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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
EXCISE APPEAL BRANCH

Appeal No. E/1283/2008-1285/2008 - EX[DB] Date 04/02/2009

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
MOKASH OVERSEAS
B-98,NARAINA INDUSTRIAL AREA, PHASE-I, NEW DELHI.

MOKASH OVERSEAS Appellant
Vs
C.C.E. LUDHIANA Respondent

I am directed to transmit herewith a certified copy of **Final order** No.88-90/09 & S.O.NO. 120—122/09-E **X** dated 02-2-09

passed by the Tribunal under Section 35-C(1)of Central Excises Act, 1944

Assistant Registrar
(Excise Appeal Branch)

Copy to :
1. Respondent CCE, DELHI-I
~~C.C.E. LUDHIANA~~ C.R. BUILDING, I.P. ESTATE, N. DELHI-2
~~CENTRAL EXCISE HOUSE, 'F' BLOCK, RISHI NAGAR, LUDHIANA-141001 (PUNJAB)~~
2. Adv. / Consult SH. C. HARI SHANKAR, ADV.,
46, BANK ENCLAVE, N. DELHI-92

3 C.D.R
~~4 J.C.D.R~~
5 Bar association, CESTAT, New Delhi
6 M/s. Deeparchi Publications, M-93, Marg. 46, Saket, New Delhi 110017
7 M/s Centax Publictions (P) Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New - 3
8 Excise & Customs cases, B-37, Sector -1, NOIDA - 201301 Gautam Budh Nagar, (U.P.)
9 Raghuraman's 44-B, Regal Flat,Shipra Suncity, Indirapuram - 201010,Ghaziabad, DT, U.P.
10 Nidheshak publications, I.P.Estate, new Delhi
11 Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh, New Delhi - 110026
12 Commercial Laws of India Pvt Ltd Post Bag No. 1033, No.70(Old No. 88), Thyagaraya Road, T. Nagar,Chennai
13 Taxindiaonline.com Pvt.Ltd, B-XI/8183,Vasant Kunj, New Delhi - 110070
14 Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road,Ahmedabad-15
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17. DEEPAK YADAV
96,VANI VIHAR, UTTAM NAGAR, NEW DELHI

Assistant Registrar
(Excise Appeal Branch)

18. MANOJ GARG
A-63, GROUND FLOOR, SHANKAR GARDEN, VIKASPURI NEW DELHI-24

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, WEST BLOCK NO.II, R.K. PURAM, NEW DELHI-110066.
BENCH-DB

E/Stay/1241 to 1243/08 in &
Appeal No.E/1283 to 1285/08

[Arising out of Order-in-Original No.06/2008 dated 26.2.2008 of Commissioner, Central Excise, New Delhi].

Date of Hearing: 21.01.09
Date of decision: ________

For approval and signature:

Hon'ble Mr. D.N. Panda, Judicial Member
Hon'ble Mr. Rakesh Kumar, Technical Member

1	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	
2	Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	
3	Whether Their Lordships wish to see the fair copy of the Order?	
4	Whether Order is to be circulated to the Departmental authorities?	

M/s. Moksh Overseas
Mr. Deepak Yadav
Mr. Manoj Garg ...Appellant
[Represented by Mr.C.Harishankar, Advocate]

Vs.

CCE, Delhi-I ... Respondent
[Represented by Mr. K.K. Goel, D.R.]

Coram: Hon'ble Mr. D.N. Panda, Judicial Member
Hon'ble Mr. Rakesh Kumar, Technical Member

STAY ORDER NO. 120 - 122/09-EX DATED: ________
FINAL ORDER NO 88-90/09-EX
PER: RAKESH KUMAR

These are the applications filed by the appellant firm M/s.Moksh Overseas and Shri Manoj Garg and Shri Deepak Yadav the Partners of the appellant firm, for waiver of the requirement of pre-deposit as well as stay of recovery of the duty demand of Rs.1,71,2,252/- alongwith interest, confirmed against the appellant firm and penalties imposed on the appellant firm as well as on Shri Manoj Garg and Shri Deepak Yadav vide the Impugned Order in Original dated 26.2.2008 passed by the Commissioner, Central Excise Delhi-1.

1.1 The facts of the case leading to these appeals are, in brief, as under:-

1.1.1 The appellants have a manufacturing unit in Naraina Industrial Area, Phase-I, Naraina Industrial Estate, Delhi-28 for manufacture of readymade garments (RMG) of Knitted as well as Woven fabrics, with or without embroidery, liable to Central Excise duty under Tariff Heading 5406, 6001, 6101 & 6201 of the Central Excise Tariff. They were also availing of the Cenvat Credit facility available under Cenvat Credit Rules, 2004. They availed Cenvat credit on inputs including duty paid fabrics purchased by them. During Feb., 2005 and March, 2005 the appellants took Cenvat Credit of Rs.1,65,24,493/- in respect of fabrics claimed to have been received by them and during the same period according to the appellant firm they made clearances of RMG valued at about Rs.20.00 Crores under ARE-1 is for export through merchant exporters. The clearances had been made on

(paid through cenvat credit)

payment of duty under rebate claim. Total duty paid on these clearances through Cenvat credit was Rs.1,61,48,930/-. As per the ER-I returns filed for April, 2005, May 2005 and June 2005, there were no clearances of RMG, during these months.

1.1.2 The appellant firm was requested by the Jurisdictional Range Officer to submit original duty paying documents and other records for verification of ARE-I under which the clearances of the RMG for export had been made. But there was no response from the appellant firm. Enquiry made by the Central Excise Officers revealed that the appellant firm had vacated its premises in Naraina Industrial Estate, West Delhi on 31.08.05. In view of this, a reference was made to Dy. Commissioner, Central Excise, Division V, Surat on 6.9.05 for ascertaining the genuineness of the invoices and payment of duty, on the basis of which the Cenvat Credit had been taken by the appellant firm during February and March, 2005, as all those invoices had been issued by eight parties of Surat- (1) Chintan Textiles, (2) Nanalal Polyster Pvt. Ltd., (3) Chandrika Textiles, (4) Shree Navneet Textiles, (5) Palaj Fabrics, (6) Rajen Textiles, (7) Shivdeep Fashion Pvt. Ltd. and (8) Rukshmani Textiles. The Asst. Commissioner, Central Excise, Division V, Surat vide letter dated 7.10.05 and 9.12.05 informed that none of the above manufacturers had supplied any material to the appellant firm and also forwarded copies of the letters given by the above mentioned manufacturers of Surat.

1.1.3. Enquiry was thereafter made with Shri Manoj Garg and Shri Deepak Yadav, partners of the appellant firm. Shri Deepak Yadav in his statement dated 17.4.06 stated that he is only an employee of the appellant firm headed by Shri Manoj Garg and that entire work of the appellant firm – procurement of the inputs, sale/export of finished goods is handled by Shri Manoj Garg. Shri Manoj Garg in his statements dated 12.4.06, 25.04.06 and 28.4.06 stated, that he had started this firm by taking his friend Shri Deepak Yadav as a Partner, that he had procured fabrics from various manufacturers of Surat and had taken Cenvat Credit on the basis of the manufacturer's invoices, that he is not in a position to produce the purchase invoices as the same have been stolen from his office and that in this regard he has lodged an FIR with the Police.

1.1.4 From the above circumstances, the Department was of the view that the appellant firm has taken Cenvat Credit without receiving any material on the basis of fictitious invoices and hence the same is not admissible at all and that the duty paid by utilising such Cenvat Credit – Rs.1,63,48,930/- would be recoverable from the appellant firm. In addition to this, in the course of enquiry, it was also noticed that the appellant had issued invoices No. 1 to 8 all dated 1.7.05 to M/s. Parental Creations Pvt. Ltd., Mira Distt. Thane, Mumbai for an amount of Rs.92,31,882/- involving Central Excise Duty of Rs.7,53,322/-, in respect of clearances of dyed and printed fabrics and no duty had been paid in respect of these clearances. On this basis the Department was of the view that duty amounting to Rs.1,71,02,252 (Rs.1,63,48,930 + Rs.7,53,322) is recoverable from them alongwith interest and the appellant firm as well as his partners are liable for penalty.

1.1.5 After issue of show-cause-notice and hearing the appellants, the Commissioner vide the impugned order held that the availed Cenvat Credit amounting to Rs.1,65,24,493/- is to be non-est and reversed from the Cenvat Credit Account and - (a) Confirmed the duty demand of Rs.1,71,02,252/- under section 11 A (1) of Central Excise Act 1944 alongwith interest on it at the applicable rate as per the provisions of section 11AB against the applicant firm, (b) imposed penalty of Rs.1,71,02,252/- on the appellant firm under section 11AC of Central Excise Act read with Rule 25 (1) of Central Excise Rules 2002 and (c) imposed penalty of Rs.5.00 Lakhs on Shri Manoj Garg, Partner and Rs.2.00 Lakhs on Shri Deepak Yadav, Partner under Rule 26 of the Central Excise Rules.

2. Heard both the sides.

2.1 Shri Hari Shankar, Advocate, the ld. Counsel on behalf of the appellants at the time of hearing of this matter on 13.1.2009 pleaded that the appellant firm had received the material in respect of which Cenvat Credit has been taken from the various manufacturers of Surat, that payment to those manufacturers had been made by Cheques, that the Commissioner's conclusion that no material has been received under the invoice on the basis of which Cenvat Credit had been taken, is based on the letters dated 7.10.05 and 9.12.05 received from the Asstt. Commissioner, Central Excise, Division V, Surat alongwith the letters issued by the manufacturers, that copies of these letters of the AC and of the manufacturers have not been supplied to the appellants and thus, there has been denial of natural justice and that the appellant accept their duty liability of Rs.7,53,322/- in respect of the clearances of dyed and printed fabrics to M/s. Parental Creations Pvt. Ltd. Mira Road, Distt. Thane, under 8 invoices No. 1 to 8 all dated 1.7.05 and that they are ready to deposit this duty, but the confirmation of duty demand of Rs.1,63,48,930/- on the basis that Cenvat Credit amounting to Rs.1,65,24,493/- had been taken without receiving any material, is wrong. In view of this, he pleaded that except for the duty demand of Rs.7,53,322/-, the pre-deposit of the remaining duty demand and penalties may please be waived for admitting these appeals. He was accordingly directed by the Bench to deposit the admitted amount of Rs.7.50 Lakhs by 17.01.09 and produce the challan at the time of hearing on 21.01.09.

2.1.1 When this case was listed for hearing on 21.1.09, Shri Hari Shankar, Advocate, reported that the appellant have deposited an amount of Rs.7,50,000/- and pleaded that the pre-deposit of the remaining amount of duty demand and penalty may be waived.

2.2 Shri K.K. Goel, Jt. CDR, the ld. DR for the Revenue pleaded that while the letters dated 7.10.05 and 9.12.05 of the Asstt. Commissioner , Central Excise, Division V, Surat and the letters issued by the manufacturers denying having sent any material to the appellant firm, have not been supplied, the reason for this was ~~but~~ the appellant had not pressed for the same, and in view of this, the non-supply of these documents does not vitiate the proceedings, that the appellant, in spite of sufficient opportunity having been given to them, have not produced the original duty paying documents (Invoices), on the basis of which the Cenvat Credit had been taken by them, that the circumstances of these cases indicated that the appellants have taken huge amount of Cenvat Credit of Rs.1,65,24,493/- without receiving any material and therefore, the Commissioner has rightly ordered the reversal of the Cenvat Credit of Rs.1,65,24,493/- holding the same as non-est, has rightly confirmed the duty demand of Rs.1,71,02,252 and has rightly imposed penalty on the appellant firm as well as its partners. He, therefore, pleaded that this is not a case for waiver of the requirement of pre-deposit of duty demand confirmed and penalty imposed for hearing of these appeals.

3. We have carefully considered the submissions from both the sides. Though this matter has been listed for hearing of the pre-deposit of the duty demands confirmed and penalties imposed, after hearing both the sides and going through the records, we are of the view that in view of the following, this matter can be finally disposed off by remanding the same for de-novo adjudication, dispensing predeposit. We do so.

3.1 There are two components of duty demand of Rs.1,71,02,252/- confirmed against the appellant firm – duty demand of Rs.7,53,322/- is in respect of clearances of fabrics in July 2005 to M/s. Parental Creations Pvt. Ltd. Under invoice No.1-8 all dated 1.7.05 and there is no dispute about the fact that duty in respect of these clearances has not been paid. The appellant have deposited an amount of Rs.7,50,000/- towards the duty liability. The other component of the duty demand is Rs.1,63,48,930/-, the basis of which is that this duty had been paid by the appellant by utilising Cenvat Credit which has been taken in a fraudulent manner without actually receiving any material. The Department's case in respect of this allegation is based on the reports dated 7.10.05 and 9.12.05 of the Asstt. Commissioner, Central Excise, Division V, Surat alongwith certain letters issued by M/s. Chintan Textiles,M/s. Nanalal Polyster Pvt. Ltd., M/s.Chandrika Textiles M/s.Shree Navneet Textiles, M/s.Palaj Fabric, M/s.Rajen Textiles, M/s. Shivdeep Fashion Pvt. Ltd. and M/s.Rukshmani Textiles in which these suppliers have stated that they had not sold any material to the appellant. The appellant, on the other hand, plead that these parties had supplied the material to them and that the payments to them had been made by Cheques and these payments can be verified. The appellant have also emphasised that the copies of the two letters dated 7.10.05 and 9.12.05 of the Asstt. Commissioner, Central Excise, Surat alongwith letters issued by the above mentioned manufacturers have not been supplied to them and the cross examination of the suppliers has also been denied and thus there is denial of natural justice. Non-supply of above mentioned documents has not been disputed by the Department. Since the Deptt.'s case is based on these documents, and the same have not been supplied to the appellant, we are of the view that the appellants have been denied natural justice. Since the impugned order suffers from the serious lacuna of denial of natural justice, we are of the view that there is no point in keeping these appeals pending. The appeals are accordingly taken up for final disposal after waiving the pre-deposit of balance amount of duty demand and penalties.

4. Since on account of denial of natural justice, the impugned order is not sustainable, the same is set aside and the matter is remanded to the Commissioner for de-novo adjudication after supplying the following documents to the appellant and granting personal hearing:-

(a) The letters dated 7.10.2005 and 9.12.05 of the Asstt. Commissioner, Central Excise, Division-V, Surat.

(b) The letters issued by the manufacturers denying selling of any material to the appellant.

5. In view of the huge amount of revenue involved, we direct the Commissioner to supply the documents by 15th Feb., 2009. The appellants shall submit their reply by 28th Feb ., 2009 and thereafter the Commissioner must adjudicate this matter by 31st March, 2009. The stay applications as well as the appeals stand disposed off as above.

[Operative part of the Order Pronounced in the open Court on 21.01.09]

(D.N.PANDA)
JUDICIAL MEMBER

(RAKESH KUMAR)
TECHNICAL MEMBER

Anita