

CASE NO.:
Appeal (civil) 1767 of 2007

PETITIONER:
Commissioner of Central Excise, Mumbai- I

RESPONDENT:
M/s Bombay Dyeing & Mfg. Co.Ltd

DATE OF JUDGMENT: 08/08/2007

BENCH:
S. H. Kapadia & B. Sudershan Reddy

JUDGMENT:
J U D G M E N T

KAPADIA, J.

Interpretation of Notification No. 14/2002-CE arises for determination in this civil appeal filed by the Department. The facts giving rise to this civil appeal are as follows:

2. The assessee has two textile mills in Mumbai known as the Spring Mills and the Textile Mills. This civil appeal relates to the former. Spring Mills is a composite name of the mill in which there is a spinning section where yarn is spun from raw cotton, and a weaving section where grey fabrics is woven from such yarn. The grey fabrics woven in the Spring Mills are not processed at Spring Mills. Most of the grey fabrics manufactured by the assessee are processed by the Textile Mill though some quantity thereof is sold to third parties. In this civil appeal, we are concerned with the period 13.3.2002 to 15.9.2002. In this civil appeal, we are not concerned with quantification. That question is even today pending adjudication.

3. At the outset, we quote hereinbelow notification no. 14/2002-CE granting exemption, both full and partial to a range of goods. As stated above, in this civil appeal we are concerned with the item, namely, grey fabrics manufactured by the assessee. In this civil appeal, we are concerned with the interpretation of item 1 and item 2 of the table to the notification. "Notification No.14/2002-CE dated 01-Mar-2002

Processed textile fabrics \026 Effective rate of duty
Notification No. 11/2001-C.E. superseded.

In exercise of the powers conferred by sub-section (1) of section 5A of the Central Excise Act, 1944 (1 of 1944) read with sub-section (3) of section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957) and in supersession of the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 11/2001-Central Excise, dated the 1st March, 2001, published in the Gazette of India vide number G.S.R. 136 (E), dated the 1st March, 2001, except as respects things done or omitted to be done before such supersession, the Central Government being satisfied that it is necessary in the public interest so to do, hereby exempts excisable goods of the description specified in column (3) of the Table below and falling within the Chapter, heading No. or sub-heading No. of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), specified in the corresponding entry in column (2) of the said Table, from so much of the aggregate of, \026

(a) the duty of excise specified in the First Schedule to the said Central Excise Tariff Act; and

(b) the duty of excise specified in the First Schedule to the said Additional Duties of Excise (Goods of Special Importance) Act, (hereinafter referred to as the 'aggregate duty') as is in excess of an amount calculated at the rate specified in the corresponding entry in column (4) of the said Table, subject to the relevant conditions specified below the said Table, and referred to in the corresponding entry in column (5) of the said Table:

Provided that the aggregate duty of sixteen per cent. ad valorem leviable on the excisable goods specified in S. No. 9 of the Table below shall be apportioned equally between the duty leviable under the said Central Excise Act and the said Additional Duties of Excise (Goods of Special Importance) Act:

Provided further that-

(a) during the period commencing from the 1st day of March, 2002 and ending on the 28th day of February, 2005, the aggregate duty in respect of the goods specified against S.Nos. 2, 3, 4, 5, 6, 7, 8, 11, 13, 15 and 16, shall be further exempted in excess of three-fourths of the rate specified in the corresponding entry in column (4) of the said Table; and

(b) during the period specified in clause (a) above, the duty leviable on the excisable goods specified therein, shall be apportioned in the ratio 2:1 between the duty leviable under the said Central Excise Act and the said Additional Duties of Excise (Goods of Special Importance) Act.

Explanation I.- For the purposes of this notification, the rates specified in column (4) of the said Table are ad valorem rates, unless otherwise specified.

Explanation II.- For the purposes of the conditions specified below, textile yarns or fabrics shall be deemed to have been duty paid even without production of documents evidencing payment of duty thereon.

Explanation III.- For the purposes of the exemption under S.No. 5 of the Table,-

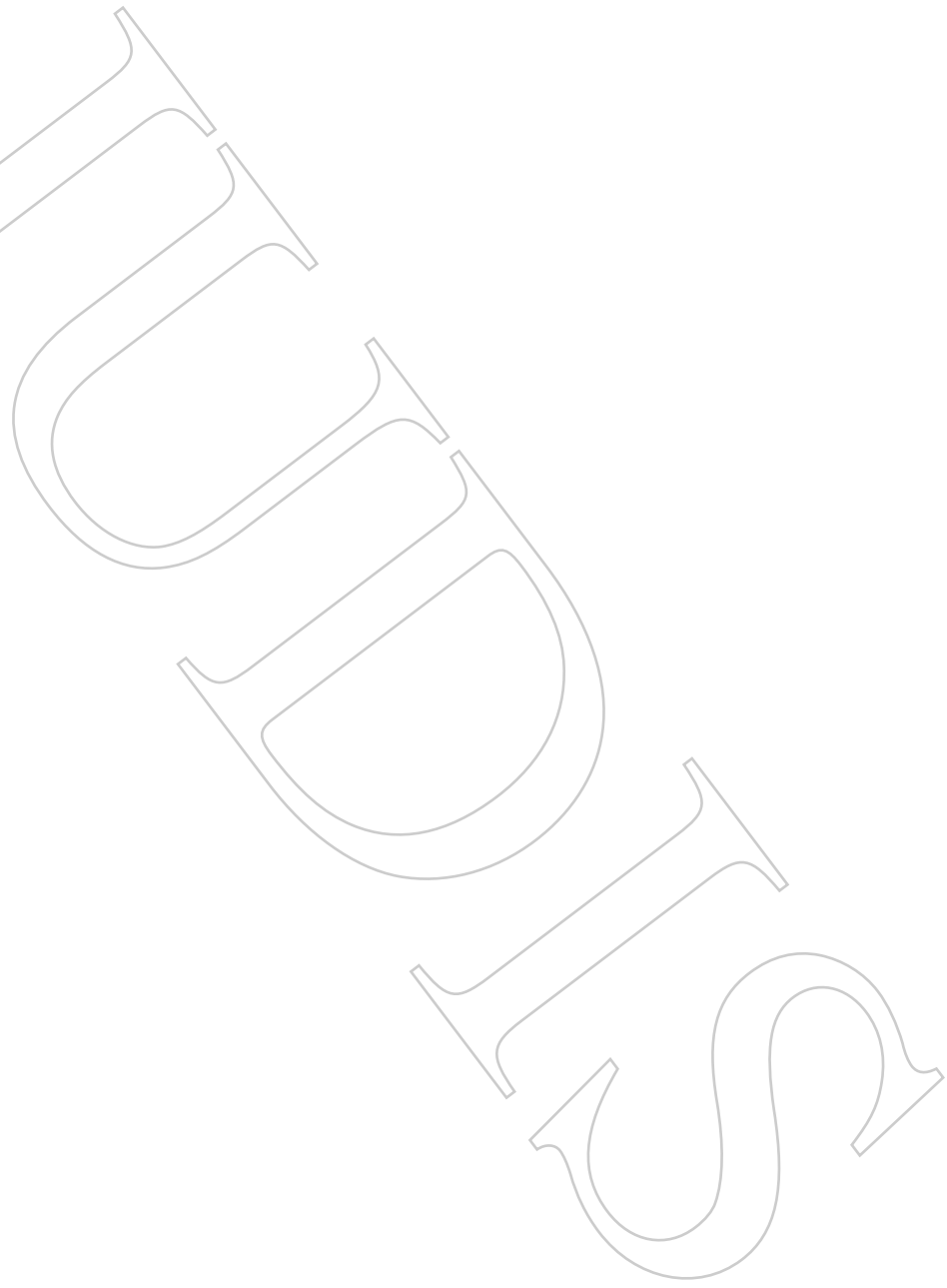
(i) the expression "independent processor" means a manufacturer who is engaged exclusively in the processing of fabrics with the aid of power and who has no proprietary interest in any factory engaged in the spinning of yarn of cotton or weaving of cotton fabrics; and

(ii) the value of the fabrics shall be equal to 40% of the value determined under section 4 of the Central Excise Act, 1944.

Table

S.No.
Chapter or heading

No., or sub-
heading
No.
Description
Rate
of
duty
Condition
(1)
(2)
(3)
(4)
(5)
1
5110.10, 5111.10,
5207.20, 5208.20,
5209.10, 5406.10,
5407.10, 5511.10,
5512.10, 5513.10,
5514.10, 5801.11
or 5802.51
Woven fabrics,
not subjected to
any process
Nil
1
2
5110.10, 5111.10,
5207.20, 5208.20,
5209.10, 5406.10,
5407.10, 5511.10,
5512.10, 5513.10,
5514.10, 5801.11
or 5802.51
Woven fabrics,
not subjected to
any process
16%
2
3
5207.10 or
5208.10
Denim fabrics,
whether or not
processed
16%
2 and 5
4
51.10, 51.11,
52.07, 52.08,
52.09, 54.06,
54.07, 55.11,
55.12, 55.13,
55.14, 5801.12,
5801.22, 5801.32,
5802.22, 5802.32,
5802.52
Woven fabrics,
subjected to any
process
16%
5
5
52.07, 52.08 or
52.09



Cotton fabrics woven on handlooms and processed with aid of power or steam by an independent processor approved in this behalf by the Government of India on the recommendation of the Development Commissioner for Handlooms.

16%

-

6

5801.21, 5801.31, 5802.21 or 5802.31

Woven fabrics, whether or not subjected to any process

16%

2 and 5

7

58.03

All goods

16%

2 and 5

8

5804.11 or

5804.12

All goods

16%

2 and 5

9

59.01

All goods

16%

-

10

6001.11, 6001.21, 6001.91, 6002.42 or 6002.92

Knitted or crocheted fabrics of cotton, not subjected to any process

Nil

1

11

6001.11, 6001.21, 6001.91, 6002.42 or 6002.92

Knitted or crocheted fabrics of cotton, not subjected to any process

16%
2
12
6001.11, 6001.21,
6001.91, 6002.42
or 6002.92
Knitted or
crocheted fabrics
of cotton,
subjected to any
process
Nil

3
13
6001.11, 6001.21,
6001.91, 6002.42
or 6002.92
Knitted or
crocheted fabrics
of cotton,
subjected to any
process

16%
4
14
6001.12, 6001.22,
6001.92, 6002.20,
6002.30, 6002.43
or 6002.93
Knitted or
crocheted
fabrics, other
than of cotton,
not subjected to
any process
Nil

1
15
6001.12, 6001.22,
6001.92, 6002.10,
6002.20,
6002.30, 6002.43
or 6002.93
Knitted or
crocheted
fabrics, other
than of cotton,
not subjected to
any process

16%
2
16
6001.12, 6001.22,
6001.92, 6002.10,
6002.20,
6002.30, 6002.43
or 6002.93
Knitted or
crocheted
fabrics, other
than of cotton,
subjected to any
process

16%
5

Condition

No.

Conditions

(1)

(2)

1

If made from textile yarns on which the appropriate duty of excise leviable under the First Schedule or the Second Schedule to the said Central Excise Tariff Act read with any notification for the time being in force or the additional duty of customs leviable under section 3 of the Customs Tariff Act, 1975, as the case may be, has been paid and no credit of the duty paid on inputs or capital goods has been taken under rule 3 or rule 11 of the CENVAT Credit Rules, 2002.

2

If made from textile yarns on which the appropriate duty of excise leviable under the First Schedule or the Second Schedule to the said Central Excise Tariff Act read with any notification for the time being in force or the additional duty of customs leviable under section 3 of the Customs Tariff Act, 1975, as the case may be, has been paid.

3

If made from knitted or crocheted textile fabrics of cotton, whether or not processed, on which the appropriate duty of excise leviable under the First Schedule to the said Central Excise Tariff Act and the Additional Duties of Excise (Goods of Special Importance) Act, read with any notification for the time being in force, or the additional duty of customs leviable under section 3 of the Customs Tariff Act, 1975, as the case may be, has been paid and no credit of the duty paid on inputs or capital goods has been taken under rule 3 or rule 11 of the CENVAT Credit Rules, 2002.

4

If made from knitted or crocheted textile fabrics of cotton, whether or not processed, on which the appropriate duty of excise leviable under the First Schedule to the said Central Excise Tariff Act and the Additional Duties of Excise (Goods of Special Importance) Act, read with any notification for the time being in force, or the additional duty of customs leviable under section 3 of the Customs Tariff Act, 1975, as the case may be, has been paid.

5

If made from textile fabrics, whether or not processed, on which the appropriate duty of excise leviable under the First Schedule to the said Central Excise Tariff Act and the Additional Duties of Excise (Goods of Special Importance) Act, read with any notification for the time being in force or the additional duty of customs leviable under section 3 of the Customs Tariff Act, 1975, as the case may be, has been paid." (emphasis supplied)

4. We also quote hereinbelow Section 11AB of the Central Excise Act, 1944;

"Interest on delayed payment of duty. - (1) Where any duty of excise has not been levied or paid or has been

short-levied or short-paid or erroneously refunded, the person who is liable to pay the duty as determined under sub-section (2), or has paid the duty under sub-section (2B), of section 11A, shall, in addition to the duty, be liable to pay interest at such rate not below [ten per cent.] and not exceeding thirty-six per cent per annum, as is for the time being fixed by the Central Government, by notification in the Official Gazette, from the first date of the month succeeding the month in which the duty ought to have been paid under this Act, or from the date of such erroneous refund, as the case may be, but for the provisions contained in sub-section (2), or sub-section (2B), of section 11A till the date of payment of such duty:

Provided that in such cases where the duty becomes payable consequent to issue of an order, instruction or direction by the Board under section 37B, and such amount of duty payable is voluntarily paid in full, without reserving any right to appeal against such payment at any subsequent stage, within forty-five days from the date of issue of such order, instruction or direction, as the case may be, no interest shall be payable and in other cases the interest shall be payable on the whole of the amount, including the amount already paid."

and, Rule 8(3) of the Central Excise Rules, 2002:

"If the assessee fails to pay the amount of duty by due date, he shall be liable to pay the outstanding amount along with interest at the rate specified by the Central Government vide notification under section 11AB of the Act on the outstanding amount, for the period starting with the first day after due date till the date of actual payment of the outstanding amount."

5. The assessee herein opted for exemption under notification no. 14/2002 under which grey fabrics, not subjected to any process, were chargeable to nil rate of duty subject to the condition that the said fabrics were made from textile yarn on which appropriate duty of excise stood paid and no credit for duty paid on inputs had been taken under CENVAT Credit Rules, 2002. However, the assessee was not in a position to ascertain the variety and quantity of yarn entering into the manufacture of export production of "grey fabrics" and grey fabrics meant for home consumption. The assessee was not in a position to pay duty on yarn at spindle stage. Therefore, they opted to pay duty on yarn on deferred basis at the time of clearance of grey fabrics for home consumption along with interest at the rate prescribed under Section 11AB of Central Excise Act, 1944 read with Rule 8(3) of Central Excise Rules, 2002. According to the Department, the assessee was liable to pay duty at the rate of 12% under item 2 of the table to notification no. 14/2002-CE. According to the Department, the assessee had failed to comply with twofold conditions mentioned in item 1 of the table to the said notification, namely, payment of duty on yarn at the spindle stage and, secondly, no credit of duty paid on inputs had been taken under CENVAT Credit Rules, 2002. In other words, according to the Department, the assessee had failed to pay duty on yarn at the spindle stage and, secondly, it had taken credit for the duty paid on inputs under CENVAT Credit Rules, 2002, therefore, according to the Department, the assessee was not entitled to claim nil rate of duty as, according to the Department, the assessee had failed to comply with the aforesaid twofold conditions mentioned in item 1 of the table to the said notification. According to the Department, the assessee herein had specifically applied for clarification from the Department as to whether the assessee was entitled to claim nil rate

of duty under the said Notification since it was not in a position to ascertain the variety and quantity of yarn going into the manufacture of grey fabrics. This request for clarification was expressly turned down by the Department and despite refusal by the Department to the request made by the assessee to pay duty on yarn at the time of clearance of grey fabrics, the assessee reversed the CENVAT credit, which, according to the Department, contravened the provisions of the said notification. Accordingly, the assessee was held liable to pay duty at the rate of 12% under item 2 of the table to notification no. 14/2002-CE and, consequently, a demand was raised for differential duty for the period 13.3.2002 to 15.9.2002 on the ground that the assessee had failed to pay the duty on the yarn at the spindle stage. The demand was confirmed by the Deputy Commissioner. However, in appeal, the Commissioner (A) allowed the assessee the payment of duty on yarn at the time of clearance of grey fabrics instead of payment of duty on yarn at the spindle stage. In this connection, the Commissioner (A) relied upon Trade Notice No. 40/96. This order of the Commissioner (A) has been confirmed by the Tribunal, hence, the Department has come to this Court by way of this civil appeal.

6. Shri Vikas Singh, learned Additional Solicitor General, appearing on behalf of the Department submitted that notification no. 14/2002-CE dated 1.3.2002 is an exemption notification. Learned counsel cited several authorities in support of his contention that the conditions mentioned in the exemption notification should be strictly followed. Learned counsel contended that in the table to the said notification, grey fabrics falling under Chapter Heading 5110.10 fell under item no. 1 as also under item no. 2. However, if it fell under item no. 1 and if the assessee was to fulfil the twofold conditions referred to above then the rate of duty was nil whereas if the said item fell in item no. 2 then it would attract the rate of duty @ 12%. Learned counsel submitted that, in the present case, the assessee was not entitled to claim nil rate of duty on the grey fabrics manufactured from yarn as the assessee has not fulfilled the two conditions mentioned in item no. 1. According to the learned counsel, the assessee was required to pay duty on the yarn prior to its claim for exemption. Secondly, according to the learned counsel, the assessee was required to show as a second condition that it had not availed of credit for the duty paid on inputs under CENVAT Credit Rules, 2002 prior to its claim for exemption. Since these two conditions were not fulfilled, the assessee was not entitled to claim nil rate of duty. Learned counsel submitted that the above two conditions were pre-conditions. They were conditions required to be fulfilled prior to making of the claim for exemption. Learned counsel submitted that since notification no. 14/2002-CE was an exemption notification, it was not open to the assessee to submit that it had substantially complied with the aforesaid two conditions. Learned counsel further submitted that, in the present case, despite refusal by the Department, the assessee had reversed subsequently the CENVAT credit. In this connection, learned counsel submitted that the assessee had requested the Department to allow the assessee to defer payment of duty on yarn from the spindle stage to the stage of clearance of the grey fabrics for home consumption. This was refused by the Department. Despite refusal, the assessee proceeded to reverse subsequently the CENVAT credit availed of by the assessee earlier and, therefore, in the present case, the Tribunal ought not to have allowed to the assessee the benefit of exemption. Learned counsel further submitted that, in the present case, we are concerned with the period 13.3.2002 to 15.9.2002. During this period, according to the learned counsel, Rule 49A was not in force. Learned counsel pointed out that originally we had Central Excise Rules, 1944. These Rules were repealed by Central Excise Rules, 2001, which, in turn, were repealed by Central Excise Rules, 2002. Learned counsel pointed out that since we are concerned with the period 13.3.2002 to 15.9.2002 there was no question of invoking Rule 49A of the earlier Rules as the earlier Rules were repealed and substituted by Central Excise Rules, 2002. In other words, according to the learned counsel, it was not open to the Appellate Authority and the Tribunal to rely upon Rule 49A of Central Excise Rules, 1944 read with Trade Notice No. 40/96. According to the learned counsel, Trade Notice No. 40/96 was based on Rule 49A of Central Excise Rules, 1944

under which deferment of duty payable on yarn along with interest could be postponed to the grey fabrics stage. That, since Rule 49A was not applicable once the Central Excise Rules, 2002 came into force, it was not open to the Commissioner (A) as well as the Tribunal to place reliance on Rule 49A of the 1944 Rules read with trade notice no. 40/96. Learned counsel further submitted that the judgment of the Allahabad High Court in the case of Hello Minerals Water (P) Ltd. v. Union of India reported in 2004 (174) E.L.T. 422 was also not applicable to the facts of the present case as the said judgment did not deal with the question of exemption.

7. Shri Atul Setalvad, learned senior counsel appearing on behalf of the assessee submitted that Spring Mills is a composite mill, meaning thereby that there is a spinning section where yarn is spun from cotton and a weaving section where grey fabrics is woven from such yarn. Learned counsel submitted that in certain cases it become difficult for a manufacturer to know at the spindle stage whether grey fabrics were to be exported or cleared for home consumption. According to the learned counsel, a manufacturer could pay duty on yarn in such cases not when the yarn stood cleared but when the fabric was cleared. It is under these circumstances that an option was given over the years under trade notice no. 40/96 allowing the assessee to defer payment of duty on yarn from spindle stage to the grey fabrics clearance stage subject to payment of interest for such deferment. Learned counsel submitted that trade notice no. 40/96 did not flow from Rule 49A of the 1944 Rules. The said trade notice was based on certain unforeseen difficulties in the operations. It was issued taking into account the trade representations. Learned counsel submitted that till today the said trade notice has not been revoked. Learned counsel further submitted that there was no difference whatsoever between item no. 1 and item no. 2 of the table to notification no. 14/2002-CE. Both dealt with grey fabrics. However, item no. 1 attracted nil rate of duty on fulfilment of twofold conditions, namely, payment of duty by the assessee for claiming exemption and that assessee should not have taken credit for duty paid on inputs under CENVAT Credit Rules, 2002. Learned counsel submitted that yarn is an input used in the manufacture of grey fabrics. Learned counsel urged that the said notification no. 14/2002-CE was an exemption notification. Learned counsel submitted that exemption was in respect of grey fabrics. Learned counsel submitted that duty was payable on yarn, however, in certain circumstances, the assessee was entitled to claim deferment of duty from spindle stage to the stage of clearance of grey fabrics subject to payment of interest under Section 11AB of Central Excise Act, 1944 read with Rule 8(3) of Central Excise Rules, 2002. Learned counsel submitted that in the present case it is not in dispute that duty on yarn became payable at the spindle stage, however, the assessee has deferred the payment to the stage of clearance of grey fabrics and, therefore, it cannot be said that the assessee has not complied with the first condition of item no. 1 to the table attached with the notification. Similarly, learned counsel submitted that the assessee, in the present case, has reversed CENVAT credit and the assessee has not taken credit on account of such reversal. Learned counsel submitted that whenever duty is paid on the input (yarn) the assessee is entitled to credit under the CENVAT Credit Rules, 2002, however, availment of credit takes place later on when the assessee makes adjustments of duty paid on input against duty paid on final product (grey fabrics). In the present case, before the account could be debited and before the assessee could avail of CENVAT credit, the assessee has reversed CENVAT credit which would amount to the assessee not taking credit for duty paid on input (yarn). Learned counsel submitted that the assessee was free to reverse the credit before utilization of such credit. In the circumstances, it was urged that both the conditions of item no. 1 of the table to the notification stood fulfilled and, therefore, the assessee was entitled to claim the benefit of exemption at nil rate of duty in this case.

8. There is no merit in this civil appeal. Under the notification, mode of payment has not been prescribed. Further, exemption is given to the final product, namely, grey fabric under the Central Excise Act, 1944, levy is on manufacture but payment is at the time of clearance. Under the Act, payment

of duty on yarn had to be at the spindle stage. However, when we come to the Exemption Notification no. 14/2002-CE, the requirement was that exemption on grey fabrics was admissible subject to the assessee paying duty on yarn before claiming exemption and subject to the assessee not claiming CENVAT credit before claiming exemption. The question of exemption from payment of duty on grey fabrics arose on satisfaction of the said two conditions. In this case, payment of duty on yarn on deferred basis took place before clearance of grey fabrics on which exemption was claimed. Therefore, payment was made before the stage of exemption. Similarly, on payment of duty on the input (yarn) the assessee got the credit which was never utilized. That before utilization, the entry has been reversed which amounts to not taking credit. Hence, in this case, both the conditions are satisfied. Hence item no. 1 of the table to notification no. 14/2002-CE would apply and accordingly the grey fabrics would attract nil rate of duty.

9. In conclusion on the question of reversal of credit we quote hereinbelow the following para from the judgment of this Court in Collector of Central Excise v. Dai Ichi Karkaria Ltd. reported in 1999(112)E.L.T. 353.

"It is clear from these Rules, as we read them, that a manufacturer obtains credit for the excise duty paid on raw material to be used by him in the production of an excisable product immediately it makes the requisite declaration and obtains an acknowledgement thereof. It is entitled to use the credit at any time thereafter when making payment of excise duty on the excisable product. There is no provision in the Rules which provides for a reversal of the credit by the excise authorities except where it has been illegally or irregularly taken, in which event it stands cancelled or, if utilised, has to be paid for. We are here really concerned with credit that has been validly taken, and its benefit is available to the manufacturer without any limitation in time or otherwise unless the manufacturer itself chooses not to use the raw material in its excisable product. The credit is, therefore, indefeasible. It should also be noted that there is no correlation of the raw material and the final product; that is to say, it is not as if credit can be taken only on a final product that is manufactured out of the particular raw material to which the credit is related. The credit may be taken against the excise duty on a final product manufactured on the very day that it becomes available."

10. Accordingly, the civil appeal filed by the Department fails and the same is dismissed with no order as to costs.