CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
Court No. III

E/Appeal No.2298/2004

(Arising out of Order-in-Original No.04/CH.72/COMMR/2004, dated 05/06-02-2004 passed by the Commissioner, Central Excise, Raipur)

Date of Hearing: 07.01.2013
Date of Decision:

Hon'ble Mrs. Archana Wadhwa, Judicial Member
Hon'ble Shri. Sahab Singh, Technical Member

1.	Whether Press Reporters may be allowed to see The order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	: No
2.	Whether it would be released under Rule 27 of The CESTAT (Procedure) rules, 1982 for Publication in any authoritative report or not?	: Yes
3.	Whether their lordships wish to see the fair copy of the order?	: Seen
4.	Whether order is to be circulated to the Department Authorities?	: Yes

M/s. SAIL — Appellant

Vs

CCE, Raipur — Respondent

Appearance:
Appeared for the Appellant: Shri B.L. Narasimhan, Adv., Shri Hemant, Adv.,
Appeared for the Respondent: Shri M-S-Negi, D.R.

Coram: Hon'ble Mrs. Archana Wadhwa, Judicial Member
Hon'ble Shri, Sahab Singh, Technical Member

Interim Order 163/2013

Per Sahab Singh:

M/s. SAIL, Bhilai Steel Plant, (here in after referred to as appellants) are engaged in the manufacture of Iron and Steel products falling under Chapter 72 & 73 of Central Excise Tariff Act, 1985. They were also availing facility of Modvat/Cenvat

Credit of duty paid on Inputs and Capital goods. They had availed the Credit of duty paid on conveyor belts used by them and after repeated use of conveyor belts, these belts got broken and worn out and therefore became unfit for further use. The appellants sold these broken and worn out conveyor belts as waste and scrap and removed the same without payment of Central Excise Duty. Accordingly the Show Cause Notice dated 16.10.2001 was issued by the department demanding duty of Rs. 68,90,283/- on the clearance of waste of conveyor belts during the period of Sep. 1996 to Mar. 2001. The Show Cause Notice was adjudicated by the Commissioner who confirmed the duty of Rs. 68.90.283 on the appellants along with the interest and also imposed the equal amount of penalty under Section 11 AC of the Act. The appellants filed appeal before the Tribunal against this order and Tribunal vide its order dated 22.03.2006 allowed their appeal. Revenue challenged this order of the Tribunal before Hon'ble High Court of Bilaspur Chhatisgarh and the Court vide its order dated 23.11.2012 has remanded the case to this Tribunal as per observations made in Para 11,12,13 as under:

11. Since the issue is of frequent occurrence involving sizable amount of duty if found payable and hence we consider it apposite to remand of the case of the Tribunal for deciding the appeal afresh on merits strictly in accordance with law. Needless to say, the parties shall cite the entire case law on the subject including the relevant rules governing the issue while arguing the appeal before the Tribunal.

12. As a consequence of foregoing discussion, the appeal succeeds and is allowed. The impugned order is set aside. The appeal is remanded to the Tribunal for its fresh decision on merits strictly in accordance with law and the same shall be decided by the Tribunal uninfluenced by our observations on merits which we have refrained from making on our forming an opinion to remand the case for its fresh hearing.

13. Parties to appear before the Tribunal on 7th January 2013 and produce the copy of this order to enable the Tribunal to decide the appeal within six months for the date of parties' appearance as directed above.

2. The Ld. Advocate appearing for the appellants submits that the duty in the Show Cause Notice has been demanded on waste and scrap under chapter heading 4004 of the Central Excise Tariff. He submits that as per chapter note 6 under the chapter 40 of the Central Excise Tariff 'waste, parings and scrap' means rubber waste, parings and scrap from the manufacture of working of rubber and rubber goods and rubber goods definitely not usable as such because of cutting-up, wear or other reasons. He submits that the waste of scrap of Conveyor Belt does not fall under this category and therefore demanding of duty under 4004 is not sustainable. He also relied upon decision of Mysore Cements Ltd., reported in 2006 (206) E.L.T. 1179 (Kar.). Where in it was held that the waste arising from processing of inputs not leviable to duty. The Ld Advocate also submits that the demand is also hit by the time limitation as Show Cause Notice was issued on 16.10.2001 demanding duty for the period of Sep, 1996 to Mar.2001. He submits that their submissions were made before the Tribunal in the earlier proceedings and the impugned order was set aside by the Tribunal.

3. The Ld D.R. appearing for the Revenue submits that the appellants have taken credit of duty paid on conveyor belts and after repeated use when the belts became unfit for further use, these belts were sold as waste and scrap. Under Rule, 57S, waste of the capital goods when sold as waste and scrap duty on such waste and scrap is leviable and if no duty is charged Rule 57S Rub 57S would become redundant. On point of limitation, he submits that appellants did not file any classification declaration as required under Rule 173B classifying such waste and scrap nor they mentioned anything in this regard in their monthly RT 12 return. He submits that B.N. Aggarwal authorized signatory of the appellant in his statement has stated that it was their bonafide belief that Excise duty was not payable on such waste and scrap. He relied upon decision of Hon'ble Gujrat High Court in case of

GNFC limited reported in 2007 (214) ELT 18 (Guj.). He also relied upon decision of the Tribunal in case Hindustan Zinc Ltd. reported in 2009 (237) ELT 309 (Tri – Del.) in support of his contention that duty on Waste/scrap is payable.

4. After hearing both the sides we find that issue involved in the appeal is whether duty is required to be paid on the waste and scrap of Conveyor belts on which the credit was taken by the appellants as capital goods. Rule 57S refers to the manner of utilization of the capital goods and the credit allowed in respect of duty paid there on. Rule 57S (2) reads as under:

(2) In a case,-

(a) Where capital goods are removed without being used from the factory for home consumption, on payment of duty, or for export on payment of duty of excise, such duty of excise shall in n case be less than the amount of credit that has been allowed in respect of such capital goods under rule 57Q;

(b) Where capital are removed after being used in the factory for home consumption on payment of duty of excise or for export under rebate on payment of duty of excise, such duty of excise shall be calculated by allowing deduction of 2.5 per cent of credit taken for each quarter of a year of use or fraction thereof, from the date of availing credit under rule 57Q; and

(c) Where capital goods are sold as waste and scrap, the manufacturer shall pay the duty leviable on such waste and scrap.

In the present case there is no dispute that credit of duty paid on conveyor belt was taken by the appellants. When the conveyor belt after repeated use became unfit for further use, these worn out conveyor belts were sold as waste and scrap by the appellants Under rule 57S (2)(C) when the capital goods are sold as waste and scrap the manufacture shall pay the duty leviable on such waste and scrap. Therefore Revenue is rightly demanding duty on such waste and scrap.

5. The appellant's contention is that such waste and scrap does not fall under heading 4004 under which the duty has

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been demanded by the Department. We find that Tariff Heading 4004 reads as under:

> *40.04 4004.00 Waste, parings and scrap of rubber (other than hard rubber) and powders and granules obtained there-from*

We have also seen the chapter note 6 of the chapter 40 which reads as under:

> *6. For the purposes of heading No. 40.04, the expression 'waste, parings and scrap' means rubber waste, parings and scrap from the manufacture of working of rubber and rubber goods definitely not usable as such because of cutting-up, wear or other reasons.*

We have also seen the HSN Explanatory Notes of Heading 4004 which reads as under:

> ***40.04 – WASTE, PARINGS AND SCRAP OF RUBBER (OTHER THAN HARD RUBBER) AND POWDERS AND GRANULES OBTAINED THEREFROM.***
>
> *The expression "waste, parings and scrap" is defined in Note 6 to this Chapter.*
>
> *(1)* ***Rubber waste, parings and scrap fromm the manufacture of working of unvulcanised or vulcanized rubber (other than hard rubber).***
>
> *(2)* ***Goods of rubber (other than hard rubber) definitely not usable as such because of cutting-up, wear or other reasons.***
>
> *This category includes worn-out rubber tyres not suitable for retreading and scrap obtained from such worn-out rubber tyres, usually by the following processes:*
>
> *(a)* ***Cutting the tyre,*** *with a special machine, as close as possible to the tringle bead wires or the heel.*
>
> *(b)* ***Splitting*** *to remove the tread.*
>
> *(c)* ***Cutting*** *into pieces.*

On going through the HSN Explanatory Notes (2) we find that goods of rubber (other than hard rubber) definitely not usable as such because of cutting-up, wear or other reasons will be covered under 4004. This Heading 4004 includes worn-out rubber tyres not suitable for retreading and scrap obtained from such worn-out rubber tyres, by cutting the tyres, splitting etc. Similarly we are therefore of the view that Waste and Scrap of worn-out conveyor belt will also be covered in Heading 4004.

6. Ld. Advocate relied upon the decision of Tribunal and the Karnataka High Court in case of Mysore Cements Limited. In this case the Tribunal 2004(168) E.L.T. 307 (Tri-Bang.) in para 7 has held as under:

> *7. On considering the submissions made by both sides on this plea and in view of the fact that the Tribunal has already taken a view regarding scrap and waste arising in the course of dismantling of equipment will not be liable to duty, following the same, we hold that the same is not liable to duty and accordingly party is entitled for a refundof Rs. 1,33,162/-. The party succeeds on this issue also.*

This order of the Tribunal was confirmed by the Hon'ble High Court of Karnataka. We find in this case Tribunal relied upon the decision of the Tribunal in case of Hindustan Petroleum Corporation Ltd. V. CCE, Vishakapatnam reported in 2002 (144)ELT 555(T) where in it was held that

> *"Scrap and Waste arising in the course of dismantling of damaged parts of equipments and structure, equipment etc. damaged in the accident - Excisability - Cutting being necessary to remove the goods from the damaged structure, such scrap and waste not excisable - Sections 2(d) and 3 of Central Excise Act, 1944."*

As per this cited case we find the waste and scrap has arisen on account of dismantling of the equipment and issue was excisability of such scrap. Facts of this case are distinguishable from the present case as the duty has been demanded under rule 57S (2) on the waste scrap of conveyor Belt. On the other hand Revenue has relied on the decision of Hon'ble Gujrat High Court in case of GNFC Limited Vs. Union of India of reported 2007 (214) E.L.T. 18 (Guj.) wherein it has been by the Hon'ble High Court as under:

> *5. On a plain reading of the said Rule, it is clear that where capital goods are sold as waste and scrap, the manufacturer is*

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bound to pay the duty leviable on such waste and scrap. Clause [c] of sub-rule (2) of Rule 57-S of the Rules has to be read in light of clauses (a) and (b), which precede clause [c]. It is apparent that the Rule does not deal with the capital goods as final products, but capital goods which are used for the purposes of manufacture. The contention on behalf of the appellant that waste and scrap can be amenable to duty only when it is generated in the process of manufacture, does not merit acceptance in light of the facts of the case, for the simple reason that the appellant is not a manufacturer of capital goods. In other words, the appellant does not manufacture ad sell capital goods, but uses such capital goods for the purposes of process of manufacture.

6. In these circumstances, in absence of any infirmity in the impugned order of Tribunal, no substantial question of law arises and the appeal is dismissed.

This order of the Tribunal was affirmed by the Supreme Court as reported in GNFC Ltd. Vs. Union of India – 2007 (214) E.L.T. A23 (S.C.). The ratio of decision of Hon'ble Guj. High Court is squarely applicable to the present case as it relates to demand of duty Under Rule 57S (2) of the Rules.

We therefore hold duty on waste of Scrap of Conveyor Belt is payable by the appellants.

7. As regards the issue of time bar the Show Cause Notice in this case was issued 17.10.2001 demanding the duty for the period Sep, 96 to Mar, 2001invoking the extended period of limitation. We find that Shri. B.N Aggarwal the authorized signatory of the appellants in his statement dated 04.04.2001 stated that it was their bonafide belief that excise duty was not payable on such waste and scrap of conveyor belts. It is also fact that appellants did not file any classification as required under rule 173B of the Rule classifying such waste and scrap. They have also not mentioned anything in this regard in their RT 12 return. We therefore agree with finding or the Commissioner that the appellants had suppressed the clearances of such waste and scrap. Once the suppression of the fact is established against the appellants, extended period of limitation as well as penal provisions Under Section 11AC are

invokable against the appellants. The impugned order confirming duty interest and imposing of penalty on the appellants is upheld.

8. We uphold the impugned order and reject the appeal.

(Order pronounced in the Court on ………………..)

Seperate Order

Archana Wadhwa
Member (Judicial)

Sahab Singh
Member (Technical)

Neha*

Per Archana Wadhwa:

9. Without expressing any opinion on the merits of the case, I am of the view that the appeal has to be allowed on the point of time bar. The demand stands confirmed against the appellant by invoking extended period of limitation. The Revenue stands justified in invocation of extended period on the ground that the appellant did not file any classification list or did not inform the Revenue about sale of the waste and scrap of the used conveyor belts. The said contention of the Revenue stands accepted by the learned Member (Technical) who has agreed with the finding of the Commissioner that the appellant had suppressed clearance of such waste and scrap and once such suppression is established , the extended period of limitation is available to the Revenue.

10. I find that the limitation has been the subject matter of various decisions of quasi-judicial as also judicial authorities. The provision of sub-section 11A proviso are applicable wherever the duty of excise has not been levied or paid or short levied or short paid or erroneously refunded on account of fraud, collusion, willful misstatement or suppression or contravention of any provision of the Act or Rules made there under with intent to evade payment of duty. As such it is seen that mere non-disclosure of information to the Revenue by not filing classification list or statutory return etc. by itself cannot be made the reason for invocation of extended period of limitation unless such non-action on the part of the assessee is with intent to evade payment of duty. The Hon'ble Supreme Court in various decisions has held that it is only mala fide intention or conscious or deliberate action on the part of the assessee to withhold particular information from the Revenue which is the key ingredients for invocation of

extended period of limitation. Non-information, without any mala fide, by itself, cannot be made a ground for invocation of longer period of limitation.

11. Before going to the fact as to whether there was any suppression or misstatement on the part of the appellant to clear waste and scrap of used conveyor belts without payment of duty, I would like to discuss the leading decision of the Hon'ble Supreme Court on the subject. In the case of C.C.E. vs. Chemphar Drugs & Liniments – 1989 (40) ELT 276 (SC), it was observed that "………Something positive other than mere inaction or failure on the part of the manufacturer or producer or conscious or deliberate withholding of information when the manufacturer knew otherwise, is required before it is saddled with any liability, before the period of six months……….". Similarly, in the case of Padmini Products vs. C.C.E. – 1989 (43) ELT 195 (SC), the observations were that "……….These ingredients postulate a positive act. Failure to pay duty or take out a licence is not necessarily due to fraud or collusion or wilful mis-statement or suppression of facts or contravention of any provision of the Act. Suppression of facts is not failure to disclose the legal consequences of a certain provision. Shri Ganguly, appearing for the revenue, contended before us that the appellants should have taken out a licence under rule 174 of the said Rules because all the goods were not handicrafts and as such were not exempted under Notification No. 55/75 and therefore, the appellants were obliged to take out a licence. The failure to take out the licence and thereafter to take the goods out of the factory gate without payment of duty was itself sufficient, according to Shri Ganguly, to infer that the appellants came within the mischief of Section 11-A of the Act. We are unable to accept this position canvassed on behalf of the revenue. As mentioned hereinbefore, mere failure or negligence on the part of the producer or manufacturer either not to take out a licence in case where

there was scope for doubt as to whether licence was required to be taken out or where there was scope for doubt whether goods were dutiable or not, would not attract Section 11-A of the Act. In the facts and circumstances of this case, there were materials, as indicated to suggest that there was scope for confusion and the appellants believing that the goods came within the purview of the concept of handicrafts and as such were exempt. If there was scope for such a belief or opinion, then failure either to take out a licence or to pay duty on that belief, when there was no contrary evidence that the producer or the manufacturer knew that these were excisable or required to be licensed, would not attract the penal provisions of Section 11-A of the Act………" Further, in the case of Pushpam Pharmaceuticals Co. vs. C.C.E. – 1995 (78) ELT 401 (SC) , it was observed that "……….the proviso carves out an exception and permits the authority to exercise this power within five years from the relevant date in the circumstances mentioned in the proviso, one of it being suppression of facts. The meaning of the word both in law and even otherwise is well known. In normal understanding it is not different that what is explained in various dictionaries unless of course the context in which it has been used indicates otherwise. A perusal of the proviso indicates that it has been used in company of such strong words as fraud, collusion or wilful default. In fact it is the mildest expression used in the proviso. Yet the surroundings in which it has been used it has to be construed strictly. It does not mean any omission. The act must be deliberate. In taxation, it can have only one meaning that the correct information was not disclosed deliberately to escape from payment of duty. Where facts are known to both the parties the omission by one to do what he might have done and not that he must have done, does not render it suppression". In the case of Cosmic Dye Chemical vs. C.C.E. – 1995 (75) ELT 721 (SC), it was observed as under:

"**6.** Now so far as fraud and collusion are concerned, it is evident that the requisite intent, i.e., intent to evade duty is built into these very words. So far as mis-statement or suppression of facts are concerned, they are clearly qualified by the word "wilful" preceding the words "mis-statement or suppression of facts" which means with intent to evade duty. The next set of words "contravention of any of the provisions of this Act or Rules" are again qualified by the immediately following words "with intent to evade payment of duty". It is, therefore, not correct to say that there can be a suppression or mis-statement of fact, which is not wilful and yet constitutes a permissible ground for the purpose of the proviso to Section 11A. Mis-statement or suppression of fact must be wilful.

7. Now coming to the facts of this case, the appellant's case is that he thought *bona fide* that he need not include the value of the Rapidogens in his declaration, for the reason that the said product was fully exempt from duty under Notification No. 180/61, dated November 23, 1961. Certain facts are brought to our notice in support of this plea. It is also brought to our notice that on the date of filing of his declaration, two High Courts had taken the view that the goods exempted from duty are not includible within the definition of `excisable goods' as defined in clause (d) of Section 2. No doubt, two other High Courts had taken a contrary view. The appellant's factory is in the State of Maharashtra and the Bombay High Court had not taken a view one way or the other. In all the circumstances, the appellant says, he was under the *bona fide* impression that he need not mention the value of the Rapidogens manufactured by him in his declarations."

Further in the case of Tamil Nadu Housing Board vs. C.C.E. – 1994 (74) ELT 9 (SC), the Hon'ble Supreme Court observed as under:-

".................A bare reading of the proviso indicates that it is in nature of an exception to the principal clause. Therefore, its exercise is hedged on one hand with existence of such situations as have been visualised by the proviso by using such strong expression as fraud, collusion etc. and on the other hand it should have been with intention to evade payment of duty. Both must concur to enable the Excise Officer to proceed under this proviso and invoke the exceptional power. Since the proviso extends the period of limitation from six months to five years, it has to be construed strictly. The initial burden is on the Department to prove that the situations visualised by the proviso existed. But once the Department is able to bring on record material to show that the appellant was guilty of

> any of those situations which are visualised by the Section, the burden shifts and then applicability of the proviso has to be construed liberally. When the law requires an intention to evade payment of duty then it is not mere failure to pay duty. It must be something more. That is, the assessee must be aware that the duty was leviable and it must deliberately avoid paying it. The word `evade' in the context means defeating the provision of law of paying duty. It is made more stringent by use of the word `intent'. In other words the assessee must deliberately avoid payment of duty which is payable in accordance with law………"

12. List of such declaration of law by the Hon'ble Supreme Court is unending and I do not propose to refer to each and every judgment. The proviso to section 11A stands interpreted by the Hon'ble Apex Court. The Supreme Court in the above referred decisions has held that extended period of limitation is available to the Revenue only when there is willful misstatement or suppression of facts with intent to evade payment of duty. As such, the word "intent" is one of the ingredients for invocation of the longer period of limitation. Applying the above decisions of the Hon'ble Supreme court, to the facts of the present case, I find that both sides have agreed that the statement of shri B.N. Aggarwal recorded on 4.4.2001 clearly deposed that there was bona fide belief on their part that excise duty was not payable on such waste and scrap of conveyor belts. If that be so, I pose a question that where is the suppression and where the misstatement with intent to evade payment of duty is. The appellant is not engaged in the manufacture of rubber products and no waste and scrap arise during the course of rubber product. Admittedly, such waste and scrap has arisen on account of long usage of conveyor belts. There could be a bona fide belief on the part of the appellant that such used and damaged

conveyor belts are not dutiable again in the hands of the assessee. There is no evidence adduced by the Revenue to reflect upon the fact that such non-payment of duty by the appellant was on account mala fide intention to evade payment of duty. Said Shri B.N.Aggarwal makes it clear that such non-payment was on account of bona fide belief being entertained by the assessee. If the law, as interpreted by the Supreme Court, is applied to the facts of the instant case we find absence of any conscious or deliberate action on the part of the assessee to suppress or misstate any fact from the Revenue with ulterior motive of non-payemnt of duty. In fact, in the case of Padmini Products (supra), the appellants were not even having any licence for manufacture of the goods and admittedly, even the existence of the appellant was not in the knowledge of the Revenue. If non-filing of classification list or statutory return is required to be held as a ground for invocation of longer period of limitation, the Padmini Products could not have been granted relief by the Hon'ble Supreme Court on the point of limitation. There is no such circumstance mentioned in Section 11A thus empowering the Revenue to invoke longer period of limitation for mere non-filing or non-intimation to the Revenue.

13. Apart from the fact that there is no positive action on the part of the assessee to suppress the fact of clearance of waste and scrap from the Revenue, I also note that the issue involved is a technical issue and is capable of interpretation on both sides. Merely because the appellant has interpreted the issue to their benefit, by entertaining a bona fide belief that such clearance of waste and scrap of conveyor belts in respect of which they have availed credit, is not required to discharge the duty liability, they

:annot be held guilty of any mala fide. Apart from the above fact when the Tribunal in the first round of litigation has accepted the appellant stand and has interpreted the said Rule 57-S in their favour it is proved that such rule is capable of two different interpretations. If an expert body like Tribunal can interpret the law in favour of the assessee, no mala fide can be attributed to the appellant for interpreting said provision of law in their favour. As such, I am of the view that in the absence of any positive action on the part of the appellant to suppress or mis-state any fact with intention to evade payment of duty, the longer period of limitation is not available to the Revenue.

Otherwise also, I find that the appellants liability to clear waste and scrap, if at all, arisen in terms of provisions of Rule 57-S, which provides for a mechanism to mineralizing the credit taken to some extent. Admittedly, the appellant is not manufacturer of rubber waste & scrap and is not required to clear the same, in the ordinary course, on payment of duty. As such, there was no legal obligation on him to file the classification list, in the strict sense. As such, in any case non-filing of classification list can not lead to invocation of extended period.

Otherwise also, and in any view of the matter, the appellant is a public sector undertaking and non-payment of duty will not benefit any individual. As such, it is difficult to hold, under evidence is available, that PSU had indulged into melafide suppression or mis-statement so as to justifiably invoke the longer period of limitation.

For all the reasons recorded above, I am of the view that appeal is to be allowed on the point of limitation itself. I order accordingly.

14/3/13
(Archana Wadhwa)
Judicial Member

Difference of Opinion

Whether the demand raised by invocation of limitation period has to be upheld as held by the Ld. Member (Technical) or the appeal has to be allowed on the point of limitation as held by the ld. Member (Judicial).

14/3/13

(Archana Wadhwa)
Judicial Member

(Sahab Singh)
Technical Member

scd/

16.4.14

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. III

DATE OF HEARING : 28/03/2014.
DATE OF DECISION : 28/03/2014.

Excise Appeal No. 2298 of 2004 with Misc. Application No. 50709 of 2014

M/s Steel Authority of India Ltd. — Appellant

Versus

CCE, Raipur — Respondent

Appearance

Shri B.L. Narasimhan, Advocate – for the appellant.

Shri Amresh Jain, Authorized Representative (DR) – for the Respondent.

CORAM : **Hon'ble Ms. Archana Wadhwa, Member (Judicial)**
Hon'ble Shri Rakesh Kumar, Member (Technical)

Per. Archana Wadhwa :-

It is seen that when the matter was originally heard by the Bench of Mrs. Archana Wadhwa, Hon'ble Judicial Member and Shri Sahib Singh, Hon'ble Technical Member there was difference of opinion between the two Members on the point of limitation. However, Member Technical also opined on merits of the case, against the appellant but there was no decision on merits by the Member Judicial.

2. When the matter was placed before the third Member, it was observed that it is obligatory on the part of Member Judicial

to give her opinion on the merits of the case, in as much as the matter was being decided in a remand proceedings, in terms of the remand order of Hon'ble High Court.

3. As is seen, the matter should have been placed before Judicial Member Mrs. Archana Wadhwa for giving her opinion on merits, however the matter stands fixed today before a Division Bench consisting of Member Judicial Mrs. Archana Wadhwa and Member Technical Shri Rakesh Kumar, in terms of the note sheet order dated 10/02/2014 of the Hon'ble President. As it is found that the matter should have been placed before Member Judicial only, for recording of her opinion and not before the Division Bench [in as much as Member Technical had already given his opinion on merits]. The registry is directed to place the file before the Hon'ble President for appropriate constitution of the Bench. The matter is accordingly adjourned to **16th April, 2014**.

(Dictated and pronounced in open court)

1.4.14

(Archana Wadhwa)
Member (Judicial)

(Rakesh Kumar)
Member (Technical)

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CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

West Block No.2, R.K.Puram, New Delhi

COURT-I

Date of hearing/decision: 6.9.2013

Central Excise Appeal No.2298 of 2004-Ex (DB)

Steel Authority of India Ltd. ... Appellant

Vs.

C.C.E., Raipur .... Respondent

Appearance:

Present Shri B.L. Narasimhan, Advocate for the appellant
Present Shri V.P. Batra, A.R. for respondent

ORDER

Per Justice G.Raghuram:

An earlier round of litigation before this Tribunal between the parties herein culminated in a decision dated 22.3.2006 in Appeal No.E/2298/2004. The appeal of the assessee was allowed on merits holding that that sale of used conveyor belts as scrap does not attract excise duty. There against, Revenue carried out the matter in appeal to the High Court at Bilaspur (Chhattishgarh), in Tax Appeal No.27 of 2006. By the judgment dated 23.11.2012, Revenue's appeal was allowed. The High Court set aside the judgment of this Tribunal on the ground that it was laconic and remanded the matter for de novo determination. Relevant portions of the order of High Court are:

> "(10) *In sum and substance, in our considered view, the Tribunal did not decide the issue in detail with reference to the facts of the case, the relevant rules and decided case law on the subject which have a bearing over the controversy and hence we can safely conclude by saying that impugned order is essentially a cryptic and unreasoned one and not liable to be sustained in this appeal. It does require a fresh look and in*

depth debate and discussion both on facts and in law in the light of relevant rules, the decided case law on the subject cited at the bar by both the sides and then to return a finding by the Tribunal as to whether assessee is liable to pay any excise duty on the items/goods in questions for which show cause notice was served on them or not and if held liable to pay then at what rate it is payable and if not liable to pay any duty then why and on what basis it is not liable?

(11) Since the issue is of frequent occurrence involving sizable amount of duty if found payable and hence we consider it appropriate to remand the case to the Tribunal for deciding the appeal afresh on merits strictly in accordance with law. Needless to say, the parties shall cite the entire case law on the subject including the relevant rules governing the issue while arguing the appeal before the Tribunal.

(12) As a consequence of foregoing discussion, the appeal succeeds and is allowed. The impugned order is set aside. The appeal is remanded to the Tribunal for its fresh decision on merits strictly in accordance with law and the same shall be decided by the Tribunal uninfluenced by our observations on merits which we have refrained from making on our forming a opinion to remand the case for its fresh hearing.

(13) Parties to appear before the Tribunal on 7th January 2013 and produce the copy of this order to enable the Tribunal to decide the appeal within six months from the date of parties' appearance as directed above."

2. As a consequence of the order of remit and in fidelity thereto it was required that this Tribunal should adjudicate the appeal on substantive merits, including on the point of limitation as the same is also urged as one of the grounds for challenging the adjudication order.

3. After remand, the appeal was heard by a Division Bench. A conflict of view however ensued. The Hon'ble Member (Technical) analysed the appeal on substantive merits and concluded that broken/worn-out conveyor belts were excisable goods liable to levy of duty; rejected the plea of the assessee with regard to the bar of limitation as well; and held that invocation of the extended period of limitation was valid. In a separate opinion, the ld.

Member (Judicial) differed on the point of limitation and concluded that invocation of extended period of limitation was unwarranted as there was neither any suppression of facts, misstatement, mala fide intention or transgression of provisions of the Act or Rules with an intent to evade duty.

4. It however requires to be noticed that in her separate opinion, the ld. Member (Judicial) clearly recorded (para 9 of the order) that no expression of opinion on the merits of the case is being recorded since the appeal requires to be allowed on the point of limitation.

5. Shri B.L. Narasimhan, ld. Counsel for the assessee submits, and rightly, that that only issue that falls for consideration before me is whether the conclusion of Member (Technical), that the extended period of limitation was rightly invoked or the contrary view by the learned Member (Judicial) that the extended period of limitation ought not to have been invoked represents the correct view.

6. It is however submitted by ld. Counsel that in view of the clear direction in the judgment of the High Court, there inhered a non-derogable obligation on this Tribunal to have recorded an operative conclusion on the substantive merits of the appeal. There is no such conclusive determination on the merits of the appeal since the ld. Member (Technical) has recorded a conclusion on merits but the ld. Member (Judicial) has not done so. It is therefore the contention of the ld. Counsel that the proper course is for the parties to make an application to the ld. Division Bench (which decided the matter) to request recording of an operative decision on the substantive merits of the appeal, to be recorded by the Ld. Member (Judicial) as well, by an application perhaps by way of rectification.

7. Having heard the ld. Counsel for the assessee and the Authorised Representative for Revenue, I consider it appropriate, in the facts and

circumstances, to defer the matter to enable the assessee/appellant to take appropriate steps in the light of the contentions advanced today. Matter is therefore adjourned by twelve weeks.

(Justice G. Raghuram)
President

scd/

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH
NEW DELHI

Application(s) Involved:

E/MISC/50709/2014 in E/2298/2004

Steel Authority of India Ltd.	Appellant(s)
Versus	
CCE, Raipur	Respondent(s)

Appearance:

Shri B.L. Narsimhan, Advocate	For the appellant
Shri Promod Kumar Jain and Shri Amreesh Jain, Autorised representatives (DR)	For the respondent

Date of Hearing: 26/12/2014
Date of Decision: 21.01.2015

CORAM:

HON'BLE Mrs. ARCHANA WADHWA, JUDICIAL MEMBER

Misc. Order No: 50313/2015

Per : ARCHANA WADHWA

As per the factual backdrop, the appeal filed by the appellant was allowed by the Tribunal vide Final Order No.332/2006-Ex. Dt. 22/03/2006. On appeal by the Revenue, the said order was set aside and matter remanded.

2. It is seen that the matter was heard by the Division Bench on 07/01/2013, in remand proceedings and vide Interim Order No.163/2013, there was opinion of difference between the Member(Technical) and Member(Judicial) on the point of limitation. However, Member(Technical) expressed his opinion as regards merits of the case as also on limitation, rejecting the both, whereas Member(Judicial) only considered the limitation

issue and held that the demand was barred by limitation. When the matter was placed before the Hon'ble President, as third Member, on 06/09/2013, it was observed that inasmuch as the matter stands remanded by the Hon'ble Chhattishgarh High Court for decision on merits as also on limitation, both the Members should have decided on the merits of the case. As such, the appellant was advised to move an application before the Member(Judicial) to express her opinion on both the issues. It is in this background that the matter was heard afresh by me, as regards the merits of the case.

3. The detailed factual position stands mentioned in the order recorded by the learned Member(Technical). As is seen, the dispute is as to whether the used and old conveyor belts removed by the appellant as waste and scrap, are required to discharge its duty liability in terms of the provisions of Rule 57S(2)(C). The said rule reads as – "where capital goods are sold as waste and scrap, the manufacturer shall pay the duty '**leviable**' on such waste and scrap". There can be no dispute about the fact that the capital goods, when sold as waste and scrap, are liable to discharge duty on the same. This has also been the ratio of the Hon'ble Gujarat High Court in the case of GNFC Ltd. Vs. UOI [2007(214) ELT 18 (Guj.)] as confirmed by Hon'ble Supreme Court reported as GNFC Ltd. Vs. UOI [2007(214) ELT A23 (SC)], as referred to by the learned Member(Technical) in his order. However as is seen from the said rule, the duty required to be paid by the assessee on the waste and scrap of such

capital goods shall be the duty, which is "**leviable**" on such waste and scrap.

4. The appellant's contention is that the conveyor belts, when sold, after being repeatedly used do not attract any duty of excise inasmuch as no such duty is "**leviable**" on such used goods so cleared by them. Revenue has confirmed the demand of duty under heading 40.04 of Central Excise Tariff. The said heading stands reproduced by the learned Member(Technical) in his order. As is seen, the same refers to waste and scrap of rubber as defined in Note 6 to the Chapter note of the said chapter. The Revenue's contention is that the goods of rubber definitely not usable as such because of cutting up, wear or other reasons would fall under Chapter 40.

5. On the other hand, the appellant's contention is that the conveyor belts were admittedly classifiable under heading 84.28 as material handling equipment and after frequent use they cleared the same as old and used conveyor belts only. No cutting up or slitting etc. of the said conveyor belts was undertaken by them. As is seen from the HSN Explanatory notes reproduced in the order of the learned Member(Technical), the waste and scrap arising out of worn out rubber articles would fall under the said headings only when certain further processes are taken up on the said worn out goods, by way of cutting, slitting etc. Inasmuch as in the present case, there is no evidence to reflect that the appellant had undertaken the said processes of cutting or slitting of

the conveyor belts into rubber pieces, the tariff entry under Chapter heading 40.04 would not become applicable. Merely because of the repeated use of the conveyor belts, which were originally falling under heading 84.28, the conveyor belts would not shift their classification under heading 40.04, after their use, when they still remain the conveyor belts and do not get converted into any waste and scrap. For the above proposition, they have relied upon various decisions of the Tribunal as also of the courts.

6. I have considered the submissions made by both the sides.

7. Though the Hon'ble Supreme Court's decision in the case of Grasim Industries Ltd. Vs. UOI [2011(273) ELT 10 (SC)] is not exactly on the point but I would like to refer to the same, for the purpose of adopting certain the observations made by the Hon'ble Supreme Court. It stands held by the apex court that the scrap or waste arising from repair and maintenance of plant and machinery (capital goods) installed in cement factory is not dutiable as they are neither by-products of the final product nor subsidiary product. To be dutiable, waste and scrap must arise regularly and continuously produced in the course of manufacturing business of the product manufactured by the assessee. It further stands observed by the Hon'ble Supreme Court that the metal, scrap and waste specified under heading 74.02 of Central Excise Tariff and read with Section Note 8(a) to Section XV of Central Excise Tariff has a very limited purpose of extending coverage to the particular item to the relevant tariff

item in the schedule for determining the applicable rate of duty and this note cannot be construed to have any deeming effect in relation to the process of manufacture as contemplated by Section 2(f) of the Central Excise Act, 1944.

8. Further I find that the Tribunal in the case of Mysore Cements Ltd. Vs. CCE, Bangalore [2004(165) ELT 307 (Tri. Bang.)] has held that the sale of old used material i.e. fire bricks and **conveyor belts**, furnace oil waste etc. would not attract any duty of excise. The said decision was arrived at by the Tribunal by relying upon the earlier decision of the Tribunal in the case of Hindustan Petroleum Corporation Ltd. Vs. CCE, Visakhapatnam [2002(144) ELT 555] as also the Tribunal decision in the case of CCE Vs. West Coast Industrial Gases Ltd. [1999(108) ELT 383 (Tri.)] and the confirmation of the said decision by the Hon'ble Supreme Court reported as CCE Vs. West Coast Industrial Gases Ltd. [2003(155) ELT 11 (SC)]. The said decision of the Tribunal in the case of Mysore Cements Ltd. was confirmed by the Hon'ble High Court of Karnataka.

The said decision in the case of Mysore Cements Ltd. stands taken note of by my learned brother Member(Technical) but he has observed that the waste and scrap in that case has arisen on account of dismantling of the equipment and the issue was excisability of such scrap & waste whereas the issue in the present case is demand of duty in respect of waste and scrap of conveyor belts in terms of Rule 57S(2)(C). On going through carefully the decision of the Tribunal in the case of Mysore

Cements Ltd., I find that the first para of the said decision refers to one of the issues as reversibility of the CENVAT credit on the sale of old and used conveyor belts. The contention of the appellant is that Rule 57S(2)(C) was introduced w.e.f. 1994 and was omitted in the new rules w.e.f. 01/07/2001. As such, the said rule was available from 1994 to 2001. The decision of the Tribunal in the case of Mysore Cements Ltd., having been decided in 2003, would relate to the period between 1994 to 01/07/2001 only, though the period is not specifically mentioned in the said decision. However I find in para 2 of the said decision, it stands mentioned that the credit was availed on 27/10/2001. As such, it can be safely concluded that the period involved in the Mysore Cements Ltd. case was after 1994 and before 01/07/2001, when the provisions of Rule 57S(2)(C) were in the statutory book. As the said decision specifically deals with the conveyor belts and as the said decision stands upheld by the Hon'ble High Court of Karnataka, I am of the view, that the sale of old and use conveyor belts would not attract any further levy of duty under Chapter 40.

9. I have already observed that the old and used rubber goods would fall under Chapter 40 only when they are converted into waste and scrap before their removal. Merely on account of repeated use, old and used conveyor belts would not be shifted to Chapter 40, from their maiden classification under Chapter 84. The fact that no processing was undertaken on the conveyor belts at the time of their clearances, is clear from the allegations made in the show-cause notice. Para 2 of the notice details as under: "...... Conveyor belts are used by the Noticee as capital

goods which has got certain life and due to its repeated use, conveyor belts get broken and worn out so become unfit for further use. The Noticee treat broken and worn out conveyor belts as waste and scrap which are sold by them in the market without payment of Central Excise duty." As such, it is clear from the above that the conveyor belts are cleared as used and worn out conveyor belts without converting the same into waste and scrap. A specific contention stands taken by the learned advocate that the appellant might treat the said old and used conveyor belts as waste for them but the same may be used by the buyers, after some reprocessing etc. as conveyor belts only, in which case it cannot be held that it is waste and scrap falling under Chapter 40.

At the stage, a common life example coming to my mind is a used and worn out wooden chair. It may happen that one leg of the chair gets broken and the owner of the same may treat as a waste for himself and clear the broken chair, as such. The buyer of the chair may choose to get the leg refixed and use the chair as chair. The question is whether in such circumstances, the wooden chair has to be treated as scrap of wood or as chair only. The answer would be clear that the broken chair, cleared as chair and further usable as chair, is required to be treated as chair only and not as waste of wood. In the absence of any evidence to show that the conveyor belts were not used as conveyor belts, in my view the shifting of the classification of the same to Chapter 40 so as to hold that such goods would be "**leviable**" to duty of excise under the said chapter heading is not proper. This also answers the Revenue's plea that Chapter 40.04 also takes into ambits the goods of rubber definitely "**not usable as such**" because of cutting up, wear and **"other reasons"**. Learned DR had pleaded that even if the said conveyor belts of rubber have not undergone any further process by cutting etc., if they do not remain usable as such on account of any other reason, even then such goods would be classifiable under Chapter 40. Before examining the expression "other reasons", a finding has to be arrived at that such goods which are being cleared are not usable "as such". As I have already observed that there is no allegation in the show-cause notice that the used conveyor belts became unusable as such, by any other reason, the said expression appearing in Chapter 40 would not get attracted. Reverting back to the example of wooden chair, it may not be usable for the owner of the chair, on account of any number of reasons, but still the same may be used as chair by the buyer of the same. Inasmuch as the conveyor belts have been cleared as conveyor belts, it cannot be concluded that the same were not usable as such.

10. I may like to clarify here that I have not examined the aspect of duty payment on old and used conveyor belts, under Chapter 84 of the Central Excise Tariff, as the same was neither the Revenue's case in the show-cause notice nor the any submissions were made in respect of the same.

11. In view of the above, I find that the provisions of Rule 57S(2)(C) of the CENVAT Credit Rules are not attracted in the present case

inasmuch as the goods cleared by the appellant are not leviable to duty of excise. In view of the above, I hold in favour of the appellant on merits.

(Pronounced on 21.01.2015)

12/1/15

ARCHANA WADHWA
JUDICIAL MEMBER

Raja....

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CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
West Block No.2, R.K.Puram, New Delhi

COURT-I

Date of hearing/decision: 19.2.2016

Central Excise Appeal No.2298 of 2004 –Ex (DB)

Steel Authority of India Ltd.	..	Appellants
Vs.		
C.C.E. & S.T., Raipur	..	Respondent

Appearance:

Present Shri B.L. Narasimhan with Shri Vipul Agarwal, Advocates for the Appellants
Present Shri Govind Dixit, A.R. for the respondent

Coram: Hon'ble Mr. Justice G.Raghuram, President

I N T E R I M O R D E R N O. 29/2016

The matter is listed before me to answer the difference of opinion recorded in interim order No.163/2013 bearing a date – 7.1.2013 (as per the certified copy of the order. The difference of opinion which is referred reads

> *Whether the demand raised by invocation of limitation period has to be upheld as held by the ld. Member (Technical) or the appeal has to be allowed on the point of limitation as held by the ld. Member (Judicial).*

Since on a consideration of the relevant chronology of events including those that have occurred subsequent to the above mentioned order indicate that there is an incomplete reference of the difference of opinion, I consider it appropriate to refer this matter to a Division Bench for framing a comprehensive difference of opinion arising out of the order dated 7.1.2013 and the subsequent order dated 21.1.2015 which is an order passed by the ld. Judicial Member (who was a Member of the Division Bench wherefrom the difference of opinion had originally arisen).

2. The substantive appeal was heard and initially a final order dated 22.3.2006 was passed by this Tribunal allowing the appeal preferred by the assessee. Aggrieved, Revenue preferred an appeal before the Hon'ble Chhattishgarh High Court at Bilaspur. By the order dated 23.11.2012, the matter was remitted for *de novo* determination by the Tribunal.

3. In terms of the order of remit by the High Court, the appeal was heard afresh. The Hon'ble Judicial Member and the Hon'ble Technical Member could not agree on the outcome of the appeal. This resulted in the interim order dated 07.01.2013 recording separate opinions, conflicting with each other and drawing up an order of reference. Suffice it to record that while Hon'ble Technical Member held against the appellant, both on merits of the appeal as also on appellant's plea for invalidation of the impugned order on the ground that extended period was not justifiably invocable and dismissed the appeal, the ld. Judicial Member did not consider it necessary to record any conclusions on the merits of the appeal but found that since the extended period was not invocable in the circumstances of the case, the appeal be allowed. She allowed and allowed the appeal.

4. When the matter was earlier listed before the President as a third Member for resolving the difference of opinion on 6.9.2013, ld. Counsel for the appellant submitted that since the ld. Judicial Member recorded no reasons, analyses or conclusion on the merits of the appeal, the reference only on the bar of limitation would be incomplete and in the circumstances, the appellant be granted liberty to move a miscellaneous application for seeking a conclusion on the merits as well, by the ld. Judicial Member. The miscellaneous application filed by the appellant was heard on 26.12.2014 and by the order 21.1.2015 the ld. Judicial Member pronounced conclusions on the merits of the appeal as well and ruled in favour of the appellant.

5 In the above circumstances, there is clearly a difference of opinion between the ld. Judicial Member and Ld. Technical Member, both on the

issue as to the bar of limitation (which is the sole issue referred vide order dated 7.1.2013), as also on the merits of the appeal which is the consequence of the Technical Member's order against the appellant on merits dated 7.1.2013 and ld. Judicial Member holding in favour of the appellant on merits by the order dated 21.1.2015.

6. The order dated 7.1.2013 which has framed the difference of opinion is however limited to the difference of opinion arising on the aspect of applicability of the bar of limitation.

7. In the above circumstances, in order to facilitate framing of a comprehensive difference of opinion consequent on the divergence in the opinion of the Hon'ble Members comprising the Division Bench, the matter shall be listed before appropriate Division Bench. Notice of hearing by the Division Bench for facilitating framing of a comprehensive difference of opinion, shall be issued to the appellant.

(Justice G. Raghuram)
President

scd/

Per. B. Ravichandran :-

In terms of interim order No. 58/2016 dated 30/06/2016 in Excise appeal No. 2298 of 2004 the following difference of opinion between Members of Central Excise Division Bench of Tribunal has been referred to the third Member for resolution.

> "*Whether the appeal has to be allowed on merits as also on limitation as held by Member (Judicial)* ***OR*** *the same has to be rejected on merits as also on limitation as held by Member (Technical) ?*"

2. The brief facts of the case are that M/s SAIL, Bhillai Steel Plant (appellant) are engaged in the manufacture of Iron and Steel products liable to Central Excise duty under Chapter 72 and 73 of Central Excise Tariff Act, 1985. They were availing facility of credit of Modvat on the duty paid on inputs and capital goods. Among other things, they had availed credit of duty paid on conveyor belts. After repeated use, these belts were worn out and became unfit for further use for intended purpose. The appellants sold these worn out broken conveyor belts as waste and scrap and removed them on receipt of consideration. The dispute is relating to the treatment of these worn out conveyor belts, cleared as waste and scrap, for Central Excise duty in terms of Rule 57-S of the Central Excise Rules, 1944 as it existed during the relevant time. The period involved in the dispute is 01/9/1996 to 31/03/2001. The Revenue is of the view that appellants are liable to discharge Central Excise duty on such removal of waste and scrap in terms of the above said Rule and

accordingly issued a demand, among other things, for this amount also. The case was adjudicated. The Original Authority vide his order dated 05/02/2004 confirmed the demand of Rs. 68,90,283/- and imposed equal amount of penalty on the appellant in terms of Section 11AC of the Central Excise Act, 1944. This matter thereafter went through the Tribunal, Hon'ble High Court of Chhattisgarh and back to the Tribunal for a fresh decision. While deciding the matter afresh, a difference of opinion arose between the Members of the Division Bench of the Tribunal. The above said reference to the Third Member is consequence of such difference of opinion.

3. The learned Counsel for the appellant submitted that the order of Member (Judicial) correctly reflects the legal position both on merit and on time bar. He mostly reiterated the findings recorded therein.

4. The submissions made by the learned Counsel for the appellant can be summarised as below :-

(a) The nature of item cleared is to be considered to arrive at the duty liability. In the present case the appellants are not engaged in the manufacture of any rubber products and hence the question of classifying the waste and scrap of rubber under Central Excise Tariff Heading (CETH) 4004 does not arise. This is very clear from the Note 6 of the said Chapter ;

(b) There is no question of "levy" of Central Excise duty on the waste and scrap of worn out conveyor belts cleared by the appellants as they cannot be held as manufacturers or producers of these items and charged to duty in terms of Section 3 of the Act ;

(c) The appellant's case is covered by the decision in **Mysore Cements Limited vs. CCE, Bangalore** reported in **2004 (165) E.L.T. 307 (Tri. – Bang.)** by the Tribunal which was affirmed by the Hon'ble High Court of Karnataka in **2006 (206) E.L.T. 1179 (Kar.)**.

(d) The demand in any case cannot be sustained for extended period. The appellants are a reputed public sector undertaking under the Government of India discharging hundreds of crores of Central Excise duty per year. There is no malafide intent in this case as the matter is involving purely interpretation of the provisions of Rule 57-S and classification of disputed product in Chapter 40. There can be no illicit motive to gain in a Government owned public sector undertaking. He relied on various case laws to support his submission on time bar.

5. The learned AR strongly contested the appellants submissions and also the views expressed by the learned Member (Judicial) in the interim order. He supported the findings recorded by the Hon'ble Member (Technical) both on merit as well as on time bar. The submissions made by learned AR on behalf of Revenue can be summarised as below :-

(i) The provisions of Rule 57-S as it existed during the material period are clear and do not admit any ambiguity. The appellants are liable to discharge duty on the waste and scrap of rubber cleared by them not because they have manufactured the said scrap but because they have availed Modvat credit on the original conveyor belts which after worn out being cleared as scrap. The condition to discharge duty as and when such capital goods are cleared after usage or as a scrap is inbuilt and the credit is linked to such later disposal of the capital goods. Here when the appellants availed credit the necessary consequence based on the condition of credit should follow ;

(ii) The decision of the Hon'ble Gujarat High Court in **GNFC Ltd. vs. Union of India** reported in **2007 (214) E.L.T. 18 (Guj.)** is squarely applicable to the facts of the present case. The said decision was affirmed by the Hon'ble Supreme Court in **2007 (214) E.L.T. A23 (S.C.)**. It was further submitted that the decision in **Mysore Cements Ltd.** (supra) is not applicable to the present case as there was no discussion about the applicability of Rule 57-S in the said decision and also the matter decided regarding to conveyor belts and other structurals is specifically with reference to their duty liability when they are cleared after dismantling. Neither the classification nor the applicability of Rule 57-S was subject matter of decision ;

(iii) Regarding time bar it was submitted that the appellants did not file due declaration under Rule 173B of the Central Excise Rules, 1944 and did not mention the clearance of such dutiable scrap in their statutory RT-12 monthly returns. It was submitted that they have suppressed the facts of clearance of waste and scrap of conveyor belts from the Department and, hence, extended period is rightly invoked and penalty also rightly imposed on the appellant.

6. I have heard both the sides extensively and perused the appeal records including the written submission and various case laws referred to by both the sides. The admitted facts of the case are that the appellants initially have taken duty credit, as capital goods, on conveyor belts and after their prolonged use these

items became worn out and not usable and as such were sold by them in the market as waste and scrap.

7. The first point to be decided is whether or not the appellants are liable to discharge duty on such clearance of waste and scrap on the value of consideration received by them in terms of Rule 57-S of Central Excise Rules, 1944. Rule 57-S talks about manner of utilisation of capital goods and credit allowed in respect of duty paid thereon. During the year 1996-1997 second proviso to Rule 57-S (1) stipulated that "..... where such capital goods are sold as waste and scrap the duty leviable shall be at the rate applicable on such waste and scrap". Later the relevant provision under Rule 57-S (2) (c) read as "where capital goods are sold as waste and scrap the manufacturer shall pay the duty leviable on such waste and scrap". It is clear that during the material period the provision for payment of duty when the capital goods are sold as waste and scrap are inbuilt in the Rule as mentioned. It was argued on behalf of the appellant that since the appellants are not manufacturers of said waste and scrap there could be no "duty leviable" as Section 3 of the Act is applicable to only excisable goods produced or manufactured. I find the said contention is misplaced and misleading. The duty on waste and scrap, as mentioned under Rule 57-S is in specific situation where capital goods on which duty credit has been availed initially by the manufacturer is later cleared for a consideration, but as a scrap. This is a condition inbuilt in the Rule framed for procedure for availing and utilising the credit

taken on capital goods. In such situation referring to Section 3 alone and without reference to the conditional credit system as envisaged under Rule 57-S is not legally tenable. In other words, when the capital goods on which credit has been availed were cleared from the premises of the manufacturer certain conditions are attached. I find no legal infirmity in holding that such waste and scrap cleared for a consideration is liable to duty. The provisions of Rule 57-S as mentioned above are very clear and unambiguous.

8. Another point raised is regarding classification of the said waste and scrap. It was argued on behalf of the appellant that Note 6 of Chapter 40 makes it clear that waste and scrap should arise from the manufacture of working of rubber and rubber goods. Hence, it was submitted that the appellant being a not a manufacturer of rubber goods the waste and scrap cannot be classified under CETH 4004. I find that the conveyor belts were considered as capital goods and credit allowed on them. These were later scraped and sold due to wear and tear. In this connection, it is relevant to note the HSN Explanatory note for heading 4004. It further elaborates the scope of the said heading and also refers to Note 6 of the Chapter. It is clearly mentioned that goods of rubber definitely not usable as such because of <u>cutting up, wear or other reasons</u> shall be classified as waste, parings and scrap. Reading together the heading and the explanatory notes make it clear that the waste and scrap of worn

out conveyor belts is covered by the above said tariff heading for the purpose of Central Excise levy in terms of Rule 57-S.

9. I have examined the various case laws relied upon by both the sides. The appellants as well as Member (Judicial) relied on the decision of the Tribunal, as affirmed by the Hon'ble Karnataka High Court in **Mysore Cements Ltd.** (supra). A careful reading of the above said decision will show that the decision was to the effect that the scrap and waste arising in course of dismantling of equipment will not be liable to duty. Admittedly, there was no examination of the scope of Rule 57-S and scope on tariff entry 4004. In this connection, I find it relevant to refer to the decision of Hon'ble Gujarat High Court in **GNFC Ltd.** (supra) which was later affirmed by the Hon'ble Supreme Court. The reasoning of the Hon'ble High Court as reproduced below is squarely applicable to the facts of the present case :

> "4. The Tribunal has upheld the levy in light of Rule 57-S (2) (c) of the Rules.
>
> 5. On a plain reading of the said Rule, it is clear that where capital goods are sold as waste and scrap, the manufacturer is bound to pay the duty leviable on such waste and scrap. Clause (c) of sub-rule (2) of Rule 57-S of the Rules has to be read in light of clauses (a) and (b), which precede clause (c). It is apparent that the Rule does not deal with the capital goods as final products, but capital goods which are used for the purposes of manufacture. The contention on behalf of the appellant that waste and scrap can be amenable to duty only when it is generated in the process of manufacture, does not merit acceptance in light

of the facts of the case, for the simple reason that the appellant is not a manufacturer of capital goods. In other words, the appellant does not manufacturer and sell capital goods, but uses such capital goods for the purposes of process of manufacture".

10. The Tribunal had occasion to examine a similar issue, though under the similar provisions of Cenvat Credit Rules, 2004. In **Hindustan Zinc Ltd. vs. CCE, Jaipur** reported in **2009 (237) E.L.T. 309 (Tri. – Del.)** it was held that the demand is arising out of conditions under which Cenvat credit has been allowed by the Cenvat Credit Rules and availed by the appellant. One of the conditions is that when waste and scrap arising out of capital goods are removed an amount equal to the duty leviable shall be paid. The credit has been taken on the duty paid on the entire value of the capital goods. After use of the capital goods the appellant is recovering a portion of the value arising as waste and scrap. Applying the provisions of Rule 3 (5A) of Cenvat Credit Rules, 2004, the Tribunal upheld the liability to pay duty on such waste and scrap. Incidentally it is to be noted that if the argument of the appellant is accepted to the effect that they are not manufacturers of such waste and scrap, the provisions of Rule 57-S (2) (c) will become redundant and without purpose. As already noted the condition mentioned in the said Rule is a part and parcel of credit scheme and the appellants availed the scheme subject to such condition. The condition cannot be made redundant by applying a different interpretation. As such, I find that the Original Authority has correctly upheld the duty demand

against the appellant on the clearance of waste and scrap of conveyor belts in view of the then prevailing legal provisions during the material time.

11. The next question is the correctness of demand for extended period in the present case. Admittedly, the appellants are not involved in any manufacture of rubber products in their normal course of activity. It is understandable that they did maintain a bonafide belief on the dutiability of worn out scrap of conveyor belts during the material time. Admittedly also, that the issue involved is one of close legal interpretation of the provisions of Modvat Rules. The existence of different views on the issue is apparent. Even the Tribunal in the first round of litigation held in the appellant's favour. Even now on merit, there is a difference of opinion in the Division Bench itself. In such a scenario it is not justifiable to attribute malafideness on the appellant with an intention to evade payment of duty on such waste and scrap. The reason given in the impugned order for invoking extended period is not convincing. The order says that the appellants did not file due declaration under Rule 173B for manufacture, classification and clearance of such waste and scrap and also did not indicate said clearance in their RT-12 monthly returns. I find that the question of filing declaration or indicating in the monthly return regarding sale of waste and scrap of conveyor belts would not arise in view of bonafide belief entertained by the appellant as could be deduced from different interpretations followed by the Tribunal itself. There could be no substance in the allegation of

fraud, suppression, wilful misstatement with an intention to evade payment of duty against the appellant in such a situation.

12. It is to be noted that the appellant is a public sector undertaking under the Government of India. They were discharging Central Excise duty to the tune of hundreds of crores per year. Reference can be made to the decision of the Tribunal in **CCE, Allahabad vs. Bharat Yantra Nigam Ltd.** reported in **2014 (36) S.T.R. 554 (Tri. – Del.)** and in **Burn Standard Co. Ltd. vs. CCE, Coimbatore** reported in **2007 (216) E.L.T. 77 (Tri. – Chennai)**. In the facts and circumstances of the present case, there could be no motive with "intend to evade payment of duty" on the part of the appellant. There could be a presumption that a public sector undertaking do not have any intent for improper benefit. In the present case there are not sufficient evidence, to rebutt such a presumption in the impugned order by the lower Authority. Simple non-filing of declaration of classification or non-mentioning in the monthly returns about the sale of waste and scrap of conveyor belts by itself did not establish a misrepresentation or suppression of material fact. This is so in the facts of present case as the duty liability of such scrap itself is a matter of interpretation as discussed elaborately hereinabove. In view of these findings, I hold that the demand cannot be for an extended period against the above appellants as the ingredients for the same are not available in the present case.

13. Keeping in view the findings, as stated above, I find the appellants are liable to pay Central Excise duty on the waste and scrap of conveyor belts sold and cleared by them. However, the demand has to be restricted to the normal period, as explained above. The reference is answered accordingly.

(order pronounced in the open court on 21.10.16).

30.10.16.
(B. RAVICHANDRAN)
Member (Technical)

PK

FINAL ORDER No. 56357 /2016

In view of decision of Third Member, as per the majority, the appellant is liable to pay Central Excise duty on waste and scrap of conveyor belts sold and cleared by them. However, the demand shall be restricted to normal period.

(Pronounced in the court on 30.12.2016)

(S K Mohanty)
Member(Judicial)

30.12.16.
(B Ravichandran)
Member(Technical)

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