

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

Appeal No.E/12885/2013-DB

[Arising out of OIA-246/2013/RAJ/CE/AK/COMMR-A/AHD dated 10.05.2013 passed by the Commissioner-
Rajkot]

M/s Welspun Ltd.

Appellant

Vs

C.C.E. & S.T. Rajkot

Respondent

Represented by:

For Appellant: Mr. V.S. Nankani & Mr. Amit Laddha (Advocate)

For Respondent: Mr. J. Nagori (AR)

CORAM:

HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)

HON'BLE MR. RAJU, MEMBER (TECHNICAL)

Date of Hearing:05.09.2018

Date of decision:02.01.2019

Final Order No. A/ 10032/2019

Per: Ramesh Nair

The brief facts of the case are that the appellant are engaged in manufacture of excisable goods falling under chapter 63 namely, toweling fabrics, made ups, sheeting and their products of the first schedule to the Central Excise Tariff Act, 1985. The appellant being located in district of Kutch whether entitled for exemption notification No. 39/2001-CE dated 03.07.2001 on the basis of Certificate issued by the Committee consisting of Chief Commissioner of Central Excise, Ahmedabad and the Principal Secretary to the Government of Gujarat, Department of Industry, Gandhinagar. They set up a new industrial unit with original value of investment in Plant and Machinery of Rs. 170, 31, 59,153/- the date of commencement of commercial production is 14.01.2005. In terms of para 2A(C) of Notification No. 39/2001-CE. The appellant exercised his option vide letter dated 31.03.2006 and 31.03.2007 for availing self re-credit

during the financial year 2006-2007 and 2007-2008. They had filed applications for self re-credit of Rs. 31,85,74,909/- in PLA paid through PLA in respect of goods cleared for the period from February, 2006 to September, 2007. The contention of the department was that the appellant installed additional machinery after 31.12.2005, the benefit of Notification is not intended to be extended to such products whose production was done from the machinery which have been installed after 31.12.2005. The sanctioning authority noticed that the claimant has made substantial enhancement in production capacity after 31.12.2005 by installing new Plant and Machinery and after conducting the verification, it was concluded that the product manufactured cleared using the Plant and Machinery installed after 31.12.2005, they are not entitled for re-credit. Accordingly, the claim for re-credit was rejected vide order No. 303 to 322/2008-2009 dated 27 March 2009. Being aggrieved with the said order, the appellant filed appeal before Commissioner (Appeals), Central Excise, Rajkot which was decided vide Order-In-Appeal No. 112/2010/Commr (A)/RAJ/dated 08.03.2010. The Commissioner (Appeals) remanded the matter to the lower authority and directed the claimant to produce the records in connection with the goods manufactured and cleared from the Plant and Machinery installed prior and after 31.12.2005 duly supported by the Logbook or other authentic record along with Chartered Engineer Certificate. The Appellate Authority further directed that after considering the said documents the lower authority is free to make further enquiry as he deems fit so as to enable him to determine the benefit available to the claimant. Against the said order of the Commissioner (Appeals), Rajkot, the appellant preferred an appeal before the CESTAT which was decided vide order No. A/639/WZB/AHD/2011 & S/477/WZB/AHD/2011 DATED

29.03.2011 observing that ".....the original authority, while deciding the de novo proceedings would not be bound by the observations and directions given by the Commissioner (Appeals). The remand would be treated as an open remand as if no opinion is expressed by Commissioner (Appeals)". In the deno vo proceedings before the adjudicating authority the appellant's main contention was that there was no expansion at the manufacturing of final product, namely, made ups. The expansion was made only in respect of intermediate stage which has not affected the production capacity of the final product i.e. Bed Sheets, Terry Towels. The adjudicating authority in deno vo adjudication rejected the claim of re-credit of Rs. 31,85,74,909/- for the period from February, 2006 to September, 2007 vide Order-In-Original No. 2001-20/re-credit/2011-2012 dated 22 March 2012. Being aggrieved by the said Order-In-Original, the appellant filed an appeal before the Commissioner (Appeals). The Ld. Commissioner (Appeals) remanded the matter to the adjudicating authority by giving observation that the appellant had installed total 3 Stenter after the cutoff date 31.12.2005 i.e. two stenter in the processing section of Terry towel and one stenter in the processing section of bed sheet. He found that the goods produced / manufactured on the said three stenter installed after the cutoff date that is 31.12.2005 and duty paid on their subsequent clearances are not entitled for re-credit. Being aggrieved by the impugned order the appellant filed the present appeal.

2. Shri. V.S. Nankani, Ld. Senior Counsel with Shri. Amit Laddha Ld. Advocate appeared. He submits that the appellant had fulfilled all the contention stipulated in the Notification No. 39/2001-CE(Supra) and therefore, they rightly claimed refund/re-credit and Central

Excise duty paid through PLA for the dispute period claiming benefit of the said Notification. He submits that the Notification No. 39/2001-CE does not put any bar or restriction on the expansion of the unit and therefore mere adding machineries at the intermediate level would not disentitle the appellant to avail the benefit of Notification No. 39/2001-CE. He submits that as per the explanation –I(ii)(b) of Clause 4 of Notification, the civil construction work of the factory premises and installation of the plant and machinery therein is completed and the unit starts commercial production not later than 31.12.2005. As regard, this contention, there is no dispute that the civil construction work and installation of plant and machinery was completed and the unit had started commercial production before the 31.12.2005. He submits that the said condition does not provide the restriction on value or the quantum of goods which were liable for exemption. It is a settled law that exemption Notification must be interpreted strictly and literally. In this support, he placed reliance on the following judgments:

- C.C.E Vs. Tullow India Operations Ltd.-2005 (189) E.L.T 401-(SC)
- Compack Pvt. Ltd. - 2005 (189) E.L.T 3 (SC)

3. He further submits that there is no cap for selling on the quantum for exemption, once the investment made in the unit is above Rs. 20 crore, the entire production irrespective of the value thereof is exempted for the full period of 5 years as provided for in said Notification. Consequently, additional investment made after 31.12.2005 did not act as a disqualification from availing the exemption, regardless of whether any additional investment had increased their production capacity or not. He submits that the only

requirement is that the investment in plant and machinery should be minimum 20 crore thereafter there is no restriction of value cap on production or clearance of the goods from said unit. The appellant manufactured the same items which were declared by them under the said notification. The restriction is only in respect of new product, whereas in the present case no new product was manufactured after commencement of the production. He submits that the appellant had not added new machines so as to enhance the capacity of their final product. The appellant had added machines at intermediate stage like the processing, spinning and weaving section and not in cutting and sewing section which did not result any capacity expansion of the final product. He submits that the narrow interpretation of the Notification will defeat the object and purpose of Notification as held in the case of Assistant Commissioner Vs. Amara Raja Batteries Limited-2009 (8) SCC 209. He submits that the experts opinion such as Certificate issued by the Chartered Engineer and certificate issued of Assistant Professor IIT, reveals that addition of machines are only at intermediate stage of production by way of backward integration and on account of said addition appellants' production capacity of final product that is Made-ups do not increase but continue to remain constant. These exports opinion will prevail over the opinion of the department. In support of this submission he placed reliance on the following judgment

- a. Sunint Auto Pvt. Ltd. vs. Commissioner of Customs, New Delhi - 2005 (183) E.L.T. 209 (Tri. - Del.)
- b. Voltas Limited vs. Commissioner of Customs, Mumbai - 2005 (182) E.L.T. 117 (Tri. - Mumbai)

c. Furtura Surgicare Pvt. Ltd. vs. Commissioner of C.Ex.,
Bangalore III - 2004 (172) E.L.T. 127 (Tri. - Bang.)

4. He submits that prior to making an addition of machines at the processing stage, the appellant used to buy almost 85% of the requirement in the weaving section the cotton yarn from open market, the total capacity of spinning section was only about 15% of the weaving section and therefore to meet the needs of requirement of the weaving section, the appellant were procuring cotton yarn from the market and using the same for weaving into grey fabrics which are used in made-ups. Post the aforesaid addition, the appellant have managed to reduce their reliance on purchase of yarn by almost 10%. The addition made by the appellant in the intermediate stage was only as and when by way of backward integration. He submits that merely enhancement of the efficiency without affecting the production capacity of the final product, the benefit of the Notification 39/2001-CE cannot be denied as held in the judgment of CCE vs Rudraksh Detergent & Chem Pvt. Ltd. 2010 (260) ELT 469. He referred to the Circular No. 110/21/2006-CX3 dated 10.07.2008, wherein it was clarified that whether a new product is introduced after the cutoff date, the exemption would not be available to this new product. He submits that in the present case firstly, there is no new product introduced, secondly, the declared final product remain same and even it's installed capacity was also not increased, therefore, the said Circular clearly supports the case of the appellant. He referred to the area based exemption Notification No. 49/2003-CE dated 10.06.2003 and 50/2003-CE dated 10.06.2003 issued for exemption to Uttarakhand and Himachal Pradesh wherein the exemption was granted for 10 years from the date of commencement of commercial

production. The said notification were issued primarily for expansion and industrialization of the units located in the state of Uttarakhand and Himachal Pradesh. With reference to such notification the board has clarified the following issue "whether the installed capacity in a particular unit is upgraded after the cut-off date, so as to increase the efficiency of the machinery by installing ancillary machines or replacement of some parts etc. but in such a way that it does not lead to increase in capacity or production." The Board has clarified in the Circular 939/29/2010-Cx dated 20.12.2010 that after commencement of commercial production before cut-off date, the unit is entitled to excise duty exemption in respect of excisable goods manufactured and cleared for a period of 10 years. The provisions of these notifications do not place a bar or restriction on any addition / modification in the plant or machinery or on the production of new product by an eligible unit after the cut-off date and during the exemption period of 10 years as per notification. Similarly in the present case the notification 39/2001 was issued with the same objective and intention of industrialization in the Kutch region and therefore, the logic for giving benefits is similarly applicable in the present facts also as there is no increment in the capacity of production of the appellant. Reliance was placed on the judgment in the case of Lakhani Footwear Pvt. Ltd. 2016 (344) ELT 721 (AAR). He submits that the department for denying the exemption relied upon the decision in the case of Ratmani Metals and Tubes Ltd. 2012 (276) ELT 230 (Tri. Amd.), CCE vs Varsana Ispat Ltd. 2015 (329) ELT 444 (Tri. Amd.), Saurashtra Ferrous Pvt. Ltd. 2014 (309) ELT 49 (Guj.) and Plastene India Ltd. 2014 (314) ELT 14 (Guj.)

5. He submits that in all the aforesaid cases the facts were altogether different from the facts prevailing in the present case, therefore, reliance placed by the department is incorrect. On the issue of invocation of extended period, he submits that the same is not applicable in the present case as the appellant followed re-credit mechanism laid down in paragraph 29 of the said Notification and the re-credit of duty paid through PLA was claimed by the appellant during the period February 2006 to September 2007 by following the procedure as provided under the provisions of the said Notification. As per the para 2A(g) of the Notification 39/2001-CE provided a mechanism for recovery of the credit availed irregularly and/ or availed in excess of the amount determined correctly refundable under clause (e) thereof and in terms of 2A(g). In the present case, the department has not determined the amounts as correctly refundable within time frame stipulated in para 2A(e) of the notification and therefore, the refund amount claimed by the appellant and intimated to the Deputy/ Assistant Commissioner was final and binding and the same could not be demanded and recovered from the appellant at a later stage. He submits that the appellant had availed re-credit during the period February 2006 to September 2007 and that there was no fraud, collusion, wilful mis-statement and / or suppression of facts in the instant case warranting notification of the larger period of limitation. The appellant after availing credit informed about the same to the department within the time specified in para 2A(d) of the said Notification and therefore, the department was aware about the refund being availed by the appellant, therefore, the recovery is clearly time barred.

6. Sh. J. Nagori Ld. Additional Commissioner (AR) appearing on behalf of the Revenue reiterates the findings of the impugned order. He further submits that the appellant have done substantial expansion in the plant and machinery which is used for the production of goods after the cut-off date i.e. 31.12.2005 accordingly the exemption to the goods attributed to the said additional plant and machinery installed after 31.12.2005 is not available to the appellant. He placed reliance on the following judgments:

- Ratmani Metals and Tubes Ltd. 2012 (276) ELT 230 (Tri. Amd.),
- CCE vs Varsana Ispat Ltd. 2015 (329) ELT 444 (Tri. Amd.),
- Saurashtra Ferrous Pvt. Ltd. 2014 (309) ELT 49 (Guj.) and
- Plastene India Ltd. 2014 (314) ELT 14 (Guj.)

7. We have carefully considered the submissions made by both the sides and perused the records. The issues involved in the present case are as under:-

- A) Whether the appellant has rightly claimed benefit of Exemption Notification No.39/2001-CE dated 31.07.2001 (as Amended from time to time) in respect of goods that said to have manufactured on such plant and machineries that were installed after cut-off date 31.012.2005?
- B) Whether the expansion of the unit after cut-off date 31.12.2005 does restrict the appellant to avail the benefit of Exemption Notification No. 39/2001-CE?
- C) Whether the larger period of limitation is invokable in the facts of the present case?

8. The Central Government with a view to rehabilitate the people of Kutch Region of Gujarat State, issued exemption Notification No. 39/2001-CE dated 31.07.2001 with a view to encourage industry to set up new units in the Kutch Region. The notification No. 39/2001-CE as amended up to the relevant period is reproduced below:

"Kutch (Gujarat) — Exemption to excisable goods (except those specified in Annexure) and cleared from Units in Kutch District of Gujarat

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 sub-section (3) of section 3 of the Additional Duties of Excise (Textiles and Textile Articles) Act, 1978 (40 of 1978), the Central Government being satisfied that it is necessary in the public interest so to do, hereby exempts the goods specified in the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) other than goods specified in the Annexure appended to this notification and cleared from a unit located in Kutch district of Gujarat from so much of the duty of excise or the additional duty of excise, as the case may be, leviable thereon under any of the said Acts as is equivalent to the amount of duty paid by the manufacturer of goods other than the amount of duty paid by utilization of CENVAT credit under the CENVAT Credit Rules, 2001 :

Provided that in the case of a unit having an original value of investment in plant and machinery installed in the factory below rupees twenty crore on the date of commencement of commercial production in that unit, the exemption contained herein shall apply only for the first clearances up to an aggregate value not exceeding twice the value of such investment from the date of commencement of commercial production, in each year.

2. The exemption contained in this notification shall be given effect to in the following manner, namely :-

(a) The manufacturer shall submit a statement of the duty paid other than the amount of duty paid by utilization of CENVAT credit under the CENVAT Credit Rules, 2001, to the Assistant Commissioner or the Deputy Commissioner of Central Excise, as the case may be, by the 7th day of the next month in which the duty has been so paid.

(b) The Assistant Commissioner or Deputy Commissioner of Central Excise, as the case may be, after such verification, as he may deem necessary, shall refund the amount of duty paid other than the amount of duty paid by utilization of CENVAT credit during the month under consideration to the manufacturer by the 15th day of the next month.

(c) If there is likely to be any delay in such verification, the Assistant Commissioner or the Deputy Commissioner of Central Excise, as the case may be, shall refund the amount on provisional basis by the 15th day of the next month to the month under consideration, and thereafter may adjust the amount of refund by such amount as may be necessary in the subsequent refunds admissible to the manufacturer.

3. The exemption contained in this notification shall be subject to the following conditions, namely :-

(i) It shall apply only to new industrial units, that is to say, units which are set up on or after the date of publication of this notification in the Official Gazette but not later than the 31st day of July, 2003;

(ii) In order to avail of this exemption, the manufacturer shall produce a certificate from a Committee consisting of the Chief Commissioner of Central Excise, Vadodara and the Principal Secretary to the Government of Gujarat, Department of Industry, to the jurisdictional Assistant Commissioner or the Deputy Commissioner of Central Excise, as the case may be, that the unit in respect of which exemption is claimed is a new unit and has been set up during the time period specified in condition (i) above.

(iii) Before effecting clearances under this notification, the manufacturer shall also furnish a declaration regarding the original value of investment in plant and machinery installed in the factory as on the date of commencement of commercial production, to the Assistant Commissioner or the Deputy Commissioner of Central Excise, as the case may be.

(iv) The manufacturer shall also produce a certificate from the said Committee confirming the original value of investment and such a certificate shall be produced within a period of one month from the date of commencement of commercial production, or such extended period as the said Assistant Commissioner or Deputy Commissioner may allow.

(v) In case on the basis of such certification, or otherwise, the original value of investment in plant and machinery,

(a) is found to be less than rupees twenty crore but was declared to be rupees twenty crore or more, the manufacturer shall be liable to pay back the entire amount of duty exemption availed under the notification along with interest at the rate of twenty four per cent. per annum as if no exemption were available; or

(b) is found to be less than the declared value and was declared to be below rupees twenty crore, the manufacturer shall be liable to pay duty on the goods cleared, if any, in excess of twice the actual value of original investment in each of the years during which exemption has been claimed under this notification along with interest at the rate of twenty four per cent. per annum, as if no exemption were available to those clearances under this notification.

(vi) The exemption shall apply for a period not exceeding five years from the date of commencement of commercial production by the unit.

4. Nothing contained in this notification shall apply to a manufacturer or a factory availing of exemption under any of the following notifications, namely :-

(a) Notification No. 8/2001-C.E., dated the 1st of March, 2001;

(b) Notification No. 9/2001-C.E., dated the 1st of March, 2001; and

(c) Notification No. 24/2001-C.E., dated the 30th April, 2001.

Explanation : For the purpose of this notification, -

(i) a change in the name or in the nature of ownership or a change in location of an existing unit would not entitle anyone for treatment as a "new" industrial unit.

(ii) the expression "set up on or after the date of publication of this notification in the Official Gazette" shall mean that any civil construction work on its factory premises and any installation of plant and machinery therein commences only on or after the date of publication of this notification in the Official Gazette.

(iii) the expression “aggregate value of clearances” shall mean the total value of clearances of excisable goods, whatsoever, from the unit in each year but shall not include goods cleared for use in the manufacture of other excisable goods in the same unit.

Annexure

1. Goods falling under Chapter 24 of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986);

2. The following goods, falling under the said First Schedule to the Central Excise Tariff Act, 1985, namely :-

- (a) Candles;
 - (b) Footwear of a retail sale price not exceeding Rs. 125 per pair;
 - (c) Tableware and kitchenware of glass;
 - (d) Imitation jewellery;
 - (e) Monochrome television receivers;
 - (f) Vacuum and gas-filled bulbs of retail sale price not exceeding Rs. 20 per bulb;
 - (g) Sunglasses for correcting vision;
 - (h) Watches and clocks of retail sale price not exceeding Rs. 500 per piece;
 - (i) Rubberised coir mattresses;
 - (j) Toothbrushes;
 - (k) Kerosene, that is to say, any hydrocarbon oil (excluding mineral colza oil and white spirit) which has a smoke content of 18 mm or more [determined in the apparatus known as smoke point lamp in the manner included in the Bureau of Indian Standards Specification ISI : 1448 (P. 31) - 1968 as in force for the time being] and is ordinarily used as an illuminant in oil burning lamps;
 - (l) Liquefied petroleum gases and other gaseous hydrocarbons other than natural gas, ethylene, propylene, butylenes and butadiene;
 - (m) Compressed Natural Gas (CNG);
 - (n) Cotton sewing thread, not containing synthetic staple fibres;
 - (o) Cotton yarn, not containing synthetic staple fibres;
 - (p) Diesel engines upto 10 HP; and
 - (q) Goods specified in the Table annexed to Notification No. 11/2001-Central Excise, dated the 1st of March, 2001.
3. Goods specified in the Second Schedule to the Central Excise Tariff Act, 1985 (5 of 1986).
[Notification No. 39/2001-C.E., dated 31-7-2001]”

9. From the above notification, we observe that the following main conditions were required to be fulfilled for availing benefit of the said Notification

- a) Investment in plant and machinery installed in the factory should be more than Rs. 20 Crores on the date of commencement of commercial production. It is further provided that in case of unit having an original value of investment in plant and machinery installed in the factory below

Rs. 20 Crores on the date of commencement of commercial production, the exemption contained therein shall apply only for the first clearances of up to an aggregate value not exceeding twice the value of such investment from the date of commencement of commercial production in each year.

b) It should apply to new industrial unit which is set up not later than 31.12.2005.

c) The manufacturer should produce a certificate, special constitute committee certifying the fact that the unit in respect of which exemption is claimed, is a new unit and has been set up during the period as specified in the Notification.

d) Before effecting clearances under the said Notification the manufacturer shall furnish a declaration regarding the original value of investment in plant and machinery installed in the factory as on date of commencement of commercial production, to the Assistant Commissioner of Central Excise.

e) The exemption shall apply for a period of not exceeding 5 years from the date of commencement of commercial production by the unit.

10. Said exemption explained the meaning of "set up on or after the date of publication of the said Notification in the Financial Gazette but not later than the 31.12.2005." It means that:

- a. Civil construction work on its factory premises and installation of plant and machinery commenced after the date of publication of the said Notification;

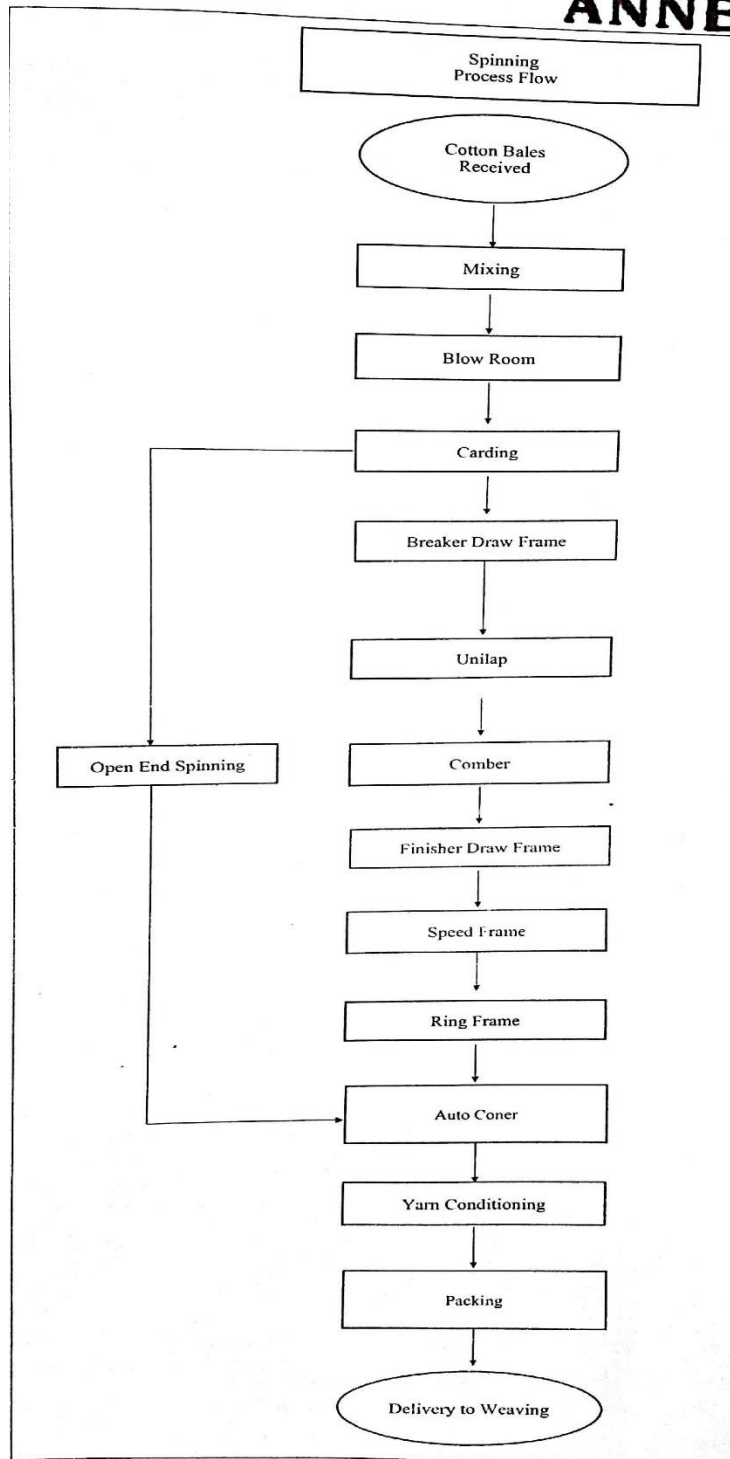
- b. The civil construction work of its factory premises and installation of plant and machinery therein was completed prior to 31st December, 2005;
- c. The unit started its commercial production not later than the 31stDecember, 2005.

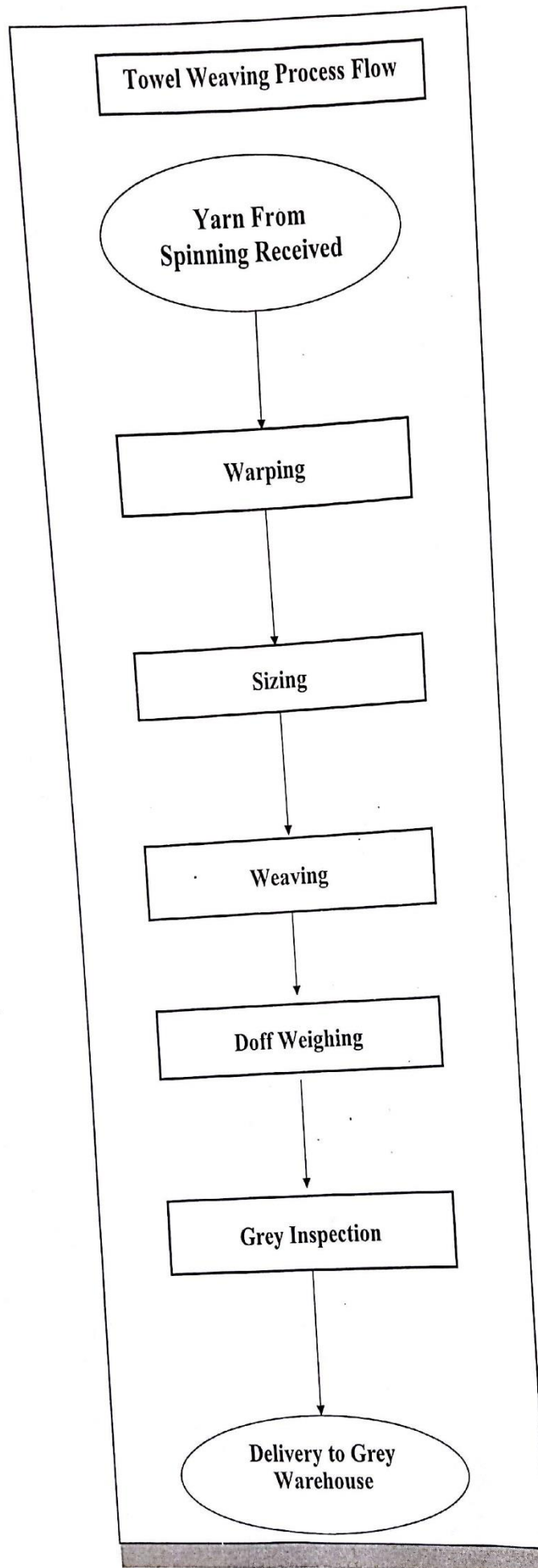
11. The appellant established its unit in Kutch and commenced the commercial production on 14.01.2005 with investment in plant and machinery of Rs. 170,31,59,153/- which was increased subsequently to Rs. 465,68,57,552/- as on 31.12.2005. From the facts of the case, the appellant admittedly complied with all the conditions mentioned in the said notification for availing benefit of exemption from Central Excise duty on clearance of the final product. The dispute arose only due to the reason that the appellant made further investments which resulted in the addition of the following machineries after 31.12.2005.

<u>Name of the Machine</u>	<u>Number</u>	<u>Section of Installation</u>	<u>Role / Functions of Machines</u>
Spindles	46800	Spinning	A spindle is a straight spike usually made from cotton used for <u>spinning</u> , twisting <u>fibers</u> into <u>yarns</u> .
Ring Frame	39	Spinning	Functions of Ring Frame are as follows: <ul style="list-style-type: none"> • To draft the roving for conversion of very fine strand of some fiber to

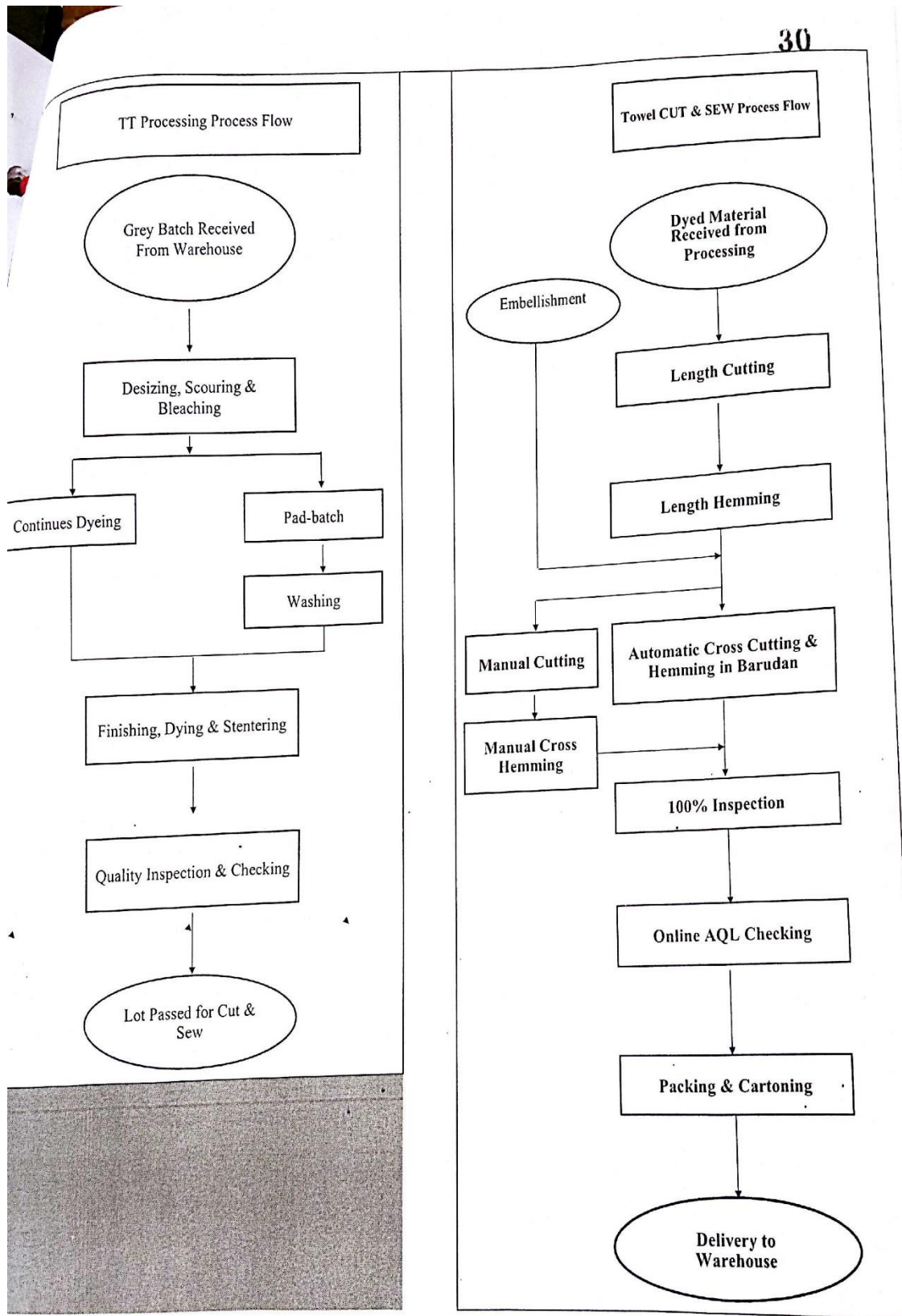
			<p>form yarn of required count;</p> <ul style="list-style-type: none"> • To impart strength to the yarn by inserting the necessary amount of twist; • To collect twisted strand called yarn onto handy and transportable.
Looms	142	Weaving (Bed-sheets)	Loom is used to weave cloth. The purpose of any loom is to hold the warp threads under tension to facilitate the interweaving of the weft threads.
Looms	102	Weaving (Terry Towels)	-----Do-----
Processing Stenters	1	Processing/ Dyeing (Bed-sheets)	Stenters are used to provide adjustment and control of fabric width during dyeing and have other functions such as heat setting, application and fixation of finishing agents to impart a particular type of finish to the fabrics etc.
Processing Stenters	2	Processing/ Continues Dyeing (Terry Towels)	-----Do-----

To understand the use of the installed machinery after 31.12.2005, the appellant have produced the process flow chart which is reproduced below:

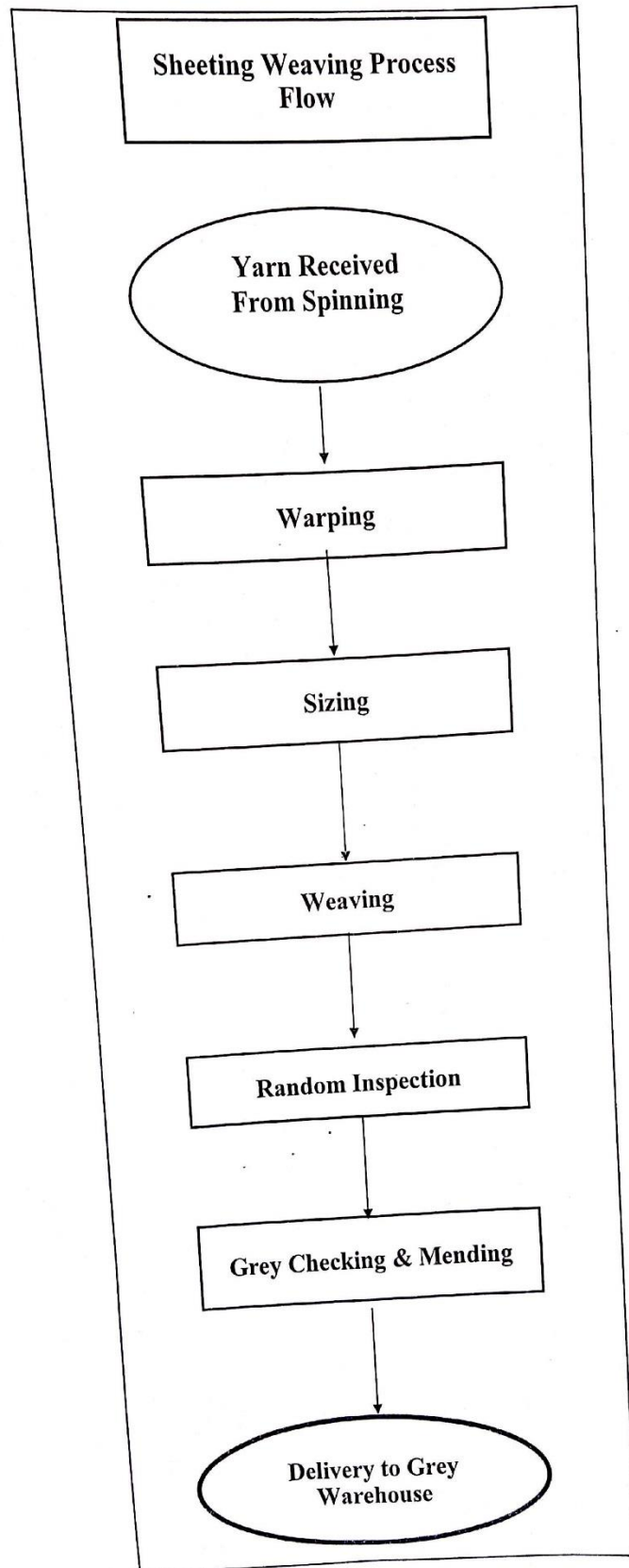


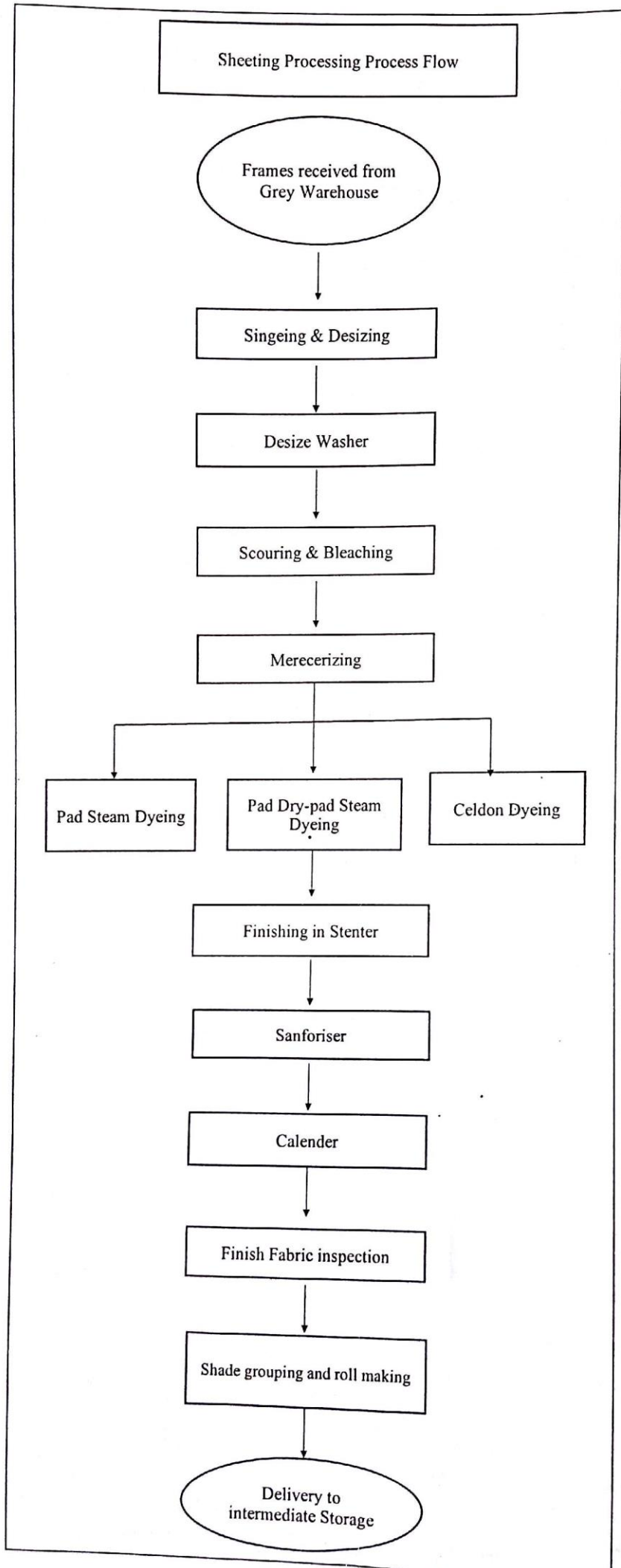


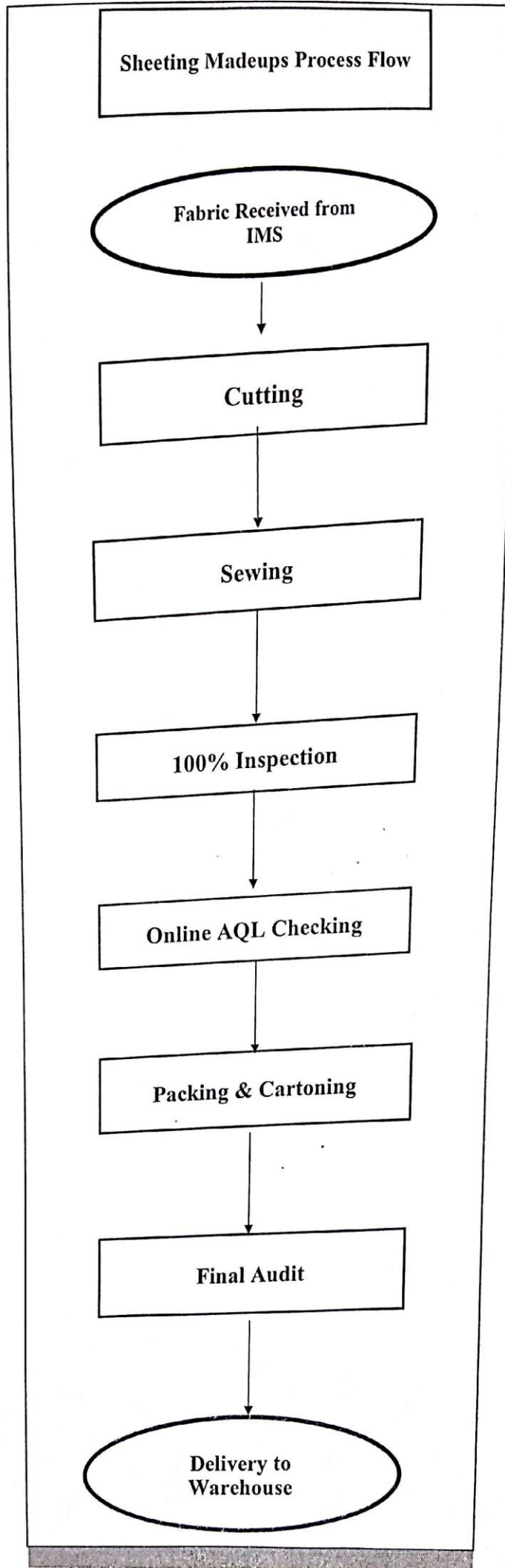
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12. From the details of machineries installed after 31.12.2005 and process flow chart, it is clear that the machines were used for intermediate process of the final product i.e. made-ups articles namely, Terry Towels and Bed Sheets. It is also observed that there is no addition to enhance capacity of final product i.e. bed sheets and terry towels. At the processing stage i.e. intermediate stage, the fabrics emerge which are then converted into the made-ups, the process of manufacture of made-ups takes place in the machine installed in the cutting department wherein prior to 31.12.2005, the appellant had already installed 15 length cutting and length hamming machines of Schmale Durate make for producing terry towel and 1 automatic laying machine of Gerber make for producing bed sheets. The said machine had capacity to cut and hem 63 MT terry towel per day, the Gerber make machine installed in the plant make can lay 75000 bed sheet per day. The appellant did not make any further additions in the said department post 31.12.2005. It is observed that in the bed sheet sewing department, 266 manually operated sewing machines were installed prior to 31.12.2005 and 132 machine post that period. In respect of said two products, the same can be converted into terry towels and bed sheets respectively in the cutting department at this stage the finished goods take shape and emerge. It is undisputed that post 31.12.2005, the appellant did not install any new machine in the cutting department. As regard adding of sewing machines in the bed sheet sewing department, it did not make the production thereof, since the capacity of production is determined at cutting stage, wherein the machines installed have a rated capacity. We agree with the submission of the appellant that it is not possible for the appellant to produce made-ups beyond the capacity of these cutting machines. The capacity of the production of bed sheets cannot

be linked to the sewing machines thus the installed capacity for manufacture of made-ups which is directly linked to the respective cutting machines has not undergone any change. Accordingly, we find that the appellant fulfilled all the conditions stipulated in the Notification No. 39/2001-CE (Supra) and therefore, have rightly entitled for the refund of Central Excise duty paid in their PLA for the disputed period. We find that the allegation of the department is not flowing from the exemption Notification inasmuch as the notification does not put any bar or restriction on the extension of the unit and therefore, mere adding machineries that too at the intermediate level would not disentitle the appellant to avail the benefit of notification No. 39/2001-CE. As regard the explanation-I (ii) (b) of Clause 4 of Notification No. 39/2001-CE, we find that the civil construction work on its factory premises and installation of plant and machinery thereunder should be completed and the unit starts commercial production not later than 31.12.2005. From this, we are of the view that only condition is that civil construction and plant and machinery involving investment of more than 20 Crores should be completed and that commercial production in the said unit should start before 31.12.2005. As per the undisputed fact completion of construction and installation of plant and machinery involving investment more than 20 Crores completed and commercial production in such unit was started on 14.01.2005. After fulfilling such condition, the appellant was entitled for exemption for 5 years from the date of commencement of the commercial production. In the notification, there is no cap on the value or quantity of the final product to be cleared during the 5 years of exemption period, therefore, we do not see that the appellant have violated any condition of the Notification No. 39/2001-CE as held by Hon'ble Supreme court in the case of

Tullow India Ltd (supra) and Compack Pvt. Ltd (Supra), it was clearly held that exemption Notification must be interpreted strictly and literally and nothing can be imported into the condition of the notification which does not exist in the notification. We, therefore, find that if the observation of the department is considered that the appellant have made further investment in the plant and machinery after 31.12.2005, but as per the facts discussed above regarding details of machinery installed after 31.12.2005 it is found that all those machines were installed at intermediate stage whereas no addition was made at the stage of manufacture of final product, therefore, the production capacity of final product does not get affected or enhanced due to installation of machinery for the intermediate process. It is an admitted fact that the appellant were buying the intermediate goods from the outsiders. Even in that case, the final product manufactured out of the bought out intermediate goods were entitled for notification 39/2001-CE and the same has been allowed without any dispute by the department, therefore, there is no difference that whether the appellant manufactured final product out of bought out goods or from the goods manufactured in the appellant's plant and machinery procured after 31.12.2005. In both cases, the exemption is available to the entire quantity of the final production produced and sold without any value cap or quantity cap.

13. We observed that if the interpretation of the department is accepted than in other words it restrict the investment to be made after 31.12.2005 which is not the object of the whole scheme of industrialization in the Kutch district. The intention of the Government's this scheme was that the more and more industry with maximum investment are setup, the exemption is provided only for 5

years. It is not the case that by increasing the investment, the appellant is getting exemption for more than 5 years. Irrespective of huge investment the appellant is entitled for exemption only up to the 5 years from the commencement of commercial production. Therefore, the intention of the notification is very clear that if the initial civil work and installation of the Plant and machinery is completed and commercial production in such unit started before 31.12.2005, the exemption for 5 years irrespective of any of the amount of value or quantity is available. We have also perused the Board Circular No. 110/21/2006-Cx dated 10.07.2008 wherein the ambiguity with respect to eligibility of benefit of exemption notification was clarified as under

"Point No. 1:

Whether the benefit of exemption would be available goods /products that the units start manufacturing after the cut off date for the commencement of commercial production i.e. 31/12/2005.

Comments:

There would be two situations. First is that where a unit introduces a new product by installing fresh plant, machinery or capital good after the cut of date in such a situation, exemption would not be available to this new product. The said new product would be cleared on payment of duty, as applicable and separate records would be required to be maintained to distinguish production of these products from the products which are eligible for exemption.

The other situation is the one where a unit starts producing some products (after the cut off date) using the plant and machinery installed upto the cut of date and without any addition to the plant and machinery. For example, in case of plastic moulded products a unit may commence the production of different products simply by changing the moulds and dies. In that case, the unit would be eligible for the benefit of Notification because the plant and machinery used for manufacture has remained the same. In this connection, it is further clarified that for the purpose of computing the original value of plant and machinery, the value of plant and machinery installed on the date of commencement of commercial production only shall be considered."

14. From the above clarification it is clear that since assessee is required to make the declaration wherein a product on which the exemption is entitled to be availed must be declared. Any new product manufactured after 31.12.2005 shall not be eligible for exemption. In the facts of the present case, the appellant right from the beginning declared the final product i.e. bed sheets and terry towels they have not started production of any new product after 31.12.2005, therefore, as per the clarification of the Board given hereinabove the appellant cannot be denied the exemption on the product declared and the same were being manufactured throughout the period of exemption. We also find that in respect of the identical

Exemption Notification which is area based bearing No. 49/2003-CE dated 10.06.2003 and notification no 50/2003-CE dated 10.06.2003 in respect of units setup in the State of Uttarakhand and Himachal Pradesh, the clarification were sought from the Board on the availability of benefit of the said exemption notification on the following issue:

"Where the installed capacity in a particular unit is upgraded after the cut-off date, so as to increase the efficiency of the machinery by installing ancillary machines or replacement of some parts etc. but in such a way that it does not lead to increase in capacity of production."

*"Board has examined the matter. Under the said notifications, any new unit set up or an existing unit which has undergone substantial expansion that commences commercial production before the cut-off date is entitled to excise duty exemption in respect of excisable goods (other than those appearing in the negative list) manufactured and cleared for a period of ten years from the date of commencement of commercial production. **The provisions of these notifications do not place a bar or restriction on any addition/modification in the plant or machinery or on the production of new products by an eligible unit after the cut-off date and during the exemption period of ten years as per the notification. Therefore, it is clarified that in all the above situations, the benefit of the excise duty exemption under the notifications would continue to be available to eligible industrial units.** However the period of exemption would remain ten years and would not get extended on account of such modifications or additions under any circumstances."*

15. From the above clarification, it is clear that irrespective of any addition or modification in the plant and machinery since the notification did not place a bar or restriction on such addition

/modification, the exemption shall be available in 10 years as per the above referred notification. In the present case also objective of the exemption notification no. 39/2001-CE is same that industrialization in the Kutch region therefore the clarification issued in above is equally applicable to the present case for the reason that in the notification no 39/2001-CE also it does not place any bar or restriction on any addition or modification in the plant and machinery. We find that since the appellant have strictly followed the conditions of the notification no 39/2001-CE particularly completion of civil work and plant and machinery and commencement of commercial production before 31.12.2005, the exemption for 5 years is available.

16. As regard the judgment relied upon by the department, we find that in the case of Ratmani Metals and Tubes Ltd. (supra) the assessee installed second tube mill after 31.12.2005 and claimed the benefit of exemption notification 39/2001-CE. In that case installation of second tube mill which is meant for producing the final product, the production capacity of final product enhanced whereas in the present case the capacity of final product was not enhanced and the machines were installed for intermediate process and no new product has been emerged by installation of machines at intermediate stage, therefore, the fact of Ratmani Metals case and the present case are entirely different. In the case of Varsana Ispat Ltd. (supra), the facts was that the appellant was engaged in the manufacture of ingots later on after 31.12.2005 they installed new machines for manufacture of new product i.e. 'Billets' moreover in the said case, the issue involved was of refund under Rule 18 for the amount paid towards basic excise duty from PLA, therefore, the facts of this case is also entirely different from the present case. As regard, the

judgment relied upon by the Revenue, in the case of Saurashtra Ferrous Pvt. Ltd. (supra) we find that the assessee in the said case set up a plant and machinery/ unit of the factory for two different products i.e. cast iron articles and pig iron articles. The commercial production of cast iron was started prior to 31.12.2005 but the entire plant and machines for production or machinery of pig iron which altogether different was not installed prior to 31.12.2005. In these vital facts, the Hon'ble High Court held that the assessee is not eligible to the benefit of exemption Notification No. 39/2001-Cx in respect of manufacturing of pig iron. The relevant paragraph 11 of the said judgment is reproduced below:

*"Now, so far as the non-granting of the exemption/benefits contained in the Notification No. 39/2001, on production/manufacturing of cast iron articles is concerned, it is not clear as to whether on production/manufacture of cast iron articles on the unit/plant and machineries fully installed and commissioned prior to 31-12-2005, the petitioners have been denied the said benefits or not? **However, considering the decision of the Division Bench of this Court, if, the unit/plant and machineries have been commissioned/installed (Fully) prior to 31-12-2005, the petitioner may be entitled to the benefits contained in the aforesaid Notification, on manufacture/production of cast iron articles for a period of five years from the date of commencement of the first commercial production of such goods on such unit.**"*

17. As regard the judgment of Hon'ble High Court in the case of Plastine India Ltd. (supra), we find that in the judgment, the issue involved was rebate under Rule 18 in respect of exported goods manufactured and cleared under Notification 39/2001-CE whereas in

the present case claim of the appellant is in respect of domestic clearances and re-credit/ refund of the duty paid from PLA, therefore, the ratio of Plastine (India) Ltd. (supra) is not applicable in the facts and circumstances of the present case.

18. In the present case admittedly the unit was fully exempted prior to 31.12.2005 by the appellant subsequently by way of backward integration installed new machines at the processing, spinning and weaving section and not in the cutting and sewing sections which did not result in capacity expansion. Therefore, the facts of all the cases cited above relied upon by the revenue are not applicable in the facts of the present case. Therefore, all the judgments are distinguished.

19. As regard the limitation, since we decide the case in favour of the assessee on merit itself we are not going to address the issue of limitation.

20. As per our above discussion, we are of the clear view that the appellant is entitled for the exemption under Notification 39/2001-CE despite the fact that the appellant have installed additional machineries for manufacture at intermediary stage as the overall capacity of final product does not increase. Accordingly, the impugned order is modified to the above extent, the appeal is allowed with consequential relief.

(Pronounced in the open court on 02.01.2019)

(Raju)
Member (Technical)

(Ramesh Nair)
Member (Judicial)

Neha