CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST ZONAL BENCH : AHMEDABAD

REGIONAL BENCH - COURT NO. 3

SERVICE TAX Appeal No. 00093 of 2012

[Arising out of Order-in-Original/Appeal No AHM-CEX-003-COM-002-2012 dated 13.01.2012 passed by Commissioner of Central Excise-Ahmedabad-III]

Nilkanth Specific Family Trust **.... Appellant**
Block No. 1974-B, 1076-1078,
Gandhinagar, Gujarat

VERSUS

Commissioner of Central Excise & ST, Ahmedabad **.... Respondent**
Custom House, 2nd Floor,
Opp. Old Gujarat High Court, Navrangpura,
Ahmedabad, Gujarat - 380009

APPEARANCE :

Shri Vikram Singh Jhala, AGM for the Appellant
Shri Pankaj Kumar Singh, Superintendent (AR) for the Respondent

CORAM: HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)
HON'BLE MR. RAJU, MEMBER (TECHNICAL)

FINAL ORDER NO. A/12377 / 2021

DATE OF HEARING/ DECISION : 17.09.2021

RAMESH NAIR :

The brief facts of the case are that the appellants are engaged in the manufacture of paper and paper board namely Kraft paper falling under Chapter heading 4804 of first schedule to the Central Excise Tariff Act, 1985. The appellant is manufacturing their final product Paper and Paper Board starting from the stage of pulp and such pulp contains less than 75% by weight of pulp made from material other than bamboo, hard woods, soft woods, reeds (other than sarkanda) or rags. They are availing Cenvat credit under Cenvat Credit Rules, 2004 and paying duty on final products availing exemption under Notification No. 04/2006-CE dated 01.03.2006 (Serial No. 93). The case of the department is that the product manufactured by the appellant is covered under Serial No. 90 of the same Notification No. 04/2006-CE dated 01.03.2006 which according to the department, is absolute notification hence appellant should have availed benefit under serial No. 90. Accordingly, the appellant was not entitled for Cenvat credit. Consequently, the Cenvat credit attributable to final product was denied.

Aggrieved by the impugned order, the appellant filed appeal before this Tribunal.

2. Shri Vikram Singh Jhala, AGM of the appellant Company appearing for the appellant submitted that identical issue has been considered by this Tribunal in the case of *Mac Paper Mills* and vide Final Order No. A/11683/2019 dated 2019 wherein it has been held that Serial No. 93 of the Notification No. 04/2006-CE dated 01.03.2006 is not conditional therefore, the appellant was entitled for the said notification.

3. Shri Pankaj Kumar Singh, learned Superintendent (Authorised Representative) appearing on behalf of the Revenue reiterates the findings of the impugned order.

4. We have carefully considered the submissions made by both sides and perused the record. We find that the dispute in the present case is that whether the appellant should have availed exemption Notification No. 04/2006-CE dated 01.03.2006 under Serial No. 90 or 93. As per the department, the notification under Serial No. 90 is not conditional therefore, the appellant supposed to avail the said exemption and not under Serial No. 93. On perusal of the notification, we find that exemption under Serial No. 93 not conditional where as exemption under Serial No. 90 is conditional not only as per entry of the exemption but also with condition laid down under condition 12 of the notification. Considering this fact, this Tribunal *Mac Paper Mills* (supra) has passed order in identical facts wherein the following order is passed:-

> "The brief facts of the case are that the appellants are engaged in the manufacture of handicraft papers and availing the exemption notification no. 04/2006-CE dated 01.03.2006 under Sr. no. 91 and 93. They are also availing the Cenvat Credit in respect of inputs used for manufacture of final product, i.e. M.G. Craft papers. The case of the department is that since the final product manufactured by the appellant is exempted from payment of duty under notification 04/2006-CE, as per section 5A, they are not supposed to pay duty, they have to compulsorily avail the exemption. Consequently, they are not entitled for the Cenvat Credit. Hence, the demand for the Cenvat Credit was raised.
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> 2. Shri M.A. Patel, Ld. Counsel appearing on behalf of the appellant submits that they are availing exemption of concessional rate of duty under Sr. no. 93 and they are not availing under S. no. 90. Exemption against Sr. No. 93 which attract nil rate of duty, contain the conditions, therefore, it is optional for the assessee

either to avail exemption under S. no. 93 of notification no. 04/2006-CE. Therefore, merely because conditional notification not availed, benefit of Cenvat Credit cannot be denied. In support of his submission, he placed reliance on the judgments of this 2 E/372/2012-DB Tribunal in the case of Balkrishna Paper Mills Ltd. v/s CCE, Thane-I 2015 (329) 468 (Tri-Mumbai)

3. Shri T.K. Sikdar, Ld. Asst. Commissioner (AR) appearing on behalf of the Revenue reiterates the findings of the impugned order. 4. We have considered the submission made by both the sides and perused the records. We find that the appellant have availed the exemption under Sr. no. 93 and paid the concessional rate of duty. The department's case is that since there is a nil rate of duty under Sr. no. 93, the appellant should have availed the said exemption. Consequently, they were not entitled for the Cenvat Credit. On perusal of the notification, under Sr. no. 93, we observe that there are conditions for such notifications. Therefore, in terms of section 5A (1A) only in a case where the goods are absolutely exempted, the assessee is not supposed to pay the duty. However, in the present case, the exemption under Sr. No. 93 of notification 04/2006-CE bears the condition. Therefore, the condition of sub section 1A of section (1A) is not applicable in the present case. The appellant had option either to avail the exemption under Sr. No. 93 or otherwise. Moreover, the appellant have cleared the goods on payment of duty. Therefore, Cenvat Credit cannot be denied. The judgment of this Tribunal in the case Balkrishna Paper Mills Ltd. (supra) is directly on the issue. Accordingly, the demand of Cenvat Credit raised by the lower authorities is not sustainable. Hence, the impugned order stands modified. Appeal is allowed."

5. As regards the Board Circular relied upon in the impugned order, we find that reading of section 5 and 5A where there is an absolute exemption, has the assessee has no option except to avail the exemption. In the present case the goods of the appellant is falling under both the entries i.e. Serial No. 90 and 93 of exemption notification but Serial No. 90 is conditional exemption whereas Serial No. 93 is absolute exemption. Therefore, we do not agree with the Board Circular on the face of statutory provisions under Section 5 read with Section 5A of Central Excise Act, 1944. Accordingly, the demand of Cenvat credit is not sustainable. The impugned order is set-aside and the appeal is allowed.

(Dictated and pronounced in the open court)

(Ramesh Nair)
Member (Judicial)

(Raju)
Member (Technical)

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