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

E/988/2006 & E/310/2006

(Arising out of Order-in-Appeal No.34/2006 CE(SLM) dated 23.02.2006 and 169/2006 CE(SLM) dated 25.10.2006 passed by the Commissioner of Central Excise, (Appeals), Salem).

M/s. Chamundi Foods Pvt. Ltd. — Appellant

Vs.

CCE & ST, Salem — Respondent

Appearance

Shri S. Murugappan, Advocate
for the appellant

Shri S. Govindarajan, AC (AR)
Shri B. Balamurugan, AC (AR)
for the Respondent.

CORAM :

Hon'ble Smt. Sulekha Beevi C.S., Member (Judicial)
Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of Hearing/Decision: 07.06.2017

FINAL ORDER No. **41209-41210 /2017**

Per: Bench

The interesting question that arises for consideration in this appeal is whether the assessee who is eligible for the rural area benefit under Notification No. 8/2000-CE and No. 8/2003-CE can opt not to avail it, so as not to include the value of clearances of goods manufactured with the brand name of another, in the aggregate value of clearances to enable him to avail the SSI benefit of the notification.

2. Brief facts of the case are that:

a) The appellants are manufacturers of 'Biscuits' falling under subheading 1905 of Central Excise Tariff Act, 1985. They manufacture biscuits under their own brand name, namely, 'sixer', S. mary, 'R.Milk' etc., and cleared them without payment of duty. They also manufactured and cleared biscuits with brand name of M/s. Britania Industries Ltd., on payment of central excise duty. They availed the SSI benefit in terms of notification No. 8/2000-CE and No. 8/2003-CE for their own branded goods.

b) These Notifications (8/2000 and 8/2003-CE) exempt specified goods from payment of duty up to aggregate value of Rs.1 Core in a financial year. To avail benefit of these notifications, the aggregate value of clearances of specified goods should not have exceeded Rs.4 crore in the preceding financial year. The exemption contained in these notifications is not applicable to goods manufactured with the brand name of another person and the value of clearances of such goods should not be taken into account for computing the aggregate value of Rs. 4 crore in a financial year.

c) However, specified goods manufactured with the brand name of another person in a factory located in a rural area have been rendered eligible to avail the exemption under para 4 (c) of notification No. 8/2003 dated 01.03.2003. In terms of para 3 (a) of Notification 8/2003, clearances bearing the brand name of another person which are ineligible for the grant of this exemption in terms of Para 4 only shall not be taken into account for determining the aggregate value of Rs.4 crores during the preceding financial year.

d) Though the appellants were eligible for exemption from payment of Central Excise duty on the goods manufactured and cleared in the name of another ie; Brittania Industries Ltd., (as the factory of the assessee is located in rural area) they did not avail the exemption and cleared such goods on payment of duty. Their own branded goods were cleared without payment of duty in terms of the SSI benefit under the notifications. Thus the clearances of the goods manufactured for Britania was not included. However, the assessee had not filed any declaration as per para-2 of the notification ~~station~~ stating that they are not opting for the rural area exemption benefit.

e) The department entertained the view that as the goods are specified in the notification, the appellants will be covered by the rural area exemption and therefore the value of the clearances of the goods bearing the brand name of another (Brittania) has to be included in order to determine the aggregate value of clearances during the preceding financial year. That the value of the clearances of the brand Brittania if included the aggregate value exceeds Rs.4 crore and therefore the appellants are not eligible for exemption as provided in the notification. Show cause notices for the period 4/2000 to 3/2005 and 4/2005 to 2/2006 were issued raising the above allegations and after due process of law the original authority confirmed the demand along with interest and also imposed equal penalty. In appeal, the Commissioner (Appeals) upheld the confirmation of duty and interest, but however, set aside the penalty imposed. Hence these appeals.

3. On behalf of the appellants, Ld. Counsel Shri S. Murugappan, Advocate, submitted that the appellants have not claimed the benefit of rural area exemption provided in the notifications. Though the appellants may be eligible for the rural area exemption as the factory of the appellant is located in the rural area, ~~and~~ the same has not been availed and the appellants were paying excise duty on the goods cleared in the brand name of another viz., Britania Industries Ltd. If the value of the goods cleared in the appellant's brand name alone is taken for determining the aggregate value of clearances, the same would be below Rs.1 crore and the appellants would be eligible for SSI exemption. He argued that the appellant cannot be pressed upon by an exemption which has not been voluntarily availed by them. To canvas this contention he relied upon the judgment in the case of *CIT Vs. Mahendra Mills Ltd.*,- 243 ITR 56 rendered by the Hon'ble Supreme Court dated 15.03.2000. In the said case, when the assesse had not claimed depreciation allowance and the assessment was made

by the officer by allowing depreciation allowance, the Hon'ble Apex Court held that such allowances cannot be pressed upon the assessee when not claimed. That a privilege cannot be made to be a disadvantage and the option cannot be an obligation. It was thus contented by him that when the assessee has not opted to avail the rural area benefit by paying Central Excise duty ~~and~~ on the goods cleared with the brand name of another, the aggregate value has to be determined without taking into account the value of clearances made with the brand name of another.

4. Against this, the Ld. AR Shri S. Govindarajan, AC and Shri B. Balamurugan, AC, adverted to the Notifications No. 8/2000 & 8/2003 applicable to these appeals and submitted that as per para-2 of the notification the appellant has to give an option in the form of a declaration that he does not wish to avail the exemption benefit. The appellant has not filed any such declaration. In terms of para-3 (a) of Notification No. 8/2003, clearances bearing the brand name of another person which are ineligible for the grant of exemption in terms of para-4 annual clearances shall not be taken into account for determining the aggregate value of Rs.4 crores during the preceding financial year. The unit of the appellant's factory was situated in a rural area and was eligible to avail exemption under para-4 (c) of the Notification No. 8/2003. Thus when the goods are eligible for exemption, the same has to be included in the assessable value to determine the aggregate value of clearances to consider whether the appellants are eligible for SSI

exemption or not. While so computing the clearances of goods manufactured by the assessee for the relevant period exceeds Rs.4 crores and therefore are not eligible for the benefit of the exemption Notification No. 8/2000 and 8/2003, in respect of goods manufactured ~~when~~ with their own brand name.

5. We have ~~further~~ heard submissions made by both sides. For better appreciation and the relevant part of the Notification No. 8/2003-CE is reproduced as under:-

> "2. The exemption contained in this notification shall apply subject to the following conditions, namely:-
>
> (i) a manufacturer has the option not to avail the exemption contained in this notification and instead pay the normal rate of duty on the goods cleared by him. Such option shall be exercised before effecting his first clearances at the normal rate of duty. Such option shall not be withdrawn during the remaining part of the financial year.
>
> 3. For the purposes of determining the aggregate value of clearances for home consumption, the following clearances shall not be taken into account, namely : -
>
> (a) clearances bearing the brand name or trade name of another person, which are ineligible for the grant of this exemption in terms of paragraph 4;
>
> (b) clearances of the specified goods which are used as inputs for further manufacture of any specified goods within the factory of production of the specified goods;
>
> (c) clearances of strips of plastics used within the factory of production for weaving of fabrics or for manufacture of sacks or bags made of polymers of ethylene or propylene.

> 4. The exemption contained in this notification shall not apply to specified goods bearing a brand name or trade name, whether registered or not, of another person, except in the following cases :-
>
> c) where the specified goods are manufactured in a factory located in a rural area."

6. The contention put forward by the ld. Counsel is that though the factory is located in a rural area, appellant has not opted to avail the exemption benefit eligible to a factory located in a rural area. That when the appellant has not exercised the option to avail the benefit of rural area exemption, the value of those clearances cannot be taken into account for the purpose of determining the aggregate value of clearances. The ld. Counsel seeks to draw support from the judgment of the Hon'ble Supreme Court in the case of Mahendra Mills Ltd. (supra). We are afraid that the said judgment cannot be applied to the facts of the present case for the reason that the said case deals with the depreciation allowances granted by the assessing officer under Income Tax Act, & when & ~~though~~ the assessee had not claimed it. The claim of depreciation under Income Tax Act is optional. In the matter at hand as per 2(1) of the Notification a manufacturer has the option not to avail the exemption contained in the said notification and such option cannot be withdrawn during the remaining part of the financial year. The notification has to be opted for, in its entirety and the appellant cannot choose to withdraw this option. There is no option given in any other portions of the notification, including para-4 for extending the

option not to avail part of the notification No. 8/2000 and 8/2003. Hence, this leads to the obvious conclusion that Notification No. 8/2003 has to be followed fully with for all the goods cleared by the appellant as per the conditions stated therein, or not at all. Appellant herein has chosen to pay duty on the goods cleared with the brand name of another and opted to avail SSI exemption for the goods cleared in his own brand name which is not permissible under this notification. Sub-clause (a) of Para-3 categorically states that for the purpose of determining the aggregate value of clearances for home consumption the clearances bearing the brand name of another person which is ineligible for grant of exemption only cannot be included. Since the clearances bearing the brand name of Brittania Industries is eligible for exemption based on rural clearances, ~~and~~ the value of such clearances also has to be included in the aggregate value of clearances. When so determined, the value of clearances exceeds Rs. 4 crores/Rs. 3 crores and therefore in our view the duty demand raised is right and proper. This being so, the appellant cannot, for whatsoever reason or perception that he may have, choose to observe the notification in piecemeal. Accordingly, the clearances of goods with brand name of others, notwithstanding the fact that he may have chosen to pay duty thereon, will be necessarily taken into account for calculating aggregate value of clearances. When this is done, the aggregate value for the preceding year will then exceed the limits laid down in the Notification No. 8/2003. Therefore, the assessee cannot then claim benefit under this notification in the succeeding year. From the foregoing discussions, we are of the considered view that the impugned order does not call for any interference and accordingly, both the appeals are dismissed.

(Operative part of the Order pronounced in the Open Court on 07.06.2017)

(MADHU MOHAN DAMODHAR)
MEMBER (TECHNICAL)

Sulekha Beevi
(SULEKHA BEEVI C.S.)
MEMBER (JUDICIAL)

BB

Customs, Excise & Service Tax Appellate Tribunal

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