CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
CHENNAI

Appeal No.E/348/2012

[Arising out of Order-in-Appeal No.29/MAD/2012 dt. 16.03.2012 passed by Commissioner of Central Excise (Appeals), Madurai]

Commissioner of Central Excise, Madurai — Appellant

Versus

Mani Spinning Mills Pvt.Ltd. — Respondent

Appearance :

Shri B. Balamurugan, AC (AR)
For the Appellant

Ms.S. Sridevi, Advocate
For the Respondent

CORAM :

Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)
Hon'ble Shri P. Dinesha, Member (Judicial)

Date of hearing / decision : 03.12.2018

FINAL ORDER No. 43172 / 2018

Per Shri Madhu Mohan Damodhar

The facts of the case are that the respondents are engaged in manufacture of cotton yarn and were availing exemption under Notification No.29/2004-CE dt. 09.07.2004 which provides 4% duty advalorem and also under Notification No.30/2004-CE dt. 09.07.2004 which provides for Nil rate of duty, with the condition that manufacturer should not avail cenvat credit on inputs. The Notification No.29/2004-CE was amended as follows :

(i) Vide Notfn No.58/2008 CE dt. 07.12.2008 – cotton yarn not containing any other textile material was wholly exempted from payment of duty.

(ii) Vide Notfn No.11/2009- CE dated 07.07.2009 – restored the position as it stood before the change brought about by (i) above.

Department took the view that cotton yarn was therefore absolutely exempted during the period from 07.12.2008 to 06.07.2009, and the assessees were prohibited from paying duty on their own and hence the assessees were not entitled for Cenvat Credit during this period; that further the assessees cannot avail Cenvat Credit on capital goods used in manufacture of wholly exempted products, as per Rule 6 (4) of Cenvat Credit Rules. From the ER-1 returns filed by assessee, it appeared that they had taken credit on capital goods during the impugned period, i.e. between 07.12.2008 to 06.07.2009 and utilized the same. Hence Show cause notice No.23/2009-CE dated 30.12.2009 was issued to the assessee for disallowing the ineligible credit amounting to Rs.31,79,050/- along with interest besides proposal to impose penalty under Rule 15 of Cenvat Credit Rules, 2004 was made. Original authority vide order dt.17.06.2011 held that manufacturers cannot opt to pay duty under Notification No.59/2008-CE ; that the assessees have no option to pay duty on their own will; that even if they choose to pay duty it will be in the nature of deposit only; that when final products are exempt, assesssee cannot avail credit of duty paid either on inputs or capital goods. On these conclusions, original authority disallowed credit and ordered recovery of amount of Rs.31,29,050/- along with interest. On appeal, the Commissioner (Appeals) vide impugned order dt. 16.03.2012 set aside the order of the original authority.

Aggrieved, department has filed the present appeal inter alia, on the following grounds :

(i) The final product manufactured and cleared by the assesse viz., cotton yarn was absolutely exempted from payment of duty in terms of Notification No.58/2008-CE dated 7.12.2008 issued under Section 5A (1A) of the Central Excise Act, 1944. Thus the assessee was prohibited from paying duty on their own for the said wholly exempted goods and cannot opt to pay duty under Notification No.59/2008-Central Excise dated 7.12.2008. Consequently, they cannot take Cenvat credit on wholly exempted products in terms of Rule 6 (4) of the Cenvat Credit Rules, 2004 during the period 7.12.2008 to 6.7.2009.

(ii) Further, the assessee themselves reversed the ineligible credit on their own on 27.01.2010 and thus admitting their ineligibility to avail the credit during the disputed period.

(iii) When the final product is fully exempted on the date of taking / availing credit, the assessee cannot take Cenvat credit on capital goods. The purpose of taking credit is to meet the duty liability on final products and when the final product does not attract any duty liability, the question of availing credit does not arise. Under these circumstances, the assessee could neither take / avail nor utilize the credit of tax / duty paid on capital goods even if representing the goods received during the previous year.

(iv) The contention that the eligibility of the capital goods is to be decided on the basis of receipt of the said goods and dutiability of the finished product at that time is not sustainable when the final product is wholly and unconditionally exempted on the date of taking credit. The assessee cannot take credit and even if they did so, it would not serve any purpose.

2. On 03.12.2018, when the matter came up for hearing, on behalf of the department, Ld. A.R. Shri B. Balamurugan reiterates the grounds of appeal.

3. On the other hand, on behalf of the assessee Ld. Advocate Ms. S. Sridevi supports the impugned order. She also submits that the matter is no longer *res integra* and an identical issue has been decided in favour of assessee by the CESTAT Chennai in the case of *Ambika Cotton Mills Ltd. Vs CCE Madurai* - 2018 (7) TMI 760 – CESTAT Chennai.

4.1 Heard both sides and have gone through the facts of the case. We find that the main grounds for Commissioner (Appeals) to set aside the order of original authority, is found in para-7 of the order, which is reproduced below :

> "7. The following provisions in the Cenvat Credit Rules 2004 (CCR) in respect of availing of capital goods credit has to be noted for deciding this issue.
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> a) In terms of Rule 3, a manufacturer of final products can be taken credit of entire duty paid on capital goods received in their factory of final product.
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> b) In terms of Rule 4, the Cenvat credit in respect of capital goods received in a factory at any point of time in a given financial year can be taken only for an amount not exceeding fifty per cent of the duty paid on such capital goods in the same financial year and the balance amount of CENVAT credit may be taken in any financial year subsequent to the financial year in which the capital goods were received in the factory of the manufacturer.
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> c) As per sub-rule 6 (4) of CCR, no Cenvat credit shall be allowed on capital goods which are used exclusively in the manufacture of exempted goods other than the final products which are exempt from whole of the duty of excise leviable

> thereon under any notification where exemption is granted based upon the value or quantity of clearance made in a financial year.
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> In view of the above provisions, it is observed that once a manufacturer is entitled to take credit on the duty paid in respect of capital goods while receiving the goods at their factory and then the eligible credit is continued to be allowed for taking credit in terms of Rule 4 of CENVAT credit rules. Further the sub-rule 6 (4) of CCR has only described the availability of fresh credit and the sub rule is not applicable for already allowed credits. Therefore, the appellants are entitled to avail the balance credit even though the final product is exempted during the period 07.12.2008 to 06.07.2009."

4.2 We are not able to find any infirmity in these conclusions of lower appellate authority. True, assessee is entitled to only take 50% of cenvat credit in respect of capital goods received in a factory at any point of time in a given financial year and the balance 50% credit can be taken in any subsequent financial year. No doubt, as per sub-rule (4) of Rule 6 of Cenvat Credit Rules, 2004, availment of cenvat credit is barred in respect of capital goods which are used captively in the manufacture of exempted goods. However, when the manufacturer was entitled to take credit on the duty paid capital goods at the time of their receipt it would be unjust and beyond the provisions of law to deny availment of remaining amount of credit only on the grounds that at the time of taking the second instalment the final goods were exempted. What is important to be seen is the eligibility or otherwise availment of credit, at the time of receipt of the goods in the factory. Restriction of availment of 50% in the first financial year and the balance subsequently, is only a procedural compulsion brought

about by sub-ordinate legislation. However that cannot take away the right of availment of credit that is vested with the appellant at the time when goods were received in the factory. We also find that Commissioner Appeals) has correctly relied upon on the decision in *Hindustan Coca Cola Beverages (P) Ltd. Vs CCE* [2005 (187) ELT 318 (Mumbai-CESTAT] which has not been appealed by the department nor been reversed by a higher court.

5. In the light of the discussions and conclusions herein above, no merit is found in the appeal of the Revenue for which reason it is dismissed.

(operative part of the order pronounced in court)

(P. Dinesha)
Member (Judicial)

(Madhu Mohan Damodhar)
Member (Technical)

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