

OPEN SESAME

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Another Circular! Another Clarification! Another Confusion! Yet another opportunity! The CBEC appears to have clarified, in its letter F.No. **267/14/06-Cx.8 Dated 1st June 2006** that, an SSI unit, availing the benefit of exemption upto Rs.1 Crore value of clearances under Notification 8/2003, can avail the Cenvat Credit in respect of the inputs contained in the finished goods which are exported. While clarifying so, the CBEC has also made an observation that the **restriction as to the non-availment of Cenvat Credit is only with reference to home consumption**. Though the clarification is well intended, we are afraid that this passing observation, which is totally unwarranted, is sure to churn the scheme.

It is quite common, especially in the pharmaceuticals industry, that the goods of one's own brand name and goods bearing the brand name of other persons will be manufactured simultaneously. Such manufacturers would be availing the benefit of SSI exemption in respect of their own branded goods and would be paying full duty of excise in respect of the goods bearing the brand name of other persons, as the benefit of SSI exemption is not available to such goods bearing the brand name of other persons (unless the manufacturing unit is situated in rural area). Since, full duty is paid on the goods bearing the brand name of other persons, such manufacturers would also be availing the benefit of Cenvat Credit, in respect of the inputs used in the manufacture of goods bearing the brand name of other persons, but they would not be availing any Cenvat credit, in respect of their own branded goods, as the benefit of SSI exemption is availed for such goods. Obviously, they would also be maintaining separate inventory. But the goods bearing the brand name of other persons, on which full duty is paid, are also clearances for home consumption. Now the moot question is as to whether such clearances of goods for home consumption would also carry the restriction as to the availment of Cenvat credit, by virtue of this present Circular?

The issue as to whether simultaneous payment of full duty on certain goods and availment of SSI exemption in respect of certain other goods is permissible or not, has always been a pet of judiciary.

The decision in the case of **Faridabad Tools Pvt. Ltd Vs CCE (1993 (63) ELT 759)**, can safely be considered to be the forerunner on this issue. In this case, the manufacturer had availed SSI exemption under Notification 175/86 for the "dies" manufactured by him, but had chosen to pay full duty and claim Cenvat credit in respect of the "raw aluminium castings" manufactured by them. By relying on certain earlier decisions, the Larger bench had upheld the conduct of the manufacturer. This decision has also been upheld by the Hon'ble Supreme Court, as reported in **1996 (82) ELT A 149 SC**.

The decision of the Hon'ble Tribunal in the case of **Jaina Detergent (P) Limited Vs CCE (1999 (113) ELT 613)**, towed the above ratio, wherein it was upheld that a manufacturer could simultaneously avail the SSI exemption under Notification 1/95 in respect of his own branded goods and avail the Cenvat credit and pay full duty, in respect of the goods bearing the brand name of other persons. Further in an identical issue, the Larger bench of the Hon'ble Tribunal had upheld the above ratio in the case of **Kinjal Electricals Pvt. Limited Vs CCE (2004 (165) ELT 300)**. Some other decisions to the same effect are **Roots Multiclan Limited VS CCE**

(2004 (174) ELT 123), Chaitanya Power Capacitors (P) Ltd Vs CCE (2005 (179) ELT 488), etc .

Now to the other side of the coin. There is also a contrary decision in the case of **Kamani Foods Vs CCE (1995 (75) ELT 202)**, rendered by a five member Larger Bench of the Hon'ble Tribunal, wherein, it has been held that such simultaneous payment of duty on certain goods and claiming SSI exemption for certain other goods, is not permissible.

The issue reached the Hon'ble Supreme Court and gave birth to **CCE VS Ramesh Food Products – 2004 (174) ELT 310 SC**. The following observations of the Hon'ble Supreme Court are worth of reproduction.

"Notification 175/86 have to be read as a whole and as noted rightly, in Kharia Cement Works case (supra) sub-clauses (i) and (ii) have to be construed harmoniously. Exemption envisaged for the specified goods accrues to them through instrumentality of the manufacturer. The notification clearly demarcated the two categories of manufacturers. A clear cut distinction is explicit between a manufacturer availing Modvat credit under Rule 57A and another not opting for the Modvat Scheme. As is statutorily provided, input duty relief is given under the scheme to the manufacturers who opt to operate under the scheme by applying for it in the prescribed manner. Ultimately the manufacturers have the choice of choosing one of the two concessions, i.e. either The Modvat Scheme or Notification 175/86. Further, there is no one to one correlation between the inputs and final products under Modvat Scheme. It would therefore not possible to allow the manufacturer to simultaneously avail Modvat for some products and avail full exemption for others under small-scale exemption scheme."

Unfortunately the department had an indigestion problem with the Ramesh Foods case, *supra*. Without appreciating the real essence of the case, the department proceeded to issue notices against all SSI units, more particularly against the pharmaceutical units, denying them the benefit of SSI exemption in respect of their own branded goods, on the ground that they have availed Cenvat Credit in respect of the goods bearing the brand name of other persons. Religiously such demands were also confirmed, by relying on the Hon'ble Supreme Court decision, *supra*.

Before proceeding further, let us understand the ratio spelt out in the Ramesh Foods case, *supra*.

The Notification involved in the case was Notification 175/86, which contained two options for a manufacturer, viz., (a) availment of full SSI exemption upto a specified value of clearance in respect of the "specified goods", without Cenvat Credit; and (b) payment of concessional rate of duty upto a specified value of clearance in respect of the "specified goods". It is necessary to reproduce the operating part of the definition, for better appreciation of the issue.

In the case of the first clearances of the specified goods up to an aggregate value not exceeding rupees seven and a half lakhs,—

(i) in a case where a manufacturer avails of the credit of duty paid on inputs used in the manufacture of the specified goods 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 and in force for the time being] as is equivalent to an amount calculated at the rate of 75% of such duty, or an amount calculated at the rate of 10% *ad valorem*, whichever is higher;

(ii) in any other case from the whole of the duty of excise leviable thereon ;

The twin options contained in the Notification 175/86, were later bifurcated into two different notifications, viz., 8/1999 & 9/1999 and so on. For easy reference we shall deal with Notifications 8/03 & 9/03.

If the decision rendered by the Hon'ble Supreme Court in the context of Notification 175/86, is applied *mutatis mutandis*, it would imply that, ONLY the simultaneous availment of the benefit of complete SSI exemption (without Cenvat credit under Notification 8/03) and availment of concessional rate of duty (with Cenvat Credit under Notification 9/03) is not permissible. But the simultaneous payment of full rate of duty for the goods bearing the brand name of other persons with availment of Cenvat Credit and claiming full exemption for own branded goods, was never the subject matter before the Hon'ble Supreme Court.

It is also curious to note that, all the relevant SSI notifications contained a clause, whereby, in the computation of specified exemption limit, goods bearing the brand name of other persons (which are ineligible for the grant of SSI exemption) have been excluded. The Notification itself envisages a situation where a manufacturer may produce both type of goods, viz., own branded goods and goods bearing the brand name of other persons. Once, the benefit of SSI exemption is not available for the latter category of goods, it would be highly unreasonable to deny the Cenvat Credit for such goods.

The decision in Ramesh Foods case, does not have any application to the present SSI Notifications, for another reason also. While the Notification 175/86, barred the availment of the Cenvat Credit in respect of all specified goods (which also includes goods bearing the brand name of other persons), in the present SSI Notifications (8/03 & 9/03), the embargo has been worded as below:

The manufacturer shall not avail of the credit of duty under rule 57A or rule 57B of the Central Excise Rules, 1944, paid on inputs **used in the manufacture of the specified goods cleared for home consumption, the aggregate value of first clearances of which, as calculated in the manner specified in the said Table does not exceed rupees one hundred lakhs.**

From the above, it may be observed that the embargo is not total, but is with reference only to the goods, which are specified and for which SSI exemption has been claimed upto Rs. One Crore.

Hence, by relying on the decision of the Hon'ble Supreme Court in the case of Ramesh Foods, the practice of paying full duty (with Cenvat Credit) on goods bearing brand names of other persons and claiming SSI exemption for own branded goods, cannot at all be faulted.

Before Parting...

In a recent and a pristine judgement, the Chennai bench of the Hon'ble Tribunal has analysed the above issues and rendered a landmark decision, distinguishing the Ramesh Foods case on the above lines and thereby immuned the SSI sector, which was stricken by "SCN Gunya!" (Nebulae Healthcare Limited VS CCE -).