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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066

EXCISE APPEAL BRANCH

Appeal No. E/3288/2005 - EX[DB]

Date 12/04/2010

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
M/S MAHARAJA SHREE UMAID MILLS LTD.
PALI, RAJASTHAN-306401

M/S MAHARAJA SHREE UMAID MILLS LTD. — Appellant

Vs

C.C.E. JAIPUR II — Respondent

I am directed to transmit herewith a certified copy of **Final order No. 176/ 2010 EX[DB]** dated 09-4-10 passed by the Tribunal under Section 35-C(1)of Central Excises Act, 1944

Assistant Registrar
(Excise Appeal Branch)

Copy to :
1. Respondent
C.C.E. JAIPUR II
N.C.R.BUILDING, STATUE CIRCLE, "C" SCHEME, JAIPUR 302005.
2. Adv. / Consult
MR.K.K ANAND
A-5,BASEMENT,LAJPAT NAGAR-III NEW DELHI-24
3 C.D.R
~~4 J.C.D.R.~~
5 Bar association, CESTAT, New Delhi
6 Director Publications, Customs, Excise. I.P. Estate, New Delhi
7 M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi - 3
8 Commercial Laws of India Pvt Ltd. Post Bag No. 1033, No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
9 Raghuraman's 44-B, Regal Flat,Shipra Suncity, Indirapuram - 201010,Ghaziabad, DT, U.P.
10 M/s Manupatra Information Solutions Pvt Ltd. Excise & Customs Cases B-37, Sector - 1, Noida - 201301, Gautam Budh Nagar, (UP)
11 M/s. Deeparchie Publications, M-93, Marg. 46, Saket, New Delhi 110017
12 Taxindiaonline.com Pvt.Ltd, B-XI/8183,Vasant Kunj, New Delhi - 110070
13 Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh, New Delhi - 110026
14 Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road,Ahmedabad-15
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18. HON'BLE PRESIDENT.

Assistant Registrar
(Excise Appeal Branch)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.
Principal Bench, New Delhi

COURT NO. I

Excise Appeal No. 3288 of 2005

[Arising out of the Order-in-Original No. 33/CE/JP-II/2005 dated 21/07/2005 passed by The Commissioner of Central Excise, Jaipur.]

For Approval and signature :

Hon'ble Justice R.M.S. Khandeparkar, President
Hon'ble Shri Rakesh Kumar, Member (Technical)

1.	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	:
2.	Whether it would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	:
3.	Whether their Lordships wish to see the fair copy of the order?	:
4.	Whether order is to be circulated to the Department Authorities?	:

M/s Maharaja Shree Umaid Mills Ltd. — Appellant

Versus

CCE, Jaipur – II — Respondent

Appearance

Shri K.K. Anand, Advocate – for the appellant.

Shri B.K. Singh, Authorized Representative (Jt. CDR) – for the Respondent.

CORAM : **Hon'ble Justice R.M.S. Khandeparkar, President**
Hon'ble Shri Rakesh Kumar, Member (Technical)

DATE OF HEARING : 23/02/2010.
DATE OF DECISION : 9/4/2010

Final Order No. 176/2010 Ex Dated : _____

Per. Rakesh Kumar :-

The facts giving rise to this appeal are, in brief, as under.

1.1 The appellants having a composite mill, are engaged in the manufacture of cotton/man made blended yarn and fabrics of cotton and man made blended yarn. The fabrics of cotton and blended yarn are chargeable to Central Excise Duty under heading 5207, 5208, 5511 and 5512 of the Central Excise Tariff. The appellant start from cotton and man made fibre, from which the cotton/cotton man made blended yarn is manufactured and thereafter in the same mill, the yarn is woven into grey fabric, which, thereafter, is processed. The appellant were availing full duty exemption in respect of cotton and blended yarn and grey fabrics of cotton/blended yarn under Notification No. 22/96-CE dated 23/7/96. The dispute in this case is about the rate of duty on the processed cotton fabrics cleared during the period from October 2002 to February 2003. During the period of dispute, the tariff rate of duty on the woven processed cotton or blended fabric was 24% (16% basic excise duty plus 8% AED (GSI)). However, exemption notification No. 14/02-CE dated 1/3/02 issued under Section 5A (1) of the Central Excise Act, 1944 (serial No. 4 of the table annexed to the notification) prescribed concessional rate of 12% in respect of woven fabrics of cotton or

blended yarn, subjected to any process. However, this concessional rate of duty was subject to condition that processed fabrics are made from textile fabrics, whether or not processed, on which appropriate duty of excise leviable under the first schedule to the Central Excise Tariff Act and Additional duties of excise (goods of Special Importance) Act [AED (GSI)], readwith any notification for the time being in force or the additional duty of customs leviable under Section 3 of the Customs Tariff Act 1975, as the case may be, has been paid. Serial No. 1 of the table annexed to this notification also exempted from the whole of duty of excise as well as AED (GSI) the "unprocessed woven cotton fabrics of heading 52.07 and 52.08 other than denim fabrics" and the "unprocessed woven fabrics of synthetic staple fibre falling under heading 55.11 and 55.12", subject to the condition that the same had been manufactured from textile yarn on which appropriate duty of excise or additional duty of customs leviable under Section 3 of the Customs Tariff Act, 1975 had been paid and no Cenvat credit of the duty paid on the inputs or capital goods had been taken. As per Sl. No. 2 of the table to this notification, the effective rate of duty on unprocessed fabric of heading 52.07, 52.08 other than denim fabrics and unprocessed fabrics of heading 55.11 & 55.12, if made from duty paid yarn, but with Cenvat credit facility was 12% advalorem. As per Sl. No. 4 of the table to the notification, the rate of duty on processed fabrics of heading 52.07, 52.08, 55.11 and 55.12 was 12% advalorem subject to condition that the same had been made out of duty paid fabrics. As per Explanation – II to this notification,

readwith Explanation VII added to this notification by notification No. 37/2002-CE dated 3/7/02 issued under Section 5A (2A) of the Central Excise Act, 1944 –

> (i) for the purpose of the conditions of the notification i.e. notification No. 14/02-CE, the textile yarns, fibres or fabrics shall be deemed to be duty paid even without production of documents evidencing duty payment ; and
> (ii) in case of manufacture of processed fabrics by a composite mill starting from fibre stage or by a weaver – processor engaged in weaving or knitting of fabrics from yarn and processing the same within the same factory, the conditions specified in column (5) of the table to the notification No. 14/02-CE for concessional rate of duty on processed fabrics "is intended to be satisfied" if the textile fibre/yarn is duty paid.

1.2 In this case, full duty exemption was availed in respect of cotton yarn and unprocessed cotton fabrics under Notification No. 22/96-CE, but the appellant cleared the processed fabrics on payment of concessional duty @ 12% advalorem. Department was, however, of the view that since the appellant have availed full duty exemption on the yarn and the grey fabric and since in view of the Hon'ble Supreme Court's judgment in the case of **CCE, Vadodara vs. Dhiren Chemical Industries** reported in **2002 (139) E.L.T. 3 (S.C.)**, the goods in respect of which full duty of exemption have been availed, cannot be said to be the goods on which the appropriate of duty of excise has already been paid, the condition for concessional rate of duty in respect of processed fabrics, as prescribed in the exemption notification

No. 14/02-CE, is not satisfied and accordingly the appellant would be liable to pay duty at the tariff rate of 24% advalorem (16%) of basic excise duty plus 8% AED (GSI). It is on this basis that a show cause notice dated 30/10/03 was issued for demand of differential duty amounting to Rs. 1,59,57,588/- on clearances of 54,12,479.41 mtrs. of processed cotton fabrics valued at Rs. 13,29,79,628/- by the appellant during the period from October 2002 to February 2003, alongwith interest on this duty at the applicable rate as per the provisions of Section 11AB of the Central Excise Act, 1944 and also for imposition of penalty on them under Rule 25 (1) of Central Excise Rules, 2002 for contravention of the provisions of Rule 4 and 8 of the Central Excise Rules.

1.3 The show cause notice was adjudicated by the Commissioner vide order-in-original No. 33/CE/JP-II/05 dated 21/7/05 by which the duty demand raised in the show cause notice was confirmed alongwith the interest and beside this, penalty of Rs. 10,00,000/- was imposed on the appellant under Rule 25 (1) of the Central Excise Rules, 2002. It is against this order of the Commissioner that the present appeal has been filed.

2. Heard both the sides.

2.1 Shri K.K. Anand, Advocate, the learned Counsel for the appellant pleaded that the appellant are a composite mill who manufacture processed cotton fabric and processed fabric of man made staple fibre starting from fibre stage, that the appellant's

case is squarely covered by the Board's Circular No. 680/71/02-CX dated 10/12/02, wherein the Board had clarified that in view of Explanation – II to the Notification No. 14/02-CE, as amended by inserting Explanation VII by Notification No. 37/02-CE dated 3/7/02, textile fibres, yarn and fabrics brought from the market are deemed to be duty paid and that the composite mills engaged in processing of fabrics alongwith weaving of the fabrics within the same factory in a continuous process starting from textile fibres/ yarns brought from the market would be eligible for concessional rate of duty of 12% Advalorem in respect of clearance of processed fabrics, that relying upon this circular of the Board, the Tribunal in the case of **CCE, Ludhiana vs. Prem Industries** reported in **2009 (168) E.C.R. 133 (Tri.-New Delhi)** has observed that concessional rate of duty in respect of processed knitted fabric manufactured from yarn stage in a continuous processed would be available, that in view of Hon'ble Supreme Court's judgment in the case of CCE, Vadodara vs. Dhiren Chemical Industries (supra), the board's circulars are binding on the Department, that the intention of the Government was to charge duty only at the processed fabric stage and for this reason , under Notification No. 22/96-CE, the grey fabrics manufactured in a composite mill and used captively for manufacture of processed fabrics were fully exempt from duty, that the Government's intention to charge duty on the processed fabrics @ 12% Advalorem is also clear from the explanatory notes to budget proposals in the Budget Bulletin, 2002 published by the Directorate of Publicity and Public Relations, Customs and

Central Excise, New Delhi, wherein it has been clarified that Notification No. 14/02-CE and 15/02-CE, both dated 1/3/2002, prescribed effective rate of duty of nil or 12% advalorem in case of textile fabrics subject to the condition that the goods should have been made from textile yarns or fabrics on which appropriate duty of excise or additional customs duty under Section 3 of the Customs Tariff Act, has been paid and that explanation II to the notification makes it abundantly clear that all the fabrics and yarns are deemed to be duty paid even without production of documents evidencing the payment of duty, and that in view of this, the Appellant were eligible for concessional rate of duty on the clearances of processed cotton fabrics. He emphasised that in view of Explanation – II readwith Explanation – VII to the Notification No. 14/02-CE, the inputs – namely fibres, yarn and unprocessed fabrics have to be treated as duty paid even without production of duty paying documents.

2.2 Shri B.K. Singh, the learned Joint CDR, defending the impugned order pleaded that under Notification No. 14/02-CE, the concessional rate of duty in respect of processed woven fabrics of heading 52.07 and 52.08 has been prescribed subject to condition that such fabrics have been made out of the textile fabrics on which the appropriate duty of excise and AED (GSI) or additional duty of customs duty, has been paid, that in this case there is no dispute about the fact that no duty had been paid at grey fabric stage, that in such a situation, in terms of Hon'ble Supreme Court judgment in the case of CCE, Vadodara vs.

Dhiren Chemical Industries (supra), it cannot be said that the appropriate duty of excise and AED (GSI) has been paid on the grey fabrics, that since no duty has been paid on the cotton yarn, the condition of unprocessed fabrics being duty paid for the purpose of concessional rate of duty on processed cotton fabrics, cannot be deemed to be satisfied in terms of Explanation – VII to the Notification No. 14/02-CE, that if a concessional rate of duty in an exemption notification is subject to certain conditions, the duty concession would be available only if the condition has been satisfied, that since in this case, the necessary condition for concessional rate of duty has not been satisfied, the Commissioner has rightly confirmed the duty demand based on the rate of duty at the tariff rate, that the Board's Circular dated 10/12/02 is applicable only in respect of the processed man made fabrics, while in this case, the dispute is in respect of processed cotton fabrics, that this is clear from para 4 of the circular, wherein it has been stated that as per explanation II (as amended by explanation VII inserted vide Notification No. 37/02-CE) textile fibres, yarns and fabrics brought from the market have been deemed to have been duty paid, and that a composite mill, that is, a manufacturer engaged in processing of fabrics alongwith spinning of yarns from fibres and weaving of fabrics within the same factory, and thus manufacturing processed textile fabrics in a continuous process from textile fibres bought from the market would attract excise duty of 12% advalorem on processed fabrics, that from the language in para 4 of the circular, it is clear that the textile fibres and yarn brought from

the market, which are deemed to be duty paid, are the man made fibres and yarns and the same cannot be cotton fibre as cotton being a natural produce is not excisable and cannot be deemed to be duty paid, that since no duty has been paid on the cotton yarn, the condition for concessional rate of duty in processed cotton fabrics cannot be treated as satisfied by applying Explanation VII, that the Tribunal's judgment in the case of CCE, Ludhiana vs. Prem Industries (supra), which was in respect of processed man made fabrics,is not applicable to the facts of this case, as in this case dispute is respect of rate of duty on the processed cotton fabrics, which have been manufactured in a continuous process starting from cotton while being non-excisable is non-duty paid.

3. We have carefully considered the submissions from both the sides and perused the records. The appellant are a composite mill manufacturing cotton as well as man made blended yarn and processed fabrics of cotton as well as blended yarn. The dispute, however, in this case is only about the applicable rate of duty in respect of processed cotton fabrics cleared during the period from October 2002 to February 2003. There is no dispute about the fact that the appellant, for manufacture of processed cotton fabrics starting from cotton, manufactured cotton yarn which was woven into fabrics and full duty exemption in respect of cotton yarn and unprocessed cotton fabrics under Notification No. 22/96-CE has been availed.

3.1 During the period of dispute, exemption Notification No. 14/02-CE dated 1/3/02 issued by the Government under Section 5A (1) of the Central Excise Act, 1944 was in force. As per Sl. No. 1 and 2 of the table annexed to this notification, woven cotton fabrics other than denim, not subjected to any processed were chargeable to nil rate of duty if the same had been manufactured out of yarn on which appropriate duty of excise leviable under 1st Schedule or 2nd Schedule to the Central Excise Tariff Act readwith any notification for the time being in force or additional duty of customs leviable under Section 3 of Customs Tariff Act, 1975, as the case may be, has been paid and no Cenvat credit in respect of inputs or capital goods has been taken under Rule 3 or Rule 11 of the Cenvat Credit Rules, 2002 but such unprocessed cotton fabrics, other than denim fabrics, were chargeable to concessional rate of duty of 12%, if the same had been made out of duty paid yarn but Cenvat credit in respect of inputs or capital goods have been availed. Sl. No. 4 of the table annexed to this notification prescribed concessional rate of duty of 12% for woven fabrics of cotton falling under heading 52.07 and 52.08 of the tariff, subject to any process, subject to condition that such processed fabrics have been made from textile fabrics, whether or not processed, on which appropriate duty of excise leviable under 1st Schedule to the Central Excise Tariff Act and additional duty of excise leviable under AED (GSI) Act, readwith any notification for the time being inforce or the additional customs duty leviable under Section 3 of the Customs Tariff Act 1975, as the case may be, has been paid.

3.2 Explanation II to the exemption Notification No. 14/02-CE provided that for the purposes of the conditions specified in this notification for duty exemption, textile yarn or fabrics shall be deemed to have been duty paid even without production of documents evidencing the payment of duty thereon.

3.3 Under Section 5A (2A) of the Central Excise Act, 1944, the Central Government may, if it considers it necessary to do so for the purpose of clarifying the scope or applicability of any exemption notification under Section 5A (1) or ad-hoc exemption order issued under Section 5A (2), issue an explanation in such notification or order by notification in the official Gazette, at any time within one year of the issue of the exemption notification under Section 5A (1) or exemption order issued under Section 5A (2) and every such exemption shall have effect as if it had always been the part of such exemption notification or exemption order. By Notification No. 37/2002-CE dated 3/7/02, issued under Section 5A (2A) in respect of exemption Notification No. 14/02-CE, the Central Government added Explanation – VII to this exemption notification, which is as under :

> "Explanation VII – In this notification,
>
> (1) for the removal of doubt, it is hereby clarified that in Explanation II and in condition No. 1 & 2 specified below the Table, the expression – "textile yarn" is intended to include therein "textile fibre" also,
>
> (2) for the purposes of exemption to processed textile fabrics, specified in the table against any of the Sl. No. 3,

4, 6, 7, 8, 13 and 16 manufactured by a composite mill (i.e. a manufacturer engaged in processing of fabrics alongwith the spinning of yarn from fibres and weaving or knitting or crocheting of fabrics within the same factory); or by a manufacturer engaged in processing of fabrics alongwith weaving or knitting or crocheting of fabrics within the same factory, the condition as specified in Column (5) against each of the said respective Sl. Nos. is intended to have been satisfied if the said processed fabrics are manufactured from textile fibres or yarn, as the case may be, on which appropriate duty of excise leviable under 1st or 2nd schedule to the Central Excise Tariff Act readwith any exemption for the time being in force, or the Additional Customs Duty under Section 3 of the Customs Tariff Act, 1975, as the case may be, has been paid ;

(3) this Explanation shall have effect as if it had always been part of this notification."

3.3.1 Thus the effect of inserting Explanation VII to the exemption Notification No. 14/02-CE, by Notification No. 37/02-CE dated 3/7/02 issued under Section 5A (2A) of the Act is that if a composite mill manufactures fabrics covered by Sl. No. 3,4,6,7,8,13 and 16 of the table annexed to the Notification No. 14/02-CE from fibre stage or a weaver processor manufactures such fabrics from yarn stage, such fabrics will be eligible for concessional rate of duty prescribed in the notification if the appropriate Central Excise Duty or Additional Customs Duty under Section 3 (1) of the Customs Tariff Act, 1975 has been paid on the yarn or fibre.

3.3.2 Two questions now arise –

(1) can the yarn or fibre or fabrics in respect of which no duty has been paid for the reason that either the tariff rate is nil or the same is fully exempt from duty under some exemption notification, be said to be the fibre/yarn/fabrics on which appropriate duty has been paid ?

(2) Does the Explanation – II to the notification No. 14/02-CE has the effect of nullifying the condition as specified in Column (5) of the table annexed to the notification, regarding duty payment on fibre/yarn/fabrics for concessional rate of duty on the final products specified in Column (2) and (3).

4. As regards the question (1) in para 3.3.2 above, Hon'ble Supreme Court in the case of CCE, Vadodara vs. Dhiren Chemical Industries (supra), wherein in para 2,3,4,5,6 and 7 has held as under :-

"2. The only question that we are concerned with, relates to the correct interpretation to be placed upon the phrase "on which the appropriate amount of duty of excise has already been paid".

3. In the case of *Usha Martin* the relevant Exemption Notification, so far as is relevant, read thus :

"Exemption in goods falling under Item 26-AA(i-a) made from duty-paid material :

In exercise of the powers conferred by sub-rule (1) of Rule 8 of the Central Excise Rules, 1944 and in supersession of the notification of the Government of India in the M.F. (D.R.) No. 131/62-C.E., dated 13-6-1962, the Central

> **Government hereby exempts iron or steel products falling under sub-item (i-a) of Item No. 26-AA made from any of the following materials or a combination thereof namely :**
>
> **fresh unused (i) re-rollable scrap *'on which the appropriate amount of duty of excise has already been paid'*...". (Emphasis supplied)**

The other clauses used the same phrase.

The Court said that there was "no doubt that as per the above notification if any amount of duty has been paid on the raw material, the output product would escape from excise duty. The doubt which arose was regarding the expression in the notification i.e., 'on which the appropriate amount of duty of excise has already been paid' as to whether it is capable of two interpretations, one, as claimed by the assessee and the other as put forth by the Revenue." The Court then said :

> **"If we take the words 'already paid' in the notification delinked from other words employed therein, they would, perhaps, lend support to the contention of the Revenue as the said combination relates to an antecedent act of payment. But the word 'already' is not the decisive term in the context because the preceding word 'appropriate', cannot be sidelined to piffle. The word 'appropriate' is defined in Websters' New Dictionary and Thesaurus (Concise Edn.) as 'applicable, apposite, appurtenant, apropos apt....'. In the World Book Dictionary it is defined as 'right for the occasion, suitable, proper, fitting...'.**
>
> **What is the idea behind granting exemption to the commodities indicated in the notification ? One reason is that the Central Government wanted to save certain raw materials and the end products**

made with them from double duty. Another idea, as could be discerned from it, is that the reason which prompted the Central Government to absolve one commodity from duty must as well be applicable to the other commodity which is made out of the former. Therefore, we are not disposed to afford a narrow interpretation to the expression (i.e. on which the appropriate amount of duty of excise has already been paid) as excluding all cases where nil duty was paid for the input materials."

The Court, thus, upheld the contention on behalf of the assessee.

4. In the case of *Motiram Tolaram*, reliance was placed upon the case of *Usha Martin* to contend that the appropriate duty being nil, because the raw material was not manufactured in India, it must be taken that appropriate duty has been paid and the appellants would be entitled to the benefit of the Exemption Notification in question, which used the said phrase. The Court was unable to agree. It said that the raw material being an item which was manufactured in India, a rate of excise duty was leviable thereon. On the raw material which had been imported, the appropriate amount of duty had not been paid. It was only if this payment had been made that the exemption notification would be applicable.

5. In our view, the correct interpretation of the said phrase has not been placed in the judgment in the case of *Usha Martin*. The stress on the word "appropriate" had been mislaid. All that the word "appropriate" in the context means is the correct or the specified rate of excise duty.

6. An exemption notification that uses the said phrase applies to goods which have been made from duty paid material. In the said phrase, due emphasis must be given to the words "has already been paid". For the purposes of getting the benefit of the exemption under the notification, the goods must be made from raw material on which excise duty has, as a matter of fact, been paid, and has been paid at the "appropriate" or correct rate. Unless the manufacturer has paid, the correct amount of excise duty, he is not entitled to the benefit of the exemption notification.

7. Where the raw material is not liable to excise duty or such duty is nil, no excise duty is, as a matter of fact, paid upon it. To goods made out of such material, the notification will not apply."

4.1 Applying the ratio of the above-mentioned judgment of the Hon'ble Supreme Court, in this case neither the cotton which being natural produce is non-excisable nor the cotton yarn and unprocessed cotton fabrics, in respect of which full duty exemption under Notification No. 22/96-CE has been availed, can be said to be the goods on which appropriate duties of excise have been paid.

5. As regards the question (2) in para 3.3.2 above, on this point, this Tribunal vide order-in-appeal No. 1276-1346/09 dated 12/11/09 in case of Auro Textiles & others vs. CCE, Chandigarh has held as under :-

"27. Coming to the contentions which are sought to be raised in relation to Explanation II, it would be worthwhile, at the cost of repetition, to reproduce the said Explanation. The same reads as under:-

> **"For the purposes of the condition specified below, textile yarn or fabrics to be deemed to have been duty paid even without production of the documents evidencing payment of duty thereon".**

28. It is settled law that while interpreting a provision creating a legal fiction, the Court or Tribunal has to ascertain purpose for which the fiction is created. After ascertaining the same, the Court or Tribunal has to assume of those facts existence of which is incidental or inevitable to give full effect to the fiction; but in the process, the fiction can not to be extended beyond the purpose for which it is created. However, it must also be remembered that what can be deemed to exist under a legal fiction are the facts and not legal consequences which do not flow from law as it stands.

29. It is also settled law that an explanation has to be read to harmonize with and clear up any ambiguity in the main section and should not be so construed to widen the ambit of that section. The meaning to be given to an explanation would really depend upon its terms and not on any theory of its purpose unless it is to be inferred from the language used in the explanation clause itself.

30. If we read the Explanation, it would be apparent that the same has been incorporated with a specific purpose and

directly in relation to certain obligation which is required to be discharged by an assessee in order to enable him or her to claim the benefit under the notification. The purpose specified therein relates to the condition. The obligation of the assessee prescribed under condition relates to discharge of duty liability. The explanation specifies that even without production of any document evidencing payment of duty, the assessee would be entitled to claim the benefit under the notification. In other words, the explanation absolves the assessee from the primary obligation of an assessee which is otherwise required to be performed while claiming any benefit under a taxing statute and it relates to the proof of payment of duty. It is settled law that it is always for the assessee to establish that he has discharged the liability regarding the payment of duty or tax. Only when this primary burden is discharged, the onus shifts upon the department to establish that the assessee is a defaulter. In case of claim of benefit under the notification in question, however, the executives have made an exception in favour of the assessees claiming benefit under the said notification. The assessee is absolved of such primary burden. The fiction that is created under the notification therefore essentially relates to the requirement of evidence pertaining to the discharge of such burden. It cannot be extended beyond the said scope of the fiction. If it is extended to the fact of actual payment itself, it will virtually amount to rewriting the explanation. As already observed above, in order to give full effect to a legal fiction, the Courts and Tribunals are not empowered to create another fiction which is not contemplated under the provision.

31. Explanation II to the said notification which is essentially for the purpose of condition specified thereunder creates a deeming provision regarding the discharge of duty liability by the assessee cannot be construed to mean payment of duty even in cases where the assessee has not actually paid the duty. To presume payment of duty even in a case of no such payment having been made, it would amount to create another fiction which is not contemplated under the said explanation.

32. In *S. Teja Singh* case, the Apex Court was dealing with the question as to whether under Section 28(1) read with Section 18-A(9) of the Indian Income Tax Act 1922, the Income tax authorities were empowered to impose a penalty on a person who had failed to comply with Section 18-A(3) of the Act. While dealing with the said question and after noting the legal fiction that had been enacted under Section 18A(9)(b) of the Act to the effect that when a person had failed to send an estimate of tax on his income under Section 18-A(3), he was deemed to have failed to furnish the return of his income, it was held that Section 18-A(9)(b) did not merely say that an estimate under Section 18-A(3) should be deemed to be a return but it enacted that the failure to send an estimate in accordance with Section 18-A(3) would be deemed to be a failure to make a return. While rejecting the contention that there could be no failure to make a return unless notice have been issued under Section 22(1) or Section 22(2), it was held that it was a deeming fiction regarding compliance of requirement of service of notice as the failure to send an estimate was itself to be deemed to be a failure to send a return which necessarily involved the fiction that notice had been issued under Section 22 and yet that had not

been complied with. It was specifically held that "it is a rule of interpretation well settled that in construing the scope of a legal fiction it would be proper and even necessary to assume all those facts on which alone the fiction can operate". After quoting the observations of Lord Asquith in East End Dwellings Co. Ld. V. Finsbury Borough Council reported in 1952 AC 109, 132 to the effect "If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imaging as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it. .....The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs", it was ruled that "fiction under Section 18A(9)(b) therefore that failure to send an estimate under Section 18A(3) is to be deemed to be a failure to send a return must mean that all those facts on which alone there could be a failure to send the return must be deemed to exist, and it must accordingly be taken that by reason of this fiction, the notices required to be given under Section 22 must be deemed to have been given, and in that view, Section 28 would apply on its own terms".

33. The Apex Court, therefore, has clearly ruled that the fiction created under Section 18A (9)(b) which presumed failure to send return leads to presumption about compliance of requirement of service of notice. Because in the absence of service of notice under Section 22(1) and 22(2) of the Indian Income Tax Act, 1922 there could not have been any obligation to comply with the requirement of filing

of the return and, therefore, the power to impose penalty could not have been exercised. Reverting to the explanation in the matter in hand, it deems the existence of proof of the payment of duty without the production of the documents evidencing the payment. In other words, while dealing with the fiction regarding the proof of the payment of duty whatever is required for compliance and fulfilment of the obligation regarding the payment of duty can be presumed to have been done. At the same time such presumption is exclusively related to the condition attached to the notification. As already quoted above, the condition clearly speaks of actual payment. Consequently, the existence of the facts which could be presumed for giving full effect to the deeming provision would be in relation to the actual payment of duty as contemplated under the condition. The presumption of existence of the fact cannot be of those facts which are not required for compliance of the condition attached to the notification. The presumption cannot be of those facts which are neither incidental nor inevitable, but has necessarily to be of those facts which are incidental or inevitable in relation to the payment of duty, since the provision being essentially related to the actual payment of duty as contemplated under the condition, and not otherwise.

34. In *Voltas Limited* case, the Apex Court was dealing with the appeals filed under Section 55 of the Monopolies and Restrictive Trade Practices Act, 1969 and the point relating to the deeming provision under Section 33 of the Act. Referring to sub-section (1) of Section 33, it was observed that it mandates that the agreements covered under different clauses of sub-section (1) thereof should be

deemed, for the purposes of the Act, to be the agreements relating to restrictive trade practices. It was observed that by the deeming clause one is not required to treat any imaginary state of affairs as real but to treat the agreements specified and enumerated in sub-section (1) of Section 33 as the agreements relating to restrictive trade practices. It can be said that Parliament after having examined different trade practices, had identified such trade practices which were to be held as the restrictive trade practices for the purposes of the Act. To keep such trade practices beyond controversy in any proceeding, a deeming clause has been introduced in sub-section (1) of Section 33 saying that they should be deemed to be restrictive trade practices and in that background, there was no much scope for argument that although a particular agreement was covered by one or the other clauses of sub-section (1) of Section 33, still it should not amount to an agreement containing conditions which could be held to be restrictive trade practices within the meaning of the Act. Referring to the said deeming clause, it was specifically observed by the Supreme Court that "The legislature by a statute may create a legal fiction saying that something shall be deemed to have been done which in fact and truth has not been done, but even then Court has to give full effect to such statutory fiction after examining and ascertaining as to for what purpose and between what parties such statutory fiction has been resorted to". In the case in hand, the deeming provision relates of the existence of documentary proof relating to discharge of duty liability and not to the factum of "actual payment of duty".

35. In *Moon Mills Ltd.*, case, the Apex Court was dealing with the reference in relation to the issue as to whether in the facts and circumstances of the case before it, the sum of Rs. 27,06,593/- was assessable as a profit of the assessee company for the previous year relevant to the assessment year 1949-50 in accordance with the fourth proviso to Section 10(2)(vii) of the Indian Income Tax Act, 1922. Section 10(2) of the Income Tax Act was dealing with the statutory allowances as distinguished from deductions those could be made in commercial practice for ascertaining the profits of a business. Under the said clause where any building, machinery or plant was discarded, demolished or destroyed, an allowance was given in respect of the amount by which the written down value of the such building machinery or plant exceeded the amount for which it was sold or its scrap value. But the 4th proviso introduced a fiction that in case any insurance, salvage or compensation money was received in respect of the such property exceeded the difference between the written down value and the scrap value, so much of the excess as mentioned therein was to be deemed to be the profits of the previous year in which such monies were received. Though in fact the said compensation represented a capital asset to the extent mentioned in the proviso, the compensation was deemed to be the profits of the previous year in which such monies were received. The proviso, therefore, introduced a fiction. What was not a profit in the previous year was deemed to be a profit in that year. The previous year was that year in which such monies were received. The fiction was an indivisible one. It could not be enlarged by importing another fiction, namely, that if an amount was receivable during the previous year it was deemed to have been received during that year. In the case

in hand, the deeming clause relates to the existence of documentary proof of payment of duty and not relating to the payment of duty itself. In other words, while claiming the benefit under the notification, the assessee need not produce documentary proof of payment of duty. But if it is shown by the department that the assessee has not paid any duty on the products specified in the conditions, then certainly the claim for benefit under the notification can be denied.

36. The Apex Court, therefore, has clearly ruled that undoubtedly efforts should be to give full effect to the fiction created under a statute. However, in the process of giving full effect to a fiction created under a statute, the Courts and Tribunals are not empowered to create another fiction and thereby extend the benefits of the legal fiction under a statute to a totally different situation.

37. Undoubtedly, the explanation in question creates a fiction about the presumption of payment of the duty for the purpose of condition. It does not enlarge the scope of the condition. However, every presumption is rebuttable. To interpret the fiction created under the explanation to mean that even in case of a product which is subjected to nil rate of duty to be presumed to have been subjected to the payment of duty would not only result in enlarging the scope of the explanation, but also scope of the condition itself.

38. Under the guise of interpretation of any statutory provision relating to a taxing matter, there is no power vested in the Tribunal to enlarge the scope of the exemption notification or to modify the same."

5.1 In this case, the Appellant, a composite mill, starting from cotton, a non excisable goods, manufacture cotton yarn, which is woven into fabrics and fabrics is processed and cleared as processed fabrics. Since full duty exemption is being availed under notification No. 22/96-CE in respect of cotton yarn and unprocessed fabrics, applying the above-mentioned judgment of the Tribunal, even by applying Explanation – II the condition for concessional rate of duty in respect of processed fabrics cannot be treated as satisfied as the unprocessed cotton fabrics cannot be said to be the fabrics on which appropriate duty has been paid. In terms of Explanation – VII readwith the Board's Circular No. 680/71/02-CE dated 10/12/02 based on the same, the condition for concessional rate of duty on processed fabrics manufactured in a composite mill or by a weaver – processor would be treated as satisfied if appropriate duty has been paid on the textile fibre or yarn. But in this case, while the cotton fibre is non-excisable, in respect of yarn full duty exemption under notification No. 22/96-CE has been availed and this even by applying Explanation – VII, the condition for concessional rate of duty on processed fabrics cannot be deemed to be satisfied.

6. The appellant have cited judgment of the Tribunal in the case of **CCE, Ludhiana vs. Prem Industries (supra)**. But, the dispute in that case was as to whether the processed knitted or crocheted fabric made out of grey/unprocessed fabrics purchased from the market would be eligible for concessional rate of duty

under Sl. No. 16 of the table annexed to this notification No. 14/02-CE and the Tribunal relying upon explanation – II to this notification, held that the unprocessed fabric purchased from the market would be deemed to be duty paid and accordingly the exemption would be available. The facts in this case are totally different, as in this case, as discussed above, while there is no question of cotton being duty paid, there is no dispute that full duty exemption has been availed in respect of the cotton yarn from which grey cotton fabrics had been manufactured and as such, the cotton yarn cannot be said to be the goods on which appropriate duty of excise had already been paid and therefore even by applying Explanation – VII, the condition for concessional rate of duty on processed cotton fabrics could not be treated as satisfied.

7. In view of the above discussion, we hold that there is no infirmity in the impugned order. The appeal is accordingly dismissed.

(Pronounced in the open court on 9/4/2010

(Justice R.M.S. Khandeparkar)
President

(Rakesh Kumar)
Member (Technical)

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