

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Zonal Bench At Ahmedabad**

REGIONAL BENCH- COURT NO.3

**EXCISE Cross Appeal No. 10911 of 2017
in**

EXCISE Appeal No. 10963 of 2017

(Arising out of OIO-SIL-EXCUS-000-COM-49-52-16-17 dated
28.11.2016/06.12.2016 passed by Commissioner of Central Excise, Customs
and Service Tax- Silvassa)

C.C.E. & S.T. – Silvassa

...Appellant

Commissioner Central Excise, Customs & Service Tax,
Silvassa, 4th floor, Adarsh Dham Building, Vapi Daman Road Vapi
Opp. Old Town Police Station-Vapi, Gujarat

VERSUS

Sunshine Fibre Pvt Ltd

...Respondent

plot no. 444/1/6, Village- masat,
Silvassa, dadra nagar haveli (ut)

WITH

- (i) **Excise Appeal No. 10964/2017 (Sunshine Fibre Pvt Ltd);**
- (ii) **Excise Appeal No. 10965/2017 (Sunshine Fibre Pvt Ltd);**
- (iii) **Excise Appeal No. 10966/2017 (Sunshine Fibre Pvt Ltd);**

(Arising out of OIO-SIL-EXCUS-000-COM-49-52-16-17 dated 06.12.2016 passed
by Commissioner of Central Excise, Customs and Service Tax- Silvassa)

APPEARANCE:

Shri M.G. Rayka, Additional Commissioner (AR) appeared for the Appellant
Shri Paresh M. Dave, Advocate appeared for the Respondent

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

Final Order No. 11296-11299 /2024

DATE OF HEARING: 15.04.2024

DATE OF DECISION: 13.06.2024

RAMESH NAIR

All the four appeals have been filed by the revenue against the
impugned Common Order-In-Original No. SIL-EXCUS-000-COM-049-52
-16-17 dtd. 28.11.2016/06.12.2016 passed by the Commissioner,
Central Excise, Customs & Service tax, Silvassa.

2. Brief facts of the case are that the respondent had sought export
of polyester waste under CETH No. 55.05 vide their letter dtd.
21.03.2013. During the course of verification of documents at the time
of supervision of export consignment it was observed by the
department that the product viz. polyester fibre waste/lump was not in
fibrous form and same was in solid irregular size small lumps shape
composed of polyester and same merited to be classifiable under CETH

39076090 of CETA, 1985. It was also observed that the respondent were procuring 'polymer waste' falling under chapter sub heading 39076090 & 39159041 from M/s Reliance Industries Ltd., and were doing process like segregation/agglomeration process i.e popcorn processing, cleaning etc. on such "polymer waste". All such processes did not amount to manufacture under Section 2(f) of Central Excise Act, 1944. 'Polymer waste' falling under CETH 3907 & 3915 did not merit classification under CETH 55.05 or 55.06 after carrying out such processes. Thus the Polymer waste' procured initially remained as "Polymer waste' only and there was no characteristic change in it even after such processes. Accordingly respondent was issued first show cause notice dtd. 26.12.2013 proposing the classification of Polyester Fibre waste/lumps/popcorn under CETH 39076090 instead of CETH 55051090 of Central Excise Tariff Act, 1985 ; classification of Polymer Waste under chapter heading No 39076090 and 39159041 of CETA, 1985 and penalty under Rule 25 of Central Excise Rules, 2002 for wrong classification. Further, based on intelligence that respondent was evading the Central Excise Duty , the department have carried out the search of the respondent's unit on 26.12.2012 and conducted detailed investigation against them. The investigation revealed that respondent were paying Central Excise Duty on clearance of their finished excisable goods, out of which certain goods i.e., Polyester Pop-Corn, Polyester Fibre Lumps/Oligomer were found to be exempted from payment of whole of the Central Excise Duty by virtue of unconditional exemption granted to the same under Sl. No. 78 of Notification No. 4/2006-CE as amended. Therefore, said duty paid by the respondent appeared to be contrary to the statutory provision under Section 5A(1A) of the Act, which appeared to bar the payment of Central Excise Duty on exempted goods; and consequently, no cenvat credit was available to the respondent in respect of the duty paid on their raw materials/inputs used in the manufacturing said exempted goods. It also appears that the respondent has wrongly availed benefit of Cenvat Credit of duty paid by them in purchase of raw-materials , which was used by them in segregating goods by manual sorting, to get PFY textured waste and for selling them as such. The said Cenvat Credit appeared inadmissible to respondent as the said goods had not been subjected to any manufacturing process within the meaning of Section 2(f) of the Central Excise Act, 1944. Further, it also appeared that the respondent had wrongly availed Cenvat Credit of duty paid by them on purchases of

Polymer Waste & FF Pre-Depolymer Waste, which remained used by them in segregating the same by manual sorting to get Polyester Fibre Lumps/Oligomer which appeared correctly classifiable under Ch. 39079190 of CETA, 1985. Also for the period prior to 17.03.2012, the said Cenvat Credit appeared inadmissible to them as the resultant product namely Polyester Fibre Lumps/Oligomer, obtained during the manual sorting of FF Pre-Depolymer Waste (Ch 55 of CETA, 1985), was exempted from payment of whole of the Central Excise duty by virtue of Notification No. 4/2006-CE dtd. 01.03.2006. Further, Polyester Fibre Lumps/Oligomer, obtained during manual sorting of goods- viz. polymer waste falling under Ch. 39 of the CETA, 1985 remained exempted from payment of the Central excise duty by virtue of Notification No. 04/2006-CE dtd. 01.03.2006 & by virtue of Notification No. 12/2012-CE dtd. 17.03.2012. Further, the resultant product obtained from these goods on manual sorting was sold by them under guise of 'waste of polyester staple fibre' by classifying the same under Ch 55051090 of CETA, 1985. Also in ER-1 returns respondent has shown the clearances of the same as that 'waste of polyester Staple fibre'. Accordingly show cause notice dtd. 31.12.2014 was issued to the respondent proposing classification of Polyester Pop-Corn, Polyester Fibre Lumps/Oligomer under Ch 39079190 of the Central Excise Tariff Act, 1985 instead of Ch 55051090. The notice further proposed recovery of cenvat credit availed on raw materials and differential cenvat credit short paid on clearance of waste raw material as such; recovery of central excise duty; recovery of interest as also penalty under Section 11AC/Rule 25 of Central Excise Rules 2002. The notice also proposed the confiscation of disputed goods. Penalty under Rule 26 was also proposed on Shri Vipul Gupta, General Manager of M/s. Sunshine Fibre Pvt. Ltd.

3. After issuance of aforesaid show cause notice, the Superintendent, Central Excise, Range-V, Division -III, Silvassa had requested the assessee to submit the information for the period from April 2014 to December 2014 which was submitted by respondent vide letter dtd. 25.02.2015 and 23.04.2015. On scrutiny of the details submitted, it appeared that respondent were continuing clearances of one of their final products i.e popcorn under CETH 55051090 instead of 39079190 and availing Cenvat Credit on raw material viz. PFY Textured waste, Polymer Waste and FF Pre depolymer waste and were also continuing clearances of their waste raw materials, Polyester Staple

Fiber under guise of sale of waste of Polyester Fibre and short reversed/paid cenvat credit amount. Accordingly the show cause notice dtd. 30.04.2015 was issued to the respondent for recovery of cenvat credit and duty alongwith interest and penalty. On the same grounds and same issues involved, further a periodical show cause notice dtd. 21.12.2015 covering the period from January 2015 to September 2015 was issued to the respondent. The respondent contested the claim of the Revenue. The Ld. Commissioner vide impugned common order dated 28.11.2016 adjudicated all the show cause notice wherein she has dropped the demands. Being aggrieved by the said impugned order the revenue filed the present appeals.

4. On behalf of the Revenue, Shri Mihir G Rayka, Learned Additional Commissioner (AR) appeared and reiterated the grounds of appeals. He submits that when polyester waste (POP Corn) and Polyester Waste (Oligomer mixed POY/mixed texturized) are held classifiable under Chapter sub-heading 39079990 as 'Other Polyester' in primary form, since the same being, obtained from reprocessing of raw materials i.e., polymer waste classified under chapter 39 as has been correctly alleged in the show cause notice and also remains admitted by the adjudicating authority herself in her findings, they are squarely covered by the unconditional exemption under Sr. No. 78 in Notification No. 4/2006-CE dtd. 01.03.2006 read with corrigendum F.No. 334/3/2006 dtd. 01.03.2006, as amended by Sr. No. 147 of Notification 12/2012-CE dtd. 17.03.2012.

5. He also submits that the finished goods viz. Polyester Waste (Pop Corn) and Polyester Waste (Oligomer/mixed POY/mixed textured) being fully and unconditionally exempted goods by virtue of Sr. No. 78 in Notification No. 4/2006-CE dtd. 01.03.2006 read with corrigendum F.No. 334/3/2006 dtd. 01.03.2006, as amended/superseded by Sl. No. 147 of Notification No. 12/2012-CE dtd. 17.03.2012, in terms of the CenvatCredit Rules, 2004, the assessee were not entitled to avail cenvat credit of the duty paid on the raw materials. Therefore the Ld. Commissioner ought to have confirmed the recovery of the Cenvat Credit wrongly availed on their raw materials, alongwith consequential interest/penalty.

6. He further submits that the adjudicating authority ought to have confirmed the demand of amount collected by the respondent from buyers of said goods by representing it as "duty of excise", in contravention of provisions of Section 5A(1) of the Central Excise Act, 1944, as the same ought to have been deposited forthwith to the account of Central Government in terms of Section 11D of the Act.

7. As regard the demand of differential cenvat credit on clearances of waste raw materials as such he submits that the adjudicating authority concluded that the respondent had only cleared the residual waste emerged during the course of manufacturing processes, and not raw material as such, due to lack of investigation at the buyer's end it is not ascertainable whether it was waste of raw materials or residual waste. However it is evident from the records and statement dtd. 27.12.2012 of Shri Suresh Chandra Sharma, Excise Executive of the respondent that all the raw-material being procured and processed by the respondent are waste of polymer in different form; and admittedly subjected to the process of segregation only, and the goods cleared in guise of residual waste was either waste which became unusable over a period of time or left over-waste after such segregation. Thus, it is clear that if any investigation would have been carried out at the end of the buyer, it would not have been possible to bring on record whether it was waste of raw material cleared as such, or residual waste emerged during the course of manufacturing processes.

8. He also submits that in terms of the provisions of Rule 3 of the Cenvat Credit Rules, 2004, the benefit of cenvat credit of duties paid on inputs/capital goods/input services are available to be taken only if such inputs/capital goods/ input services are used in or in relation to manufacture of the dutiable excisable goods. Since in the present case, such duty -paid raw materials were not put to use in or in relation to any manufacturing process within the meaning of Section 2(f) of the Act, the benefit of Cenvat Credit of duty paid on such inputs are not available to the respondent. In the light of above, the Ld. Adjudicating authority has erred in holding that the respondent has not cleared any raw -materials as such, and has also erred in holding them eligible for the Cenvat credit and dropping the differential cenvat credit demanded thereon with consequential interest/ penalty.

9. As regard the demand of central excise duty on the finished goods i.e., usable Polyester Staple Fibre, allegedly cleared in the guise of clearances of residual waste of polyester staple fibre at Re. 1 per Kg. to the non existent buyers/ individual buyers, he submits that the Ld. Commissioner has pointed out the deficiencies in the investigation and she has held that without any evidence the allegation of clandestine clearance by the respondent in the guise of residual waste is not sustainable and has dropped the demand thereon. However the details of investigation and statement of the vehicle owners recorded during the course of investigation are mentioned in show cause notice by which it is clearly appeared that the clearances of waste of Polyester Fibre at Re. 1/Kg, shown by Respondent to various individuals, were fake. Especially when the investigation officers had collected so much of evidences from various independent witnesses such as RTO authorities, vehicle owners whose vehicle were claimed to have used in transportation of the impugned goods etc, and when the same shown to Shri Vipul Gupta, GM of the respondent, his act of refraining from explaining the fact at the time of recording his statement clearly brings out their malafide intent. Therefore, the adjudicating authority ought to have upheld and confirmed the demands and proposals as raised in the show cause notices.

10. On the other hand, Shri P.M. Dave the Ld. Advocate appearing on behalf of the respondent reiterates the finding of the impugned order. He submits that all type of waste purchased by the Respondent were generated by the suppliers during production of textiles fibers, textiles yarns and such textiles products; and the suppliers have classified such waste under Chapter heading 55051090 and paid excise duty accordingly. The Central Excise officers in charge of the supplier's factories have assessed excise duty on such waste under Chapter heading 55051090, and such assessments by the Excise officers having jurisdiction over the supplier's premises have become final. Therefore, the Central Excise Officers in charge of the recipient (respondent) herein have no jurisdiction to reclassify such inputs, and accordingly the Commissioner of Silvassa Commissionerate has rightly considered the classification of inputs, namely waste purchased by the respondent, under chapter 55 of the Tariff. Notwithstanding the observation of the Commissioner in the impugned order about classification of Polyester /Polymer waste and notwithstanding reference to Chapter 39 of the

Tariff for waste in the impugned order, the final conclusion of the Commissioner that waste used by the respondent were classified under chapter 55 and therefore exemption of Notification No. 4/2006-CE was admissible is correct and legally justified. The Commissioner in charge of the recipients could not have reclassified the raw materials by changing the classification accepted and assessed by the officers having jurisdiction over the supplier's units. He placed reliance on the following judgments.

- (i) Sarvesh Refractories (P) Ltd. -2007(218)ELT 488 (SC)
- (ii) Balakrishna Industries Ltd. – 2014(309)ELT 354 (Tri. Del) and 2019 (366)ELTA23(Raj.)
- (iii) Oleofine Organics(India) Pvt. Ltd. 2014(299)ELT 91 (Tri. Mumbai) upheld in 2017(352)ELT A21(SC).
- (iv) Newlight Hotels & Resorts Ltd. 2016(44)STR 258(Tri Ahmd) – upheld -2016(44)STRJ142(SC)
- (v) MDS Switchgear Ltd. -2001(132)ELT 405(Tri. –Mumbai) – upheld – 2008(229)ELT 485(SC)
- (vi) CCE Vs. Nahar Granites Ltd. -2014(305)ELT 9(Guj.)

11. He also submits that exemption under Sl. No. 78 of Notification No. 4/2006-CE was not an absolute exemption, but it was a conditional exemption; the condition being that the goods specified under col.(2) of the table were production in India out of the scrap or the waste falling within the specified chapters. If the goods specified under Col.(2) were not reprocessed in India out of the scrap or the waste of goods specified under Col.(3), then nil rate of duty was inadmissible. The exemption was thus conditional, depending upon the inputs/ raw materials used for production of the goods which were exempt. Therefore, the respondent was even otherwise not under a legal obligation of Section 5A(1A), hence is paying excise duty on their final products, and accordingly cenvat credit of inputs was admissible. He placed reliance on the following judgments.

- (i) Hicare Pharmaceuticals Pvt. Ltd. Vs. CCE, Belgaum 2024 (1) TMI 669
- (ii) Macleods Pharmaceuticals Ltd. Vs. CCE & ST -2023(7)TMI 360 –CESTAT, Ahmedabad.
- (iii) Macleods Pharmaceuticals Ltd. Vs. CCE & ST -2024(1)TMI 387-CESTAT, Ahmedabad.
- (iv) Rainbow Papers Ltd. -2023(10)TMI 288.

12. He further submits that it is found by the Commissioner on the basis of evidence including a statement of the General Manager of the Respondent, that only sorting or cleaning was not undertaken on the concerned waste, but the processes undertaken were segregation, cleaning, drawing, crimping, pop corn processing and packing and testing for qualities; and it was during these processes that many

intermediate products, by products and residual products emerged. The process of sorting out usable products out of the waste was manufacture.

13. He also submits that by virtue of the adjudication order passed by the Commissioner, the waste products obtained by the respondent are classified under Tariff heading 3907/3915 ; whereas all the varieties of waste purchased by the respondent from suppliers like Reliance Industries Ltd. were classified under Chapter 5505 of the Tariff. Even if the revenue's case that no manufacture was undertaken for 'residual waste' is accepted, then also the position is that waste is classified under tariff heading 5505 whereas 'residual waste' is ordered to classify under Chapter heading 3915 and thus there is change in Tariff heading and chapter for classification of the Respondent's final products vis-à-vis the inputs. When there was change in the classification of inputs and final products, then the process was deemed to be 'manufacture', and therefore cenvat credit of excise duty by the supplier on waste classified under Tariff heading 5505 cannot be denied.

14. He also argued that even for clearance of segregated foreign materials by removing impurities attached to the main material like scrap, it is clarified by the government of India that segregation from scrap in order to weed out other foreign materials before the process of melting in the furnace was an essential process relating to manufacture of metal articles. Such foreign materials emerging during the process of segregation are to be treated as process waste, and not like removal of input as such. This Circular No. 1029/17/2016-CX dtd. 10.05.2016 issued for clarification on segregation of impurities from honey grade brass scrap is applicable in the Respondent's case also, and the Commissioner has rightly relied upon this circular for rejecting the Revenue's case that process for removal of impurities for obtaining usable and clean waste on one side and unusable "residual waste' on the other side was manufacture, and such process cannot be treated as removal of inputs as such.

15. He also submits that the activities/ process of testing and quality checking and packing the products for sale are considered to be manufacture because these activities/process render the goods marketable. In the present case, assuming without admitting that only manual sorting for separating good quality materials and removing

impurities for obtaining clean waste were undertaken and the unusable waste were sold as residual waste, then also such process would constitute manufacture because apart from the sorting and segregation, final packing for selling the goods (i.e good quality clean waste as well as the residual waste) was also carried out by the respondent for rendering the goods saleable. He placed reliance on the following judgments.

- (i) Baccarose Perfumes & Beauty Products Ltd. – 2006(194)ELT 310.
- (ii) Dy. Commissioner Vs. Baccarose Perfumes & Beauty products Ltd. 2010(257)ELT 177 (Guj.)
- (iii) Commissioner Vs. Baccarose Perfumes & Beauty Products Ltd.. – 2016(338)ELT A236(SC).

16. He also argued that it is a settled position that even if both the raw materials as well as the final products were classified in the same Tariff heading, still the final product can be considered to be goods 'manufactured' when saleable to particular class of customers whose requirements and purpose were served by such goods. In the present case, waste that the Respondent purchased were mixed waste comprising waste of different colours with impurities and foreign matter stuck to the waste materials, and such waste were not usable by textile processors; and therefore segregation, cleaning etc. were essential process for rendering the cleaned and good quality waste saleable to the textile processors. Classification of the raw materials and the products sold by the respondent was the same is not a ground for concluding that there was no manufacture of the final products. He placed reliance on the following decisions.

- (i) Laminated Packaging Pvt. Ltd. Vs. Collector of Central Excise- 1990 (49)ELT 326(SC)
- (ii) CCE Vs. BabubhaiNyalchand Mehta 1992(51) ELT 182(SC)
- (iii) Atlas Laminates industries -1991(51)ELT 251 (Guj.)

17. As regard the demand of Rs. 1,07,88,935/- he submits that this demand is for period from December 2009 to March 2014 under 2nd Show Cause notice dtd. 31.12.2014 which was issued invoking larger period of limitation. Prior to this Show Cause Notice in December, 2014, one show cause notice had been issued on 26.12.2013 for changing classification of inputs and final products and also for penalty; and therefore a subsequent show cause notice invoking larger period of limitation was impermissible. The demand raised under the second show cause notice dtd. 31.12.2014 for the F.Y. 2012-13 and 2013-14

was therefore barred by limitation. He placed reliance on the following judgments.

- (i) Nizam Sugar Factory – 2006(197)ELT 465 (SC)
- (ii) P&B Pharmaceuticals Pvt. Ltd. – 2003(153)ELT 14(SC)
- (iii) Ajit India Pvt. Ltd. – 2018(19)GSTL 659
- (iv) CST Vs. Ajit India Pvt. Ltd. – 2023(385)ELT 646(SC)

18. He also argued that it is a settled position that clandestine removal is a very serious charge against an assessee, and such allegation has to be proved beyond a reasonable doubt by adducing independent and cogent evidence about actual production and actual removal of goods in clandestine manner. Only because the buyers whose names and addresses were shown in the concerned invoices were not found at the premises/address in the invoices and the Respondent's General Manager could not give any other evidence, the revenue's case about clandestine removal of waste products by the Respondent in guise of 'residual waste' cannot be considered as proved beyond a reasonable doubt. He heavily relied upon the decision of Arya Fibers Pvt. Ltd. Vs. CCE, Ahmedabad –II 2014(311)ELT 529 (Tri.- Ahmd.)

19. He also submits that there is no evidence for proving that the goods under these invoices were actually usable polyester waste like Pop corn; but it is only the assumption of the revenue that the goods must be usable waste because the buyers were not found at the addresses shown in the invoice. There is no evidence for showing that the Respondent actually received a higher price for such residual waste, and no evidence like any jottings or recording in diaries or note books of receiving unaccounted money as price of clandestinely removed goods is found, and the Respondent's employees have also not stated that usable waste in guise of residual waste was removed or about receiving unaccounted money towards price of clandestinely removed goods. Only on assumptions or presumptions or doubts, a case of clandestine removal cannot be made against the assessee. The entire basis of the Revenue's case is that the Respondent's employee could not explain further details of sale and clearance of about 12,53,754 Kgs of residual waste and that his statement was the evidence casting doubt about genuineness of sale of the above quantity of residual waste at Rs. 1 per Kg. But this statement is not proved in the adjudication proceedings by following the mandatory procedure laid down under Section 9D of the Central Excise Act, and therefore this statement was not relevant as evidence in the adjudication proceeding. This statement

of the Respondent's General Manager was liable to be discarded in view of Section 9D of the Act, and there has been no evidence for establishing actual removal of waste produced by the Respondent in guise of 'residual waste' on payment of excise duty at the price of Rs. 1 per kg. He placed reliance on the following judgments.

(i) J.P. Iscon Pvt. Ltd. -2022(63)GSTL 64 (Tri. Ahmd.)

(ii) Arsh Alloys -2022(11) TMI 1071.

(iii) Poojan Décor Pvt. Ltd. 2023(9)TMI 722

20. He further argued that the revenue has filed all the four appeals under order/direction issued by the Committee of the Chief Commissioners, who has passed order No. 08/Review/2017 dtd. 6.03.2017 for this purpose. But there was no meeting of minds by the Chief Commissioners, and admittedly the Chief Commissioners constituting the Committee have not sat together and satisfied themselves as to legality and propriety of the decisions/order passed by the Commissioner of Central Excise, Silvassa Commissionerate. The authorization was defective if there was no meeting by the Review Committee and the Commissioners signed the noting sheet without any meeting and without any discussion. He placed reliance on the following judgments.

(i) Commissioner of Central Excise & Customs, Surat –I Vs. Shri Ganesh Dyeing & Ptnng, works -2010(19)STR 353(Guj.)

(ii) Commissioner of Central Excise, Delhi –III vs. IMT Cable Pvt .Ltd. -2016(339)ELT 139 (Tri. Del.)

(iii) Commissioner of Central Excise, Meerut-I Vs. Pioneer Fabricators (P) Ltd. 2011(24)STR 124(Tri. Del.)

21. Heard both the sides and perused the records. We find that in the first show cause notice dtd. 26.12.2013 the issue relating to classification of the finished products and inputs was raised by the revenue and polyester waste was proposed to be classified under Chapter heading 3907 instead of Chapter heading 5505, and Polymer waste was proposed to be classified under Chapter 3907 and 3915. In this regard, it is the revenue's case that when the Commissioner has held that polyester waste was classifiable under Tariff heading 39079990 as "other polyester" in primary form, then exemption under Sl. No. 78 of Notification No. 4/2006-CE was inadmissible, because waste purchased by the Respondent were also classifiable under same chapter heading 3907 and chapter 39 was specified in column (3) against Sl .No. 78 of the raw materials. In this regard we observed that all type of waste purchased by the respondent were generated by the

suppliers during production of textiles fibers, textiles yarns. The suppliers have classified such waste under Tariff heading 55051090 and paid excise duty accordingly. However in the present matter revenue try to re-classify the product under different chapter heading. To our mind this proposition of the law is incorrect. The assessee/respondent purchased the disputed raw materials from their suppliers and suppliers had classified their final products as per the classification indicated on the invoices. There is no dispute at the supplier end as regards the classification of the products purchased by the respondent. It is settled law that once the classification is not challenged at the end of the seller, the same goods cannot be re-classified at the recipientend. The decisions relied upon by the respondent in this context squarely covers the issue involved, in favour of the assessee/respondent on this point.

22. Further, we find that it is the revenue’s case that the finished products of the Respondent being fully exempted and unconditionally exempted goods by virtue of Sl. No. 78 of the Notification No. 4/2006-CE, the respondent were not entitled to avail Cenvat Credit of the raw materials. The Commissioner therefore ought to have confirmed the recovery of Cenvat Credit wrongly availed. Firstly, for the ease of reference we reproduce the relevant portion of the Notification No. 4/2006-CE and relevant entry where under the goods of the appellant are under exemption as per revenue.

S. No.	Chapter or heading or sub-heading or tariff item of the First Schedule	Description of excisable goods	Rate	Condition No.
(1)	(2)	(3)	(4)	(5)
78.	3901 to 3914	Plastic materials reprocessed in India out of the scrap or the waste of goods falling within Chapter 39, 54, 55, 56, 59, 64, 84, 85, 86, 87, 90, 91, 92, 93, 94, 95 and 96 <i>Explanation.</i> - For the removal of doubts, it is hereby clarified that nothing contained in this exemption shall apply to plastic materials reprocessed in a free trade zone, a special economic zone or a hundred per cent export-oriented undertaking and brought to any other place in India.	Nil	—

On going through the said Notification No. 4/2006-CE dtd. 01.03.2006 we find that to avail the benefit of said Notification, it is necessary to fulfil the conditions. The condition being that the goods specified under Col.(2) of the Table were produced in India out of the scrap or the

waste falling within the specified chapter. If the goods specified under Col.(2) were not reprocessed in India out of the scrap or the waste of goods specified under Col.(3), then NIL rate of duty was inadmissible. Therefore, it cannot be said that the Notification is absolute. Since respondent have not availed the exemption notification No. 4/2006-CE question of application of rule 6 does not apply. Moreover in respect of the goods respondent have admittedly paid the excise duty, once the excise duty has been paid the Cenvat cannot be denied.

23. Further, from the above exemption notification entry it is clear in our mind that above exemption entry carry conditions, therefore there is no doubt that the disputed exemption entry are conditional. The contention of the Revenue is based on the Section 5A(1A) which prescribes that in case of absolute exemption the assessee has no option except to avail such exemption. In the present case, as discussed above, the exemption entry are subject to certain conditions therefore in this position respondent was not under a legal obligation of Section 5A(1A) and accordingly Cenvat Credit of Inputs were admissible.

24. The Revenue's other contention is that as per Section 5A(1A) of the Central Excise Act where an exemption in respect of any excisable goods from the whole of duty of Excise leviable thereon has been granted absolutely, the manufacturer of such excisable goods cannot pay the duty and since for the clearance of disputed goods duty prescribed is nil as per above notification, the respondent -assessee are not required to pay the duty and whatever duty they have paid is to be recovered from them under Section 11D of the Central Excise Act. The relevant portion of Section 5A is reproduced below:-

"Section 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:

.....

(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."

It would be seen from the said Section 5A that the Central Government is empowered to exempt generally either absolutely or subject to such

conditions (to be fulfilled before or after removal) as may be specified in the Notification from the whole or any part of the duty. Further, a reading of Section 5A(1A) shows that 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. Thus, a bare reading of the above Section indicates that a manufacturer will not have an option to pay the duty only where the goods are exempt and the exemption granted is absolute. In the present case as discussed above serial No. 78 of Notification No. 4/2006-CE was not absolute exemption and have conditions. In our view, it cannot be said that serial No. 78 of Notification No. 4/2006-CE provides absolute exemption. In such circumstance, excise duty was therefore correctly paid by the respondent and Cenvat Credit of the inputs was also admissible. In our view Excise Duty paid cannot be appropriated under Section 11D of the Act.

25. We also find that for demand of differential Cenvat Credit of Rs 3,12,27,981/-, the revenue's case is that the process of segregation only was undertaken by the respondent, and the goods cleared in guise of 'residual waste' was either waste that become unusable over a period of time or left over waste after such segregation. As per revenue, the raw materials on which the respondent started their process was waste of polymer in different form, and the finished goods was also waste of Polymer /so called 'residual waste' which remained exactly the same even after the processes, and hence there was no manufacture involved. By such processes, the assessee was only removing foreign materials i.e. unusable waste of polymers from goods complete in themselves and/or processes which clean goods that were complete in themselves i.e usable polyester and staple fibre. The Ld. Commissioner has erred in holding that the assessee had not cleared any raw material as such. We find that the process of conversion of waste input into staple fibre involves a number of manufacturing processes like segregation, cleaning, drawing, crimping, popcorn processing, packing and testing for qualities and in the course of conversion many intermediate products, by-products and residual products emerge. The products so separated have now obtained as separate and new identity in the market terms and distinctly different from the waste input received. Further we have also gone through the finding recorded by

the Ld. Commissioner in this regard, in the present disputed matter Ld. Commissioner after scrutiny of the relevant Invoices, daily stock register (RG-1) and Stock Account of Inputs/ Raw materials (RG 23A Pt. I) found that the description of the goods shown in invoices is 'residual waste' and the relevant entry in respect of the such invoices is made in the RG-1 register and there is no entry of clearance of such 'residual waste' in their RG 23A Pt.I register which clearly show that the assessee had cleared the residual waste as finished goods and they had not cleared any raw materials as such, as alleged in the show cause notices. We also find that sub-rule (5) of Rule 3 of Cenvat Credit Rules 2004 applies only when the inputs which are brought into the factory is now to be removed in the same condition i.e 'As Such' in their original condition. In the instant case, it is on record that the input is not removed, 'as such' from the respondent premises but after the various process the resultant goods obtained in form of 'residual waste' were cleared and therefore the said Rule has no application to the facts of this case. We also find that in the present matter revenue has not produced any corroborative documentary evidences to prove that the respondent had cleared the waste raw materials as such. Therefore the demand of differential Cenvat Credit is legally not sustainable and demand in the present case was rightly dropped by the adjudicating authority.

26. We further find that as regard the demand of Rs. 1,07,88,395/-, it is the revenue's case that the respondent's general manager during the recording of statement on 12.12.2014 could not explain or clarify who were the persons to whom 'residual waste' was sold under the few of invoices at Rs. 1. per kg., and he also agreed that as per RTO reports etc., the vehicle number shown in the sale invoice were not for vehicles capable of being used for transportation. He could not provide addresses and whereabouts of the Customers. Therefore, the Commissioner has committed error in dropping demand of duty that was raised in the show cause notice on the basis that the goods sold under the concerned invoices of 'residual waste' were good quality polyester waste produced by the Respondent; and the demand raised on this basis could not have been dropped for the reason that the revenue did not adduce any corroborative evidence to prove that the goods under such invoices were actually polyester waste and that they were actually sold at a higher price by the respondent. We find that in

this regard the revenue and investigation team has not brought out any concrete and tangible evidences in support of the allegation that the Respondent had cleared the Polyester Staple Fibre clandestinely in the guise of waste of polyester fibre (residual waste). It is well settled law that allegation of clandestine removal is required to be arrived at on the basis of sufficient and positive evidence and the onus to prove such allegation is on the revenue. We find that in the impugned matter revenue has not interrogated any single buyer of the alleged cleared Polyester Staple Fibre clandestinely in the guise of waste of polyester fibre (residual waste). There is no evidence to prove that the goods under these invoices were actually usable polyester waste. There is no evidence by which it can be proved that respondent actually received a higher price for such residual waste. Further we have also gone through statement of respondent's employees wherein he has also not stated that usable waste in guise of residual waste was removed, or received any unaccounted money towards price of clandestinely removed goods. We find that in the present matter revenue has not produced any evidence to show that the respondent had cleared Polyester Staple Fibre in guise of residual waste. As Tribunal in the case of *Kothari Pouches Ltd. v. CCE, New Delhi* reported as [2001 \(135\) E.L.T. 531](#) (Tri.-Del) held that confirmation of demand entirely on the basis of documents of the transporters, without any independent corroborating evidence cannot be upheld. The Tribunal further observed that in the absence of any questioning of the consignee of the goods about receipt of clandestine removal, confirmation of demand was not warranted. To the similar effect in another decision of the Tribunal in the case of *Kothari Synthetics Industries Ltd. v. CCE*, [[2002 \(141\) E.L.T. 558](#) (Tri.)] laid down that the entries made in the transport register of the Transporter company could not be accepted as exclusive proof of clandestine receipt of grey fabrics from the transporter company and thereafter removal of the same after processing, without payment of duty, for want of corroboration by any tangible evidence. In the case of *M/s. Rhino Rubbers Pvt. Ltd. v. CCE, Bangalore* [[1996 \(85\) E.L.T. 260](#) (Tri.)] it was held that it is not safe to rely only on the third parties invoices where no link has been established and set aside the demand confirmed against the appellant in that case.

27 By applying the ratio of law declared in the above Tribunal decisions and also relied upon by the respondent to the facts of the present case, we find that Revenue has simplicitor relied upon the RTO

records, statements of transporters. It is well settled law that charges of clandestine removal are serious charges and are required to be established by production of positive and tangible evidence. The same cannot be upheld on the basis of surmises and conjecture. There has to be some cogent evidences so as to prove such charges and the same cannot be simpliciter based upon third parties documents and the statement of transporters. It may be observed here that nothing incriminating was recovered from the respondent's premises or from employees of the respondent during search of the same. In such circumstance and lack of evidences, since the Commissioner has recorded the specific findings that clandestine removal of goods has not been proved by the Department with any tangible evidence and dropped the demand in favour of the respondent, we do not find it appropriate to interfere with the said findings in the impugned order at this juncture.

28. In the light of the above discussion and finding, the department's appeals are found devoid of merit. Accordingly, the impugned order is upheld. The appeals filed by the revenue are dismissed. The cross-objections are also disposed of accordingly.

(Pronounced in the open court on 13.06.2024)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Neha