

HIGH COURT OF DELHI

WP(C) No. 6692 of 2002

Date of decision : September/0, 2004

M/S Asahi India Safety Glass LimitedPetitioner
... through: Mr.V. Lakshmikumaran
... with MrAvtar Singh
... Advocates.

- **VERSUS** -

Union of India and othersRespondent
... through: Mr. Gaurav Duggal
... Advocate

Coram :-

THE HON'BLE MR JUSTICE B.C.PATEL, C. J.
THE HON'BLE MR JUSTICE BADAR DURREZ AHMED.

- i) Whether Reporters of local papers may be allowed to see the judgment.
- ii) To be referred to the reporter or not ?
- iii) Whether the judgment should be reported in the Digest ?

B.C.PATEL, C.J

1. The petitioner, engaged as a manufacturer of toughened (tempered) and laminated safety glass, has filed this petition against the order dated 16.9.2002 made by the Customs and Central Excise Settlement Commission, New Delhi (hereinafter referred to as 'the Commission') directing the petitioner to pay duty amount of Rs. 3,47,38,325/- towards settlement of the show cause notices dated 1.9.2000, 14.12.2000 and 20.6.2001 and has prayed to quash and set aside the operation of the impugned order No. F/63/2002-SC(PB) dated 21.8.2002 made by the Commission confirming the duty as aforesaid

and has also prayed for issuance of a writ or order entitling the petitioner to take Modvat credit to the tune of Rs. 3,47,38,325/- in relation to three show cause notices.

2. The petitioner sells the manufactured items to the motor vehicle manufacturers. It is required to clear the goods on payment of excise duty. In the instant case, it has availed a Modvat credit on sale of safety glass to the motor vehicle manufacturers like Maruti Udyog Ltd.

3. For the purpose of manufacture of toughened or laminated or tempered safety glass (hereinafter referred to as 'the safety glass') the raw material required is known as float glass. It is averred by the petitioner that in relation to additional duty of customs paid on the imported float glass and the excise duty paid on the locally procured float glass, the petitioner took Modvat credit of the duty so paid. During the course of manufacture of safety glass inspection is required for a quality check or to detect a defect in the raw material i.e. float glass. It is the case of the petitioner that defective float glass is scrapped and appropriate excise duty is paid on the clearance of such scrapped glass. In respect of the defective float glass the petitioner used to raise quality claims with the float glass manufacturer and

such claim would hardly be about 8-9% of the total purchases made. The petitioner has pointed out that the float glass is received in wooden boxes. Glass sheets are removed from the wooden boxes and put on floating table. If the float glass is found broken or defective, on opening, the same is scrapped and for the said glass duty is already paid and as such defective or broken glass cannot be used in the manufacturing process. The same is not a subject matter of any benefit. However, the float glass which is not defective *per se* has to be placed on the floating table. Out of each sheet of float glass, there may be one to eight pieces of the final product. The procedure prescribed by the petitioner is as under:-

- "a) Cutting
- b) Marking
- c) Breaking off
- d) Grinding
- e) Washing with de-mineralised water
- f) Inspection.

(a) Cutting: The glass is cut to size according to template provided. The glass is cut according to pre-determined size, shape i.e. specifications given by the customer.

(b) Marking : This is done on the glass on one side. This contains the customer's name and logo along with other particulars such as customer's name, etc.

(c) Breaking off: The extra /unwanted portion of the glass, as scored by the cutting machine is separated manually and thrown into the cullet tank.

(d) Grinding : The edges of the glass which has been cut are beveled with the grinding machine. The grinding machine is equipped with a diamond wheel, which grinds the edges.

(e) Washing the glass: The glass is firstly washed with hot de-mineralised water. The temperature of the water remains

between 40-60° C. No chemical is used. Thereafter, the glass is scrubbed by using high density brush rollers running at a speed of 1800 rpm. The water on the glass is then soaked up from the surface by sponge rollers. In case the sponge rollers are not used, water mark/stains will remain on the glass and such stain would become permanent when the glass is taken to furnace for tempering process. Inspection of the glass is not possible unless the water mark/stains are completely removed from the surface of the glass. Thereafter, the wet glass is dried by blowing hot air at 40-60° C. For the purpose of drying, blowers with heaters are installed inside the dryers.

(f) Inspection: The glass having been cut, beveled and washed are inspected by the trained employees of petitioner with naked eyes against a light source. If the glass contains defects such as bubbles, stones, scratches, white spots, paper marks etc are detected. The glass containing any of these defects are segregated. Only glasses which do not contain such defects are passed on to the next stage viz. tempering or lamination, as the case may be. It may be noted that the glass sheets being the input material, have been cut to size and shape and edges beveled. The glass containing defects are destroyed by throwing them into the cullet tank, since the defective glass cannot be marked even as sub-standard/. Seconds glass, keeping in mind the end application in motor vehicles. That is why there is no point of subjecting such glass to further processes of tempering/lamination. The defects if any, in the float glass which would affect their suitability for use in motor vehicles can only be detected after the float glass undergoes the mandatory processes of cutting, marking, breaking off, grinding and washing which form an integral part of the manufacturing processes undertaken by the petitioner in the factory."

4. According to the petitioner the process indicated herein above being manufacturing process must be followed to obtain the safety glass. These processes form manufacturing process of the final product namely safety glass. Since the cut to size pieces of glass from sheets form one of the stages of manufacture, according to the petitioner, the manufacturing process commences the moment the process of cutting starts and it is only during further process, the defects are detected after washing,

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drying and on inspection of the glass. Even if the defects such as scratches and bubbles are found existing then such pieces are not accepted and as such are thrown in a cullet tank and only accepted pieces are forwarded for such process for making the tempered glass and laminated glass. For the reason that the defects such as scratches, bubble, etc. may occur on the float glass supplied, which may not form part of the final cut piece. It is reiterated by the petitioner that it is only after putting the float glass sheets into the process of manufacture that inspection is carried out after completion of certain stages. The cut pieces are to be inspected only after thorough washing and drying for the reasons that if the glass is dirty, having paper marking, etc. certain defects will not be noticed at the stage when it is placed on a floating table and is cut to pieces of required size though the float glass itself had defects of white spot, cullet, stone, etc. Hence inspection is carried out on the cut to size pieces only after washing and drying. The further process thereafter is carried out to get the tempered glass and laminated glass. After picking up the glass from the stock cart manually, it is placed on a glass hanging supporter. This glass is automatically carried into the furnace, which has electric heaters

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inside. There are four chambers in the furnace and glass is moved from lower temperature chamber to higher one. There the glass piece is pressed by a press machine at a very high temperature. The glass is then cooled and quenched uniformly by a blast of air. The glass is then unloaded and is transferred to an inspection line. Thereafter the glass is examined again. If any defect like white spot, cullet, stains etc are detected, due to the defect originating at the suppliers end, but not detected visually, and found after inspection, after following the procedure described above, the glass is rejected. Out of a sheet of float glass, ultimately one to eight pieces may be ultimately turned into a final product. The facts that a sheet of glass used as an input must be considered for benefit irrespective of fact that entire sheet or all the pieces turned into a final product or not. It is a different matter that for such rejected glass also claim is made on the supplier. The department is aware of this procedure since 1987.

5. In laminated glass, there is combination of two glasses which are laminated together. The first process carried out is bending of two glasses, one inner and another outer according to the fixture required. After bending, the glass is inspected for

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curvature and cross curvature. Next, a PVB film is put between the two glasses and de-airing is done by which air is taken out. Thereafter the glass is sent to an oven for heating upto 100 degree Celsius. Finally, the glass is subjected to a process known as auto-calving at a temperature of 135 degrees Celsius and at a pressure of 13 Kg/centimeter square which results in finished laminated glass.

6. Show cause notices were issued, *inter alia*, denying Modvat credit on the defective safety glass (which were cleared as scrap (cullet) on payment of duty later on) Show cause notice has denied Modvat credit taken by the petitioner during the period from August, 1995 to December, 2000. Show cause notice was issued for invoking penal provisions under Section 11AB and 11AC of the Central Excise Act, 1944. Ultimately, the petitioner approached the Settlement Commission and the application was admitted on or about 12.12.2001 and after hearing, the order was made on 21.8.2002 under Section 32F(7) of the Central Excise Act, 1944. The Commission made an order as under:-

"(i) The correct duty liability of the applicant is Rs. 3,55,37,917/- Rs. 21,48,876/-, Rs. 26,90,902/- respectively in the 3 show cause notices in question, totaling to an amount of Rs. 4,03,77,695/-. The applicant had accepted liability of Rs. 56,39,370/- where amount has been paid. The balance amount of Rs. 3,47,38,325/- shall be



paid by the applicant within 30 days of the receipt of this order.

(ii) The applicant is allowed immunity from prosecution for offences under the Act in respect of the case covered by the applications and the SCNs in question.

(iii) The applicant is allowed immunity from payment of penalty leviable under the Act and the Rules made thereunder in respect of the case covered by the applications and SCNs in question.

(iv) The applicant is allowed partial immunity from levy of interest. The applicant shall pay interest @10% per annum on the duty amount of Rs. 56,39,370/- from the date the credit was availed till the date of payment of this duty. The interest liability shall be effective from the date the provisions of Section 11AB came into effect under the Act. The applicant shall work out the interest liability accordingly, have it certified by the Jurisdictional Commissioner of Central Excise and shall make the payment thereof within 30 days of the receipt of this order."

7. Sub-section (7) of Section 32F of the Central Excise

Act, 1944 being relevant, is reproduced hereunder :-

"(7) After examination of the records and the report of the Commissioner of Central Excise received under sub-section (1), and the report, if any, of the Commissioner (Investigation) of the Settlement Commission under sub-section (6), and after giving an opportunity to the applicant and to the Commissioner of Central Excise having jurisdiction to be heard, either in person or through a representative duly authorized in this behalf, and after examining such further evidence as may be placed before it or obtained by it, the Settlement Commission may, in accordance with the provisions of this Act, pass such order as it thinks fit on the matters covered by the application and any other matter relating to the case not covered by the application, but referred to in the report of the Commissioner of Central Excise and Commissioner (Investigation) under sub-section (1) or sub-section (6)."

8. Learned counsel, therefore, submitted that the Settlement Commission is entitled to make an order in accordance with the provisions of the Act, and not

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beyond that. According to the learned counsel, it is not open for the Settlement Commission to pass an order de hors the provisions of law.

9. Learned counsel drew our attention to Rule 57A and 57D of the Central Excise Rules 1944 (hereinafter referred to as the Rules) which are reproduced hereunder:-

Rule 57A. Applicability. 1. The provisions of this section shall apply to such finished excisable goods (hereinafter, in this section, referred to as the final products) as the Central Government may, by notification in the Official Gazette specify in this behalf for the purpose of allowing credit of any duty of excise or the additional duty under Section 3 of the Customs Tariff Act, 1975 (51 of 1975), as may be specified in the said notification (hereinafter, in this Section, referred to as the specified duty) paid on the goods used in the manufacture of the said final products (hereafter, in this section, referred to as the inputs).

(2) The credit of specified duty allowed under sub-rule (1) shall be utilized towards payment of duty of excise leviable on the final products, whether under the Act or under any other Act, as may be specified in the notification issued under sub-rule (1) and subject to the provisions of this Section and the conditions and restrictions, if any, specified in the said notification.

(3) The Central Government may also specify in the said notification the goods or classes of goods in respect of which the credit of specified duty may be restricted.

(4) **The credit of specified duty under this Section shall be allowed on inputs used in the manufacture of final products as well as on the inputs used in or in relation to the manufacture of the final products whether directly or indirectly and whether contained in the final product or not.**

(5) Notwithstanding anything contained in sub-rule (1), the Central Government may, by notification in the Official Gazette declare the inputs on which declared duties of excise or additional duty (hereinafter referred to as declared duty) paid shall be deemed to have been paid at such rate or

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equivalent to such amount as may be specified in the said notification and allow the credit of such declared duty deemed to have been paid in such manner and subject to such conditions as may be specified in the said notification even if the declared inputs are not used directly by the manufacturer of final products declared in the said notification, but are contained in the said final products.

Explanation—for the purposes of the sub rule it is clarified that even if the declared inputs are used directly by a manufacturer of final products, the credit of the declared duty shall, notwithstanding the actual amount of duty paid on such declared inputs, be deemed to be equivalent to the amount specified in the said notification and the credit of the declared duty shall be allowed to such manufacturer.

6. Notwithstanding anything contained in sub-rule (1), the Central Government may, by notification in the Official Gazette, declare the inputs on which the duty of excise paid under Section 3A of the Central Excise Act, 1944 (1 of 1944) shall be deemed to have been paid at such rate or equivalent to such amount as may be specified in the said notification, and allow the credit of such duty in respect of the said inputs at such rate or such amount and subject to such conditions as may be specified in the said notification:

Provided that the manufacturer shall take all reasonable steps to ensure that the inputs acquired by him are goods on which the appropriate duty of excise, as indicated in the documents accompanying the goods, has been paid under Section 3A of the Central Excise Act, 1944 (1 of 1944)."

57D. Credit of duty not to be denied or varied in certain circumstances.—(1) Credit of specified duty shall not be denied or varied on the ground that part of the inputs is contained in any waste, refuse, or by-product arising during the manufacture of the final product, or that the inputs have become waste during the course of manufacture of the final produce, whether or not such waste or refuse or by-product is exempt from the whole of the duty of excise leviable thereon or chargeable to nil rate of duty or is not specified as a final product under rule 57A."

10. Learned counsel drew our attention to Rule 57D of the Rules to point out that credit of duty is not to be denied or varied in certain circumstances. It is

in view of the combined reading of Rule 57A(4) and Rule. 57D(1), the learned counsel submitted that once the float glass is under process for final output, irrespective of manufacturing product, good or bad or rejected being useless or destroyed during the manufacturing process etc the benefit of Rule 57A cannot be denied.

11. To understand the question, an illustration can be given of corn thrown in a hot oven for the purpose of obtaining popcorn. Before using the corn, if it is found unfit and rejected and if the duty is to be paid, one has to pay the duty even on such rejected and unfit corn. However, when the remaining corn, other than rejected are thrown in hot oven for getting popcorn the entire quantity may not be popped. Some popcorn may be of better quality- one may call it export quality, some may be of poor quality and some corn because of hardness may not have popped at all, but for making popcorn the quantity used after acceptance (except being rejected as unfit) the entire quantity is used for preparing popcorn and it cannot be said that corn which is not popped up were not used for making the popcorn. Whatever quantity after preliminary inspection is used for

making popcorn, one will be entitled to get the benefit of the entire quantity irrespective of the results i.e. either popped fully partially or not popped up at all.

12. It is clear that float glass is eligible input. It was subject to process of manufacturing. After float glass has undergone the process of manufacturing if defects are noted then it is not used for final product, namely, lamination or toughening. As this defect is brought out only during the process on which duty is paid, it is required to be considered. In the instant case, at the initial stage the defect is noted in the float glass and therefore no question of Modvat could arise. Only the float glass which has undergone the process of manufacturing has to be considered for Modvat irrespective of the claim lodged with the supplier. The manufacturer has claimed Modvat because he has paid duty on the float glass and has used the same for the manufacturing process, though for one or the other reason, sheet of float glass or part of the sheet could not be used for the final product, is no ground for rejecting the same. If duty is not paid on the goods used as input, one is not entitled to claim Modvat. However, if the duty



is paid and the glass is used in the manufacturing process, then one would be entitled. It is clear that no Modvat could be claimed on the float glass, if the same is rejected after opening the wooden box as sheet is found broken or defective and therefore, could not be used as input for obtaining final product. Irrespective of obtaining a final product if the input is used in the manufacturing process one is entitled merely because credit is taken on defective glass used as input is no ground to reject the claim.

13. On behalf of the respondent, it was submitted that Section 32 is a complete code. Section 31 which falls in Chapter V of the Act pertains to Settlement Commission. Learned counsel for the respondent submitted that the order once made by the Settlement Commission would be one under Section 32M. It cannot be reopened. Section 32M reads as under :-

“32M“Order of Settlement to be conclusive.— Every order of settlement passed under sub-section (7) of Section 32F shall be conclusive as to the matters stated therein and no matter covered by such order shall, save as otherwise provided in this Chapter, be reopened in any proceeding under this Act or under any other law for the time being in force.”

14. According to the learned counsel, once an order is made, it is not subject to review. According to the



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learned counsel for the respondent, the order made under sub-Section (7) of Section 32F may provide the terms or the manner in which the amount shall be paid and the Settlement shall be void if it is subsequently found by the Commission that the same has been obtained by fraud or misrepresentation of facts. It was submitted by the counsel for the respondent that for bringing an end to the matter, the stage of assessment, appeal or appeal before Tribunal are bypassed in view of the special provision. Once the Settlement Commission makes an order that being final, it cannot be interfered even under Article 226 of the Constitution of India. On merits, learned counsel for the respondent submitted that the Commission has committed no error in arriving at a conclusion and, therefore, the Court should not interfere in the matter.

15. Undisputed facts, according to the Commission in paras 11 and 12 are as under:-

- (i) The main raw material for the manufacture of the tempered and laminated glass in the applicant's factory is float glass which is an eligible input under Rule 57A of the Rules in this case.
- (ii) The defects noticed in the float glass (input) at the stage of inspection thereof after subjecting it to the process of cutting, marking, breaking off, grinding and washing are defects arising at the end of the suppliers of the said float glass and such defects have not been brought about during any of the

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processes to which the float glass is subjected to in the applicant's factory.

- (iii) The applicant filed a claim for such defective glass on the respective suppliers and the suppliers reimbursed the applicant for the cost of such defective glass. The cost reimbursed does not include the element of duty suffered on such float glass.
- (iv) The demand of duty made by Revenue is confined to the credit taken on defective float glass for which the applicant has been reimbursed by the suppliers of such defective glass. The demand of duty does not include breakages or defects noticed during the process of toughening, tempering on lamination
- (v) Revenue have confirmed the correctness of the amount of duty accepted by the applicant in their applications. The accepted amount of duty is confined to breakages of float glass (input) noticed when the wooden boxes containing it are opened in the factory of the applicant.

The Commission further observed in para 12 as under:

"12. The claim of the applicant is centered on the contention that the suitability for use of the float glass in the motor vehicles can only be detected after it has undergone the mandatory processes of cutting, marking, break off, grinding and washing, that the manufacturing process for manufacture of toughened and laminated glass starts as soon as the float glass is out on the float table and subjected to the aforesaid processes and that these processes are mandatory and integral to the process of manufacture of their final products. Revenue have disputed this claim of the applicant. The applicant rely on the Production Manual of Ashai Glass Limited, Japan in support of their contention that world-over the process of manufacture adopted by their parent company is identical."

16. In para 13, the Commission considered the expression "used in the manufacture of final products" and "inputs used in or in relation to the manufacture of the final products" that these are to be widely construed as held by the Apex Court.



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Surprisingly, the Commission proceeded by saying "however the main question to be decided in this case is whether the float glass (input) can be said to be an eligible input of the applicant when it was defective at the supplier's end itself and accordingly could not have been used in the manufacture of the finished goods. As observed by us earlier, it is not in dispute that the defects may be in the float glass at the supplier's end and that is the reason why the suppliers agreed to reimburse the applicant for the value of such defective inputs. This being the case, in our view, the applicant identified such defect at the stage of inspection after subjecting the float glass to certain processes. Even if these pre-processes are considered as integral to manufacture of finished glass, the fact remains that input of float glass could not have been used in or in relation to the manufacture of the final product on account of inherent defect in it. It is also to be noted that these defects are identified through a naked eye against a light source at the stage of the inspection and this could have been done even after the receipt of the goods in the factory of the applicant and before subjecting them to the various process of cutting, marking, breaking off,

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grinding etc. it is also not in dispute that the input float glass does not get rejected on account of any defects developed during any of the pre-processes to which it is subjected to. In view of this position, the reliance placed by the applicant on the following judgments of the Tribunal does not appear to be relevant.”

17. Thus, it is clear that the Commission arrived at a conclusion that after subjecting the float glass to certain process, the defects were identified. The process of manufacturing commences from the initial stage of cutting the float glass of required size as demanded by the customer. Even thereafter, after following certain procedure, the defect is noted in certain piece or pieces made from one sheet. All pieces are not necessarily rejected, may be one, two, or more. Rest are further processed to get the end product. The Commission erred in holding that float glass could not have been used in or in relation to the manufacturer of the final product. There is total non-application of mind. End product is obtained. May be that out of six pieces cut initially all may not have been used for final product on account of defect noticed. It cannot be said that the float

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glass was not used as input. As supplier agreed to reimburse is no ground to say that it was defective material and could not have been used as input.

18. The Commission in para 14 observed that the defective float glass does not get rejected on account of defects developed during any of the processes to which it is subjected to in the factory of the applicant and accordingly the judgment in the case of **Greaves Ltd v. CCE, Allahabad, 1999(113) ELT 270** does not help the applicant.

19. The Commission further observed that the basic question to be asked in the facts of the present case is whether the float glass with built-in defects is at all useful in the manufacturing of the finished products. While giving answer in negative Rule 57D(4) was referred.

20. According to the Commission, as the defective input float glass in the case of the applicant is neither waste or refuse arising during the manufacture of their final product nor it has become wastage in or in relation to the manufacture of their final product. Accordingly, the benefit of Rule 57D (1) of the Rules is not available to the applicant. In the case of the

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applicants the input glass did not become waste in the course of or on account of any of the pre-processes to which it had been subjected to in the factory of the applicant.

21. However, the Commission has observed as under:-

"17. We have also carefully perused the Production Manual of Ashai Glass Limited, Japan (October, 1986) annexed as Appendix 2 of the application for the first SCN. The Manual no doubt shows that the pre-process is the first procession automotive safety glass production 1 line, and very important process in terms of fixing the shape of final products. The intermediate inspection to be carried out after the raw glass is subjected to cutting, breaking off, marking, grinding and washing, according to the Manual is to check, scratch, bubble and crack in accordance with the standard. The Manual states that the 'ground glass is stained with kerosene, cullet dust etc'. grinding scratches, marks etc and therefore it is subjected to the process of washing by the high pressure spray on the roller conveyor and brush by the nylon brush of washing machine. The Manual further states that the "rejected products may be used as smaller sized glass. It is loaded on to separate cards. Glass which cannot be used for any other purpose shall be disposed of as cullet." This appears to show that the purpose behind the intermediate inspection is to identify scratches etc. suffered during grinding. There is nothing to suggest in this Manual that the in built defects arising at the supplier's end cannot be detected before adopting the pre-process. In any case, the Manual of the Japanese Parent Company could not have visualized the availability of a fiscal benefit under the Indian Law. It could not be the intention that the

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processes adopted by a manufacturer should result into a revenue disadvantage to the stage by allowing benefit of Modvat credit to defective inputs which are not at all useable in the manufacture of the final product. This, In our view does not also serve the objective of the provision relating to Modvat under the Central Excise Rules.

18. In view of the above, we are of the considered view that the defective input i.e. float glass of the applicant is not entitled to the Modavt credit availed, particularly when the suppliers of such defective input have reimbursed the applicant for the defective supply. We are also of the view that if such a credit is allowed it would create a situation where those who subject the input to quality testing immediately after receipt of the input in their factory would be denied the benefit of the credit whereas those who do so after carrying out some processes would stand to gain even though the inputs were *ab initio* defective and could not have been used in the manufacture of the final product. This , in our view, cannot be the intention of the legislation.

22. The Commission also observed (in para 21) that “we are of the view that they made the disclosure under a genuine belief of the interpretation adopted by them and there was no ground to suppress any information from the Commission.”
23. It appears that the Commission has misdirected itself in examining Rule 57A(4) and 57D. When the impugned order made by the Commission is vitiated by more than one misdirection in law then it is always open for this Court to exercise the jurisdiction over the orders made by the

Commission. When the Court finds that the Commission's order is "contrary to any of the provisions of the Act" or the Rules made thereunder, it becomes the duty of the Court to examine the matter and to pass an appropriate order in accordance with law.

24. The Apex Court in **J.K. Cotton Spinning and Wvg Mills Co Ltd vs STO**, 1997 (91) ELT 34 (SC) pointed out that the expression "in the manufacturing of goods" should normally encompass the entire process carried on by the dealer of converting raw materials into finished goods. In para 8, the Supreme Court further pointed out "where any particular process is so integrally connected with the ultimate production of goods that but for that process, manufacture or processing of goods would be commercially inexpedient, goods required in that process would, in our judgment, fall within the expression "in the manufacture of goods". For instance, in the case of a cotton textile manufacturing concern, raw cotton undergoes various processes before cloth is finally turned out. Cotton is cleaned, carded, spun into yarn, then cloth is woven, put on rolls, dyed, calendared and pressed. All these processes

would be regarded as integrated processes and included "in the manufacture" of cloth. It would be difficult to regard goods used only in the process of weaving cloth and not goods used in the anterior processes as goods used in the manufacture of cloth. To read the expression "in the manufacture" of cloth in that restricted sense, would rise many anomalies. Raw cotton and machinery for weaving cotton and even vehicles for transporting raw and finished goods would qualify under Rule 13, but not spinning machinery, without which the business cannot be carried on. In our judgment, Rule 13 does not justify the importation of restrictions which are not clearly expressed, nor imperatively intended. Goods used as equipment, as tools, as stores as spare parts or as accessories in the manufacture or processing of goods, in mining, and in the generation and distribution of power need not, to qualify for special treatment under Section 8(1), be ingredients or commodities used in the processes, nor must they be directly and actually needed for "turning out or the creation of goods."

"In our judgment if a process or activity is so integrally related to the ultimate manufacture of

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goods so that without that process or activity manufacturer may, even if theoretically possible, by commercially inexpedient goods intended for use in the process or activity as specified in Rule 13 will qualify for special treatment."

25. Even with regard to drawing and photographic materials which may not be used as a raw material, in the view of the High Court, designing is a process distinct from the process of manufacture, i.e., of making or fabricating raw materials by hand, art or machinery, and work into forms convenient for use. The Apex Court pointed out that without a design of the goods sought to be manufactured in a factory which is geared to production of goods of uniform pattern, it would be impossible to attempt manufacture of goods on a commercial scale. The production itself has to be of a set pattern, and deviation from the design prepared would be impermissible. That without the use of drawing and photographic materials, designing of patterns, would, if not impossible, be very difficult, is conceded. The Court pointed out that a bare survey of the diverse uses to which the goods may be intended to be put in the manufacture or processing of goods,

clearly shows that the restricted interpretation placed by the High Court is not warranted.

26. The Apex Court in the **Collector of Central Excise v Rajasthan State Chemical Works, 1991(55) ELT 444 (SC)** pointed out in paras 12 and 14 as under:-

"Manufacture thus involves series of processes. Process in manufacture or in relation to manufacture implies not only the production but the various stages through which the raw material is subjected to change by different operations. It is the cumulative effect of the various processes to which the raw material is subjected to, manufactured product emerges. Therefore, each step towards such production would be a process in relation to the manufacture. Where any particular process is so integrally connected with the ultimate production of goods that but for that process manufacture or processing of goods would be impossible or commercially inexpedient, that process is one in relation to the manufacture.

14. In JK Cotton Mills v. S.T. Officer, (1965 1 SCR 900, this Court in construing the expression 'in the manufacture of goods' held thus :-

"But there is no warrant for limiting the meaning of the expression "in the manufacture of goods" to the process of production of goods only. The expression "in the manufacture" takes within its compass, all processes which are directly related to the actual production"

The Court further held thus :-

"The expression 'in the manufacture of goods' would normally encompass the entire process carried on by the dealer of converting raw materials into finished goods. Where any particular process is so integrally connected with the ultimate production of goods that but for that process manufacture or processing of goods would be commercially inexpedient, goods required in that process would, in our judgment, fall within the expression 'in the manufacture of goods.'"

The word 'process' has been interpreted by the Apex Court in the aforesaid case in para 16 as under :-



"A process is a manufacturing process when it brings out a complete transformation for the whole components so as to produce a commercially different article or a commodity. But, that process itself may consist of several processes which may or may not bring about any change at every intermediate stage. But the activities or the operations may be so integrally connected that the final result is the production of a commercially different article. Therefore, any activity or operation which is the essential requirement and is so related to the further operations for the end result would also be a process in or in relation to manufacture to attract the relevant clause in the exemption notification. In Our view, the word "process" in the context in which it appears in the aforesaid notification includes an operation or activity in relation to manufacture."


27. In Standard Fireworks Industries v. Collector,

1987 (28) ELT 56(SC), it was held that manufacture of fireworks requires cutting of steel wires and the treatment of papers and, therefore, it is a process for manufacture of goods in question. Thus, the expression, "in the manufacture of goods" takes within its compass all the stages.

28. Keeping the interpretation of Rule 57D and 57A(4), if we once again turn to the finding of the Commission, it is clear that the Commission has misdirected itself. The Commission observed in para 2 that the investigation carried out reveal that the applicant was filing claims with the suppliers of float glass in respect of supply of defective/sub standard float glass which had some



inbuilt defects such as bubbles, stones, scratches, white spots, paper marks, etc. that the claims were filed on the basis of pre-process and quality work sheets maintained by the applicant on daily basis showing such defects in the float glass; that acceptance of such claims by the supplier indicated that the defects were inherent during the manufacturing of the float glass and that such defective float glass were neither useable nor used in the manufacture or in relation to the manufacture of the applicant's finished goods. It is further observed that it appears on this basis that the Modvat credit taken by the applicant on such defective float glass was not permissible under the Law. Here again, the Commission misdirected itself in stating that defective float glass was neither usable nor used in the manufacture of the finished goods. As noted earlier, the Commission observed that after certain process, applicant noticed the defect. Therefore, only after the process commenced, rejection of a sheet or a piece or pieces became necessitated. It does not mean that it was not used as an input. Once it is used so, it cannot be said that the applicant was not entitled to claim Modvat. It further appeared that the applicant had been receiving consignment of




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float glass duly packed and packing material was being disposed off by them as scrap without reversing the credit of duty taken thereon or without discharging the duty leviable on such scrap.

29. As indicated earlier, when the float glass in wooden boxes is received and on opening if the glass is found broken, the same is rejected. The Commission has misdirected itself in arriving at a conclusion that the glass having defects after having been cut, beveled and washed are inspected and at that stage the goods are segregated. The applicant is not entitled to Modvat credit. It may be that from one sheet six pieces are to be manufactured as safety glass and if in a portion where bubble is noted it does not mean that five glass pieces cannot be manufactured. Before lamination the 6th piece which may be defective will be left out. From this it cannot be said that the entire sheet of glass was not under process of manufacture. Cutting, marking, breaking, grinding and washing with de-mineralised water, are different stages of manufacturing process. If the float glass is not found defective the same is cut into pieces of



required sizes and is marked as per requirements of customer. It is thereafter extra portion or unwarranted portion or a glass piece is removed by hand or machine. Thereafter edges of glass pieces are grinded. It is thereafter scientifically at certain temperature glass piece is washed, mechanically scrubbed, soaked by sponge rollers, passed through furnace for temperature process, dried through drying blowers with heaters installed inside the dryers. Thus input has undergone certain process of manufacture.

30. If a sheet is rejected or a piece of sheet is rejected, it does not mean that the sheet was not used in the manufacture of safety glass. It is at this juncture again we emphasise that sub-rule (4) of Rule 57A points out that credit is to be allowed on inputs used in the final product and all inputs used in or in relation to the manufacture of the final products, whether directly or indirectly and whether contained in the final product or not the department cannot deny credit of specified duty or even can vary on the ground that part of the inputs contained in any waste, refuse or by-product arising during the manufacture of final product or when the inputs have become waste
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31 during the course of manufacture of the final product whether or not such waste or refuse or by-product is exempt from the whole of the duty of excise leviable thereon or chargeable to nil rate of duty or not specified as a final product under rule 57A.

31. In substance, when the material i.e. glass sheet is used for the manufacturing process and merely because at a later point of time after the glass has undergone the process of manufacture, it was found defective and rejected or part of the input being found defective and rejected is no ground in view of the Rule 57A read with Rule 57D to deny the benefit.

32. In view of what is stated herein above, we find that the commission has misdirected itself in examining the question.

33. Considering the stage-wise process indicated earlier, it is clear that the process commences with loading of the float glass sheet on the float table where cutter is used to cut the glass to size. The process of manufacturing commences at this stage. Therefore, if at a subsequent stage before the process of lamination, the defect is noted, it cannot be said that the process of manufacturing

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did not commence. In view of this, we find substance in the petition and we find no substance in the submission made by the learned counsel for the revenue that it is not open for the Court to examine the matter. The Apex Court has pointed out in **Jyotendrasinhji v. S.I. Tripathi, (1993) 201 ITR 611** that finality clause contained in Section 245-I of the Income-tax Act, 1961 in relation to orders of the Settlement Commission under Section 245D(4), does not and cannot bar the jurisdiction of High Courts under Article 226 of the Constitution of India or the jurisdiction of the Supreme Court under Article 32 or under Article 136 and it remains the same i.e. to consider whether the order of Settlement Commission is contrary to the provision of the Income-tax Act and if so and whether it has prejudiced the petitioner. This of course, apart from the ground of bias or malice which constitute an independent and separate category. At page 622 the Court after examining the scheme in detail has pointed out that "it is true that finality clause contained in Section 245-I does not and cannot bar the jurisdiction of the High Court under Article 226 or the jurisdiction of this Court under Article 32 or Article 136 as the case may

be". The Court also examined that the order of Commission is in the nature of package deal and it may not be possible to dissect its order and that the assessee should not be permitted to accept what is favourable to him and reject what is not. It was also argued before the Apex Court that the Commission is not even required or obliged to pass a reasoned order. The provisions contained in the Income-tax Act in so far as Settlement Commission is concerned, are *pari materia* to the provisions contained in the Central Excise Act.

34. The Apex Court pointed out that in this context it is relevant to note that the principle of natural justice (*audi alteram partem*) has been incorporated in Section 245D itself. The sole overall limitation upon the Commission thus appears to be that it should act in accordance with the provisions of the Act. The scope of enquiry, whether by the High Court under Article 226 or by the Apex Court under Article 136 is also the same- whether the order of the Commission is contrary to any of the provisions of the Act and if so, apart from ground of bias, fraud and malice which, of course, constitute a separate and independent category, has it prejudiced the petitioner/appellant. The Court pointed out that

for all the above reasons it was also of the opinion that the only ground upon which the Court can interfere is that the order of the Commission is contrary to the provisions of the Act and that such contravention has prejudiced the petitioner.

35. Thus, it is very clear that the Settlement Commission has misdirected itself in considering that the claims had been accepted by the manufacturer and settled by the supplier of the float glass for arriving at a conclusion that the float glass was not used as input, though, it is clear from the record that after the manufacturing process commenced, and, before the final product was obtained the part being noticed as not up to the mark for safety glass was rejected. The claim cannot be denied on this ground.

36. In the result petition is allowed, and the Settlement Commission is directed to consider the matter afresh.

Bepreel
CHIEF JUSTICE

September 10, 2004.
~vsp

Badar Durrez Ahmed
BADAR DURREZ AHMED, J.

Date transferred
12/10/09