CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

REGIONAL BENCH - COURT NO. 01

Excise Appeal No. 905 of 2012

(Arising out of Order-in-Original No. 29/2012/C dated 24/04/2012 passed by Commissioner of Central Excise, Nagpur.)

Gajanan Paper Mills Pvt Ltd .....**Appellant**
B-10, 11 & 12, MIDC Malkapur,
Dist – Buldhana (M.S.) – 443 101.

VERSUS

Commissioner of Central Excise and Service Tax, Nagpur .....**Respondent**
Telangkhedi Road, Civil Lines,
Post Box No. 81, Nagpur – 440 001.

Appearance:

None for the Appellant
Shri Sydney D'Silva, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. RAJU, MEMBER (TECHNICAL)

FINAL ORDER NO. A/85246/2022

Date of Hearing : 09.12.2021
Date of Decision: 30.03.2022

PER: S.K. MOHANTY

Briefly stated, the facts of the case are that the appellant herein is engaged in the manufacture of *Paper and Paper Board*, falling under Chapter heading No. 48 of the Schedule to the Central Excise Tariff Act, 1985 attracting duty at different rates during the period in dispute. The goods manufactured by the appellant were covered by three entries of exemption notification No. 4/2006-C.E., dated 01.03.2006. The entry at Sl. No. 90 prescribed the concessional rate of duty @ 8% *advalorem*, which was subject to fulfilment of the conditions itemized at Sl. No.10 appended thereto. Another entry at Sl. No.91 prescribed the concessional rate of duty of 12% *advalorem,* which was subject to fulfilment of the condition No. 11. The third entry at Sl. No.93, which was unconditional, also prescribed concessional rate of 12% *advalorem*.

1.1. In the budget for the year 2008-09, the Notification No. 4/2006-C.E. at Sl. No. 90 was amended by Notification No. 4/2008-C.E. dated 01.03.2008 in changing the rate of duty from 8% to 'NIL', retaining all other conditions as per the earlier notification. Corresponding changes were also made in the rate of duties prescribed vide entries at Sl.No.91 & 93, which were changed from 12% *advalorem* to 8% *advalorem*. No changes were made in the columns relating to conditions in both the said entries. By Notification No. 58/2008-C.E., dated 07.12.2008, Notification No. 4/2006-C.E. was amended in order to substitute the rate of duty of 8% by the rate of 4% *advalorem*.

1.2. During the disputed period, the appellant made clearances of the finished products on payment of duty at the rates prescribed under various notifications (supra) issued by the Central Government. The appellant also availed cenvat credit of Central Excise duty paid on the inputs and capital goods received in the factory. Payment of Central Excise duty on the final product by the appellant during the disputed period was objected to by the Department on the ground that the appellant should have self-assessed at 'NIL" rate of duty under Sl. No.90 of notification dated 01.03.2006, as amended. Accordingly, show cause proceedings were initiated against the appellant, calling upon it to show cause as to why self-assessment of the goods cleared during the period 2008-09 to 2010-11 should not be assessed at "NIL" rate of duty in terms of entry at Sl. No. 90 of Notification No. 4/2006-C.E., dated 01.03.2006. Referring to the provisions of Section 5A (1A) of the Central Excise Act, 1944 the SCN had alleged that as per condition No. 10 of Sl. No.90 of Notification No. 4/2006, the first clearance of 3500 MTs during any financial year was absolutely exempted without any further conditions w.e.f. 01.03.2008. The matter arising out of the show cause notice dated 29.04.2011 was adjudicated vide order dated 25.04.2012, wherein the proposals made therein were confirmed by the learned Original Authority

2. Feeling aggrieved with the impugned order, the appellant has preferred this appeal before the Tribunal.

3. None appeared for the appellant. Heard Shri Sydney D'Silva, learned A.R. for the Revenue and examined the case records. He has reiterated the findings recorded by the original authority.

Further, he has relied upon the orders of this Tribunal passed in the case of *Sidhmukh Flexible Packaging (P) Ltd. Vs. Commissioner of C. Ex., Indore* – 2005 (191) E.L.T. 983 (Tri.-Del.), *Process Pumps (India) P. Ltd. Vs. Commissioner of Central Excise, Bangalore* – 2004 (173) E.L.T. 98 (Tri.-Bang.) and *Hewelett Packard (I) Sales (P) Ltd. Vs. Commr. Of Cus., Bangalore* – 2007 (6) S.T.R. 155 (Tri.-Bang.).

4. Section 5A of the Central Excise Act, 1944 recognizes two categorizes of exemption notification. The first category being that of an “absolute” exemption, where there was no condition attached to the exemption entry and the other one is a “conditional” exemption, which was subject to fulfilment of the conditions attached to the exemption entry. In the present case, the exemption entry at Sl. No.90 of Notification No. 4/2006-Central Excise was attached with two conditions for availing of the benefit of duty exemption and therefore, it was a conditional exemption and not an absolute exemption, as contemplated by Section 5A(1A) *ibid*. Since, the appellant had opted for payment of duty on clearance of the finished products and availed cenvat credit of Central Excise duty, such option exercised by the appellant cannot be questioned by the department inasmuch as there was no stipulation contained in the subject notification that only condition No. 90 appended thereto had to be followed and not otherwise. Thus, in our considered opinion, the appellant had correctly assessed the duty liability as provided under Sl. No. 93 contained in notification dated 01.03.1998, as amended. Thus, there was no contravention of the Cenvat statute in availment and utilization of the Cenvat credit. Further, it is not the case of Revenue that the duty amount collected by the appellant was not deposited with the Government Exchequer. Hence, under such circumstances, the provisions of Section 11D *ibid* cannot be invoked for recovery of the duty amount in question.

5. We find that the issue arising out of the present dispute is no more *res integra*, in view of the order Nos. A/607-611/15/EB dated 05.02.2015, passed by the Tribunal in the case of *Balkrishna Paper Mills Ltd. & Ors. Vs. Commissioner of Central Excise, Thane-I,* reported in 2015-TIOL-1100-CESTAT-MUM. The relevant paragraph in the said order is extracted herein below:

> *“7. In the result, we hold that the appellant-assessees cannot be forced to pay duty as per serial No.90 of Notification 4/2006 and they have option to pay the duty*

under other numbers, viz. 91 and 93. Since we have taken the view that the appellant cannot be forced to pay the duty under nil rate vide serial no.90, the other aspects raised in all the show cause notices as also the Revenue's appeal fall flat".

6. The issue decided by the Tribunal (supra), relied upon by the learned A.R. for Revenue is distinguishable from the facts of the present case inasmuch as in those decided cases, it was held that when the notification provides unconditional exemption from payment of duty, then the assesse is not permitted under the statute to avail the Modvat/Cenvat credit. Contrary is the case in hand; the appellant herein had availed the duty exemption, which provides for compliance of the conditions itemized in the notifications in question. Thus, it cannot be said that the subject notifications were provided unconditional exemption to the goods manufactured by the appellant.

7. In view of above discussions, we do not find any merits in the impugned order, insofar as it has confirmed the adjudged demands on the appellant. Therefore, the impugned order is set aside and the appeal is allowed in favour of the appellant.

(Order pronounced in the open court on 30.03.2022)

(S. K. Mohanty)
Member (Judicial)

(Raju)
Member (Technical)

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