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IN THE HIGH COURT OF KARNATAKA, BENGALURU

DATED THIS THE 25TH DAY OF JULY 2018

PRESENT

THE HON'BLE Dr.JUSTICE VINEET KOTHARI

AND

THE HON'BLE Mrs.JUSTICE S.SUJATHA

C.E.A.No.65/2016

BETWEEN:

THE COMMISSIONER OF CENTRAL EXCISE
& SERVICE TAX,
BENGALURU-I COMMISSIONERATE,
NOW AT: 2ND FLOOR, SOUTH WING,
SHIVAJI NAGAR BUS STAND COMPLEX,
SHIVAJI NAGAR,
BENGALURU – 560 051.

...APPELLANT

(BY MR.ARAVIND.K.V, ADV.)

AND:

M/S. BELL CERAMICS LTD.,
(NOW ORIENT BELL LTD.,)
CHOKKAHALLI VILLAGE,
HOSKOTE TALUK,
BENGALURU – 562 114.

...RESPONDENT

(BY MR.K.S.RAVISHANKAR, ADV. AND
MR.N.ANANDA, ADV.)

THIS C.E.A IS FILED UNDER SECTION 35G OF THE CENTRAL EXCISE ACT, ARISING OUT OF ORDER DATED 17.02.2016 PASSED IN FINAL ORDER NO.20260/2016, PRAYING TO 1. ANSWER THE SUBSTANTIAL QUESTIONS OF LAW FRAMED ABOVE IN FAVOUR OF THE APPELLANT IN THE INTEREST OF JUSTICE AND EQUITY; 2. SET ASIDE THE IMPUGNED FINAL ORDER NO.20260/2016 DATED 17.02.2016 PASSED BY THE CESTAT, SOUTH ZONAL BENCH, BENGALURU IN THE INTEREST OF JUSTICE AND EQUITY; AND 3. PASS SUCH OTHER ORDER, DIRECTION AS THIS HON'BLE COURT DEEMS FIT IN THE CIRCUMSTANCES OF THE CASE IN THE INTEREST OF JUSTICE AND EQUITY.

THIS C.E.A. COMING ON FOR ADMISSION, THIS DAY, **Dr. VINEET KOTHARI J.** DELIVERED THE FOLLOWING:-

JUDGMENT

Mr.K.V.Aravind, Adv. for Appellants- **Revenue**
Mr.K.S.Ravishankar, Adv. &
Mr.N.Ananda, Adv. for Respondent - **Assessee**

The Revenue has filed this appeal under Section 35G of the Central Excise Act, 1944 raising the

purported substantial questions of law to be arising from the order of CESTAT, South Zonal Bench, Bengaluru, dated **18.02.2016**.

2. The suggested substantial questions of law are quoted below for ready reference.

SUBSTANTIAL QUESTION OF LAW

1. *Whether on the facts and in the circumstances, the CESTAT was correct in interpreting the issue and not considering the objections raised by the Department?*
2. *Whether, the citations in the judgment of tribunal regarding the entitlement of more beneficial Notification by the assessee are squarely applicable in this case?*
3. *Whether CESTAT was right in concluding that Revenue intends to compel assessee to avail the Notification No.05/2006 - CE when the fact is that it was assessee's decision to avail Notification No.05/2006 - CE?*

3. The learned counsel for appellant-Revenue has urged before us that the respondent-Assesee was not entitled to avail CENVAT credit because condition No.7 of the Notification No.05/2006-C.E. dated 01.03.2006 prohibited the assessee from availing any CENVAT credit under CENVAT Credit Rules, 2002 on the manufacture of ceramic tiles manufactured in a factory not using electricity for firing kiln, falling under Chapter 69 vide Entry No.13 of the said Notification No.05/2006-C.E. dated 01.03.2006. He submitted that the said Notification No.05/2006-C.E. dated 01.03.2006 came to be amended by Notification No.58/2008-C.E. dated 07.12.2008 and vide Entry No.6 thereof, the rate of duty was fixed at 4% in place of 8%, which rate of 8% was again restored later on by Notification No.15/2009-C.E. dated 07.07.2009 at Annexure-E.

4. Learned counsel for Revenue, Mr.Aravind K V, submits that condition No.7, which stood throughout

including the period in question involved in the present case **from 07.07.2009 to 26.02.2010** read as under:

“7. If no credit of the duty paid on the inputs used in or in relation to the manufacture of such ceramic tiles has been taken under rule 3 or rule 11 of the CENVAT Credit Rules, 2002.”

5. He, therefore, submitted that despite there being another **Notification No.02/2008-CE** dated **01.03.2008** vide Entry No.48 of Chapter 69, the rate of duty of 8% having been prescribed for such ceramic tiles, without any condition of non-availment of CENVAT Credit in the said Notification No.2/2008-CE dated 01.03.2008, the assessee was not entitled to claim the said CENVAT Credit. He drew our attention towards the finding of the learned adjudicating authority in order (Original) Annexure-A dated **24.07.2013** in paragraph-14 of the said order in which the assessing authority has relied upon the declarations made by the assessee in ER-1 returns filed for the relevant period from

07.07.2009 to 26.02.2010. The relevant paragraph Nos.13 and 14 of the order of the adjudicating authority is quoted below for ready reference.

“13. As a result of the amendments to both the Notification Nos.5/2006 CE dated 1.3.2006 and 2/2008 CE dated 1.3.2008 over a period of time, during the period from 7.7.2009 to 26.2.2010, rate of duty applicable under Notification No.5/2006 dated 1.3.2006 (with condition of non-availment of Cenvat credit on inputs) and under Notification No.2/2008 dated 1.3.2008 (without any conditions) were at uniform rate of 8% advalorem.

14. The assesseees were operating under self assessment scheme during the relevant period and were at liberty to avail benefit of concessional rate under any eligible notification and pay applicable duties on the clearance of the goods. In the instant case, the assessee have availed the benefit of Notification No.5/2006 dated 1.3.2006 (as amended by Notification No.15/2009 CE

dated 7.7.2009) for the clearances affected during the period from 7.7.2009 to 26.2.2010 and the same is evident from the **declarations made by them in the ER-1 returns filed for the relevant period.** The same is also evident from the invoices issued by them for clearance of the goods during the impugned period, **wherein they have indicated Notification No.15/2009 CE dated 07.07.2009** against the Notifications claimed. Accordingly, for the period upto 26.02.2010, as per the condition under the said Notification, they were not eligible to avail Cenvat Credit of duty paid on the inputs used in or in relation to the manufacture of the goods. **If the assessee had any intention to shift to any other notification, in this case Notification No.2/2008 CE dated 1.3.2008, they should have done the same prospectively,** for the subsequent clearances and there is no provision under any notification to extend the benefit of the notification which was not claimed by the assessee at the time of clearance of the goods, for the previous

period. In the light of the above, the assesseees were not entitled for the said credit of Rs.1,11,02,931/- which relates to the period prior to 26.02.2010 and availment of the same by them in March, 2010 is in contravention of the underlying condition under Notification No.5/2006 dated 1.3.2006. Hence, entire credit of Rs.1,11,02,931/- is liable to be recovered from them along with interest.”

6. When the assessee took up the matter further before the learned CESTAT, the learned CESTAT, however, allowed the appeal of the assessee following the view taken by the CESTAT at Ahmedabad in the case of assessee himself on **09.04.2014** and in another case in **M/s.Savana Ceramics**. The relevant findings of the short order passed by the learned CESTAT, is also quoted below for ready reference.

“After allowing the stay petition unconditionally, we proceed to decide the appeal itself with the consent of both sides as the issue stands decided in the appellant’s

own case in respect of the Bharuch (Gujarat) factory.

2. *After hearing both sides, we find that the issue relates to availability of the benefit of exemption Notification No.02/2008-C.E. dated 01.03.2008 which allows the concessional rate of duty subject to the appellant availing benefit of Cenvat credit. Revenue is of the view that another Notification No.05/2006-C.E. also provides the same concessional rate of duty without availing benefit of Cenvat credit. As such the credit availed by the assessee stands disallowed to them.*

3. *The assessee's contention is that when Notification No.02/2008-C.E. prescribed same concessional rate of duty and allows availment of credit, Revenue cannot compel them to avail the Notification No.05/2006-C.E.*

4. *We find that the Tribunal in the appellant's own case reported as **Bell Ceramics Ltd., vide Final Order***

No.A/10580/2014 dated 09.4.2014, by following the earlier order of the Tribunal on identical issue in the case of **Savana Ceramics**, has allowed the appellant's appeal. Inasmuch as the same issue is involved in the present appeal, we, by following the earlier order, set aside the impugned order and allow the appeal with consequential relief to the appellant. Stay petition as also the appeal get disposed of in above manner."

7. Aggrieved by the same, the Revenue has preferred this appeal on the aforesaid contentions.

8. On the other hand learned counsel for the assessee, Mr.K.S.Ravishankar, has urged before the Court that assessee has correctly claimed CENVAT credit only after he came to know of the Notification No.11/2010 dated 27.02.2010 whereby, the aforesaid Entry No.13 in the Notification No.05/2006-C.E came to be omitted and therefore, the assessee for the aforesaid period of 07.07.2009 to 26.02.2010 made its claim on

CENVAT credit against the duty payable by it at the rate of 8% from 01.03.2010, which has been wrongly denied by the learned assessing Authority but the learned Tribunal has rightly allowed the same. The learned counsel for the assessee also urged before the Court that the anomaly of the two notifications namely, (i) Notification No.05/2006-C.E. dated 01.03.2006 as amended on 07.07.2009 with condition No.7 against availment of CENVAT credit and (ii) Notification No.02/2008-CE dated 01.03.2008 was removed by the Central Government, only by the Notification No.11/2010 dated 27.02.2010 deleting Entry No.13 in the Notification No.05/2006 dated 01.03.2006. He, however, submitted that if the assessee can claim CENVAT credit under another valid Notification, viz., No.02/2008 dated 01.03.2008 by availing the CENVAT credit for the aforesaid period, he cannot be deprived of the same merely because another Notification No.05/2006 as amended on 07.07.2009 also was

operating during the same period with the condition against availment of CENVAT credit and the assessee is entitled to choose a more beneficial or advantageous notification applicable to him and there is no malafide on the part of the assessee to claim such CENVAT credit for the aforesaid period of 07.07.2009 to 26.02.2010 under the aforesaid Notification No.02/2008-C.E. dated 01.03.2008.

9. He also submitted that, the said matter stood concluded with the decision of the Tribunal in the case of **M/s.Savana Ceremics** against which no appeal was filed by Revenue. Even though, the appeal against the order passed by the Tribunal in the case of the assessee on **09.04.2014** has been appealed against before the Gujarat High Court where the same is still pending. He, therefore, submitted that no substantial question of law arises for consideration of this Court.

10. Having heard learned counsels for the parties, we are of the clear opinion that no substantial question of law arises in the present case requiring our consideration. It is not disputed before us that the Notification No.02/2008 dated 01.03.2008 was also applicable to the assessee in the present case for the period **07.07.2009 to 26.02.2010** in question. The Show Cause Notice of the assessing authority dated **16.03.2011** and the order (Original) Annexure-'A' dated **24.07.2013** clearly admits this position vide aforesaid quoted paragraph Nos.13 and 14 from the Order-in-Original. The assessee has not claimed CENVAT credit during the aforesaid relevant period in violation of condition No.7. It has started to claim the said CENVAT credit only after 01.03.2010, after the anomalous position between the two Notifications No.05/2006 with the condition against availment of CENVAT credit and Notification No.02/2008 without any such condition, was removed by the Central

Government on **27.02.2010**. Therefore, no malafide can be attributed to the respondent-assessee in claiming such CENVAT credit after removal of the anomaly by the Central Government itself.

11. Why the two Notifications governing the same commodity and exigibility of excise duty on the same commodity one with the condition and another without condition of CENVAT credit is not for the assessee to explain. On the contrary, it is for the Central Government to take the responsibility of prescribing the same rate of excise duty under two different Notifications, but one with the condition against the availment of CENVAT credit and another without any such condition.

12. The claim of CENVAT credit in the eye of law by the assessee in the present case appears to be perfectly in consonance with the Notification No.02/2008 dated 01.03.2008. Merely because the

assessee in the said period filed its returns in form No.ER-1 indicating the payment of said 8% excise duty under Notification No.15/2009-C.E. dated 07.07.2009, which amended the original Notification No.05/2006-C.E. dated 01.03.2006 and did not mention anything about Notification No.02/2008 dated 01.03.2008, though the said later Notification also equally applies for the said period, the respondent-assessee cannot be bound down to abide by the condition No.7 of the said Notification No.05/2006-C.E. dated **01.03.2006**.

13. We are supported for our aforesaid view by the decision of the Hon'ble Supreme Court in the case of ***Share Medical Care vs. Union of India*** reported in ***2007 (209) E.L.T 321 (S.C.)***, wherein the Hon'ble Supreme Court held that if two exemption notifications are applicable in a given case, the assessee may claim benefit of the more beneficial notification. This position of law was re-iterated by the Apex Court following its

earlier decisions in the case of **Collector of Central Excise, Baroda vs. Indian Petro Chemicals** and **H.C.L. Limited v. Collector of Customs, New Delhi.**

We quote below paragraph Nos.12 and 16 of the said judgment for ready reference:

*“12. In Collector of **Central Excise, Baroda v. Indian Petro Chemicals, (1997) 11 SCC 318**, this Court held that if two exemption notification are applicable in a given case, the assessee may claim benefit of the more beneficial one. Similarly, in **H.C.L Limited v. Collector of Customs, New Delhi, (2001) 130 E.L.T. 405 (S.C.)**, this Court relying upon Indian Petro Chemicals, held that where there are two exemption notifications that cover the case in question, if the assessee is entitled to the benefit of that exemption notification which may give him greater or larger relief. In **Unichem Laboratories Ltd. v. Collector of Central Excise, Bombay, (2002) 7 SCC 145: JT 2002 (6) SC 547**, the appellant was a manufacturer of bulk drugs. Exemption was granted to him under one*

item. He, thereafter, filed a revised classification list categorizing its bulk drugs under the other Head claiming more benefit. The claim was rejected on the ground that the appellant had not claimed the benefit of exemption at the time of filing the classification list and subsequently it could not be done. The appellant approached this Court.

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16. *In the instant case, the ground which weighed with the Deputy Director General (Medical), DGHS for non-considering the prayer of the appellant was that earlier, exemption was sought under category 2 of exemption notification, not under category 3 of exemption notification and exemption under category 2 was withdrawn. This is hardly a ground sustainable in law. On the contrary, well settled law is that in case of applicant is entitled to benefit under two different Notifications or under two different Heads, he*

can claim more benefit and it is the duty of the authorities to grant such benefits if the applicant is otherwise entitled to such benefit. Therefore, non-consideration on the part of the Deputy Director General (Medical), DGHS to the prayer of the appellant in claiming exemption under category 3 of the notification is illegal and improper. The prayer ought to have been considered and decided on merits. Grant of exemption under category 2 of the notification or withdrawal of the said benefit cannot come in the way of the applicant in claiming exemption under category 3 if the conditions laid down thereunder have been fulfilled. The High Court also committed the same error and hence the order of the High Court also suffers from the same infirmity and is liable to be set aside.

14. We, therefore, do not find any substantial question of law to be arising in the present appeal filed by the Revenue and therefore, the said appeal filed by

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the Revenue is without any merit and is liable to be dismissed.

Appeal is accordingly, ***dismissed***. No costs.

**Sd/-
JUDGE**

**Sd/-
JUDGE**

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