CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

Regional Bench COURT-2.

Excise Appeal No. 22025 of 2014

[Arising out of the Order-in-Appeal No. 177-178/2014-CE dated 20.03.2014 passed by the Commissioner of Central Excise (Appeal-I), Bangalore.]

Mineral Enterprises Ltd
No. 300/1-b, 16th Cross, Sadashivanagar,
Bangalore, Karnataka – 570080 **.......Appellant**

VERSUS

Commissioner of Central Excise
Bangalore-II
C R Building Queens Road, Bangalore
Karnataka-560001 **..... Respondent**

Appearance:
Mr. N. Anand, Advocate for Appellant
Mr. H. Jayathirtha, Authorized Representative for Respondent

Coram:
Hon'ble P.A. Augustian, Member (Judicial)
Hon'ble Pullela Nageswara Rao, Member (Technical)

<u>Final Order No. 20246 of 2025</u>

Date of Hearing: 28.08.2024
Date of Decision: 26.02.2025

Per: Pullela Nageswara Rao

The issue in the present appeal is whether the activity carried out by the appellant amounts to manufacture and whether the excise duty paid by appellant by utilizing the CENVAT credit is recoverable.

2. The brief facts are the Appellant is an 100% EOU engaged in manufacture or production and export of 'iron ore lumps and fines' classifiable under CETSH 26011110/20 and 260111130/40 of the First Schedule of the Central Excise Tariff Act, 1985 from the mines located at Tumkur District, Karnataka. The process of extraction of iron ore, mining and thereafter subjecting it to various processes such as crushing, grinding, screening and washing and making into lumps and fines is construed as production and/or manufacture of excisable goods in terms of 2(f) of the Central Excise Act, 1944.

3. During the period of dispute, the appellant cleared their manufactured excisable goods (viz., Iron Ore Lumps) into DTA and discharged Central Excise duties at the tariff rate as applicable at 8.2% during July 2009 to February 2010 and at 10.30% during March 2010 without claiming the benefit of exemption at Sl. No. 4 of Notification No. 23/2003-CE dated 31.03.2003. The total duty paid by appellant was Rs. 45,02,823/- and the said duty was discharged by the appellant by utilizing their Cenvat credit balance. Accordingly, the appellant self-assessed their duty liability in respect of DTA clearances by filing periodical form ER-2 Returns.

4. Based on the verification of ER-2 returns filed by the appellant, it is alleged that the amount was deliberately paid by the appellant as excise duty and passed on the incidence of excise duty to their customers and collected the same in cash and the same cannot be treated as duty. It can be only treated as amount/deposit and the same is required to be recovered under Section 14 of Cenvat Credit Rules, 2004. Accordingly, Show Cause Notice was issued demanding excise

duty, which was paid by the appellant along with interest and also proposing penalty under Section 26 and 27 of the Central Excise Rules, 2002. Thereafter, Adjudication Authority as per the impugned order confirmed the demand. Aggrieved by the said order both appellant and department filed appeals before Commissioner (Appeals). The Commissioner (Appeals) held that the process undertaken by the appellant did not amount to manufacture and said goods were not dutiable and appellant had wrongly availed Cenvat credit. The Revenue contended that the entire Cenvat credit of Rs. 45,02,823/- itself was recoverable. Accordingly, the appeal filed by the appellant was dismissed and appeal filed by the department was upheld by Commissioner (Appeals). Aggrieved by said order present appeal is filed before the Tribunal.

5. When the appeal came up for hearing, learned counsel for the appellant submits that the findings regarding manufacture given by the first appellate authority is beyond the scope of Show Cause Notice. The Revenue appeal was allowed on the ground that the process undertaken by the appellant does not amount to manufacture and the entire duty paid by the appellant is recoverable. Learned Counsel further submits that the said order allowing the appeal of the Revenue is beyond the scope of Show Cause Notice and relied on the following decisions in support of their contention;

(i) CCE Vs. Ballarpur Industries Ltd, 2007 (215) ELT 489 (SC).

(ii) CCE Vs. Gas Authority of India Ltd, 2008 (232) ELT 7 (SC).

(iii) CCE Vs. Brindavan Beverages (P) Ltd, 2007(213)ELT487 (SC).

(iv) Reckitt and Colman of India Ltd Vs. CCE, 1996 (88)ELT 641 (SC).

(v) CCE Vs. Sun Pharmaceuticals Inds Ltd, 2015 (326) ELT 3 (SC).

(vi) CC Vs. Toyo Engineering India Ltd, 2006 (201) ELT 513 (SC).

(vii) Caprihans India Ltd Vs. CCE, 2015 (325) ELT 632 (SC).

(viii) Hindustan Polymers Co Ltd Vs. CCE, 1999 (106) ELT 12 (SC).

(ix) CCE Vs. Gupta Soaps, 1999 (111) ELT 720 (Tri-Del.).

6. Learned Counsel further draws our attention to insertion to Section 5A (1A) of the Central Excise Act, 1944 introduced w.e.f. 13.05.2005, which reads as *"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 excise leviable thereon has been granted absolutely, the manufacturer of such excisable goods shall not pay the duty of excise on such goods*." The Learned counsel further draws our attention to Notification No. 23/2003-CE dated 31.03.2003 which read as follows:-

S.No.	**Chapter of heading No.or sub-heading No.**	**Description of goods**	**Amount of Duty**	**Conditions**
4.	Any Chapter	All goods produced or manufactured wholly from the raw materials produced or manufactured in India, other than those referred to in Sl. Nos. 5, 6 and 7 of this Table.	In excess of amount equal to 30% of the duty payable under section 3 of the Central Excise Act, 1944. Illustration. - Assuming product X has the value Rs. 100 under section 14 of the Customs Act, 1962 and is chargeable to basic custom duty of 25% ad valorem, special additional duty of 4% ad valorem and not chargeable to additional duty. The computation of duty required to be paid would be as follows:	4

			Basic Customs duty = Rs. 25/- Value for the purpose of special additional duty if leviable = Rs. 100/- + Rs. 25/- =Rs. 125/- special additional duty if leviable= 4% of Rs. 125/- i.e., Rs. 5.0/- Total duty payable but for this exemption= Rs. 25/- + Rs. 5.00/-= Rs. 30.00/- Thirty per cent. of the aggregates of the duties of customs 30% of Rs. 30.00/-= 9.00/- Duty required to be paid in accordance with this notification = Rs. 9.00/-	

7. Thus, on a combined reading of relevant provisions, manufacturer of such excisable goods shall not pay the duty of excise on such goods only if exemption of whole of the excise duty leviable thereon has been granted, absolutely. In appellant's case, exemption is only limited to "in excess of an amount equal to 30% of the duty payable under Section 3 of the Central Excise Act, 1944.

8. Learned Counsel further submits that the Commissioner (Appeals) has misconstrued the definition of 'mining activity' and has wrongly held that it does not amount to manufacture, whereas the mining activity amounts to manufacture and is excisable goods within the meaning of Section 2(d) of the Central Excise Act, 1944. In this regard, Learned Counsel draws our attention to the following decisions of this Tribunal in appellant's own case, where the orders of the appellate authority regarding the issue of manufacture was settled;

Appeal before this Hon'ble Tribunal	**Impugned order**	**Final Order passed by this Honorable Tribunal**
ST/243 to 254/2009	OIA No.138/2008 dt.31.10.08	No.20489-20500/2017- The impugned order was set aside and appeals were allowed and inter alia held that "....In fact, the Commissioner (A) has misconstrued the definition of mining activity and has wrongly held that it does not amount to manufacture whereas the mining activity amounts to manufacture and is excisable goods within the meaning of section 2(d) of the Central Excise Act, 1944......".
E/20834-20840/2014	OIO No.31-37/2012 dt. 18.09.2012 was affirmed in OIA No.639-645/2013-CE dt.27.11.2013	No.22400-22406/2017 dt.08.10.2007 This Tribunal followed the above order and allowed the appeal by setting aside the OIA No.639-645/2013.
ST/2728 & 2729/2010	OIA No.195/2010 dt.29.10.2010 & No.186/2010 dt.30.09.2010	No.20638-20639/2024 dt.14.08.2024. This Honorable Tribunal set-aside OIAs which had in-turn denied refund claims filed for the subsequent periods by relying on OIA No.138/2008 dt.31.10.2008.

9. Learned Counsel further submits that when there is an exemption available to the appellant, the assesse does not claim the same on the specific type it cannot be forced upon the assessee. The learned counsel in support relied on the decision of the Hon’ble Supreme Court in the matter of **Commissioner of Income Tax Vs. Mahendra Mills – 2022-TIOL-597-SC-IT,** wherein it is held that *“When there are two provisions under which an assessee could claim some benefit, it is for the assessee to choose one.* Thus, the law is well settled that a privilege cannot be a disadvantage, and an option cannot become an obligation.

10. Further, the Learned Counsel relied on the judgment of the

Hon'ble Supreme Court in the matter of **HCL Limited Vs. Collector of Customs, New Delhi. – 2001- (130) ELT 4105 (SC),** wherein it is held that where there are two exemption notifications that cover the goods in question, the assessee is entitled to the benefit of that exemption notification which gives him greater relief, regardless of the fact that notification is general in its terms and the other notification is more specific to the goods. Similarly the decisions in the matter of **Collector of Central Excise, Baroda Vs. Indian petro chemicals – 1997 (92) ELT 13 (SC), Commissioner of Central Excise Vs. Bharat Chemicals – 2015 (320) ELT 337 (Bom.)** where it is held that:-

> *"7. We have perused the appeal paper book and the annexures including the impugned order with the assistance of the Counsel appearing for the parties. There is no dispute about the factual position. The notification dated 1st March 1994, itself clarifies that there is a partial exemption to specified goods falling under Chapters 28, 29 and 30 of the Central Excise Tariff Act, 1985. A copy of this Notification dated 1st March, 1994 (Notification No. 6/94-C.E.) denotes that serial No. 6 are bulk drugs on which 10% Adv. duty can be paid. There are no conditions attached and appearing in the table. In the present case, the exemption as partially granted by this notification was available in both the cases namely clearance for home consumption and for export. If the assessee in this case has paid duty at the tariff rate namely 20% and not availed of the exemption under the subject notification and subsequently sought refund of the duty paid over and above 10% or has made payment from the accumulated amount or the credit accumulated in his Modvat account, the Tribunal found that he could not have been denied the relief.......................*
>
> *We find that the Tribunal's reasoning and particularly in paragraph No. 4, does not warrant our interference because, the*

> *Tribunal's view is a possible and plausible one. It is consistent with the factual materials on record. Hence, it is neither perverse nor vitiated by any error of law apparent on the face of record. There is no prohibition in law for the course adopted by the assessee that we must sustain the impugned order. As a result of the above discussion, this appeal fails. It is accordingly dismissed. No costs."*

11. Learned Authorised Representative (AR) reiterated the findings of in the impugned order and further submits that the since the appellant has deliberately paid the duty to pass on the benefit duty of to the customers and thereafter availed the benefit of same deliberately for monetary gains. Thus, the Adjudicating and Appellate Authority rightly upheld the demand of duty and imposed penalty.

12. Heard both sides perused the records.

13. We find that as regards the findings of the Appellate Authority while disposing the Revenue appeal regarding manufacture, it is beyond the scope of show cause notice since there is no such allegation as to the activity of the appellant not falling under manufacture in the Show cause notice. Moreover, the issue is well settled by the decision of this Tribunal in Final Order No. 20489-20500/2017 dated 20.04.2017, Final Order no. 22400-22406/2017 dated 08.10.2017 and Final Order no. 20638-20639/2024 dated 14.08.2024 holding that the activity carried out by the Appellant is manufacture. As regards allegation of considering the excise duty paid by the appellant has deposit, we find strong force in the contention of the appellant that once the duty is not exempted absolutely, as per the provision of Section 5(1) of the Central Excise Act, it is an option available to the appellant to either opt for the benefit of Notification No. 23/2003-CE or not and it is for the assessee

to decide the best method of making payment and merely if the assessee fails to avail the benefit of said notification, no allegation can be made that they have made an attempt to evade duty and to confirm demand of duty and impose penalty alleging violation of provision of law. Therefore, we find that the impugned order is unsustainable.

14. In view of the above discussions and in the facts and circumstances, the appeal is allowed with consequential relief, if any, in accordance with law.

(Order pronounced in open court on 26.02.2025)

(P.A.Augustian)
Member (Judicial)

(Pullela Nageswara Rao)
Member (Technical)

Sasidhar