REGISTERED / AD

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
OLD RED BUILDING, 38,M.G.Marg,CIVIL LINES, ALLAHABAD

Dated: 27/10/2015

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. A/ 70044 /2015- dated 17/09/2015

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section 35-C(1) of the **Central Excise and Salt Act, 1944.**

28/10/15

Asstt. Registrar

Application	Appeal	Name and Address of Appellant
	E/1052/2007	SHIVA INDUSTRIES, 26-C POANKI INDUSTRIAL ESTATE,KANPUR.

Name and Address of Respondent	CCE KANPUR 117/7, SARVODAYA NAGAR, KANPUR

Other Appellants and Respondents as per Annexure

Copy To

3Advocate(s) / Consultant(s): SH AMIT AWASTHI, ADV
7/116A,H-1, IST FLOOT,
RADHEY APARTENT
SWAROOP NAGAR,KANPUR

4 Bar Association, CESTAT, Delhi
5 Director Publications, Customs, Excise, I.P. Estate, Delhi
6 M/s Centax Publications Pvt. Ltd., 1512-B, Bhisham Pitamah Marg, New Delhi-3
7 Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17
8 Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005
9 Easy Service Tax Online Dot Com Pvt. Ltd., 407A, Iscon Mall, Satellite Road, Ahmedabad-15
10 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)
11 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi – 110070

12 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad – 38

13 The ICFAI society, 52, Nagarjuna Hill,Punjagutta Hyderabad.-500082
14 C.D.R. 15 Office Copy 16 Guard File

Asstt. Registrar
Regional Bench, Allahabad

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
CIRCUIT BENCH AT ALLAHABAD

Appeal No. E/1052/2007

(Arising out of Order-in-Original No. 1/Commissioner/07 dated 23.1.2007 passed by the Commissioner of Central Excise, Kanpur).

For approval and signature:

Hon'ble Shri P.S. Pruthi, Member (Technical)
Hon'ble Shri S.S. Garg, Member (Judicial)

1.	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	:	No
2.	Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	:	Yes
3.	Whether their Lordships wish to see the fair copy of the order?	:	Seen
4.	Whether order is to be circulated to the Departmental authorities?	:	Yes

M/s Shiva Industries — Appellant

Vs.

Commissioner of Central Excise, Kanpur — Respondent

Appearance:

Shri Amit Awasthi, Advocate — for Appellant

Shri Rajeev Ranjan, Jt. Commissioner (AR)
Shri B.B. Sharma, Asst. Commissioner (AR) — for Respondent

CORAM:

SHRI P.S. PRUTHI, MEMBER (TECHNICAL)
SHRI S.S. GARG, MEMBER (JUDICIAL)

Date of Hearing: 17.09.2015

Date of Decision: 17.09.2015

Final ORDER NO. 70044/2015

Per: P.S. Pruthi

This appeal is filed against the Order-in-Original dated 23.1.2007 passed by the Commissioner.

2. The facts are that the appellant M/s Shiva Industries a partnership firm, came into existence on 2.6.2001 in a partnership deed wherein Shri Narendra Kumar Surekha and M/s Shiva Textile Mills through their partner joined hands to increase their business. The partnership firm planned to supply textile fabrics to the Defence Establishment. The partnership firm furnished the details of partners, address of their factory and manufacturing facility in their registration application dated 6.6.2001 to the DGQAE (Defence Department). The list of plant and machinery was also annexed to the registration application submitted to DGQAE. They also applied for Central Excise Registration vide their application dated 6.6.2001, for processing various varieties of textile fabrics. The appellant vide their letter dated 7.6.2001 submitted an application in form ASP-1 (application for permission to avail the Special Procedure relating to processed textile fabrics) (Rule 97ZAN) to the Dy. Commissioner, Central Excise, Division Kanpur and also requested to re-open one sealed chamber stenter w.e.f. 8.6.2001. Under the Special Procedure, the duty was payable on the basis of capacity of production of independent textile processors under the Compounded Levy Scheme. The duty payable was based on annual capacity of production which in turn was determined on basis of various parameters such as no. of stenters, length and breadth of the chamber, approximate value of the goods. The benefit of duty on the basis of capacity of

production was available only to those independent processors who do not have proprietory interest in any factory primarily and substantially engaged in the spinning of yarn or weaving or knitting of fabrics, in terms of Explanation-1 under Rule 96ZNA. The case of Revenue is built around the fact that the appellant did not qualify for the benefit available to an independent processor as they were having proprietory interest in other manufacturing facilities of weaving/knitting. The Commissioner came to the conclusion that M/s Shiva Industries cannot be treated as an independent processor because M/s Shiva Industries were having proprietory interest in one of the partners' firm (i.e. M/s Shiva Textile Mills), which were having weaving and knitting facilities and were two bodies corporate under the same management.

2.1 Commissioner also referred to the statement of Shri Narendra Kumar Surekha, who accepted that they had opened the Air Stenter. The Commissioner held that the processing of drying dyeing cannot be said to be carried out exclusively in a Hot Air Stenter. This was also a ground for rejecting the Special Procedure relating to processed textile fabrics. Accordingly, the Commissioner confirmed demand of duty payable under Section 3 in terms of proviso to Section 11A(1) invoking the extended time period and imposed equivalent penalty under Section 11AC.

3. Heard both sides.

4. Learned Counsel for the appellant opened the arguments by claiming that the extended time period is not applicable in the present case. He referred to their application dated 7.6.2001 in which they applied for the Special Procedure and requested for one chamber stenter to be opened. This letter was replied by the Dy. Commissioner, Central

Excise, Division-I vide C.No. V-13/56/Tech/Shiva Indu./2001/3065 dated 18.6.2001. To this letter from the Central Excise authorities, the appellant gave the detailed reply vide their letter dated 23.6.2001.

5. The learned AR took us through the portion of the order which makes a reference to the invocation of extended time period.

6. We have carefully considered the facts and the submissions.

6.1 Noting that the appellants are contesting on time limitation as well as merits, we proceed to examine the documents and case records in this regard. The documents reveal that their application was not agreed to because of lack of information such as Plant and Machnery installed. The appellant replied in their letter dated 23.6.2001 that they had already submitted a list of plant and machinery. They returned the ASP (Application Form) to Central Excise authorities after making corrections. They also clarified the query from Central Excise regarding another unit which had applied for the Special Procedure. Most importantly they declared the constitution of their partnership firm along with a copy of the partnership deed.

6.2 The reference to invocation of extended time period in the show-cause notice is briefly stated at para 51 as follows: -

> "51. However, since M/s Shiva Industries had concealed that vital information of having their proprietary interest in their partner firm i.e. M/s Shiva Textile Mills, a partnership fir, as discussed at length in the foregoing paras, they appears to have contravened the provisions of Central Excise Act, 1944. Therefore, M/s Shiva Industries, a partnership fir, appears to be non-entitled to avail the benefit of deemed credit under the provisions of clause 7 of the Notification No. 29/96-CE(NT) dated 3.9.1996."

The show-cause notice refers to clause (6) of the partnership deed which reads as follows: -

> "6. *That the said Smt. Sunita Dodojwala has joined the firm on behalf of M/s Shiva Textile Mills who have independent status and proprietary rights on their assets as per settled terms contained in Annexure-A".*

6.3 The conclusion is reached in the show-cause notice that clause (6) of the partnership deed dated 6.6.2001 is nothing but a colourable device to avoid tax because M/s Shiva Industries accepted their proprietary interest in the property of Shiva Textile Mills. The Order-in-Original also confirms this allegation in the show-cause notice. It was alleged by the Revenue that before the formation of M/s Shiva Industries, the partnership firm had partners namely, M/s Shiva Industries, a proprietory concern and M/s Shiva Industries, partnership firm both having processing and weaving & knitting facilities respectively. But complete facts were concealed from the Central Excise and impression was sought to be created that the partnership firm had one property only at 35B, Dada Nagar, Kanpur and 22C, Site 1 Pankey, Kanpur.

6.4 We find from records that the details of the partnership concern as well as a photo copy of the partnership deed were submitted to the department in June, 2001. But, the show-cause notice for the period June, 01 to Feb, 02 was issued on 29.5.2006 invoking the extended time period. Even if the department had some doubts as whether the criterion of independent processor was fulfilled or not, the relevant records were available with the department to make their enquiry. The letter dated 18.6.2001 from the department sought clarification regarding owners/partners/directors of present Shiva Industries. This letter was replied. The department issued show-cause notice after three years when all records were verifiable at the initial stage itself. We find that the partnership deed dated 2.6.2001 clearly states that M/s Shiva Industries shall not have any proprietory or ownership right of any kind on the plant and machinery of M/s Shiva Textile Mills, but will continue to have their own independent status also. Similarly, M/s Shiva Textile Mills would not have any ownership right on the plant and machinery of M/s Shiva Industries. It is alleged that such partnership deed is contrary to the spirit and provisions of Indian Partnership Act. Reference has been made to Section 14 of the Law of Partnership which states that "The property of the firm; subject to contract between the partners, the property of the firm includes all property and rights and the interest in property originally brought into stock of the firm or acquired/purchase ...." In the present case, we do not find any violation if the property of the partnership firm does not include the property of its partners. The fact remains that the appellant have not concealed any facts. They declared their status and also gave detailed information including details of plant and machinery as well as a copy of the partnership deed. It is held in the adjudication order that M/s Shiva Industries had an unambiguous proprietory interest in the combined factories of both partners where facilities of knitting, weaving and processing etc. were available. The said combined facilities available in the different factories of both partners were brought in a partnership firm for the purpose of maximizing business gains. It is further held that the partners in both the firms i.e. M/s Shiva Industries and M/s Shiva Textile Mills were close family members. By recording that all the provisions with regard to the term proprietory interest as contained in sub-section 1B of section 370 of the Companies Act, and as contained under section 2(g) of the MRTP Act as well as the definition of 'Interconnected undertakings', it has been sought to establish that the colourable device was created to avoid the payment of tax. Be that as made, we do not see how any facts were concealed from the Department to justify extended time period.

6.5 The documents did not reveal that the assets of the partners became the property of the appellant by bringing them into its stock. It does not seem to be established that the partnership firm had proprietory interest in another firm when a legal distinct deed of partnership firm is separate from its partner as an arguable point under Central Excise. Without going into the merits of the case, we find that the department for a long period had not communicated any objection to the information provided by the appellant in June, 2001. There does not appear to be any fact which could not have been verified by the department from the information given by the appellant in June, 01. The information supplied to the Defence Deptt. was for purposes of facilitating overall assessment and registration based on facility/services of vendors. Merely because it was informed to Defence Deptt. that they had weaving and knitting facilities owned by partners does not necessarily lead to the conclusion that they had, under Central Excise Law, proprietory interest in them. The fact remains that the legal document viz. partnership deed clearly provided that the appellant firm do not have proprietory/ownership right of any kind of asset of M/s Shiva Textiles. In any case it was open to department to verify all the assets of the partners and the facilities the partnership firm intended to use. Thus, a show-cause notice issued under extended time period is unsustainable.

6.6 As regards the allegation that an open air stenter was installed, except for a statement there is no evidence to prove that the process of deying was not carried out exclusively in a hot air stenter. In any case, de sealing of one stenter was declared to the department.

6.7 There is no evidence that inquiries were made from the appellants which were not replied to. Whatever information was sought by the department, the same was given by the appellant. Still the show-cause notice was issued after 4 years. In these circumstances, it cannot be held that there was a deliberate fraud or mis-statement on the part of the appellant. The conclusion that the appellant had proprietary interest in some other concern has been arrived at on the basis of legal interpretation of various aspects of the terms such as letter of partnership, proprietary interest, connected undertakings etc. There is no justification for invoking the extended period merely on the grounds of such interpretation.

7. In the circumstances, we hold that the extended period is not applicable. Having so held, we do not find it necessary to go into the merits of the case. Accordingly, the impugned order is set aside and the appeal is allowed.

(Pronounced in Court)

Sd/-
(S.S. Garg)
Member (Judicial)

Sd/-
(P.S. Pruthi)
Member (Technical)

प्रमाणित प्रति / Certified True Copy

सहायक पंजीकार / Asstt. Registrar
सीमाशुल्क, उत्पादशुल्क एवं सेवा कर
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