CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH

EXCISE APPEAL NO. 52327 OF 2016

(Arising out of Order–in-Original No. DLI-LTUNT-000-COM-03 to 06/2016-17 dated 18.05.2016 passed by the Commissioner, Central Excise & Service Tax, Large Taxpayer Unit, New Delhi - 110017)

M/s. SRF Ltd. **......Appellant**

Versus

Commissioner, Central Excise & Service Tax, LTU, New Delhi **......Respondent**

APPEARANCE:

Shri B.L. Narasimhan & Shri Dhruv Tiwari, Advocates for the Appellant
Shri Rakesh Agarwal, Authorized Representative for the Department

CORAM: **HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT**
HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)

Date of Hearing/Decision: August 11, 2021

FINAL ORDER NO. 51744/2021

JUSTICE DILIP GUPTA :

This appeal seeks the quashing of the order dated 18.05.2016 passed by the Commissioner, Central Excise and Service Tax, Large Taxpayer Unit, New Delhi[1], by which the demand proposed in the four show cause notices has been confirmed with penalty and interest.

2. The issue raised in this appeal is as to whether the activity of manufacture undertaken by the job-workers, availing exemption under Notification dated 09.07.2004, has to be treated as if undertaken by the appellant as the principal manufacturer and consequently liable to pay Central Excise duty.

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1 **the Commissioner**

3. The appellant is engaged, inter alia, in the manufacture of Nylon Yarn and Nylon Fishnet Twine, falling under Tariff Item 5402 19 90 and 5402 61 00, respectively, of the First Schedule to the Central Excise Tariff Act, 1985[2].

4. The Nylon Yarn manufactured by the appellant in its factory, is partly cleared for domestic consumption on payment of duty and partly consumed captively for further manufacture of Nylon Fishnet Twine within the factory and thereafter cleared on payment of duty against Tariff Item 54026100, upon availment of CENVAT credit. Since the factory of the appellant (i.e. Manali Plant) has the facility to manufacture Cheese Type Fishnet Twine only and does not have adequate facilities for making desired quantity of Hank Type Fishnet Twine as per the market demand, the appellant also clears a part of internally manufactured Nylon Yarn upon payment of duty of third party job-workers for conversion of Nylon Yarn into Nylon Fishnet Twine as per agreement with converters on principal-to-principal basis.

5. The job-workers, after converting such Nylon Yarn into Nylon Fishnet Twine, clear part quantity of Twine directly to the depots of the appellant and return part quantity to the appellant's factory, which is thereafter sold/traded by the appellant. Inasmuch as the said job-workers do not have the facility to manufacture Nylon Yarn and they do not avail CENVAT credit on duty paid Nylon Yarn cleared by the appellant for conversion, these job-workers avail the exemption benefit under Serial No. 6 of the Notification dated 09.07.2004 and clear the converted Nylon Fishnet Twine without payment of duty under delivery challans.

6. In relation to above, the Department alleged that the appellant attempted to avail exemption benefit under the Notification dated 09.07.2004 by getting the Nylon Fishnet Twine manufactured by job-

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2 **Tariff Act**

workers, with intent to evade payment of duty on such products manufactured and cleared by such job-workers without payment of duty. As the Department also believed that these job-workers are nothing but extended arm of the appellant, four show cause notices dated 21.02.2014, 08.10.2014, 27.04.2015 and 17.11.2015 for the period from February 2009 to August 2013, September 2013 to March 2014, April 2014 to October 2014 and November 2014 to August 2015 respectively were issued to the appellant proposing to demand Central Excise duty aggregating to Rs. 7,34,80,654/- with interest and penalty. The appellant filed detailed replies to the show cause notices denying the allegations but the Commissioner, by a common order dated 18.05.2016, confirmed the demand with interest and penalty.

7. This appeal has, accordingly, being filed to assail the said order of the Commissioner. The appellant also filed a Miscellaneous Application for urging an additional ground in the appeal. This Application has been allowed by order of date.

8. Shri B.L. Narasimhan and Shri Dhruv Tiwari learned counsel for the appellant submitted that the appeal deserves to be allowed for the sole reason that for the subsequent periods from September 2015 to January 2017 and February 2017 to June 2017, the Department issued two Statements of Demand dated 15.06.2017 and 10.04.2018 respectively under section 11A of the Central Excise Act, 1944[3] proposing to demand of Rs. 11,14,719/- and Rs. 3,07,238/- and by an order dated 31.05.2018 the Assistant Commissioner dropped the proceedings. The appellant was not considered to be a manufacturer of Nylon Fishnet Twine as the same was manufactured by the job-workers who should be considered as the real manufacturer of the goods. The appellant was, therefore, not liable to pay duty on such Nylon Fishnet Twine manufactured and cleared by the job-workers,

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3 the Excise Act

who had availed exemption benefit under the Notification dated 09.07.2004. The relevant portion of the order is reproduced below:

> "22.1. Manufacture of Twine takes place at the job workers' end/premises and accordingly, the job workers are the manufacturers of the Twine in their own right. Since, they do not have the facility to manufacture Yarn in their factory, and they have not availed the Cenvat Credit facility, the job workers are eligible to avail the benefit of exemption under Notification no. 30/2004 – CE, dated 09-07-2004 [Sl. No. 6] and so cleared the twine, without payment of duty.
> 22.2 'Sale' under the Central Excise Act, 1944, is mere transfer of the possession of goods. In the case on hand, the transfer of the possession goods involved in the transaction for cash, is deemed to be sale, in as much as the job workers receive job charges from the assessee, at the conversion rate agreed between the parties, for the job work undertake by them.
> 22.3 Even if there is no sale or transfer of ownership or title of goods involved in the transaction, or as alleged on the Statements of Demand, this aspect will not have a bearing on the manufacture per se, and consequently, the duty liability cannot be fastened on the assessee, on this count and on the presumption that they are the manufacturers of the impugned goods.
> 27. In view of the facts and the position of law, I hold that the assessee is not the manufacturer of twisted twine and hence, not liable to pay duty on the impugned goods. I. therefore, drop the demand made in the statements of Demand."

9. Learned counsel pointed out that the aforesaid order dated 31.05.2018 passed by the Assistant Commissioner has attained finality since no appeal was filed by the Department and in this connection learned counsel placed the information obtained from the Department under the Right to Information Act. Learned counsel, therefore, submitted that the Department cannot be permitted to take a contrary stand in the present appeal and in support of this contention placed reliance upon the following decisions:

- **i.** **Popular Carbonic Pvt. Ltd.** vs. **Commissioner of Central Excise, Chennai-I**[4]**;**
- **ii.** **Rosmerta Technologies Ltd.** vs. **Commissioner of CE & ST, LTU, Delhi**[5]**;** and
- **iii.** **Mohak Hi Tech Specialty Hospital** vs. **Principal Commissioner of Central Excise, Customs and Service Tax, Indore, M.P.**[6]

10. Shri Rakesh Agarwal learned Authorized Representative appearing for the Department, however, submitted that since the

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4 **2021 (8) TMI 240- CESTAT CHENNAI**
5 **2019(11) TMI 1573- CESTAT CHANDIGARH**
6 **2020 (11) TMI 152 – CESTAT NEW DELHI**

order dated 31.05.2018 for the subsequent period in the case of the appellant was passed by the Assistant Commissioner, the Tribunal should ignore this order and be guided by the earlier order dated 18.05.2016 which was passed by the Commissioner. Learned Authorized Representative also stated that even after noticing the fact stated by the appellant that the Commissioner had earlier passed an order on 18.05.2016 on the same issue, the Assistant Commissioner did not examine this order and passed a contrary order on 31.05.2018.

11. The submissions advanced by the learned Counsel for the appellant and the learned Authorized Representative appearing for the Department have been considered.

12. It is not in dispute that the issue raised in the proceedings before the Assistant Commissioner is the same issue as was raised before the Commissioner nor is it in dispute that the order dated 31.05.2018 passed by the Assistant Commissioner has attained finality.

13. The submission advanced by the learned Authorized Representative appearing for the Department that in the face of the order dated 18.05.2016 passed by the Commissioner, the subsequent order dated 31.05.2018 passed by the Assistant Commissioner should be ignored cannot be accepted. Both the Commissioner and the Assistant Commissioner adjudicated upon the show cause notices that proposed a demand for the same reasons. If the Department was aggrieved by the order dated 31.05.2018 passed by the Assistant Commissioner, an appeal could have been preferred but that was not done. It is for this reason that the submission advanced by learned Authorized Representative of the Department that since the subsequent order passed by the Assistant Commissioner does not discuss the earlier order dated 18.05.2016 passed by the

Commissioner, the present appeal should be heard on merits cannot also be accepted.

14. It has been held by a Division Bench of the Tribunal in **Popular Carbonic, Rosmerta Technologies** and **Mohak Hi Tech Specialty Hospital** that if an order attains finality, the Department cannot take a contrary stand in the other pending appeals.

15. In **Popular Carbonic,** a Division Bench of the Tribunal examined the contention raised on behalf of the appellant that since the order attained finality, the Department cannot be permitted to contend that the activity undertaken by the appellant would amount to manufacture. The submission made on behalf the appellant was accepted and the relevant portions of the judgment are reproduced below:

> "28. A Division Bench of the Tribunal in **M/s. Rosmerta Technologies Ltd.** vs. **Commissioner of C.E. & ST, LTU Delhi [Service Tax Appeal No. 57703 of 2013 dated on 25.11.2019],** had an occasion to examine this contention. It was held that when for a subsequent period in the own case of the appellant it was held that service tax cannot be levied, which order had attained finality, the Department cannot be permitted to take a stand that service tax is leviable. The relevant portion of the decision is reproduced below:
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>> "16. Learned Counsel for the Appellant, on instructions, has stated that the aforesaid order dated 31 December, 2015 of the Commissioner has also attained finality as the Department did not file any Appeal.
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>> 17. The submission of the learned Counsel for the Appellant is that in such circumstances, the Department cannot agitate that the Appellant is liable to pay Service Tax under BAS. To support this contention, learned Counsel has placed reliance upon a decision of Allahabad Bench of this Tribunal in **Shri Niraj Prasad** vs. **CCE & ST, Kanpur [Service Tax Appeal No. 3834 of 2012]** decided on 17 July, 2019. In the aforesaid case, it was sought to be submitted by the Appellant that the Department cannot be allowed to discriminate between various assesses on the same issues. A view was taken that the centres of the Appellant would not be required to pay Service Tax under BAS, if Service Tax had been paid on the entire amount by the agency. This submission was made in view of the order dated 25 October 2012 passed by the Commissioner (Appeals), which order had attained finality. It is in this context that the Tribunal held that once the Department has permitted the order to attain finality, it cannot be permitted to contend that the Appellant should also be

required to pay Service Tax on BAS and to arrive at this conclusion, reliance was placed on the decision of the Supreme Court in Damodar J Malpani vs. CCE , wherein it was held:

> 3. It appears from the records that several letters were written by the Appellants to the Excise Authorities requesting that a sample of the Appellants" product may be chemically analysed at the Appellants" cost for the purpose of determining whether the Appellants" product or process in any way differed from the product and process of M/s. Chandulal K. Patel and Company. However, the Excise Authority decided against the Appellants without heeding such request. On 4-8- 88 a decision was taken by the Assistant Collector to classify the Appellants" product under Tariff Heading 24.04. On 11-8-88 a sample of the Appellants" product was taken by the respondents but returned within one week without testing on the ground that the issue was being finalised by the Assistant Collector. In the appeal preferred to the collector, the Appellants again raised the issue specifically that the process followed by and the product of the Appellants were identical with that of M/s. Chandulal K.P. Patel and Company and that the Appellants product should be similarly classified under Heading 24.01. While upholding the decision of the Assistant Collector, the Collector did not consider this aspect of the matter at all. The point was again taken specifically in the Appellants" Appeal before the Customs, Excise and Gold (Control) Appellate Tribunal. The Tribunal however dismissed the appeal and said:
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>> The Appellants have stated that some of the manufacturers who were producing similar goods, were not paying any excise duty on their production. These matters are not before us and it is neither possible nor desirable for us to deal with these matters. Suffice it to say that each and every case has to be examined in the light of our above observations, and it is for the competent Central Excise Officers to come to correct decisions in consonance with the principles of uniformity, equity and justice.
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> 4. It is difficult to understand the reasoning of the Tribunal. The least that the Tribunal could have done in the interest of uniformity' was to call upon the Revenue Authorities to explain why they were making a distinction between the Appellants product and that of M/s. Chandulal K. Patel without subjecting the Appellants' product to any chemical analysis.
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> 5. In their Appeal from the decision of the Tribunal before us the Appellants have again raised the issue that the Tribunal should have considered the fact that the Appellants and Chandulal K. Patel & Co's products were identical and were the outcome of an identical process, and that since the latter had been exempted from paying any central excise duty on the ground that their product was classifiable under Tariff Heading 24.04, the Appellants should get the same benefit.

6. At the hearing today we sought an explanation from the learned Counsel appearing on behalf of the Revenue Authorities as to why different stand had been taken in the cases of M/s. Chandulal K. Patel & Company and the Appellant. Since the matter had not been squarely dealt with on facts at any stage by any of the authorities below, it was not possible for learned Counsel to give us the reasons for drawing this distinction between the two manufacturers and differently classify what were alleged to be materially the same product.

7. In the circumstances we deem it appropriate to set aside the order of the Tribunal and remand the matter back to the Tribunal for considering whether the product and process followed by M/s. Chandulal K. Patel & Co. is the same as that of the Appellants" product for the chemical analysis if not already done. The Tribunal will thereafter consider the question of classification of the appellants" product having regard to the classification of "Karta ChhapZarda" the chemical analysis report and any other material that may be placed before it by the respective parties.

18. In this view of the matter, when the Commissioner in regard to the appellant own case for a subsequent period held that Service Tax cannot be levied under the category of BAS, which order of the Commissioner attained finality, the Department cannot be permitted to contend in this appeal that Service Tax under the category of BAS can be levied upon the Appellant."

29. This issue was also examined by the Supreme Court in **Commissioner of C. Ex., Hyderabad** vs. **Novapan Industries Tries Ltd. [2007 (209) E.L.T. 161 (S.C.)]** and the relevant portion of the judgment is reproduced below:

"11. In our view, the point in issue is squarely covered by the judgment of this Court in MRF case [(1986) Suppl. SCC 751] read with the subsequent order passed in the Review Petition reported in (1995) 4 SCC 349.

12. The Tribunal in its order has relied upon its earlier judgment in ICI India Ltd. v. CCE, Hyderabad [2000 (91) ECR 152 (T)] in which the similar issue was involved and the Tribunal had taken the view that interest being inbuilt in the price which had not been charged separately, was deductible from the assessable value.

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13. Counsel for the Revenue fairly concedes mat the Department did not file an appeal against the decision of the Tribunal in ICI India's case (supra). Thus, the same has attained finality.

14. In view of a catena of decisions of this Court, it is settled law that the department having accepted the principles laid down in the earlier case cannot be permitted to take a contra stand in the subsequent cases [See: Birla Corporation Ltd. v. CCE [2005 (186) E.L.T. 266 (S.C.)], Jayaswals Neco Ltd. v. CCE, Nagpur [2006 (195) E.L.T. 142 (S.C.)] etc.]

> 15. The point in issue being concluded by the decision of this Court in MRF case (supra) and the fact that the Revenue did not file an appeal against the order of the Tribunal in ICI India case (supra), we do not find any merit in these appeals and dismiss the same with no order as to costs."

16. In **Mohak Hi Tech Specialty Hospital,** after placing reliance upon the decision of the Supreme Court in **Damodar J. Malpani** vs. **Collector of Central Excise**[7]and the Division Bench decision of the Tribunal in **Niraj Prasad** vs. **Commissioner of Central Excise and Service Tax, Kanpur**[8]**,** a Division Bench of Tribunal also observed that since the Department had accepted the findings of the Additional Commissioner in the order dated 22.02.2016, which order had attained finality, it was not open to the Department to take a contrary view. In coming to this conclusion the Tribunal relied upon the following decisions:

i. **Ujagar Prints** vs. **UOI**[9]
ii. **M/s. Mahendra Metal Works** vs. **CCE, Bombay – II**[10]
iii. **Mayo India Limited** vs. **CCE, Aurangabad**[11]
iv. **M/s. Bhilosa Industries Private Limited** vs. **CCE, Vapi**[12]

17. Thus, as the order dated 31.05.2018 passed by the Assistant Commissioner has attained finality, the Department cannot take a contrary view in this appeal. The confirmation of demand by the Commissioner in the order dated 18.05.2016, therefore, cannot be sustained and is set aside. The appeal is, accordingly, allowed.

(Order pronounced in open court)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

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7 2002 (146) E.L.T. 483 (S.C.)
8 2019-TIOL-3237-CESTAT-ALL.
9 1988 (38) E.L.T. 535 S.C
10 2002 (141) E.L.T 480 Tri. – Del.
11 1999 (113) E.L.T. 1036
12 2015 (317) E.L.T. 283 Tri.- Ahmd.