IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.
Principal Bench, New Delhi

COURT NO. I

DATE OF HEARING : 21/06/2017.
DATE OF DECISION : 05/07/2017.

Excise Appeal No. 2643 of 2008

[Arising out of the Order-in-Appeal No. IND-I/155/2008 dated 18/09/2008 passed by The Commissioner (Appeals – I), Customs & Central Excise, Indore.]

M/s Ramesh Industries — Appellant

Versus

CCE, Indore — Respondent

Appearance

Shri Jaideep Wagde, Advocate – for the appellant.

Shri R.K. Mishra, Authorized Representative (DR) – for the Respondent.

CORAM : **Hon'ble Shri Justice Dr. Satish Chandra, President**
Hon'ble Shri B. Ravichandran, Member (Technical)

Final Order No. 54635/2017 Dated : 05/07/2017

Per. B. Ravichandran :-

The appeal is against order dated 18/09/2008 of Commissioner of Central Excise (Appeals), Indore. The appellants are engaged in the manufacture of cups, containers, spoons etc. of plastics liable to Central Excise duty. The appellant is a small scale unit registered with Central Excise Department. They were availing credit of duty paid on inputs in terms of Cenvat Credit

Rules, 2004. During the year 2004-2005, the appellants cleared goods on payment of duty availing concession under Notification 9/2003-CE dated 01/03/2003, with Cenvat credit facility on the inputs. In terms of the said notification, the appellants have option to avail Cenvat credit facility and to pay duty at 60% of normal rate of duty for the goods cleared for home consumption upto a value of Rs. One crore. The said notification was rescinded w.e.f. 01/04/2005. From that date, the SSI unit has only two option namely, either to avail exemption under Notification 8/2003-CE dated 01/03/2003 upto Rs. One crore value of clearance without availing Cenvat credit on inputs, or pay Central Excise duty at the tariff rate alongwith facility of availing credit on inputs. The appellants had total aggregate value of clearance of Rs. 1,61,06,074/- during the financial year 2004-2005. During the year 2005-2006, the appellants paid duty at the tariff rate of 16% adv. and also availed Cenvat credit of duty paid on inputs. However, the appellants started availing exemption under Notification 8/2003-CE from 01/09/2005 to 31/03/2006 and surrendered the Central Excise registration. They have paid an amount of Rs. 2,32,026/- in terms of Rule 11 (2) of Cenvat Credit Rules, 2004 in order to avail exemption under Notification 8/2003. This amount is towards credit involved on the inputs and finished goods lying in stock as on 31/08/2005.

2. The Revenue initiated action against the appellant to demand duty on the excisable goods cleared by the appellant during the period 01/09/2005 to 31/03/2006 on the ground that

the appellants are not eligible to exemption under Notification 8/2003. The Original Authority adjudicated the case and issued order dated 31/03/2008. He held that the appellants were discharging duty as per the normal rate applicable, during the period 01/04/2005 to 31/08/2005. As such, they have not opted to avail the small scale exemption under Notification No. 8/2003. Accordingly, it is not legally tenable for them to switch over to such small scale exemption w.e.f. 01/09/2005. He confirmed a Central Excise duty demand of Rs. 9,77,649/- alongwith interest and imposed penalty of equivalent amount in terms of Rule 25 of Central Excise Rules, 2002 readwith Section 11AC of the Central Excise Act, 1944. On appeal, the Commissioner (Appeals) upheld the original order.

3. The learned Counsel for the appellant submitted that the appellants have correctly availed exemption from payment of duty under Notification 8/2003-CE for the period 01/09/2005 to 31/03/2006 on the value of Rs. 59,90,493/-. The impugned order erred in presuming that, as the appellants continued to pay duty even after 01/04/2005, they have not intended to avail Notification 8/2003. It is the case of the appellant that they have never exercised option in writing not to avail exemption under Notification 8/2003. Hence, the question of withdrawing the same does not arise. As alternative submission, the learned Counsel stated that in case duty is liable to be paid the value should be arrived at by treating the gross amount as cum duty value. Further, Cenvat credit available on the inputs used in the

manufacture of final products is also eligible to the appellant. The penalty of equivalent amount imposed on the appellant is also contested by the appellant.

4. The learned AR submitted that the provision of Notification No. 8/2003-CE is very clear. Para 2 stipulates that a manufacturer has the option not to avail the exemption contained in this notification and instead pay the normal rate of duty on goods cleared by him. Such option was not to be withdrawn during the remaining part of the financial year. Accordingly, it is the submission of the learned AR that when the appellant continued to pay duty at the normal rate even in the new financial year 2005-2006, they cannot switch over to the SSI exemption in the middle of the year.

5. We have heard both the sides and perused the appeal records. The admitted facts of the case are that the appellants were discharging Central Excise duty for the year 2004-2005 in terms of Notification 9/2003 dated 01/03/2003. The said notification was rescinded w.e.f. 01/04/2005. During the financial year 2005-2006, for the period 01/04/2005 to 31/08/2005, the appellants had paid duty on the goods cleared @ 16% adv. They have availed Cenvat credit of the duty paid on inputs. Evidently, the appellants did not opt for availing exemption available to small scale industries in terms of Notification 8/2003. We are not convinced by the argument of the appellant that they have never given in writing their option not to avail exemption under this

notification. Clearly, the appellants paid duty at the normal tariff rate for 5 months from 01/04/2005 without opting for SSI exemption under Notification 8/2003. It is clear that they have specifically opted not to avail the exemption during this period. Their plea that they have not filed written option in this regard will not help their case. Their failure to file a written letter cannot add to the benefit of the appellant. Their payment of duty upto 31/08/2005 clearly shows that they have not opted for exemption under the said notification. As such, they cannot switch over to SSI exemption, as per their choice, in the middle of the year. That will be in violation of the provision of the said notification. We have examined the case laws relied upon by the appellants. In **Crescent Polymers Pvt. Ltd. vs. CCE, Bangalore** reported in **2008 (227) E.L.T. 419 (Tri. – Bang.)**, the Tribunal was dealing with the option exercised by the appellant for exemption under Notification 9/2002. However, in respect of certain clearances they have discharged full rate of duty. In such situation, the Tribunal held that aberration in respect of a few clearances would not disentitle the appellants from a substantial benefit. We find the facts of the present case are entirely different. Here, the appellants continued to discharge full Central Excise duty after availing Cenvat credit on inputs, for 5 months. In **CCE, Chandigarh – I vs. Saboo Cylinders (P) Ltd.** reported in **2005 (180) E.L.T. 40 (Tri. – Del.)**, the Tribunal was dealing with failure of the assessee in exercising option in writing to avail Notification 9/2002-CE. The Tribunal held that the benefit of Notification 9/2002 will not be available to the assessee as they have not exercised option in writing for the said notification. We are not convinced that the present case is simple reverse of the fact dealt with by the Tribunal in the said case. As already noted, the appellants consciously did not avail the exemption notification for 5 months. They have also availed Cenvat credit on inputs for all these period. Thereafter, they chose, in the middle of the year to go for SSI exemption. We find such action is not sanctioned by the provision of the said notification. Regarding, the demand with extended period and penalty under Section 11AC, we note that it has been recorded in the show cause notice that while surrendering the registration certificate the appellants indicated that they were going to stop the manufacturing operation. No information was provided regarding switching over to SSI exemption. As such, we find no merit in the submission of the appellant against the penalty imposed on them.

6. The appellants pleaded for recalculation of duty demand considering the gross receipt as cum duty value. We hold that the same can be done on submission of evidence by the appellants to the effect that they have not indicated in their sales invoice or collected Central Excise duty separately. The value should be shown to the inclusive of Central Excise duty. Subject to such verification, the duty demand can be recomputed considering the value as cum duty value. In case of reduction of duty demand on this account, the penalty payable will also get reduced to that

extend. The eligibility of Cenvat credit on various inputs claimed to have been used during the period for clearance of final products can also be verified by the Jurisdictional Authority. Subject to the satisfactory examination of duty paying documents and related accounts maintained by the appellant, the Cenvat credit on such inputs shall be eligible to the appellant. The appeal is disposed of in the above terms.

(Order pronounced in the open court on 05/07/2017.)

(Justice Dr. Satish Chandra)
President

(B. Ravichandran)
Member (Technical)

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