



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 21.09.2021

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THE HON'BLE MR.JUSTICE R.SURESH KUMAR

W.P. (MD)Nos.1721 & 1722 of 2012

and

M.P (MD)Nos.1 & 1 of 2012

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M/s.Sri Shanmugavel Mills (P) Ltd.,
Rep. by its Director,
K.Shanmugavel.

... Petitioner (in both cases)

-Vs-

1.The Additional Commissioner of Central Excise,
Central Revenue Building,
No.4, Lal Bahadur Shastri Road,
Bibikulam, Madurai - 625 002.

2.The Assistant Commissioner of Central Excise,
Dindigul I Division,
No.68, Nehurji Nagar, R.M.Colony,
Dindigul - 624 001.

... Respondents in W.P. (MD)Nos.1721 of 2012

1.The Assistant Commissioner of Central Excise,
Dindigul I Division,
No.68, Nehurji Nagar, R.M.Colony,
Dindigul - 624 001.

... Respondent in W.P. (MD)Nos.1722 of 2012

Prayer in W.P. (MD)No.1721 of 2012: Writ Petition filed under Article 226 of Constitution of India, to issue a Writ of Certiorari, to quash the impugned order in C.No.V/52/15/127/2009 Adjn dated 08.12.2011 disallowing the credit of Rs.24,71,126/- taken/availed and utilized during the period from 07.12.2008 to 06.07.2009 as illegal.

Prayer in W.P. (MD)No.1722 of 2012: Writ Petition filed under Article 226 of Constitution of India, to issue a Writ of Certiorari, to quash the impugned order in C.No.V/52/15/21/2011 Adjn dated 05.01.2012 disallowing the credit of Rs.2,11,894/- taken during July 2009 to November 2009 and April 2010 on the input services and capital goods received during the period 07.12.2008 to 06.07.2009 as illegal.

For Petitioner	:	Mr.R.Sivaraman (in both cases)
For Respondents	:	Mrs.S.Ragaventhre (in both cases)
		Standing Counsel



COMMON ORDER

The prayer sought for herein is for a Writ of Certiorari, to quash the impugned order in C.No.V/52/15/127/2009 Adjn dated 08.12.2011 disallowing the credit of Rs.24,71,126/- taken/availed and utilized during the period from 07.12.2008 to 06.07.2009 as illegal and to quash the impugned order in C.No.V/52/15/21/2011 Adjn dated 05.01.2012 disallowing the credit of Rs.2,11,894/- taken during July 2009 to November 2009 and April 2010 on the input services and capital goods received during the period 07.12.2008 to 06.07.2009 as illegal.

2.It is the case of the petitioner that the petitioner engaged in export of cotton yarn falling under Chapter 52 of the First Schedule to the Central Excise Tariff Act, 1985 and having Central Excise Registration No.AADCS8200N XM001. Only the period from 07.12.2008 to 06.07.2009, the petitioner Company has availed CENVAT credit in respect of the capital goods and input services by having bonafide impression that the Notification No.59/2008-CE fixing the rate of the cotton yarn at 4% was issued and hence, they paid the duty under claim for rebate on cotton yarn exported by availing the benefit of notification, since cotton yarn was dutiable under notification No.59-2008-CE. Therefore, the petitioner Company took credit of the duties paid on capital goods and input services and availed the payments of duty for exports.

3.For the same period, the petitioner Company earlier rebated in respect of the said CENVAT credit and this was initially sanctioned by the Revenue. Against such proceedings sanctioning first rebate to the petitioner, the Department preferred an appeal before the Commissioner of Central Excise, Dindigul, who by order dated 29.10.2009 had set aside the order in original sanctioning the rebate and ordered to make cash payment to the Department. Against said order, the petitioner preferred a revision before the Government and the Joint Secretary, Government of India, by order dated 14.02.2011 held that the duty paid by the said Company was just a deposit with the Government and directed the same to re-credit into CENVAT credit. Against such order, the petitioner company filed W.P.Nos.9814 to 9817 of 2011 in the Principal Seat of this Court. The Principal Seat of this Court, by order dated 19.04.2011 admitted the writ petitions and granted an order of interim stay of the proceedings.

4.In the meanwhile, in the matters which were pending before the Joint Secretary, Government of India, ie., the first respondent, vide proceedings dated 21.12.2009 had issued show cause to explain why CENVAT credit already availed and utilized during the period from 07.12.2008 to 06.07.2009 should not be disallowed and recovered. Written submissions in response to the same has been made on 01.02.2010. As against the show cause notice, the



petitioner also filed a writ petition in W.P.(MD)No.4915 of 2011 before this Court and by order dated 27.04.2011, the said case along with connected writ petitions was disposed of directing the respondents to consider the explanation offered by the petitioner. However, it is the grievance of the petitioner that the first respondent, without adhering to the observations made by this Court in the said order, has passed an order on 08.12.2011 disallowing CENVAT credit. As against which, the present writ petitions have been filed.

5.Mr.R.Sivaraman, learned counsel appearing for the petitioner, at the outset would submit that, the issue raised in this writ petition is covered by a decision of this Court made in **W.P. (MD) No.4922 of 2011** dated **01.08.2019** in the matter of **M/s.Sudan Spinning Mills (P) Limited vs. Commissioner of Central Excise and another**. In the said order, this Court has made the following orders to that effect.

"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.

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.

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



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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 vs. Collector of Customs, New Delhi*,



[2001 (130) E.L.T. 405 (S.C.)] and Collector of Central Excise, Baroda vs. 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."

6.The said decision infact has not been controverted by Mrs.S.Rageventhree, learned Standing Counsel appearing for the respondent revenue.

7.In view of the aforesaid position, where the issue raised in this writ petition since has been covered by the decision as referred to above, by order dated 01.08.2019 and also in view of the order passed by the Principal Seat of this Court in the assessee's own case in W.P.Nos.9814 to 9819 of 2011, etc batch, dated 25.10.2019, this Court feels that the issue raised in the writ petitions can be decided in favour of the petitioner assessee.

8.Resultantly, the following orders are passed in the writ petitions:

that the impugned orders are quashed and the Writ Petitions are allowed accordingly. However, there shall be no order as to costs. Consequently, connected Miscellaneous Petitions are closed.

Sd/-

Assistant Registrar (CS-III)

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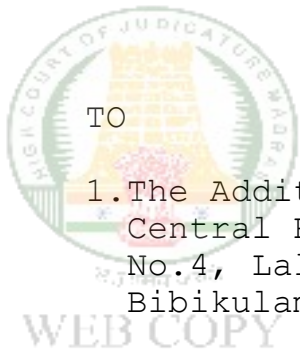
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Sub Assistant Registrar(CS)

SM

Note:

In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the Advocate/litigant concerned.



TO

1.The Additional Commissioner of Central Excise,
Central Revenue Building,
No.4, Lal Bahadur Shastri Road,
Bibikulam, Madurai - 625 002.

2.The Assistant Commissioner of Central Excise,
Dindigul I Division,
No.68, Nehurji Nagar, R.M.Colony,
Dindigul - 624 001.

Common Order made in
W.P. (MD)Nos.1721 & 1722 of 2012

Dated:
21.09.2021

PS (CO)
GC/UV(01.11.2021) 7P 3C