

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CEA No. 2 of 2011 (O&M)

Date of Decision: 4.5.2016

Commissioner, Central Excise Commissionerate, Panchkula
....Appellant.

Versus

M/s Cure Quick Remedies P. Ltd., Karnal
...Respondent.

1. Whether the Reporters of the local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not? **YES**
3. Whether the judgment should be reported in the Digest?

**CORAM:- HON'BLE MR. JUSTICE AJAY KUMAR MITTAL.
HON'BLE MR. JUSTICE SHEKHER DHAWAN.**

PRESENT: Mr. Kamal Sehgal, Advocate for the appellant.

Mr. Vikrant Kackria, Advocate for the respondent.

AJAY KUMAR MITTAL, J.

1. This order shall dispose of CEA Nos. 2 and 4 of 2011 as according to learned counsel for the parties, the common questions of law and facts are involved therein. For brevity, the facts are being extracted from CEA No. 2 of 2011.

2. CEA No.2 of 2011 has been preferred by the revenue under Section 35G of the Central Excise Act, 1944 (in short "the Act") against the order dated 28.4.2010 (Annexure A-4) passed by the Customs, Excise and Service Tax Appellate Tribunal, New Delhi (hereinafter referred to as "the Tribunal"). The appeal was admitted for consideration of substantial questions of law as proposed in para 4 of the appeal which are as under:-

- i) Whether Tribunal has erred in law by not appreciating the language of the relevant sub-para (iii) of para 2 of Notification No. 8/2003-C.E., dated 01.03.2003, which debars the manufacturer from taking credit of duty paid on inputs, if manufacturer opts for availing of the benefit under Notification No. 8/2003-C.E., dated 01.03.2003?
- ii) Whether the Tribunal was correct in distinguishing the judgment of Hon'ble Supreme Court in the case of Commissioner of Central Excise, Ahmedabad vs. M/s Ramesh Food Products reported in 2004(174) ELT 310 (SC)?

3. The facts, in short, necessary for adjudication of the instant appeal as narrated therein may be noticed. The respondent availed exemption upto ₹ 100 lacs under notification dated 1.3.2003 for manufacture and clearance of their own goods and simultaneously availed and utilized Cenvat/Modvat credit qua other branded goods manufactured and cleared by them on payment of duty. A show cause notice dated 11.1.2007 (Annexure A-1) was issued to the assessee-respondent after denial of SSI exemption by raising demand of duty along with interest and penalty. The adjudicating authority vide order dated 29.6.2007 (Annexure A-2) confirmed the demand of duty amounting to ₹ 15,73,174/- under Section 11A of the Act along with interest. Feeling aggrieved, the assessee filed an appeal before the Commissioner (Appeals) whereas the revenue challenged the action of the adjudicating authority refraining from imposing any penalty under

Rule 25 of the Central Excise Rules, 2002 (in short “the 2002 Rules”). Both the appeals were disposed of vide order dated 28.1.2008 (Annexure A-3) whereby the Commissioner (Appeals) upheld the order of the adjudicating authority and also imposed penalty of ₹ 10,000/- under Rule 25 of the 2002 Rules and modified the order to that extent. The respondent assailed the order, Annexure A-3, in appeal before the Tribunal. The Tribunal vide order dated 28.4.2010 (Annexure A-4) allowed the appeal and set aside the order, Annexure A-3. Hence, the present appeals.

4. We have heard learned counsel for the parties.

5. The issue that arises for consideration of this Court in these appeals is whether the respondent was entitled to claim full exemption in terms of Notification No. 8/2003-CE dated 1.3.2003 in respect of the goods manufactured by the assessee under his own brand name even though Cenvat Credit was availed by it in respect of the duty paid on the inputs utilized in the manufacture of those goods which bear brand name of another person and are cleared on full payment of duty.

6. During the period in question, notification No. 8/2003-CE dated 1.3.2003 as amended was in force. It would be apposite to quote below relevant Clauses 3(a), 4 and Clause 1 of Table contained therein of the said notification which are essential for proper adjudication of the dispute between the parties. The said Clauses read thus:-

“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.

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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.....”

Clause 1 of the table contained therein:-

Sr. No.	Value of clearances	Rate of duty
(1)	(2)	(3)
1.	First clearances up to an aggregate value not exceeding one hundred lakh rupees made on or after the 1 st day of April in any financial year.	Nil

7. A plain reading of Clause 3(a) of the said notification shows that for the purposes of determining the aggregate value of the clearances of all excisable goods for home consumption, the clearances bearing the brand name or the trade name of another person which are ineligible for the grant of exemption under the said notification in terms of Clause 4 thereof shall not be taken into account. Further, the relevant portion of Clause 4 of the aforesaid notification stipulates that the exemption contained in the notification would not apply to the specified goods bearing the brand name or trade name whether registered or not of another person. It has been noted in clause 1 of the Table contained in the said notification, which deals with the subject of value of the clearance provided that, “first clearance upto an aggregate value not

exceeding one hundred lakh rupees made on or after the first day of April in any financial year”, shall be liable for nil rate of duty.

8. The Tribunal had recorded that the period involved in these appeals is from October 2005 to September, 2006 and the notification dated 1.3.2003 (as amended) was in force. Referring to Clauses 3(a) and 4 of the said notification, it was held that the specified goods bearing brand name or the trade name of another person, manufactured by the assessee and cleared on payment of entire duty would not be entitled to claim the benefit under the said notification. Simultaneously the specified goods manufactured in the brand name of the assessee were not excluded from availing the benefit of exemption under the said notification even though in case of the former goods, the assessee seeks to avail the Cenvat credit facility in respect of the duty paid on the inputs utilized in the manufacture of the branded specified goods on which the full duty was paid while clearing the same. It was also recorded that the authorities below had erred in denying the benefit of SSI exemption to the goods to which the said notification applied by wrongly applying the decision in **Commissioner of Central Excise, Ahmedabad v. Ramesh Food Products (2004) 174 ELT 310 (SC)**.

9. The Tribunal adjudicated the matter in favour of the assessee by recording the underquoted findings which read thus:-

“....Taking into consideration the facts of the matter in **Ramesh Food Products** case and bearing in mind, the pre-condition for availing the benefit of the notification No. 175/86-CE dated 01.03.86, it is abundantly clear that the manufacturer thereunder was given clear option to choose between the two

benefits, one under the notification and another under the Modvat Scheme and not to avail both the benefits simultaneously. That is not the case under Notification No. 8/2003-CE dated 01.03.2003. There is no such restriction imposed under the said notification. Rather plain read of Clauses 3, 3(a) and 4 of the said notification would disclose that the manufactures are not debarred from availing the benefit under the said notification in relation to the goods other than the goods which are excluded from the benefit of the said notification while simultaneously seeking to avail the benefit of Cenvat Credit or Modvat Credit in relation to such excluded goods provided they are cleared on payment of full duty. The notification being abundantly clear in this regard, in our considered opinion, the authorities below erred in applying the decision in **Ramesh Food Products** to the cases in hand and to deny the benefit of SSI Exemption to the goods to which the said exemption notification applies. The impugned orders, therefore, in this regard, cannot be sustained and the demand of duty made while denying the benefit under the said notification cannot be sustained.”

10. The approach of the Tribunal finds support from the decision of the Apex Court in **Commissioner of C. Ex., Chennai v. Nebulae Health Care Ltd. 2015 (325) ELT 431 (SC)** where similar issue was under consideration. The relevant observations of the Apex Court read

thus:-

“13. Having taken note of the relevant provisions of the aforesaid exemption Notifications and without commenting upon the same at this juncture, we would like to discuss few judgments of this Court which have considered and interpreted these Notifications in the context of the issue that arises for determination in these appeals. In **Commissioner of Central Excise, Ahmedabad v. Ramesh Food Products – 2004 (174) ELT 310 (S.C.)**, the assessee therein was engaged in the manufacture of biscuits under the brand name 'Ramesh' on his own account. It was also manufacturing, on job work basis, biscuits under the brand name of 'Cadbury' on behalf of M/s. Hindustan Coco Products, Bombay. It availed MODVAT benefit on the inputs used for manufacture of Cadbury branded biscuits. The Department issued the show cause notice taking the position that as the assessee had availed MODVAT benefit it had no right to avail the benefit of Notification No. 175/86 in respect of its own goods bearing 'Ramesh' brand either. Though, the Assistant Collector dropped the demand holding that assessee could avail both the benefits, the Collector (Appeals) took a contrary view holding that it was not permissible for the assessee to simultaneously opt for goods of one heading and MODVAT facility in respect of another heading.

Assessee's appeal before the CEGAT was decided in favour of the assessee, which decision of CEGAT was upset by this Court in the judgment. This Court noted that the CEGAT had relied upon another judgment of Tribunal in **Faridabad Tools Pvt. Ltd. v. Collector of Central Excise – 1993 (63) E.L.T. 759** which was specifically overruled by a larger Bench of CEGAT in **Kamani Food v. Collector of Central Excise – 1995 (75) E.L.T. 202.**

14 to 16. XX XX XX

17. A holistic reading of the Notification, in the light of the other paragraphs, brings into focus the overall scheme. It, inter alia, provides that the clearances bearing the brand name or trade name of third parties which are ineligible for grant of this exemption, for the purposes of determining aggregate value of clearances for home consumption, are not to be included. These Notifications also make it clear that the exemption contained therein is not to apply to the specified goods bearing a brand name or trade name, whether registered or not, of any person, except under certain circumstances specifically stipulated therein. The Notifications also clarify that for the purpose of these Notifications, where the goods manufactured by a manufacturer bear brand name or trade name (whether registered or not) of any manufacturer of trade, they shall not be deemed to

have been manufactured by such other manufacturer or trade. Reading of the aforesaid provisions in the Notifications unambiguously points out that for the purposes of availing the benefit of Notification by an SSI Unit, the clearances for home consumption only are to be taken into consideration, except in those cases where it is clearly provided otherwise. For this purpose, clearances bearing the brand name or trade name of third parties are concerned, they are kept outside the scheme inasmuch as: (a) they are not to be included for the purposes of determining the aggregate value of the clearances for home consumption; and (b) such products bearing brand names or trade names of third parties, even if manufactured by the SSI Unit, are not eligible for any exemption and excise duty thereupon has to be paid. Once we understand the scheme of the Notifications in the aforesaid perspective, which according to us is the only manner in which it has to be understood, it becomes apparent that so far as manufacture of branded goods of third party on job work basis by the SSI Unit is concerned, they are to be dealt with differently in the sense that they do not come within the ambit of exemption on which normally excise duty, as per the provisions of the Act, is payable. As a sequitur, it also follows that once excise duty is paid by the manufacturer on such branded goods

manufactured, the brand name whereof belongs to another person, on job work basis, the SSI Unit would be entitled to CENVAT/MODVAT credit on the inputs which were used for manufacture of such goods as on those inputs also excise duty was paid. To put it otherwise, these branded goods manufactured by the SSI Units meant for third parties are regulated by the normal provisions of excise law and will have no bearing or relevance insofar as availing the benefit of those exemption notifications in respect of its own products manufactured by the SSI Units is concerned.”

11. In all fairness to learned counsel for the appellant, it would be imperative to refer to the judgment of the Supreme Court in **Ramesh Food Products' case (supra)** on which heavy reliance had been placed by him. It may also further be noticed that the Apex Court in **Nebulae Health Care Ltd's case (supra)** had distinguished the pronouncement in **Ramesh Food Products' case (supra)** by recording as under:-

“15. Some of the salient features of the decision of this Court in **Ramesh Food Products** which need to be emphasised are the following:

(a) The decision of the Tribunal in that case was of the year 1998 and it had relied upon its earlier judgment in **Faridabad Tools case**, which was decided in the year 1993, without realising that the said judgment had been overruled by a larger Bench of the Tribunal in **Kamani Foods**

case, decided in the year 1995.

- (b) In view of the above, this Court was influenced by the fact that smaller Bench of the Tribunal, while giving the decision which was impugned before it, was bound to follow the judgment of the larger Bench as per the demands of judicial propriety.
- (c) In **Kamani Foods case**, the larger Bench of the Tribunal had noted its earlier Special Bench ruling in the case of **Kharia Cement Works v. Collector of Central Excise – 1989 (42) E.L.T. 696 (Tribunal)** wherein it was held that Notification No. 175 of 1986 had to be read as a whole and sub-clauses (i) and (ii) had to be construed harmoniously. The case was, thus, confined to interplay between sub-clauses (i) and (ii) of clause (a) of para 1 of the Notification which reads as under:-

“In exercise of the powers conferred by sub-rule (1) of Rule 8 of the Central Excise Rules, 1944, in supersession of the notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 85/85-Central Excises, dated the 17th March, 1985, the Central Government hereby exempts the excisable goods of the

description specified in the Annexure below and falling under the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), (hereinafter referred to as the “specified goods”), and cleared for home consumption on or after the 1st day of April in any financial year, by a manufacturer from one or more factories,

(a) in the case of the first clearances of the specified goods upto an aggregate value not exceeding rupees thirty lakhs, -

(i) in a case where a manufacturer avails of the credit of the duty paid on inputs used in the manufacture of the specified goods cleared for home consumption under Rule 57A of the said Rules, from so much of the duty of excise leviable thereon which is specified in the said Schedule [read with any relevant notification issued under sub-rule (1) of Rule 8 of the said Rules or sub-section (1) of section 5A of the Central Excises and Salt Act, 1944 (1 of 1944) and in force for the time being] as is equivalent to an amount calculated at the rate of 10% ad valorem:

(ii) in any other case from the whole of

the duty of excise leviable thereon :

Provided that the aggregate value of clearances of the specified goods under sub-clause (ii) of this clause in respect of any one chapter of the said Schedule, shall not exceed rupees twenty lakhs;

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- (d) Interpreting the aforesaid two sub-clauses harmoniously, this Court, while giving its imprimatur to **Kamani Foods case**, held that if the MODVAT credit under Rule 57A is availed by the assessee, it would not be entitled to exemption from excise duty under the said Notification. Significantly, these two sub-clauses deal with the goods manufactured by the assessee with its own brand and do not deal with the situation where, in addition, the assessee/manufacturer also manufactures the goods of third parties on job work basis. It goes without saying, and does not need much elaboration, that in respect of its own goods manufactured by the SSI Unit, it can either claim exemption from the excise duty or CENVAT credit, and not both. That is the clear message of sub-clauses (i) and (ii) of clause (a) of para 1 of the Notification.
- (e) Distinction between the goods cleared for home

consumption and those manufactured on job work basis for third parties and the fact that CENVAT credit was availed of only in respect of goods manufactured for third parties and not with respect to home brand was not brought to the notice of the Court. Other provisions of the notifications which have bearing on this issue were also not brought to the notice of the Court. In fact, as noted above, the Court was primarily influenced by the fact that Tribunal had relied upon its earlier decision in **Faridabad Tools case** without realising that same had already been overruled by a larger Bench of the Tribunal in **Kamani Foods case**. It would be pertinent to point out that the appeal was decided ex parte, i.e., in the absence of assessee who chose not to appear. As would be noted hereafter on this issue, it is the other clauses of the Notifications which provide a correct answer.”

12. In view of the above, we find that the issue in the present appeals is governed by the ratio of the Supreme Court in **Nebulae Health Care Ltd's case (supra)** and the judgment in **Ramesh Food Products case (supra)** had been rightly distinguished by the Tribunal on the same lines as has been noticed by the Apex Court in the aforesaid pronouncement. Accordingly, there is no error in the approach of the Tribunal which may warrant interference by this Court. The questions of

law as claimed are answered against the revenue and in favour of the assessee. Consequently, finding no merit in the appeals, the same are hereby dismissed.

(AJAY KUMAR MITTAL)
JUDGE

May 4, 2016
gbs

(SHEKHER DHAWAN)
JUDGE