CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL CHENNAI

REGIONAL BENCH – COURT NO. III

EXCISE APPEAL No.395 of 2011

(Arising out of Order-in-Original No.43/2011-CE dated 31.03.2011 passed by Commissioner of Central Excise, Madurai]

M/s.Bannari Amman Spg. Mills Ltd. **Appellant**
Unit-II,
Velvarkottai Village
Vedasandur Taluk
Dingidul District - 624 803

VERSUS

Commissioner of GST & Central Excise **Respondent**
Madurai Commissionerate
Central Revenue Building,
No.4, Lal Bhadur Shastri Road, Bibikulam
Madurai 625 002.

WITH

(i) EXCISE APPEAL No.431 of 2012 (Shiva Texyarn Ltd. Vs CGST & CE Madurai)

(ii) EXCISE APPEAL No.432 of 2012 (Bannari Amman Spg. Mills Ltd., Unit-I Vs CGST & CE Madurai)

(iii) EXCISE APPEAL No.433 of 2012 (Bannari Amman Spg. Mills Ltd., Unit-II Vs CGST & CE Madurai)

(iv) EXCISE APPEAL No.434 of 2012 (Bannari Amman Spg. Mills Ltd., Unit-I Vs CGST & CE Madurai)

(v) EXCISE APPEAL No.435 of 2012 (Shiva Texyarn Ltd. Vs CGST & CE Madurai)
(Arising out of Order-in-Appeal No.137-141/2012 dated 26.06.2012 passed by Commissioner of Central Excise (Appeals), Madurai]

(vi) EXCISE APPEAL No.40457 of 2013 (Bannari Amman Spg. Mills Ltd., Unit-II Vs CGST & CE Madurai)

(vii) EXCISE APPEAL No.40458 of 2013 (Bannari Amman Spg. Mills Ltd., Unit-I Vs CGST & CE Madurai)

(viii) EXCISE APPEAL No.40459 of 2013 (Shiva Texyarn Ltd. Vs CGST & CE Madurai)
(Arising out of Order-in-Appeal No.308-310/2012 dated 21.12.2012 passed by Commissioner of Central Excise (Appeals), Madurai]

APPEARANCE :

Shri M.S.Nagaraja, Advocate
For the Appellant

Shri Arul C. Durairaj, Superintendent (A.R)
For the Respondent

**CORAM : HON'BLE MS. SULEKHA BEEVI C.S., MEMBER (JUDICIAL)
HON'BLE MR. P. ANJANI KUMAR, MEMBER(TECHNICAL)**

**DATE OF HEARING : 25.01.2022
DATE OF PRONOUNCEMENT: 31.01.2022**

FINAL ORDER No. 40014-40022 / 2022

Order PER : SULEKHA BEEVI C.S.

The issue involved in all these appeals being the same, they were heard together and are disposed by this common order.

2. The brief facts are that appellants are engaged in the manufacture of cotton yarn not containing any textile material falling under Chapter 52 of the First Schedule of CETA, 1985. During the relevant period from 07.12.2008 to 06.07.2009, the following three notifications were in operation in respect of cotton yarn :-

Notification No.29/2004-CE as amended vide Notification No.58/2008-CE dated 07.12.2008	'Nil' rate of duty
Notification No.30/2004-CE dated 09.07.2004	'Nil' rate of duty (subject to CENVAT on inputs is not taken – conditional Exemption Notification)
Notification No.59/2008-CE dated 07.12.2008	4% Adv.

Notification No.29/2004-CE as amended vide Notification No.58/2008-CE dated 07.12.2008 prescribes 'Nil' rate of duty. Notification No.30/2004-CE dated 09.07.2004 prescribes 'Nil' rate of duty on cotton yarn not containing any other textile material subject to the condition that cenvat credit was not taken on inputs. Notification No.59/2008-CE dated 07.12.2008 prescribed Excise duty @ 4% ADV. on all goods falling under "CHH 5204, 5205, 5206, 5207, 5208, 5209, 5210, 5211 and 5212. The appellants availed the benefit of Notification No.30/2004 for different periods in respect of clearances to domestic parties and in respect of export clearances. They availed cenvat credit on the capital goods and the said credit was used by them for paying the duty. They availed the benefit of Notification No.29/2004 for their domestic clearances. The appellants utilized the cenvat credit taken on capital goods for payment of duty of excise on export clearances under the Notification No.29/2004 dt. 09.07.2004 for which rebate claim was filed. The rebates were sanctioned.

3. According to department, Section 5A (1A) of the Central Excise Act, 1944 prohibited manufacturers from paying duty on excisable goods which stood wholly exempted. However, the appellants paid duty during the disputed period for exports and claimed rebate of the duty paid. Further, they were not entitled to take credit of the tax / duty on inputs or capital goods during the disputed period. However, appellants had taken credit on capital goods which, according to the department, was not eligible. Show cause notice was issued proposing to disallow the credit availed on capital goods and for recovery of same along with

interest and for imposing penalty. After due process of law, the Ld. Commissioner vide his adjudication order dt. 31.03.2011 has confirmed demand and interest but dropped penalty which is challenged in Appeal No.E/395/2011.

4. In other batch of these appeals (Appeal E/431-435/2012 & E/40457-40459/2013), the orders of adjudicating authority in two cases were modified by Ld. Commissioner (Appeals) only to the extent of setting aside the disallowance and recovery of balance 50% capital goods credit originated from earlier dutiable period and rest of the orders were upheld by the appellate authority. Hence these appeals.

5. Ld. Counsel Shri M.S. Nagaraja appeared and argued for the appellant. He submitted that appellants were clearing cotton yarn for domestic area at 'Nil' rate of duty under Notification No.30/2004-CE dated 09.07.2004 and they did not avail cenvat credit on inputs as per the condition of the exemption notification. The appellant exported cotton yarn on payment of Central Excise duty @ 4% (cotton yarn not containing any other textile material) in terms of Notification No.29/2004-CE dated 09.07.2004 and claimed rebate of Excise duty so paid on the exported goods.

6. The department has issued show cause notices to disallow the credit availed by them on capital goods and utilized for payment of duty at 4% on cotton yarn exported by them. Though it is alleged that the appellant has availed cenvat credit on input service no such credit has been taken.

7. Department has issued SCN dt. 18.12.2019 which is subject matter of Appeal E/395/2011. It is alleged in the SCN that in terms of Rule 6 (4) of CCR 2004 cenvat credit cannot be availed on capital goods which are exclusively used in the manufacture of exempted goods. Thus the SCN proposes to disallow the cenvat credit for the period 07.12.2008 to 06.07.2009 and to recover the same along with interest. This amount includes 50% of the credit on capital goods taken in April 2009 in respect of capital goods received by the appellants during the period from 07.04.2008 to 06.12.2008 even though the cotton yarn, according to the department, was exempt only during the period from 07.12.2008 to 06.07.2009. This is beyond the grounds made out in the SCN. There is no dispute with respect to the eligibility of credit on the capital goods received prior to 07.12.2008 and after 06.07.2009. The original authority however confirmed the entire demand along with interest and dropped penal proceedings. Similar show cause notices were issued for different periods proposing to disallow cenvat credit on capital goods alleging that they were used exclusively for manufacture of exempted cotton yarn during the period 07.12.2008 to 06.07.2009. However, the proposals in the SCNs were confirmed by different Orders-in-Originals which were upheld by appellate authority.

8. He adverted to para-7 of the impugned Order-in-Appeal E/395/2011 and argued that Commissioner (Appeals) has held the product manufactured by the appellant is cotton yarn not containing any other synthetic material. The authorities below have also held that when the said goods attract 'Nil' rate of duty in terms of Notification

No.29/2004-CE as amended by Notification No.58/2008-CE dated 07.12.2008, the assessee cannot have the option of choosing Notification No.59/2008-CE dated 07.12.2008 which prescribes payment of excise duty @ 4%.

9. The Department has heavily relied upon sub-section (1A) of Section 5A of Central Excise Act which reads as under :

> **"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 :
>
> **Provided** that, unless specifically provided in such notification, no exemption therein shall apply to excisable goods which are produced or manufactured —
>
> (i) in a free trade zone or a special economic zone and brought to any other place in India; or
>
> (ii) by a hundred per cent export-oriented undertaking and [brought to any place in India.
>
> ***Explanation***. — In this proviso, "free trade zone", "special economic zone" and "hundred per cent export-oriented undertaking" shall have the same meanings as in *Explanation* 2 to sub-section (1) of section 3.
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> (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."

10. He submitted that Notification No. 30/2004 dated 09.07.2004 did not exempt cotton yarn absolutely. The exemption was conditional and it was eligible only if cenvat credit was not taken on the "inputs". It did not bar availing of credit on capital goods. Notification No.59/2008-CE dated 07.12.2008 prescribes rate of duty of 4% ADV. on cotton yarn without any condition. Therefore, the

contention of the department that the cotton yarn was unconditionally exempted from excise duty by referring only to Notification No.29/2004-CE as amended by Notification No.58/2008-CE dated 07.12.2008 is factually and legally incorrect when there are two or more notifications simultaneously operational in respect of cotton yarn.

11. The CBEC vide Circular No.795/21/2000-CX dated 28.07.2004 has Clarified that there was no restriction in availing both the notifications simultaneously namely Notification No.29/2004-CE and 30/2004-CE both dated 09.07.2004.

12. CBEC vide Circular No.845/03/2006-CX dated 01.02.2007 [as amended vide Circular No.858/16/2007-CX dated 08.11.2007] clarified once again that both the Notification No.29/2004-CE and 30/2004-CE both dated 09.07.2004 could be availed simultaneously. The Commissioner, Coimbatore also issued Trade Notice No.14/2008 dated 11.12.2008 confirming the above. Thus appellants have relied on the CBEC Circular No.937/27/2010-CX dated 26.11.2010. The said CBEC circular is only with regard to cenvat credit of the duty paid on inputs. There is no reference in the said circular as to the eligibility of the credit on capital goods.

13. Ld. Counsel further argued that it is settled legal position that when a product / commodity is covered by two or more notifications, the rate of duty beneficial to the assessee has to be extended and assessee has option to avail benefit the beneficial one. During the

disputed period, the appellants had the option of three notifications. They have availed the benefit of all these notification. He relied on the following judgements to contend that assesse can avail the more beneficial notification when there are two or more notifications operating simultaneously :-

1) *Share Medical Care Vs UOI* – 2007 (209) ELT 321 (SC)
2) *HCL Ltd. Vs CCE New Delhi* - 2001 (130) ELT 405 (SC)
3) *CCE Vs Indian Petro Chemicals* - 1997 (92) ELT 13 (SC)

14. In the show cause notice, the department has invoked Rule 6 (4) of CCE to deny credit on capital goods alleging that the capital goods have been exclusively used in the manufacture of exempted goods. In the instant case, cotton yarn was exported on payment of duty @ 4% under the Notification No.59/2008-CE dated 07.12.2008 and cleared at 'Nil' rate of duty in Domestic Tariff Area. Therefore, the capital goods have been used in the manufacture of exempted goods as well as the dutiable gods. Credit is thus available on capital goods not used exclusively in the manufacture of exempted goods.

15. He submitted that the issue in the present appeals are squarely covered by the decisions of the Tribunal in the case of *S.T.Cotton Exports (P) Ltd. Vs CCE Ludhiana* - 2010 (261) ELT 807 (Tri.-Del.). The said decision was upheld by the Punjab & Haryana High Court as reported in 2011 (268) ELT 318 (P&H). Similar decision was taken by the jurisdictional High Court in the case of *Sudan Spinning Mills (P) Ltd.*

Vs CCE Madurai - 2019 (368) ELT 953 (Mad.) and prayed that the appeals may be allowed.

16. Ld. A.R Shri Arul C. Durairaj supported the findings in the impugned orders.

17. Heard both sides.

18. The department's contention in these appeals is that the appellants are not eligible to avail credit on capital goods when they have opted to avail benefit of 'Nil' rate of duty under the Exemption Notification. It is also the case of the department that the appellant cannot claim the benefit of Notification No.29/2004-CE to avail the exemption while clearing the goods in DTA and also simultaneously avail the benefit of Notification No.50/2008-CE to clear the goods for exports by paying concessional rate of duty @ 4% ADV. and then avail cenvat credit on capital goods. In para-5 of the impugned order dated 31.3.2011 in Appeal E/395/2011, the original authority has relied upon Board's circular dated 26.11.2010 to hold that appellant cannot avail the credit on capital goods. The discussion is as under :

> "5. I have gone through the records of the case and considered the points put forth in defence. I find that the issue as to whether manufacturers could be permitted to pay duty under Notification No.59/2008 dated 07.12.2008 in view of unconditional exemption under Notification No.29/2004 dated 09.07.2004 was referred to the Board and the Board vide Circular No.937/27/2010-CX dated 26.11.2010 had clarified as follows :
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> > ".....The period of dispute is from 07.12.2008 to 06.07.2009. During this period while one notification No.29/2004-CE as amended granted full exemption to certain items of Textile Sector without any condition, the second notification 59/2008-CE prescribed a concessional rate of duty of 4% on these items, with the benefit of Cenvat Credit.

> 2. The dispute was with regard to whether an assessee can avail the benefit of either of the above said two notifications whichever is beneficial to him or he is bound to avail the unconditional exemption under notification no.29/2004-CE, as amended, during the period under dispute in terms of the provisions of section 5A (1A) of the Central Excise Act, 1944.
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> 3. The matter was examined in the Board. As a substantial question of law was involved, the matter was referred to the Law Ministry for its opinion. The Ministry of Law has opined that the language used in the said section 5A (1A) is unambiguous and principles of harmonious construction cannot be applied in the instant case in view of specific provision under sub section (1A) of Section 5A of the Central Excise Act. **The Law Ministry has accordingly concluded that in view of the specific bar provided under sub-section (1A) or section 5A of the Central Excise Act, the manufacturer cannot opt to pay the duty under notification 59/2008-CE dated 7.12.2008 and he cannot avail the cenvat credit of the duty paid on inputs.**

Since the Board has accepted the afore-said opinion of the Law Ministry and further directed the field formations to decide the pending issues in the light of the opinion expressed as above, the undersigned, being an authority functioning under the administrative jurisdiction of the Board, has no option but to follow the instructions as conveyed. In view of the acceptance of the Law Ministry's opinion by the Board, the question of applicability of the Trade Notice issued by the Coimbatore Commissionerate does not arise. It is, therefore clear that Bannari was not entitled to avail credit of duty paid on input services and capital goods by opting to pay duty under Notification No.59/2008-CE when Notification NO.29/2004-CE as amended by Notification No.58/2008-CE granted absolution un-conditional exemption."

19. The said circular dated 26.11.2010 which has been heavily relied by the department had come up for consideration before the jurisdictional High Court in the case of *Sudan Spinning Mills (P) Ltd. Vs CCE Madurai* (supra). The Hon'ble High Court observed that when there are two or more notifications simultaneously operational for the same commodity, it is the option of the assesse to elect and select the benefit provided under the notification. The relevant portion of the judgment reads as under :

"**8.** Mr. Aravindan, for his part, relies on the provisions of Section 5A(1A) of the Central Excise Act, 1944 and upon two Circulars viz., Circular No. 937/27/2010-CX, dated 26-11-2010 and Circular No. 940/l/2011-CX., dated 14-1-2011 to the effect that where there are two Notifications holding the field simultaneously, an assessee is bound to avail only the one extending an unconditional exemption. This, proposition, if accepted would mean that the petitioner, in this case, could avail only of benefit under Notification No. 29/2004.

9. Circular No. 937/27/2010-CX., dated 26-11-2010 is extracted below :

> 'References had been received from the field formations as well as trade to clarify the ambiguity arising out of simultaneous prevalence of two exemption Notifications namely 29/2004-C.E., dated 9-7-2004 as amended by notification No. 58/2008-C.E., dated 7-12-2008 and another notification 59/2008-C.E., dated 7-12-2008. The period of dispute is from 7-12-2008 to 6-7-2009. During this period while one Notification No. 29/2004-C.E., as amended granted full exemption to certain items of Textile Sector without any condition, the second notification 59/2008-C.E., prescribed a concessional rate of duty of 4% on these items, with the benefit of Cenvat Credit.
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> 2. The dispute was with regard to whether an assessee can avail the benefit of either of the above said two notifications whichever is beneficial to him or he is bound to avail the unconditional exemption under notification No. 20/2004-C.E., as amended, during the period under dispute in terms of the provisions of Section 5A(1A) of the Central Excise Act, 1944.
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> 3. The matter was examined in the Board. As a substantial question of law was involved, the matter was referred to the Law Ministry for its opinion. The Ministry of Law has opined that the language used in said Section 5A(1A) is unambiguous and principles of harmonious construction cannot be applied in the instant case in view of specific provision under sub-section (1A) of Section 5A of the Central Excise Act. The Law Ministry has accordingly concluded that in view of the specific bar provided under sub-section (1A) of Section 5A of the Central Excise Act, the manufacturer cannot opt to pay the duty under notification 59/2008-C.E., dated 7-12-2008 and he can not avail the Cenvat Credit of the duty paid on inputs.
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> 4. The aforesaid opinion of Law Ministry has been accepted by the Board. Pending issues, if any, may be decided accordingly.'

10. In direct contradiction to the above, the Board has issued Circular No. 99/2008, dated 11-12-2008 in response to a query by the Southern India Mills' Association, Coimbatore, clarifying that where the levy of duty is covered by more than one Notification, the rate more beneficial to the assessees will have to be extended, subject to the assessee satisfying all conditions imposed thereunder. The aforesaid Notification reads as follows :

ALL MEMBER MILLS :

Sub : Fiscal Stimulus package - Central Excise Duty - Reg.,

Ref : Association Circular No. 95/2008, dated December 8, 2008

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Member mills may be aware that the Central Government had amended Notification No. 29/2004-C.E., dated 9-7-2004 by way of Notification No. 58/2008-C.E., dated 7-12-2008 thereby reducing the rate of duty on cotton yarn and pure cotton fabrics to zero per cent from 4 per cent. A query therefore arose with regard to the utilisation of the accumulated credit. The validity of Notification No. 59/2008-C.E., dated 7-12-2008 was also questioned.

In reply to the Association's query as to whether the textile mills are still eligible to clear their goods utilising both the Notifications i.e., at zero per cent and 4 per cent simultaneously, the Commissioner of Central Excise, Coimbatore has clarified by way of a Trade Notice on the following lines :

'Due to issue of these notifications, there may be cases where same product/commodity Is being covered by more than one notification. In such a situation, it is clarified that the rate beneficial to the assesses would have to be extended if they fulfill the attendant conditions of the exemption.'

A copy of the Trade Notice No. 14/2008 dated 11-12-2008 issued by the Commissioner of Central Excise, Customs and Service Tax, Coimbatore is reproduced below for your information and guidance.'

11. The aforesaid two Circulars are in direct contradiction with each other. Circular No. 99/2008, dated 11-12-2008 makes it clear that where there are multiple Notifications operating simultaneously in respect of the same commodity and extending different benefits, an option must be given to the assessee to elect and choose the Notification that would be most beneficial to it. Circular No. 937/2010, dated 26-11-2010 on the other hand, limits the choice to only the Notification granting unconditional exemption.

12. This does not stand to reason. All the Notifications providing multiple choices to an assessee for tax treatment of the same commodity have been issued by one and the same Department and continued to operate simultaneously. The rationale behind this cannot be fathomed and it was incumbent upon the authorities to withdraw the Notifications that would be unavailable such that the remaining Notifications would prevail. This, not having been done, I am of the view that the assessee has to be permitted to elect and choose the Notification of its choice and the Department cannot thrust a Notification of its choice upon the assessee.

13. I am supported in this view by two judgments of the Supreme Court in the case of *H.C.L. Limited* v. *Collector of Customs, New Delhi*, [2001 (130) E.L.T. 405 (S.C.)] and *Collector of Central Excise, Baroda* v. *Indian Petro Chemicals* [1997 (92) E.L.T. 13 (S.C.)] where the Full Bench and Division Bench of the Supreme Court respectively have categorically confirmed the position that the option to elect and select the benefits provided under Notification is clearly within the realm of choice of an assessee. Circular No. 937/27/2010-CX., dated 26-11-2010, thus does not set out the correct position in law.

14. In the light of the above discussions, this Writ Petitions are allowed and the impugned orders are quashed. No costs. Consequently, connected Miscellaneous Petitions are closed."

20. The issue in these appeals with regard to simultaneously availing the benefit of Notification 29/2004 as amended by Notification 58/2008 and another Notification 59/2008 during the disputed period (07.12.2008 to 06.07.2009) has been considered in the above decisions and found in favour of assessee. The Board circular dt.26.11.2010 which has been heavily relied by department has been quashed by the Hon'ble High Court.

20. Another allegation raised by the department is that capital goods have been used exclusively for the manufacture of exempted goods. In the present case, the appellants were paying duty @ 4% on the goods manufactured by using the very same capital goods. There is no room for doubt that the capital goods were not exclusively used for manufacture of exempted goods. The Tribunal in the case of *S.T.Cotton Exports (P) Ltd. Vs CCE Ludhiana* (supra) had occasion to analyse this issue in regard to Notification No.30/2004-CE and Notification No.29/2004-CE. The relevant portion of the judgement reads as under :

> "**4.** I have carefully considered the submissions from both sides and perused the records. Capital goods, in question, had been received during January, 2005 to March, 2005 and at that time the goods manufactured by using those capital goods - cotton yarn had been cleared by a duty exemption under Notification No. 30/2004-C.E. However, from June, 2005 onward the appellants started availing benefit of Notification No. 29/04-C.E. in respect of their clearances for export where there is optional rate of duty of 4% and there is no dispute about the fact that Notification No. 29/04-C.E. and 30/04-C.E. were being availed during the same period simultaneously. In view of this position, it cannot be said that the capital goods in question had been used exclusively for the manufacture of fully exempted finished products. Under sub-rule (4) of Rule 6 of Cenvat Credit Rules, 2004, capital goods Cenvat credit is inadmissible only in respect of those capital goods which are exclusively used in the manufacture of exempted goods. But it is not so in this case. In the case of *Surya Roshni Ltd.* (supra) relied upon by the Commissioner (Appeals), the finished products

> at the time of receipt of capital goods were fully and unconditionally exempt from duty while it is not so in this case as in this case while Notification No. 30/04-C.E. provides full duty exemption subject to the condition that no input duty credit has been taken, Notification No. 29/04-C.E. issued on the same date provides optional rate of duty of 4% adv. without any condition. Therefore, the ratio of Tribunal's judgment in the case of *Surya Roshni Ltd.* (supra) is not applicable to the facts of this case. In view of the above discussion, impugned order is not sustainable and the same is set aside. Appeal is allowed."

21. The said decision was upheld by the Hon'ble High Court of Punjab & Haryana cited supra. From the above, we see that issues that pose for our consideration in these appeals have been decided and settled by decisions discussed above. Though it is alleged in the show cause notice that the appellants have availed credit on input services, the Ld. Counsel for appellants has asserted that the issue is with regard to disallowance of credit on capital goods only.

22. After appreciation of facts and evidence placed before us and applying the decisions cited supra, we are of the considered opinion that the disallowance of credit cannot be justified. Impugned orders are set aside. Appeals are allowed with consequential relief.

(Pronounced in court on 31.01.2022)

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

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

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