

**Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad**

REGIONAL BENCH- COURT NO. 3

Excise Appeal No. 13518 of 2013-DB

(Arising out of OIA-CCEA-SRT-I-SSP-246-2013-14 dated 18/07/2013 passed by Commissioner of Central Excise, Customs and Service Tax-SURAT-I(Appeal))

Priyanka Developers Pvt Ltd

.....Appellant

Block No. 523, N.H. No. 8,
Village- Palsana,
Surat, Gujarat

VERSUS

C.C.E. & S.T.-Surat-I

.....Respondent

New Building...Opp. Gandhi Baug,
Chowk Bazar, Surat,
Gujarat - 395001

APPEARANCE:

Shri S.Suriyanarayanan, Advocate for the Appellant

Shri Rajesh K Agarwal, Superintendent (AR) for the Respondent

**CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. C.L.MAHAR**

Final Order No. A/ 11593 /2023

DATE OF HEARING: 24.03.2023
DATE OF DECISION: 24.07.2023

RAMESH NAIR

The brief facts of the case are that the appellant were issued show cause notice dated 15.12.2011 proposing to disallow and recovering cenvat credit of Rs. 4,42,539 under Rule 14 of the Cenvat Credit Rules, 2004 read with Section 11 A (1) of Central Excise Act, 1944. It also proposed to recover interest under Rule 14 of Cenvat Credit Rules, 2002 read with erstwhile Section 11 AB of the Central Excise, 1944. However, equal penalty amounting to Rs. 4,42,539/- was also proposed under Rule 15 (2) of Cenvat Credit Rules, 2004 read with Rule 25 of Central Excise Rules, 2002. For the above proposal the contention in the show cause notice is that the appellant while availing the Notification No. 30/2004-CE though reversed the cenvat credit attributed to input, input in process and input contained in the finished

goods. However, after such reversal there was a balance of cenvat credit remained unutilized to the tune of Rs. 1,02,08,846/- which the appellant have kept on carrying forward the same every month. Out of the said amount the appellant utilized the amount of Rs. 4,42,539/- for payment of excise duty on removal of input namely POY as well as duty on paper tubes got manufactured on job work. The case of the department is that while availing the exemption Notification No. 30/2004- CE dated 09.07.2004, the appellant was not entitled to utilize the cenvat credit lying unutilized after reversal. Therefore, the amount utilized is required to be recovered. The show cause notice has been adjudicated by the Adjudicating Authority whereby the demand under Rule 14 was confirmed along with interest and penalty. Being aggrieved by the Order-In-Original the appellant filed an appeal before the Commissioner (Appeals). The Learned Commissioner (Appeals) concurring with the view taken by the Adjudicating Authority upheld the Order-In- Original and rejected the appeal of the appellant. Therefore, the present appeal.

2. Shri S. Suriyanarayanan, learned Counsel appearing on behalf of the appellant submits that the issue is no longer res-integra in the light of the following judgments:-

- J.Jayalalitha Vs. Union of India and ANR -1999 (5) TMI 594-SC
- Firoj Farukee Vs. The State of West Bengal -1972(2) TMI 107 -SC
- Ranchhodas Atmaram Vs. The Union of India - 1961 (2) TMI 72 -SC
- M/s. Kanchan India Ltd Vs. CCE, Udaipur - 2019 (1) TMI 310 - CESTAT New Delhi
- CCE , Udaipur Vs. M/s. Sitaram India Limited - 2018 (10) TMI 11 - CESTAT New Delhi
- Synfab Sales and Industries Ltd Vs. CCE & ST -SILVASA - 2022 (1) TMI 259 -CESTAT Ahmedabad

- M/s. Patodia Filaments Pvt Ltd , Shivkaran Choudhary VS. CCE & ST – VAPI- 2019 (4) TMI 435- Ahmedabad.
- M/s. Wearit Global Ltd Vs. CCE, Udaipur - 2018 (8) TMI 1094 – Cestat New Delhi
- Jansons Textile Processors Vs. Commissioner of Central Excise & ST Salem -2018 (7) TMI 850 – CESTAT Ahmedabad
- M/s. Supertex Industries Ltd , Shri Balkrishna Sharma Vs. Commissioner , Central Excise & Service Tax, Vapi – 2015 (11) TMI 1337 – CESTAT Ahmedabad.

2.1 He submits that since the exemption Notification No. 30/2004-CE is conditional one, the unutilized cenvat credit remitted after reversal as provided under Rule 11 (3) of the Cenvat Credit Rule, 2004, the same can be utilized as upheld in the above judgments.

3. Shri Rajesh K Agarwal, Learned Superintendent (AR) appearing on behalf of the Revenue reiterates the finding of the impugned order.

4. We have carefully considered the submission made by both sides and perused the records. We find that there is no dispute that the appellant have availed the exemption Notification No. 30/2004-CE which contains the following condition:-

"Provided that nothing contained in this Notification, which shall apply to the goods in respect of which credit of duty on inputs has been taken under the provisions of Cenvat Credit Rules, 2004."

4.1 Accordingly, the notification does not provide absolute exemption but it is the conditional one. Rule 11 (3) of Cenvat Credit Rules, provides as under:-

"Rule 11 (3) A manufacturer or producer of a final product shall be required to pay an amount equivalent to the CENVAT credit, if any, taken by him in respect of inputs received for use in the manufacture of the said final product and is lying in stock or in process or is contained in the final product lying in stock, if, -

(i) he opts for exemption from whole of the duty of excise leviable on the said final product manufactured or produced by him under a notification issued under section 5A of the Act; or

(ii) the said final product has been exempted absolutely under section 5A of the Act, and after deducting the said amount from the balance of CENVAT credit, if any, lying in his credit, the balance, if any, still remaining shall lapse and shall not be allowed to be utilized for payment of duty on any other final product whether cleared for home consumption or for export, or for payment of service tax on any output service, whether provided in India or exported."

4.2 As per the clause (i) of Section 11 (3), assessee who opts for exemption is required to reverse the credit on input, input in process and input contained in the finished goods. As per the clause (ii) of Section 11 (3) if the assessee avail an absolute exemption notification in that case the remaining unutilized amount after reversal in terms of clause (i) shall stand lapse. As per the above provision, only in a case where the exemption which is opted for, if it is absolute exemption, the remaining amount of cenvat credit after reversal as per clause (i) shall lapse, whereas if the exemption is not absolute only requirement is to reverse the credit attributed to input as such, input in process and input contained in the finished goods lying on the date of opting of exemption notification. In the present case since the Notification No. 30/2004-CE is undisputedly a conditional one therefore clause (ii) of the Rule 11 (3) is not applicable. Consequently the remaining amount of unutilized cenvat credit shall not lapse. In this case the appellant has utilized an amount of Rs. 4,42,539/- out of unutilized cenvat credit which is not barred under any of the provision. The same issue has been considered in various judgments of the Tribunal cited by the learned counsel. In the case of Synfab Sales & Industries Ltd (Supra), this Tribunal dealing with the absolutely identical issue passed the following order:-

"4. We have carefully considered the submissions made by both the sides and perused the records. We find that the limited issue to be decided by us is that when the appellant has availed the exemption Notification No.

30/2004-CE dated 09.07.2004 which prescribed the nil rate of duty but bearing condition that no Cenvat credit should be availed whether Cenvat credit lying in balance after reversal on inputs, WIP and inputs contained finished goods, shall lapse in terms of Rule 11(3). For the ease of reference we reproduced Rule 11(3):-

"[(3) A manufacturer or producer of a final product shall be required to pay an amount equivalent to the CENVAT credit, if any, taken by him in respect of inputs received for use in the manufacture of the said final product and is lying in stock or in process or is contained in the final product lying in stock, if, -

(i) he opts for exemption from whole of the duty of excise leviable on the said final product manufactured or produced by him under a notification issued under section 5A of the Act; or

(ii) the said final product has been exempted absolutely under section 5A of the Act, and after deducting the said amount from the balance of CENVAT credit, if any, lying in his credit, the balance, if any, still remaining shall lapse and shall not be allowed to be utilized for payment of duty on any other final product whether cleared for home consumption or for export, or for payment of service tax on any output service, whether provided in India or exported."

From the plain reading of the above rule 11(3) (i) (ii) it is clear that in terms of Clause (ii) of Rule 11(3) the balance credit shall lapse only if the assessee availed an exemption which is absolutely and exempted which is other than absolute covered under clause (i) of Rule 11(3). In case of clause (i) of Rule 11(3) no similar condition of lapsing of balance cenvat credit is provided. In the present case undisputedly the appellant have availed the benefit of Notification No 30/2004-CE which is a conditional one and the said condition prescribed is provided that nothing contained in this notification shall apply to the goods in respect of which credit of duty on inputs has been taken under the provision of the Cenvat Credit Rules, 2002.

4.1 Since the Notification No. 30/2004-CE dated 09.04.2007 contains the above condition the notification is not absolutely therefore, the situation of the appellant is covered under Rule 11(3)(i) according to which the appellant is required to pay an amount equivalent to Cenvat Credit, if any taken by him in respect of inputs received for used in the manufacture of said final product and is lying in stock or in process or is contained in the final product or lying in stock but if the Notification is absolutely having no condition in terms of Rule 11(3)(ii) the remaining credit shall lapse and shall not be allowed to be utilized. The case of the appellant is covered by rule 11(3) (i) therefore, the remaining credit shall not lapse. One of the contention by the adjudicating authority is that even though the argument of the appellant that the Cenvat credit balance will lapse as per Rule 11(3) only, the product is exempted absolutely is accepted there is no dispute that Notification No. 30/2004-CE has been issued under section 5A of the Central Excise Act, 1944 and the appellants having opted for the same, cannot escape from the obligation relating reversal of balance Cenvat Credit. The relevant section 5A is reproduced below:-

"[5A. Power to grant exemption from duty of excise.(1)If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by notification in the Official Gazette, exempt generally either absolutely or subject to such conditions (to be fulfilled before or after

removal) as may be specified in the notification, excisable goods of any specified description from the whole or any part of the duty of excise leviable thereon:

Provided that, unless specifically provided in such notification, no exemption therein shall apply to excisable goods which are produced or manufactured

(i) in a [free trade zone [or a special economic zone]] and brought to any other place in India; or

(ii) by a hundred per cent export-oriented undertaking and [brought to any other place in India].

Explanation. In this proviso, ["free trade zone" [, special economic zone]] and "hundred per cent. export-oriented undertaking" shall have the same meanings as in Explanation 2 to sub-section (1) of section 3.

[(1A) For the removal of doubts, it is hereby declared that where an exemption under sub-section (1) in respect of any excisable goods from the whole of the duty of excise leviable thereon has been granted absolutely, the manufacturer of such excisable goods shall not pay the duty of excise on such goods.]

.....

In the aforesaid section 5A in Sub-section (1) exemption is of two category one is exemption which exempt the goods absolutely and other is subject to such condition as specified in the Notification. In terms of Sub-section (1A) which makes clear distinction that in case of exemption granted absolutely the manufacturer of excisable goods shall not have any option except to pay the duty. The only option is to avail the exemption and no duty shall be paid. Therefore there is a clear distinction between an absolute exemption and conditional exemption. Therefore, the contention of the adjudicating authority that since the exemption notification was issued under section 5A the appellant is otherwise required to pay balance credit is of no substance and has no basis.

4.2 We find that this issue has been considered by the tribunal time and again and after interpreting Rule 11(3) (i) and (ii) came to conclusion that in case of conditional notification the assessee is not required to lapse the remaining credit after reversal on input as such, input in process and input contained in finished goods. The relevant judgments are reproduced below:-

- **CCE Vs. Orient Syntex- 2020 (40) GSTL 56 (T)**

"5. We find that there is no dispute on the fact that the respondent has opted for exemption Notification No. 30/2004-C.E., which carries the following conditions :-

"Provided that nothing contained in this Notification, which shall apply to the goods in respect of which credit of duty on inputs has been taken under the provisions of Cenvat Credit Rules, 2004."

6. As per the above condition, the exemption Notification No. 30/2004-C.E. is not an absolute exemption. The provision for lapsing of credit is provided in Rule 11(3).

" (3) A manufacturer or producer of a final product shall be required to pay an amount equivalent to the Cenvat credit, if any, taken by him in respect of inputs received for use in the manufacture of the said final product and is lying in stock or in process or is contained in the final product lying in stock, if, -

- (i) he opts for exemption from whole of the duty of excise leviable on the said final product manufactured or produced by him under a notification issued under Section 5A of the Act; or
- (ii) the said final product has been exempted absolutely under Section 5A of the Act, and after deducting the said amount from the balance of Cenvat credit, if any, lying in his credit, the balance, if any, still remaining shall lapse and shall not be allowed to be utilized for payment of duty on any other final product whether cleared for home consumption or for export, or for payment of service tax on any output service, whether provided in India or exported."

7. On the plain reading of the above Rule 11(3)(i) (ii), it is clear that as per sub-clause (2), the credit shall be lapsed only if the exemption under the Notification is absolute that means in case of conditional Notification the provision of lapsing of credit will not apply. This issue has been considered by this Tribunal in various judgments.

7.1 In case of Patodia Filaments Pvt. Ltd. (supra), the Tribunal has observed as under :-

"6. Heard both the sides and perused the records. We find that the notification No. 30/2004-C.E., dated 9-7-2004 is not an absolute notification but a conditional notification issued under Section 5A. The notification has the condition of non-avilment of Cenvat credit. The sub-rule (3)(i) and (ii) of Rule 11 of the CCR, 2004 are separate. In the present case the sub-rule 3(i) would thus apply as per which the manufacturer is required to pay an amount equivalent to the Cenvat credit in respect of inputs used in the manufacture of said final product and is lying in stock or in process or is contained in final product lying in stock. In the present case all the conditions enumerated under sub-rule 3(i) has been followed by the Appellant and he is not required to reverse the entire credit lying in balance on the date of opting Notification No. 30/2004-C.E., dated 9-7-2004. Therefore, the balance credit is not liable to be reversed. For the same reason the credit utilised by him for clearance of finished goods or capital goods. We also find that on similar issues in the case of Wearit Global Ltd.- 2018 (8) TMI 1094- CESTAT, Janson Textile Processors- 2018 (7) TMI 850-CESTAT-Chennai and Sitaram India Ltd.- 2018 (10) TMI 11-CESTAT-New Delhi, the credit stands allowed to the manufacturer.

7. We, therefore, allow the appeals filed by both the Appellants with consequential reliefs, if any. Revenue's appeal being involved the amount less than Rs. 20 Lacs is dismissed on the ground of Government's litigation policy instruction F.No. 390/Misc/116/2017-JC, dated 11-7-2018."

7.2 In the case of Kanchan India Ltd.(supra), the Co-ordinate Bench of CESTAT, Delhi has taken the following view :-

6. After going through the impugned order and appeal papers, we are of the considered [view] that similar view has been taken by the various coordinate benches, which is as under :

3. Ld. Advocate for the appellant while relying upon the decision of Jansons Textile Processors vs. Commissioner, Central Excise & ST Salem- 2018 (7) TMI 850 (CESTAT), Chennai has submitted that the present case is squarely covered under the said decision. Actually Rule 11 sub-rule (1) of CCR is applicable to him. It is impressed upon that decision under challenge has wrongly relied upon Rule 11 sub-rule (2) of CCR

while denying utilization of the unutilized credit with the appellant. Order is accordingly prayed to be set aside and appeal is prayed to be allowed.

4. Ld. DR while justifying the impugned order has impressed upon findings in para 21.2 thereof. It is impressed upon that the adjudicating authority has clearly explained about the applicability of Rule 11(2) in the present case. Appeal is accordingly prayed to be rejected.

5. After hearing both the parties, we are of the opinion that in the present case the appellant has opted for exemption as per the Notification No. 30/2004-C.E. where the exemption is conditional. As per Rule 11(3)(ii) CCR, Cenvat Credit balance will lapse only if the product is exempted absolutely under Section 5A of Central Excise Act. But since the Notification No. 30/2004-C.E., dated 9-7-2004 is a conditional notification, hence only Rule 11(3)(i) of CCR would apply which does not mandate any such lapsing.

6. We draw our support from the decision of CESTAT Chennai in the case of Janson Textile Processors vs. Commissioner of Central Excise & ST, Salem wherein it was held as follows :-

5.1 The core issue that comes up for decision is whether the transitional provisions contained in sub-rule (3) of Rule 11 will be applicable to both sub-rules 3(i) and 3(ii). For better understanding, the relevant provisions relating to manufacturers are reproduced as under :-

RULE 11. Transitional provision. -

" (3) A manufacturer or producer of a final product shall be required to pay an amount equivalent to the Cenvat credit, if any, taken by him in respect of inputs received for use in the manufacture of the said final product and is lying in stock or in process or is contained in the final product lying in stock, if,

(i) he opts for exemption from whole of the duty of excise leviable on the said final product manufactured or produced by him under a notification issued under Section 5A of the Act; or

(ii) the said final product has been exempted absolutely under Section 5A of the Act, and after deducting the said amount from the balance of Cenvat credit, if any, lying in his credit, the balance, if any, still remaining shall lapse and shall not be allowed to be utilized for payment of duty on any other final product whether cleared for home consumption or for export, or for payment of service tax on any output service, whether provided in India or exported.

5.2 It is pertinent to note that the sub-rule 3(i) and sub-rule 3(ii) are separated by a semicolon (;) followed by the disjunctive, 'or'. The use of semicolon (;), the punctuation mark is to separate two closely related independent clauses, 'or' is a particle used to connect words, phrases or classes representing alternatives [J. Jayalalitha vs. UOI- (1999) 5 SCC 138]. Only if the phrasing of the legal provision is such that in actuality 'and' is intended, should it be examined whether the alternatives separated by 'or' are not mutually exclusive. The Courts may construe 'or' as 'and', only if they find from the context that the wrong word must have been used. [Ranchhoddas Atmaram vs. UOI, AIR 1961 SC 935; Firoj Farukee vs. State of West Bengal, AIR 1972 SC 2141] . However, in respect of the sub-rule 3(i) and sub-rule 3(ii) *ibid*, there should not be any such confusion or doubt, since those two sub-rules are separated not by just a particle 'or' but also by a semicolon (;), thus creating an additional wall for conveying mutual exclusivity between the two sub rules. There is also no basis for suggesting that the use of 'or' between these sub-rules conveys the meaning 'or both'. For example, to be able

to impose both a fine and a penalty, one would need to add 'or both' to the end of the phrase. That surely is not the case here.

5.3 Viewed in this context, it is but obvious that the legislature intended the said sub-rules 3(i) and 3(ii) to be two distinct and separate alternatives, with distinctively different qualifying factors and conditionalities.

5.4 In sub-rule 3(i), the assessee has an option to avail of a particular notification or otherwise; when such assessee takes such option, he will be required to pay an amount equivalent to Cenvat credit, if any,

.....

6. In the event, the findings and decision of the lower appellate authority to the contrary in the impugned order is not on sound legal footing. The impugned order then cannot sustain and will require to be set aside, which we hereby do. Appeal is allowed with consequential benefits, if any, as per law.

7. Following these 2 decisions and indulging the facts at length, we are of the considered opinion that the ratio laid down in the judgments are squarely applicable in this case, and therefore, we allow the appeal."

7. After going through the facts of the case which is similar, to the above we propose to apply the same in case at hand, we allow the appeal.

8. In view of the above judgments, it is settled that after reversal of credit in respect of input, input in process and input contained in final products whatever balance is left shall lapse only when the Notification is unconditional. As regards, the judgment relied upon by the Learned Authorised Representative, on careful consideration, we find that the issue involved in such case was eligibility of exemption Notification No. 30/2004-C.E. Though some observation was made by the Hon'ble Bench, however, no final decision was given on the said issue, as the said issue was not the subject matter of the appeal.

9. As regards the judgment in the case of Supertex Industries Ltd. (supra) relied upon by the Learned Authorized Representative, the same is not directly applicable in the facts and circumstances of the present case and the same is distinguished. The impugned order is upheld and the Revenue's appeal is dismissed"

• **Jansons Textile Processors v. Commissioner -2018 (7) TMI 850- (T)**

"5.1 The core issue that comes up for decision is whether the transitional provisions contained in sub-rule (3) of Rule 11 will be applicable to both sub-rule 3 (i) and 3 (ii). For better understanding, the relevant provisions relating to manufacturers are reproduced under :

"RULE:-11.Tansitional provision

....

(3) A manufacturer or producer of a final product shall be required to pay an amount equivalent to the CENVAT credit, if any, taken by him in respect of inputs received for use in the manufacture of the said final product and is lying in stock or in process or is contained in the finalproduct lying in stock, if, -

(i)he opts for exemption from whole of the duty of excise leviable on the said final product manufactured or produced by him under a notification issued under section 5A of the Act; or

(ii) the said final product has been exempted absolutely under section 5A of the Act, and after deducting the said amount from the balance of CENVAT credit, if any, lying in his credit, the balance, if any, still remaining shall lapse and shall not be allowed to be utilized for payment of duty on any other final product whether cleared for home consumption or for export, or for payment of service tax on any output service, whether provided in India or exported."

*5.2 It is pertinent to note that the sub-rule 3 (i) and sub-rule 3 (ii) are separated by a semicolon (;) followed by the disjunctive "or". The use of semicolon (;), the punctuation mark is to separate two closely related independent clauses. "Or" is a particle used to connect words, phrases or classes representing alternatives [J. Jayalalitha Vs UOI - (1999) 5 SCC 138]. Only if the phrasing of the legal provision is such that in actuality "and" is intended, should it be examined whether the alternatives separated by 'or' are not mutually exclusive. The Courts may construe 'or' as 'and', only if they find from the context that the wrong word must have been used. [Ranchhoddas Atmaram v. UOI, AIR 1961 SC 935; Firoj Farukee v. State of West Bengal, AIR 1972 SC 2141] . However, in respect of the sub-rule 3 (i) and sub-rule 3 (ii) *ibid*, there should not be any such confusion or doubt, since those two sub-rules are separated not by just a particle 'or' but also by a semicolon (;), thus creating an additional wall for conveying mutual exclusivity between the two sub rules. There*

is also no basis for suggesting that the use of 'or' between these sub-rules

conveys the meaning 'or both'. For example, to be able to impose both a fine and a penalty, one would need to add 'or both' to the end of the phrase. That surely is not the case here.

5.3 Viewed in this context, it is but obvious that the legislature intended the said sub rules 3 (i) and 3 (ii) to be two distinct and separate alternatives, with distinctively different qualifying factors and conditionality.

5.4 In sub rule 3 (i), the assessee has an option to avail of a particular notification or otherwise; when such assessee takes such option, he will be required to pay an amount equivalent to cenvat credit, if any,

.. taken by him in respect of inputs received for use in the manufacture of the final product and is lying in stock

.. or in process

.. or is contained in the final product lying in stock.

*There is no other requirement that the assessee falling within the scope of sub-rule 3 (i) will be required further to do. On the other hand, sub-rule (3) (ii) *ibid* will cover the situation where the said final product has been exempted 'absolutely' under Section 5A *ibid*.*

*5.5 Sub-rule (3) (i) *ibid* will apply when the assessee opts for an exemption from the whole of duty of excise leviable under a notification issued under Section 5A of the Central Excise Act, 1944. Sub-rule (3) (ii) *ibid* will be attracted only to those assessees who are confronted with absolute exemption in respect of final product/s manufactured by them, in which case the entire balance of cenvat credit lying in his account shall*

lapse and the same shall not be allowed to be utilized for payment of duty for home consumption or for export.

5.6 Hence, in sub rule 3 (i) ibid, the assessee has to 'opt' for the exemption whereas in sub-rule 3 (ii) ibid, there is no such option available to the assessee and the absolute exemption that may have been brought forth under Section 5A ibid would apply unilaterally to the related final product manufactured by the assessee.

5.7 It is important to note that the law makers have not incorporated the requirement of payment of cenvat credit equivalent to credit taken by the assessee in respect of inputs lying in stock or in process in sub rule 3 (ii) ibid. In our view, this is because once the entire cenvat credit account is reduced to naught, there will be no cenvat credit that will be available whatsoever, under sub-rule 3 (ii) ibid, for the assessee to avail.

6. In the event, the findings and decision of the lower appellate authority to the contrary in the impugned order is not on sound legal footing. The impugned order then cannot sustain and will require to be set aside, which we hereby do. Appeal is allowed with consequential benefits, if any, as per law."

• **CCE Vs Sitaram India Ltd- 2018(10) TMI 11- CESTAT NEW DELHI**

"6. The respondent who was availing the benefit of cenvat credit under Cenvat Credit Rules, 2004, opted for exemption granted by Notification No.30/2004 ibid, w.e.f. 01.04.2013. The dispute has arisen consequent to such a move on the part of the respondent. Rule 11 of Cenvat Credit Rules, 2004 outlines the transitional provisions which are required to be followed by an assessee opting from the route of payment of duty to that of availing exemption. The question for decision is whether the respondent will be covered by the provisions of Rule 11(3)(i) or 11(3)(ii).

7. We find that the identical issue has been considered in detail in the case laws relied by the respondent. In the case of Jansons Textile Processor (supra), the Chennai Bench of the Tribunal has taken the view that in case of conditional exemption such as exemption under Notification No. 30/2004, the assessee will be covered only by Rule 11(3)(i). This decision has been followed in the case of Wearit Global Ltd. (supra) wherein the Tribunal observed as under:

"5. After hearing both the parties, we are of the opinion that in the present case the appellant has opted for exemption as per the Notification No. 30/2004-CE where the exemption is conditional. As per Rule 11(3) (ii) CCR, Cenvat Credit balance will lapse only if the product is exempted absolutely under Section 5A of Central Excise Act. But since the Notification No. 30/2004-CE dated 09.07.2004 is a conditional notification, hence only Rule 11 (3)(i) of CCR would apply which does not mandate any such lapsing."

8. By following the settled position of law as above, I find no infirmity in the impugned order passed by the Commissioner (Appeals). The same is sustained and the appeals filed by Revenue are rejected."

• **Wearit Global Ltd Vs CCE-2018(8) TMI 1094 CESTAT NEW DELHI**

5. After hearing both the parties, we are of the opinion that in the present case the appellant has opted for exemption as per the Notification No. 30/2004-CE where the exemption is conditional. As per Rule 11 (3)(ii) CCR, Cenvat Credit balance will lapse only if the product is exempted absolutely under Section 5A of Central Excise Act. But since the Notification No. 30/2004-CE dated 09.07.2004 is a conditional notification, hence only Rule 11 (3)(i) of CCR would apply which does not mandate any such lapsing.

6. We draw our support from the decision of CESTAT- Chennai in the case of Janson Textile Processors Vs. Commissioner of Central Excise & ST Salem wherein it was held as follows:-

"5.1 The core issue that comes up for decision is whether the transitional provisions contained in sub-rule (3) of Rule 11 will be applicable to both sub-rules 3 (i) and 3 (ii). For better understanding, the relevant provisions relating to manufacturers are reproduced as under:

"RULE 11. Transitional provision.

....

(3) A manufacturer or producer of a final product shall be required to pay an amount equivalent to the CENVAT credit, if any, taken by him in respect of inputs received for use in the manufacture of the said final product and is lying in stock or in process or is contained in the final product lying in stock, if,

(i) he opts for exemption from whole of the duty of excise leviable on the said final product manufactured or produced by him under a notification issued under section 5A of the Act; or

(ii) the said final product has been exempted absolutely under section 5A of the Act, and after deducting the said amount from the balance of CENVAT credit, if any, lying in his credit, the balance, if any, still remaining shall lapse and shall not be allowed to be utilized for payment of duty on any other final product whether cleared for home consumption or for export, or for payment of service tax on any output service, whether provided in India or exported."

5.2 It is pertinent to note that the sub-rule 3 (i) and sub-rule 3 (ii) are separated by a semicolon (;) followed by the disjunctive 'or'. The use of semicolon (;), the punctuation mark is to separate two closely related independent clauses. 'Or' is a particle used to connect words, phrases or classes representing alternatives [J. Jayalalitha Vs UOI - (1999) 5 SCC 138]. Only if the phrasing of the legal provision is such that in actuality 'and' is intended, should it be examined whether the alternatives separated by 'or' are not mutually exclusive. The Courts may construe 'or' as 'and', only if they find from the context that the wrong word must have been used. [Ranchhoddas Atmaram v. UOI, AIR 1961 SC 935; Firoj Farukee v. State of West Bengal, AIR 1972 SC 2141] . However, in respect of the sub-rule 3 (i) and sub-rule 3 (ii) *ibid*, there should not be any such confusion or doubt, since those two sub-rules are separated not by just a particle 'or' but also by a semicolon (;), thus creating an additional wall for conveying mutual exclusivity between the two sub rules. There is also no basis for suggesting that the use of 'or' between these sub-rules conveys the meaning 'or both'. For example, to be able to impose both a fine and a penalty, one would need to add 'or both' to the end of the phrase. That surely is not the case here.

5.3 Viewed in this context, it is but obvious that the legislature intended the said sub rules 3 (i) and 3 (ii) to be two distinct and separate alternatives, with distinctively different qualifying factors and conditionalities.

5.4 In sub rule 3 (i), the assessee has an option to avail of a particular notification or otherwise; when such assessee takes such option, he will be required to pay an amount equivalent to cenvat credit, if any,

.....

6. In the event, the findings and decision of the lower appellate authority to the contrary in the impugned order is not on sound legal footing. The impugned order then cannot sustain and will require to be set aside, which we hereby do. Appeal is allowed with consequential benefits, if any, as per law."

7. Following these 2 decisions and indulging the facts at length, we are of the considered opinion that the ratio laid down in the judgments are squarely applicable in this case and therefore, we allow the appeal."

From the above it can be seen that on the absolute identical issue involving the exemption notification 30/2004-CE the tribunal in various judgments held that balance credit shall not lapse in terms of Rule 11(3) of Cenvat Credit Rules, 2004 therefore the issue is no longer res-integra.

5. Accordingly, the impugned order is set aside and appeal is allowed.

5. From the above judgment which has relied upon various other judgments and our finding given herein above, the issue is no longer res-integra. Accordingly, the impugned order is set aside. Appeal is allowed.

(Pronounced in the open court on 24.07.2023)

RAMESH NAIR
MEMBER (JUDICIAL)

C.L.MAHAR
MEMBER (TECHNICAL)