rules. Consequently, the orders of adjudications passed by the authority going behind the approved price lists were patently erroneous and without jurisdiction. And on that basis also the impugned orders of adjudication are liable to be quashed. Mr. K. S. Nanavati and Mr. A. C. Gandhi broadly supported the contentions canvassed by Mr. S. I. Nanavati. Mrs. K. A. Mehta, Standing Counsel for the Union of India and the Excise Department refuted these contentions and submitted that these petitions are liable to be dismissed.

Pointwise discussions :-

9 (1) So far as the question of properly assessing the value of the fabric manufactured by the petitioners is concerned, it is obvious that fabric manufactured by the petitioners in their composite mills is a separate excisable product. Duty thereon has to be paid according to the provisions of the Act. It is now well settled by a series of decisions of Supreme Court and High Courts that assessable value for the purpose of levying the excise duty on a manufactured product as per Sec. 4 of the Act would include amongst others manufacturing costs and manufacturing profits. They are the basic essentials to be included in computing the assessable value of the manufactured product. But in addition thereto, other aspects have also to be taken care of and costs thereof have to be included while computing the assessable value of the concerned excisable item. It is also clear that when a manufacturer captively consumes any other manufactured product as an input for manufacturing the end product, the cost of the product used as input enters the cost structure of the final product which is prepared out of it as the manufacturer naturally would like to shift the entire burden of the cost of captively consumed articles on the purchaser who would purchase the final finished goods. Under these circumstances, when the composite textile mills manufactured yarns in the spinning department and when they used the said yarn for captive consumption, the excise duty payable on the yarn would ipso-facto enter the cost structure of the finished product fabric. It is also obvious that if the concerned mills companies had not manufactured yarn on their spindles, they would have been required to purchase the yarn from open market and then they would have utilised the same in manufacturing fabric. In that eventuality of necessity, the price which the fabric manufacturer would have paid to the outside seller of the yarn in open market would have included the excise duty borne by the outside manufacturer of the yarn, and that would have been passed on to the fabric manufacturer and fabric manufacturer in his turn would have included the total cost of yarn purchased from open market including the excise duty charged thereof in the manufacturing cost of fabric which he would have ultimately passed on to the purchaser of his fabric at the factory gate. If this is the normal state of affairs, merely because the yarn is manufactured by the composite mills in their spinning department and on which they have to bear excise duty and such yarn in captively consumed for manufacturing fabric, it cannot be said with any justification that the excise duty payable on manufactured yarn cannot enter the cost structure of fabric or that it should not be treated to be a part of the manufacturing cost of the fabric. In fact, the excise duty paid on yarn used to be included in the manufacturing costs of fabric for years together by these very composite textile mills. However, from 16-3-1976 onwards they had second thoughts and they did not include the excise duty on yarn while preparing the price lists for fabrics and they relied upon Rules 96V and W in that connection. In our view the reliance

placed on these rules by the petitioners for that purpose is totally besides the point. Under these rules as they then existed, a concession was given to the concerned petitioners to pay duty on captively consumed yarn at a later date. These rules offered a scheme deferred payment of excise duty on yarn captively consumed by the concerned assessee. These composite mills were utilising the procedure laid down by these rules and got the concession of paying the duty on cotton yarn as well as cotton fabrics together at the time they they paid the excise duty on fabrics. However, it is difficult to appreciate how these rules on enable the petitioners to exclude the duty paid by them on yarn captively consumed in manufacturing of fabric while computing the assessable value of fabric. Rules 96V and W merely provided a special procedure for calculation of payment of excise duty on yarn, manufactured by the assessee in his own factory for the manufacturing of cotton fabrics. There is nothing more in these rules to suggest that the excise duty on yarn is to be excluded while computing the assessable value of cotton fabrics. The valuation of excisable goods for the purpose of charging duty on excise is provided for in Sec. 4 of the Act as we have been earlier. In this connection it will be useful to have a look at the decision of Supreme Court in the case of Union of India and Others V/s. Bombay Tyre International Ltd. 1984 (17) ELT 329 (SC) - AIR 1984 SC 420. In this case R.S. Pathak, J., as he then was, speaking for the court made the following pertinent observations in para 15 of the judgement.

> "We move on now to a different dimension, to the conceptual consideration of the measure of the tax. Sec. 3 of the Central Excises and Salt Act provides for the levy of the duty of excise. It creates the charge and defines the nature of the charge. That it is a levy on excisable goods, produced or manufactured in India, is mentioned in terms in the section itself. Sec. 4 of the Act provides the measure by reference to vividly the charge is to be levied. The duty of excise is chargeable with reference to the value of the excisable goods, and the value is defined in express terms by that section..... It is apparent, therefore, that when enacting a measure to serve as a standard for assessing the levy the Legislature need not contour it along lines which spell out the character of the levy itself. Viewed from this stand point it is not possible to accept the contention that because of levy of excise is a levy on goods manufactured or produced the value of an excisable article must be limited to the manufacturing cost plus the manufacturing profit. We are of the opinion that a broader based standard of reference may be adopted for the purpose of determining the measure of the levy. Any standard which maintains a nexus with the essential character of the levy can be regarded as a valid basis for assessing the measure of the levy. In our opinion, the original Sec. 4 and the new Sec. 4 of the Central Excises and Salt Act satisfy this test."
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> It is, therefore, obvious that for computing assessable value of any manufactured article for the purpose of its liability to be taxed under Section 4 of the Act, to say the least all the manufacturing costs incurred by the manufacture till the manufactured article emerges are of necessity to be included in its assessable value. Therefore, costs of inputs including the excise duty paid on such inputs by the manufacturer as purchaser of inputs from the outside market or as a captive consumer of such inputs manufactured by himself would enter into the manufacturing costs of the final finished product manufactured out of these inputs. Consequently merely because the authority permitted the petitioners to pay the excise duty on manufactured yarn at a later stage by way of a deferred system of payment as envisaged by Rules 96V and W, it cannot be said that the liability to pay excise duty on yarn arose for the first time when the duty was actually paid under the aforesaid concessional procedure.

> On the contrary it must be held that liability to pay excise duty on manufactured yarn arose the moment the manufacturing of yarn was completed at spindle stage. It is that accrued liability to pay excise duty on yarn that was deferred by the concessional procedure permitted under Rules 96V and W. But once under that procedure excise duty was paid on yarn it would discharge the liability for paying excise there on at the stage of actual manufacture of yarn which had taken place earlier. It is that duty on yarn which of necessity would get telescoped in the manufacturing cost of fabric. Therefore, the actual cost of manufacturing of yarn alongwith excise duty payable thereon as per Rules 96V and W had got to be included in the manufacturing cost of fabric and once they are so included, they would of necessity be reflected in the assessable value of the final product viz. the fabric. Inasmuch as the petitioners had under some misconception failed to include the excise duty paid by them on yarn in the assessable value of fabric during the relevant period the department was justified in taking the view that the excise duty of fabric was short levied on account of this fact. In view of this, the first contention of Mr. Nanavati is found to be devoid of any substance and has to be rejected.

10 At this stage we may mention that a learned single Judge of Bombay High Court Sujatha V. Manohar, J. in the case of Kamala Mills Ltd. V/s. Union of India and Others, 1986 (25) E.L.T. 24 (Bom.) has taken the same view on the scope of Rules 96V and W and has held that the excise duty paid on cotton yarn captively consumed for manufacturing cotton fabric has to be included in the assessable value of cotton fabric for the purpose of calculation of excise duty on cotton fabric. With respect, we concur with the view expressed by the learned single Judge in the said Bombay High Court decision.

11 Before parting with discussion on point No. 1 we must also deal with the aspect of the matter put forward by Mr. S.I. Nanavati for the petitioners. He submitted that if the excisable value of fabric to include the excise duty on yarn captively consumed by the manufacture on fabric, then it would amount to duty on duty. It is not possible to agree with this contention. The concept of double duty envisages that under the very same tariff, the same commodity gets doubly taxed. Such is not the situation in the present cases. Yarn is altogether a different manufactured commodity which attracts the excise duty on its own.

> This yarn while captively consumed in the composite textile mill gets completely used up and entirely a different article emerges viz. cotton fabric. As it is new commodity it attracts excise duty on its own under an altogether different tariff item. Thus it is not as if the yarn is being taxed twice over, nor is fabric being taxed twice over. Both are separate manufactured items being taxed separately under different tariff items. In such a case, there would never arise the question of paying duty on duty. In this connection it is profitable to look at the decision of the Supreme Court in the case of Empire Industries Ltd. & Others, V/s. Union of India and Others 1985 (20) E.L.T. 179 (S.C.). In that case Supreme Court was concerned with the question whether manufactured grey fabric is said to have resulted into a new manufactured coloured fabrics after it was processed. This court had taken the view that when manufactured grey fabric was processed only did not ceased to be a fabric and consequently processed fabric was not a new manufactured article. Upsetting the aforesaid view of this court, the Supreme Court in the aforesaid decision held that the process of bleaching, mercerising, dyeing, printing, water-proofing would result in a new manufactured product subject to excise duty. Thus as per the aforesaid decision grey fabric, because of the process to which it is subjected to is transformed into another

commodity as coloured fabric, which is an accessible commodity by itself. In fact, learned counsel for the petitioners have not even challenged this position. Under these circumstances, it cannot be said that the yarn remained yarn when it resulted into a new commodity viz. fabric. Consequently there would never arise any occasion for apprehending that it would amount to duty on duty if excise duty paid on yarn was included in the cost structure of fabric for fixing the assessable value of fabric. It is also pertinent to note that there would never be an occasion for the manufacturer of earn to pay double duty on yarn. In the present cases firstly the cotton yarn is charged duty under Rules 18 and 18A at the specific compounded rates and later cotton fabrics are charged excise duty under Tariff Items 19 and 22 at ad valorem rates. The tariff items are different the rates of duty are different and the manufactured items are also different. Consequently, the submission of Mr. Nanavati, that insistence of the department that the petitioner should include the excise duty paid on yarn in the assessable value of fabric would amount to double taxation is devoid of any substance and has to be rejected. The first submission, therefore, fails.

12 So far as the second contention is concerned, learned counsel for the petitioner is on a firmer footing. As we have seen earlier while discussing the statutory setting. Rule 10 which was enacted on 6th August, 1977 got omitted on 17-10-1980 [Should read as 17-11-1980.]. As per sub-rule 2 of Rule 10 the concerned authority after considering the representation, if any, made by the person on whom the notice is served under sub-rule (1) shall determine the amount of duty or charges due from such person. But Rule 10(2) got omitted alongwith sub-rule (1) of Rule 10. Therefore, adjudication made in the light of the earlier notices under Rules 10 and 10A could not survive after 7-10-1980 despite the fact that almost analogous statutory provisions were enacted in the Act by bringing in Sec. 11A from that very date. It is to be kept in view that on the date on which Rule 10 was omitted, the proceedings which were pending for adjudication pursuant to the earlier notices issued under the omitted rule could not have legitimately continued in two eventualities (i) if express saving clause was included in the notification issued by the Central Government which omitted the Rule (ii) or even in the absence of such express saving clause, Sec. 6 of the General Clauses Act could be pressed in service by the respondent authorities. It is not in dispute that there is no express saving clause in the notification thereby Rule 10 came to be omitted on 17-11-1980. So far as the second eventuality is concerned, even that cannot be pressed in service by the respondents for the simple reason that as held by the Constitution Bench of the Supreme Court in the case of M/s. Rayala Corporation P. Ltd. and Another V/s. The Director of Enforcement, A.I.R. 1970 Supreme Court 494, Sec. 6 of the General Clause Act cannot apply to omission of rules, that it can apply to repeal of statutory enactments of regulations but not to rules especially when they are omitted. In view of this pronouncement of the Supreme Court on the scope of Sec. 6 it has to be held that, the omission of Rule 10 from the rules would not attract Sec. 6 of the General Clause Act and the same cannot apply to save the pending proceedings initiated earlier under the omitted rule. In this connection it is profitable to see what the Constitution Bench of the Supreme Court speaking through Bhargava, J. has to say on the point. In para 15 of the judgement while considering the omission of Rule 132A of the Defence of India Rules the Constitution Bench laid down as under :

> "In the case before us, Sec. 6 of the General Clauses Act cannot obviously apply on the omission of Rule 132A of the D. I. Rs. for the two obvious reasons that Sec. 6 only applies to repeals and not to omissions, and applies when the repeal is of a Central Act or regulation and not of a Rule. If Sec. 6 of the General Clauses Act had been applied, no doubt this complaint against the two accused for the office

punishable under Rule 132A and D.I. Rs. could have been instituted even after the repeal of that rule."

Therefore, the contention of the earned counsel for the petitioner on this aspect rests on a very sound footing and has to be accepted.

13 Learned counsel for the petitioners in support of the aforesaid contention also heavily learned on a decision rendered by a Division Bench of this Court in the case of Amrit Processor Pvt. Ltd. V/s. Union of India & Others, 1985 (21) E.L.T. 24 (Guj.). In that case the Division Bench consisting N. H. Bhatt (as he then was) and J.P. Desai, JJ in terms held relying on the decision of Constitution Bench of the Supreme Court in AIR 1970 SC 494 (supra) that when the Rule 10 of the Central Excise Rules was omitted on 17-11-1980 without containing saving clause for the continuance of proceeding already initiated, and when Section 11A of the Central Excise Act did not create any fiction and when Section 6 of the General Clauses Act was also not applicable, all adjudication proceedings pending under old Rule 10, became incompetent and without jurisdiction after 17-11-1980. The aforesaid decision of the Division Bench of this Court squarely support this contention of the petitioners. However, Mrs. Mehta, learned standing Counsel for the respondents made a valiant effort to salvage the situation by submitting for our consideration a decision of the Delhi High Court in the case of Kolhapur Cane Sugar Works Ltd. and another V/s. Union of India and Others, 1986 (24) E.L.T. 205 (Del.) wherein its Division Bench consisting of Yogeshwar Dayal and S. Ranganathan, JJ. has taken the view that Sec. 6 of the General Clauses Act is on the same lines as Sec. 38(2) of the Interpretation Act of England, which provides that a repeal, unless contrary intention appears does not affect the previous operation of the repealed enactment as if the repealing Act had not been passed and therefore, one cannot subscribe to be broad proposition that Sec. 6 of the General Clauses Act is ruled out when there is repeal of an enactment followed by fresh legislation. Sec. 6 would be applicable in such cases also unless the new legislation manifests and intention incompatible with or contrary to the provisions of this Section. Such incompatibility would have to be ascertained from a consideration of all the provisions of the new law. In that case before the Delhi High Court new Rule 10 was substituted for the earlier Rule 10 and 10A on 6th August, 1977. The question was whether the proceedings initiated under old Rule 10 which was omitted would survive after the enactment of new Rule 10 with effect from 6-8-1977. Answering the question in the affirmative, the Delhi High Court held that the new Rule 10 did not show any different intention from what was discernible from the old rules prior to their substitution. In new Rule 10 for certain types of recoveries limitation period has been extended and therefore, in view of the Delhi High Court Sec. 6 of the General Clauses Act will apply. The mere absence of saving clause by itself was therefore, not material. Mr. Mehta submitted that various Supreme Court decisions were pressed in service by the Division Bench of the Delhi High Court in this matter to come to this conclusion. She submitted that when old provisions are substituted by almost analogous new provision, the earlier proceeding initiated under the old provisions so repealed or omitted would survive. The aforesaid contention canvassed by Mrs. Mehta cannot be accepted for two obvious reasons. Firstly, as compared to the Delhi High Court decision, we have got a direct decision of this High Court which is binding on us. Secondly, the Division Bench of the Delhi High Court applied Sec. 6 of the General Clauses Act by relying on certain decisions of the Supreme Court, but had no opportunity to look at the decision of the Constitution Bench of the Supreme Court, AIR 1970, Supreme Court 494 (supra). That is a direct decision on Sec. 6 of the General Clauses Act. Consequently the view expressed by the Delhi High Court stands impliedly overruled by the aforesaid decision of the Supreme Court, Mrs. Mehta made a

heroic attempt to persuade us to refer the decision of the Division Bench of this Court in 1985 (21) E.L.T. 24 (Guj.) for reconsideration to the full bench. She submitted that Supreme Court itself has granted special leave against the aforesaid decision of the Division Bench and the matter is pending before the Supreme Court. That is neither here nor there. We are normally bound by the ratio of the decision of another Division Bench of this Court directly on the point unless we are persuaded to refer it to a large bench prima-facie disagreeing with the same. Mrs. Mehta submitted that the Division Bench which decided the aforesaid case has not properly appreciated the limited scope of the decision of the Supreme Court, 1970, AIR 494 (supra). She submitted that in that case the limited question whether after omission of Rule 132A of the Defence of India Rules, a complaint could be filed later on for any alleged infraction of the said omitted rule during the relevant time was on the anvil. It was submitted that in that case Rule 132A was not re-enacted simultaneously under a different nomenclature. The Supreme Court held that after the rule is omitted, there would not arise any occasion to file a complaint for the alleged infraction of the rule and that the saving clause in that case only saved things done or omitted to be done under that rule and hence it could not include future filing of complaint. Mrs. Mehta submitted that in the present case such is not the situation. Here Rule 10 has been re-enacted in a statutory form by way of Section 11A which is in pari materia. On the very day the rule was omitted, Section 11A was introduced in the Act. Of course Mr. Mehta fairly stated that there is no express saving clause in the notification amending rule but she submitted that general principles underlying Sec. 6 of the General Clauses Act can be effectively pressed in service in such cases. And that there is no such distinction between omission of a provision and its repeal, as much as if the provision is omitted by the present legislature it can be said to be repealed but if it is deleted by delegated legislative functionary it can be said to be an omission and therefore, Sec. 6 of the General Clauses Act can include "omissions" within the phraseology "repeal" used in that section. Repeal would include omission. Mrs. Mehta submitted that all these aspects have not been highlighted before the Division Bench of this Court which decided the case of Amit Processors Pvt. Ltd. and hence the matter may be referred to a larger bench. It is not possible to agree with this contention for the simple reason that in the case of M/s. Rayala Corporation P. Ltd. while interpreting Sec. 6 of the General Clauses Act, the Supreme Court held that Sec. 6 of the General Clauses Act cannot apply to cases of omission and will not apply also to the omissions of rules. As we are directly concerned with the omission of Rule 10, the aforesaid decision of the Supreme Court on applicability of Sec. 6 of the General Clauses Act gets squarely attracted against the respondent and once that decision has been applied by the Division Bench of this Court on identical facts, no useful purpose can be served by referring this matter to the larger bench. If at all the respondents will have to request the Supreme Court in the pending appeal against the decision of the Division Bench of this court, that the Constitution Bench decision of the Supreme Court on interpretation of Section 6 of the General Clauses Act in the case of Rayala Corporation P. Ltd. may be reconsidered. Even in that eventuality, the constitution bench of Supreme Court, if is inclined to reconsider the decision of M/s. Rayala Corporation case, it will not be able to do so unless reference is made to a still larger bench of seven learned Judges and or more. With all these hurdles in the way of the respondents, no useful purpose can be served by our referring this question to a larger bench of this High Court. On the other hand we are of the view that the decision of the Division Bench of the High Court following the decision of the Constitution Bench of the Supreme Court does not reflect any error and with respect, the view taken by it is unassailable and we respectfully concur with the same. Consequently, the second contention canvassed by the learned counsel for the petitioners has got to be accepted.

Shri K. S. Nanavati
Sr. Advocate

14 So far as the third contention the objection raised by the department against the concerned petitioner was to the effect that the petitioners when they submitted the price lists and had wrongly not included the excise duty paid by them on yarn captively consumed by them while manufacturing the fabric. In these lists while computing the assessable value of fabric they had not included the excise duty paid by them on yarn. That had resulted into short levying on duty on fabric manufactured by the petitioners. In such an eventuality Rule 10 which existed before the 6th August, 1977 was squarely attracted. Rule 10A which is residuary rule could not obviously apply when Rule 10 directly applied. Similarly so far as the new Rule 10 brought in statutory books on 6th August, 1977 was concerned, the first part thereof clearly applied to the facts of the case and of the sub-paras of the proviso applied. The concerned show cause notice had, therefore, to be issued covering the permissible period as laid down by old Rule 10 upto 6-8-1977 or new Rule 10 after 6-8-1977 as the case may be. Reliance is rightly placed by Mr. Nanavati, learned counsel for the petitioners on the very same decision of the Bombay High Court, 1986 (25) E.L.T. 24 (Bom.) in the case of Kamala Mills Ltd. V/s. Union of India and Others. In that decision learned single Judge Smt. Sujatha V. Manohar, J. has observed as under :

> "Under Rule 10 read with rule 173(J) as it was in force at the relevant time, the time limit, inter alia, for recovery of duty short levied, was one year. The show cause notice of 10th June, 1976 covers a period beyond one year. Under this show cause notice the claim for the period prior to 11th June, 1975 is time-barred. Similarly under the show cause notice of 28th March, 1977, the claim for the period prior to 29th March, 1976 is time-barred. The respondents are, therefore, directed not to recover any excise duty for the period which is beyond the period of limitation prescribed under Rule 10 read with Rule 173(J) as aforesaid."

15 However on the facts of the present case, it is found that in any case, the Collector of Central Excise himself has upheld the submissions of the petitioners that these proceedings fall under Rule 10 and not under Rule 10A. For that purpose, the relevant period for which the proceedings can be initiated would be a period of one year prior to the issuance of the concerned show cause notice. As this relief has already been granted by the competent authority itself, no further relief is required to be given to the petitioners in the present proceedings. However, on the principle the submission of the learned counsel for the petitioners has got to be accepted.

16 It also appears that this is a case of bona fide error on the part of the assessee or for that matter even of the proper officer who approved the price list from time to time. It is this bona fide error which resulted in short levy of the concerned excise duty on fabric during the relevant period. In these cases there was no intention to evade payment of duty by any assessee or his agent. Consequently the short period as provided by the Rule 10 operated at the relevant time will have to be adhered to by the authorities while deciding the liabilities of the concerned petitioners in the adjudication proceedings pursuant to the show cause notices issued to them.

17 The fourth contention submitted by Mr. K. M. Mehta, learned counsel, appearing for some of the petitioners is that the notices issued to the petitioners represented by him were issued by the authorities under Rule 10 that existed prior to 6-8-1977 while the adjudication was made after 6-8-1977. That by that time the original Rules 10 and 10A were omitted and new Rule 10 was substituted. He, therefore, contended placing reliance on the aforesaid decision of the Division Bench of this Court in the case of Amit Processors Pvt. Ltd. (supra) that the

adjudication must be avoided on the ground that when Rule 10 was omitted from 6-8-1977 no saving clause was engrafted in the notification deleting the rule, for saving the pending proceeding and as Sec. 6 of the General Clause Act could not be pressed in service by the authorities as the Constitution Bench of the Supreme Court had already held that Sec. 6 of the General Clauses Act will not apply to the omission of rules. It was, therefore, contended by Mr. Mehta that the ratio of the Division Bench decision of this Court in the case of Amit Processors Pvt. Ltd. (supra) directly applies to the facts of the cases represented by him. It seems there is substance in the aforesaid contention of Mr. Mehta. The ratio of the decision of the Division Bench of this court to the effect that when Rule 10 was omitted and Sec. 11A was engrafted on the statute books on the same day, the pending proceedings under the omitted Rule 10 did not survive and Sec. 6 of the General Clauses Act did not help to salvage the situation for the department. On the same reasoning it must be held that when old Rules 10 and 10A were omitted on 6-8-1977 and new Rule 10 was brought in force on that very day and as there was no saving clause in the notification deleting and introducing these rules, and as Sec. 6 of the General Clauses Act did not help as this is a case of the omission of the rules and not of their repeal, the pending proceedings under old Rule 10 could not be continued and could not be adjudicated upon under new Rule 10 by the department authorities. Thus considering the ratio of the decision of the Division Bench of this Court in the case of Amit Processors Pvt. Ltd. (supra), the present contention canvassed by Mrs. Mehta has also got to be accepted on the same grounds and reasons on which we have upheld contention No.2

> In fact contentions No. 2 and 4 are interlinked. As we have upheld the contention No. 2, this contention also has to be upheld especially when the ratio of the Constitution Bench of the Supreme Court, AIR 1970 Supreme Court 494 squarely gets attracted even to cover this contention. Consequently the fourth contention canvassed by Mr. Mehta is upheld by not competent to adjudicate upon the old show cause notice issued under old Rule 10 prior to 6-8-1977, and proceedings pending for adjudication under such notices became incompetent after 6-8-1977.

18 Before parting with this discussion, we may mention that Mrs. Mehta, learned Standing Counsel for the respondents vehemently submitted that so far as this contention is concerned, it is squarely decided in her favour of Delhi High Court in the case of Kolhapur Cane Sugar Works Ltd. and another V/s. Union of India and Others, 1986 (24) E.L.T. 205 (Delhi) and that decision may be followed by us. It is not possible to agree with this contention of Mrs. Mehta for the simple reason that this decision runs counter to the ratio of the decision of the Division Bench of this Court in the case of Amit Processors Pvt. Ltd. with which we have concurred. Even otherwise, the view taken by the Delhi High Court on the applicability of the Sec. 6 of the General Clauses Act runs counter to the view taken by the Constitution Bench of the Supreme Court, AIR 1970 Supreme Court 494. Thus for the detailed reasons given by us for not following the Delhi High Court decision while discussing the point No. 2, the present submission of Mrs. Mehta has to be rejected as a logical corrollary thereof.

19 Mrs. Mehta for Union of India then submitted that so for as omission of Rule 10 was concerned, it was specifically done by the rule making authority and Section 11A was added of course on the same day by another authority, viz. the Parliament; while so far as old Rule 10 and Rule 10A were concerned, by the very same Notification No. 267 of 1977, dated 6-8-1977, old Rules 10 and 10A were substituted by Rule 10. She invited our attention to Rule 4 of the said notification which reads as under :-

"4. For Rules 10, 10A and 11 of the said rules, the following rules shall be substituted namely :-

* * * * * *

She therefore, contended that it is not a case of omission of Rules 10 and 10A and the enactment of new Rule 10, but it is a case of substitution. It is difficult for us to appreciate this contention. It is not as if that Rule 10 and 10A did not survive even for a moment after Rule 10 got substituted in their place. Moment Rule 10 is substituted, it necessarily means that old Rules 10 and 10A got displaced. Therefore, they stand omitted where forthwith after such substitution. Consequently the distinction tried to be drawn by Mrs. Mehta in the scheme of substitution envisaged by Notification No. 267/77 on the one hand and the scheme of omission envisaged at the later stage by the rule making authority when even Rule 10 was omitted, pales into insignificance. It is also pertinent to note that while enacting new Rule 10, sub-rule (2) was enacted as substracted earlier which in terms provided that the Assistant Collector of the Central Excise shall, after considering the representation, if any made by the person on whom notice is served under sub-rule (1) determine the amount of duty from such person. It, therefore, clearly contemplates that the Assistant Collector of Central Excise under New Rule 10 had to adjudicate upon the notice served under sub-rule (1) of new Rule 10. No power is conferred under sub-rule (2) of new Rule 10 on the Assistant Collector to adjudicate upon pending notices issued under substituted Rule 10. In that view of the matter, on principle, no difference can be found between the scheme of new Rule 10 as envisaged by Notification No. 267 of 1977 and the later scheme adopted by the rule making authority when the said rule was omitted and Sec. 11-A was enacted on the very same day by the Parliament. The aforesaid additional contention of Mrs. Mehta therefore also has to be rejected.

20 So far as the fifth contention is concerned, Mrs. Mehta of the petitioners did not press the same for our consideration in view of the fact that we have upheld his fourth contention. The fifth contention was placed for our consideration in the alternative and as we have decided the main contention in his favour, he made it clear that he does not press this last contention. We therefore, express no opinion thereon.

21 Before leaving the 5th contention, we must make it clear that all the advocate appearing for each petitioner in this group of matters agreed before us that they do not press the 5th contention nor do they want this court to pronounce upon the same so far as the present proceedings are concerned and consequently, we have not decided this 5th contention earlier canvassed by Mrs. Mehta as it is treated to be expressly given up.

22 In view of the aforesaid conclusion reached by us on diverse points, we now proceed to deal with the petitioners in these group of matters individually with a view to passing appropriate final orders.

Shri K. S. Nanavati
Sr. Advocate