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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/5691/2004-5693/2004 - EX[DB]   Date 30/10/2009

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

To :
M/A GERMAN DYE & CHEMICALS LTD.
261,GHARI KHUSARO MUKHMAILPUR,NEAR VILL-BHAKTAWARPUR,DELHI -110036

M/A GERMAN DYE & CHEMICALS LTD.   Appellant

Vs

C.C.E DELHI - I   Respondent

I am directed to transmit herewith a certified copy of **Final order No. 845-847/2009 EX[DB]** dated 24-9-09 passed by the Tribunal under Section 35-C(1)of Central Excises Act, 1944

Assistant Registrar
(Excise Appeal Branch)

Copy to :

1. Respondent
   C.C.E DELHI - I
   CENTRAL REVENU BUILDING,I.P ESTATE,NEW DELHI
2. Adv. / Consult SH.J.P.KAUSHIK,ADV.,
   A-14/3,SFS FLATS, SAKET,N.DELHI-17
3. C.D.R
4. ~~J.C.D.R.~~
5. Bar association, CESTAT, New Delhi
6. Director Publications, Customs, Excise, I.P. Estate, New Delhi
7. M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi - 3
8. Commercial Laws of India Pvt Ltd. Post Bag No. 1033, No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
9. Raghuraman's 44-B, Regal Flat,Shipra Suncity, Indirapuram - 201010,Ghaziabad, DT, U.P.
10. M/s Manupatra Information Solutions Pvt Ltd. Excise & Customs Cases B-37, Sector - 1, Noida - 201301, Gautam Budh Nagar. (UP)
11. M/s. Deeparchie Publications, M-93, Marg. 46, Saket, New Delhi 110017
12. Taxindiaonline.com Pvt.Ltd. B-XI/8183,Vasant Kunj, New Delhi - 110070
13. Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh, New Delhi - 110026
14. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road,Ahmedabad-15
15. LAWCRUX Advisors Pvt Ltd, LAW House,1-8,Sector - 10, Faridabad 121003 (Haryana)
16. Office Copy
17. Guard file
18. HON'BLE PRESIDENT.
19. SH. DIWAKAR AGGARWAL
    261,GHARI KHUSARO MUKMAILPUR,
    NEAR VILL-BHAKTAWARPUR,DELHI-36
20. SH. MADHUKAR AGGARWAL, AUTHORISED SIGNATORY
    261 GHARI KHUSARO MUKHMAILPUR NEAR VILL-
    BHAKTAWARPUR,DELHI
21. SH.J.M.SHARMA,ADV.,
    G-31,BASANT ENCLAVE,N.DELHI-

Assistant Registrar
(Excise Appeal Branch)

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
West Block No.2, R. K. Puram, New Delhi
COURT-I

Date of hearing: 23-24.09.2009
Date of decision: 24.09.2009

Excise Appeal No. 5691, 5692 & 5693 of 2004
[Arising out of order in original No. 31-34/2004 dated 30.09.2004 passed by the Commissioner of Central Excise, New Delhi]

For approval and signature:

Hon'ble Shri Justice R.M.S. Khandeparkar, President
Hon'ble Shri M. Veeraiyan, Member (Technical)

1.	Whether Press Reporters may be allowed to see t Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982.	Yes
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 German Dyes & Chemicals — Appellant
Shri Madhukar Aggarwal
Shri Diwakar Aggarwal, Partner

Vs.

CCE, Delhi-I — Respondent

Appearance:

Appeared for the Appellant – Shri J.P. Kaushik, Advocate with Shri J.M. Sharma, Consultant

Appeared for the Respondent –Shri B.K. Singh, Jt. CDR

Coram: Hon'ble Shri Justice R.M.S. Khandeparkar, President
Hon'ble Shri M. Veeraiyan, Member (Technical)

FINAL Oral Order No. 845-847/09-EX

Per Shri Justice R.M.S. Khandeparkar:

Since common questions of law and facts arise in all these three appeals they were heard together and are being disposed of by this common order.

2. These appeals arise from order dated 30.09.2004 passed by the Commissioner of Central Excise, Delhi-I. By the impugned order, the Commissioner has confirmed the demand of duty amounting to Rs. 61,19,774/- alongwith interest thereon and has also imposed penalty of equal amount against the partnership firm, personal penalty of Rs. 5 lakhs against the appellants Shri Shri Diwakar Aggarwal, Partner of the firm and Rs. 10 lakhs against Shri Madhukar Aggarwal, authorized signatory of the firm.

3. We have heard at length the learned Advocate and learned Joint CDR and have also perused the records placed before us.

4. The appellants firm is engaged in manufacture of Cable Filling Compound classifiable under sub-heading 3824.90 of the First Schedule to the Central Excise Tariff Act, 1985 and were availing modvat credit facility under Rule 57A of the Central Excise Rules, 1944 in respect of the inputs declared by them as being used in their final product. The inputs declared included Low Density Poly Ethylene, Linear Low Density Poly Ethylene, High Density Poly Ethylene, Microfine ADC LAD, Pentaerythritol, Master Batch Organic, Master Batch Inorganic, Poly Propylene, Dioctyl Pthalate (DOP) and Dibutyl Pthalate (DBP).

5. Having received intelligence report that some of the declared inputs were not being actually used by the appellants in or in relation to the manufacture of their final product, the investigation was carried out. Pursuant to the said investigation, on allegation that the inputs like LDPE, LLDPE, Atatic P.P. copolymer, DBP Plasticizer Penta Erythrotal were not being used in or in relation to the manufacture of the final product, a show cause notice dated 02.05.2000 in relation to the period commencing from October 1999 to March 2000 came to be issued demanding the amount of duty to the tune of Rs. 48,23,256.84. The said show cause notice was followed by another show cause notice dated 21.03.2001 for the period April 2000 to October 2000 alleging non utilization of the input like LDPE and LLDPE in or in relation to the manufacture of final product and on that ount demanding the duty to the tune of Rs. 26,03,691/-. It was followed by third

show cause notice dated 10.8.2001 for the period November 2000 to May 2001 alleging non utilization of the input namely LDPE, LLDPE, HDPE, Atatic P.P. copolymer demanding the duty to the tune of Rs. 26,24,489/-. Thereafter, fourth show cause notice was issued dated 05.03.2002 for the period from December 1997 to September 1999 alleging non utilization of the input Penta Erythrotal in or in relation to the manufacture of the final product and on that count demanding the duty to the tune of Rs. 44,60,868/-. In all these show cause notices, the duty was demanded on the ground that modvat credit was wrongly availed in relation to the inputs in question as those inputs were never utilized in or in relation to the manufacture of the final product.

6. The allegation on the part of Department was contested by the appellants and the adjudication proceedings in relation to all the show cause notices were taken together. The impugned order came to be passed whereby in relation to the first show cause notice the demand of duty was confirmed to the extent of Rs.14,15,523/-, in relation to the third show cause notice it was confirmed to the tune of Rs. 2,73,382/- and in relation to the fourth show cause notice it was confirmed to the tune of Rs. 44,30,868/-, totally amounting to Rs.61,19,774/- the demand in relation to the second show cause notice was dropped.

7. The challenge to the impugned order is on three grounds namely that the department had failed to establish that the inputs in question were not being utilized in or in relation to the manufacture of the final product, secondly, the claim in relation to the period from December 1997 to September 1999 was totally barred as the respondent could not have invoked extended period of limitation in the facts and circumstances of the case and thirdly that the firm having been penalized, there could not have been separate penalty against the partner or the authorized signatory.

8. Learned Advocate for the appellants while assailing the impugned order submitted that the materials placed on record in the form of chemical test report as well as the cross examination of the expert rather than lending any support to the allegation on the part of the Department about non utilization of the inputs in question in or in relation to the manufacture of the final product by the appellants, establish the case put forth by the appellants. He further submitted that the statutory documents which were required to be maintained in the form of returns clearly disclose the inputs utilized in the manufacture of the final product by the appellants as also the credit availed in respect of duty paid on such inputs. The documents seized by the department which have been produced in the course of the adjudication also disclose the stock of such inputs which was available with the appellants at the time of the seizure of records and the quantity of the stock in relation to such inputs clearly tally with the records relating to the utilization of such inputs in the manufacture of the final product out of the total quantity of such inputs procured by the appellants. He further submitted that though the first chemical test report does not disclose actual utilization of the inputs in question in the final product, the second test report read with cross-examination of the expert clearly establishes the case put forth by the appellants in relation to the utilization of such inputs in or in relation to the manufacture of the final product. Merely because such inputs lost their identity in the course of manufacture of the final product, that cannot be a justification to deny the modvat credit in relation to the duty incurred on such inputs by the appellants nor there has been any suppression of the facts by the appellants and fact of availment of such credit was disclosed to the Department from time to time. The Department having not been able to establish non utilization of such inputs in or in relation to the manufacture of the final product by the appellants as against the voluminous materials placed on record in the form of stock register and other evidence, according to the learned Advocate the adjudicating authority erred in confirming the demand under the impugned order. He further submitted that there was no allegation of use of the

inputs in question for any other purpose by the appellants or clandestine removal thereof from the premises of the appellants. The purchase invoices clearly disclosed the total stock of inputs in question procured by the appellants and the stock register reveal the balance of the stock of inputs left in the premises of the appellants on the day of inspection by the authorities, coupled with regular returns and declarations filed by the appellants in relation to the utilization of the credit pertaining to the duty paid on such inputs, and all these materials taken together read with the test report and statement of expert, clearly establish the case put forth by the appellants, and disclose the allegations by the department to be totally baseless. He further submitted that in any case the claim for the period from December 1997 to September 1999 was clearly barred and in view of the fact that the respondent had already issued show cause notices for the period from October 1999 to May 2001, being three different show cause notices, the respondent could not have invoked extended period of limitation for the period prior to the one covered by the show cause notice already issued. There was neither any case of suppression of facts nor it disclosed intention on the part of the appellants to evade payment of duty. He further submitted that, neither the provisions of Rule 209A were attracted nor there could have been independent imposition of penalty against the partners and authorized signatory, once the partnership firm is subjected to imposition of penalty. He has placed reliance in the decisions in the matter of Eagle Mineral Products vs. Collector of C.Ex. reported in 1988 (38) ELT 315 (Tribunal), Thacker Pulversing Co. vs. Collector of Central Excise, Rajkot reported in 1997 (94) ELT 359 (Tribunal), Nizam Sugar Factory vs. Collector of Central Excise, A.P. reported in 2006 (74) RLT 564 (SC), ECE Industries Limited vs. Commissioner of Central Excise, New Delhi reported in 2004 (164) ELT 236 (SC), P&B Pharmaceuticals (P) Ltd., vs. Collector of Central Excise reported in 2003 (55) RLT 275 (SC), Mahindra Ugine Steel Co. Ltd., & Ors. vs. CCE, Pune and Vice Versa reported in 2007 (80) RLT 55 (CESTAT-Mum.) and Vikas Metal

Works & Ors. vs. CCE, Mumbai-III reported in 2005 (70) RLT 181 (CESTAT-Mum.).

9. Learned Joint CDR on the other hand submitted that the records, particularly in the form of test report placed on record clearly establish the case of the Department that the final product manufactured by the appellants did not disclose utilization of the inputs in question either in or in relation to the manufacture of such final product. Drawing our attention to the second test report he submitted that the product was sent for examination with specific direction to find out utilization of the inputs in question in the final product manufactured by the appellants and report disclosed absence of such inputs therein. He further submitted that merely because there was stock register maintained by the appellants in relation to the alleged procurement of such inputs, that by itself would not be a proof of utilization of those items as the inputs in or in relation to the manufacture of the final product by the appellants. In view of the fact that the test report in relation to the final product of the appellants does not support the contention sought to be raised on behalf of the appellants, it was necessary for the appellants to place on record sufficient evidence in support of their claim about utilization of those inputs in or in relation to the manufacture of the final product. It is more so, because, it is their own case that the alleged inputs loose their identity in the process of manufacture of the final product. Being so, according to the learned Jt. CDR in the facts and circumstances of the case, it was necessary for the appellants to bring on record cogent evidence to disprove the case putforth by the respondents. Attention was also drawn to the impugned order wherein it was clearly stated that the dispute pertains to only two of the alleged inputs namely (Pentaerythritol and Atatic PP corn (CoPo), Atatic PP Coco (CoPo), though initially the show cause notices were issued in relation to various other items also. He further submitted that the investigation in relation to the matter in hand was in progress to ascertain whether even prior to October 1999, the appellants had illegally availed the credit in relation to the duty alleged to have been paid on the

alleged inputs and pursuant to the completion of the investigation, the show cause notice was issued in March 2002 pertaining to the period December 1997 to September 1999 and, therefore, the Department was justified in invoking the extended period of limitation. He also submitted that in Nizam Sugar Factory case there was no suppression of facts, and the facts were to the knowledge to the authorities whereas in the case in hand the fact that the alleged inputs were not being utilized in or in relation to the manufacture of the final product was not to the knowledge of the Department till it was revealed in the course of investigation and, therefore, the decision in Nizam Sugar Factory case is not applicable to the matter in hand.

10. The main point which arises for consideration is whether the product in the nature of Atatic Poly Propylene and Pentaerythritol were utilized in or in relation to the manufacture of the Cable Filling Compound by the appellants during the relevant period. Undoubtedly, the primary burden in that regard lies upon the Department when the claim of the assessee based on statutory documents, about utilization of a particular product as the input in or in relation to the manufacture of final product by him is sought to be disputed by the Department. In a case where the analysis of final product apparently discloses the presence of the inputs alleged to have been used in or in relation to the manufacture of the final product itself, it is not difficult to arrive at the finding about the dispute sought to be raised in such a case. However, in a case where the input looses his identity in the process of manufacture of the final product, the proof thereof can certainly be established by proper analysis of the product alongwith the other circumstantial evidence.

11. In the case in hand, the record discloses that the final product manufactured by the appellants was subjected to chemical analysis. The first report of such analysis could not lend any support either to the case of the appellants or to the Department as the report merely recorded that polymer was not identified in the sample analysed in the laboratory. The report pertaining to the second test, it was

reported that the sample did not answer the test of Pentaerythritol and it disclosed the following composition –

- Petroleum wax	-	46.4%
-Petroleum Oil	-	26.5%
-Polyethylene Polymer	-	17.0%
-Phthalate Plasticizer	-	10.0%

12. Dr. Badri Prasad, Director (Revenue Laboratories) in his statement has stated that he had not come across any technical literature in relation to the description or definition of the inputs which are required to be used in manufacture of Cable Filling Compound. When he was specifically asked about his opinion relating to the use of Pentaerythritol in the manufacture of Cable Filling Compound and use of such inputs to improve the quality of the final product, he stated that "Pentaerythritol is used in plastic, industry including cable sheaths as plasticizer. Plasticizer is generally used for workability and to improve the quality". As regards the possibility of loosing the identity of Pentaerythritol in the process of manufacture of final product when such input is heated at a temperature of 215 degree centigrade in an open vessel and stirred at 60 cycles per minute continuously, he opined that "Pentaerythritol is alcohol containing four hydroxyl (-OH) groups. It may lose water on heating at certain PH/or oxidized. Thus it may lose its identity". As regards the input Atatic PPCoCo in relation to the sample which was examined, the Director stated that the report did not show that the said product was present or absent, but the term Polyethylene includes copolymer also.

13. Alongwith the above materials on record, it is an undisputed fact that the appellants were time to time disclosing under the statutory documents about utilization of the product in question in the process of manufacture of their final product and were also availing modvat credit in relation to the duty paid on procuring the such products as the inputs for the final product. It is also an

undisputed fact that the procurement of such inputs was reflected from time to time in the stock register maintained in respect thereof by the appellants. It is not the case of the Department that the balance quantity of the inputs which was available at a time of inspection of the premises of the appellants was not tallying with the stock register maintained by the appellants. As rightly pointed out by the learned Advocate on behalf of the appellants that there is no allegation that any part of such inputs were clandestinely removed from the premises of the appellants or were utilized for any other purpose. There is no evidence on record to show that such products utilized in the process of manufacture of the final product cannot loose their identity, it is not the case of the respondent that in order to avail Modvat credit in respect of the duty amount spent on the inputs, it is necessary for the manufacturer to establish process of such inputs in the final product. In the absence of this relevant material coupled with the evidence already brought on record, it is difficult to accept the contention on behalf of the Department that the appellants were wrongly availing the credit in relation to the duty paid on such items. Neither there is cogent evidence to establish the allegation about non utilization of the inputs in question in the process of manufacture of the final product nor to establish alleged illegality in availing credit in relation to the duty paid on such inputs. It is however sought to be contended that the appellants have stopped claiming credit in relation to Pentaerythritol from January 2000 onwards and that itself shows that utilization of such product is not necessary for the manufacture of the final product like Cable Filling Compound. The contention is difficult to accept more particularly in view of the evidence in the form of statement of Dr. Badri Prasad, Director (Revenue Laboratories). The said witness had clearly deposed that Pentaerythritol is used as Plasticizer and the same is helpful for the workability and to improve the quality of the final product. In other words, the use or utility of such input in the process of manufacture of the final product, even though may not be absolutely necessary, the fact that the use thereof can improve the quality of the final product is not in dispute. Merely because the manufacturer has stopped using such product on a particular date or month, that itself cannot lead to a conclusion that prior to the said date or month, the manufacturer had never used such product in the process of manufacture of the final product. It is more so in view of voluminous evidence which lend support to the use of such product prior to January 2000.

14. This brings us to the second question which has been raised on behalf of the appellants and that pertains to the bar of limitation. The records undoubtedly disclose that the show cause notice dated 05.03.2002 was issued in relation to the period from December 1997 to September 1999. Admittedly, the Department had already issued three show cause notices prior to 05.03.2002 in relation to the period from October 1999 to May 2001. The facts and the ground on which all the three show cause notices dated 02.05.2000, 31.03.2001 and 10.08.2001 were issued were not different from those facts and grounds disclosed for issuance of show cause notice dated 05.03.2002. Only difference was in relation to the period. The allegation made in the three show cause notices were similar to those in show cause notice dated 05.03.2002. In the background of these facts, the contention that since investigation was still in progress and that only thereafter the notice dated 05.03.2002 in relation to the period from December 1997 to September 1999 was issued cannot be a justification for invoking extended period of limitation. It is pertinent to note that the show cause notice dated 02.05.2000 related to period October 1999 to March 2000. The show cause notice dated 21.03.2001 related to the period from April 2000 to October 2000 and show cause notice dated 10.08.2001 related to the period from November 2000 to May 2001. As already stated above, all the three show cause notices disclose the same facts and same grounds. One fail to understand if the show cause notice dated 05.03.2002 was also issued on the same ground but relating to the earlier period, what prevented the Department from invoking the extended period of limitation in May 2000 itself. Mere pendency of investigation, in the facts and circumstances of the case, cannot justify invocation of extended period of limitation. In fact, the contention

about on going investigation and the claim of justification on that ground for invocation of the extended period of limitation is not borne out from the record. Being so, the appellants are justified in contending that there was no scope for invoking the extended period of limitation for issuing show cause notice dated 05.03.2002.

15. For the reasons stated above and in the facts of the case, the Department having failed to establish non utilization of the product in question in or in relation to the manufacture of the final product by the appellants and on the contrary, the appellants having established from the materials placed on record the utilization of such product in the process of manufacture of the final product for the relevant period, the contention about unauthorized availment of the credit cannot be accepted and for the same reason confirmation of the demand of duty also cannot be sustained. Being so, the impugned order in that regard is liable to be set aside. The invocation of the extended period in relation to the show cause notice dated 05.03.2002 also is not sustainable. Once the duty liability cannot be established, question of imposition of penalty does not arise.

16. For the reasons stated above, therefore, we do not find it necessary to refer to the decisions sought to be relied upon on behalf of the appellants.

17. In the result, therefore, the appeals succeed; the impugned order is set aside with consequential relief.

(Justice R.M.S. Khandeparkar)
President

(M. Veeraiyan)
Member (Technical)

/Pant/