

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

Appeal No. E/6069/2004 - EX[DB]

Date 04/12/2009

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

To :
C.C.E.LUDHIANA

F-BLOCK RISHI NAGAR LUDHIANA

C.C.E.LUDHIANA

PEE JAY INTERNATIONAL LTD.

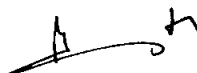
Appellant

Vs

Respondent

2009 EX[DB] dated 26-11-09

I am directed to transmit herewith a certified copy of Final order No. 1272/
passed by the Tribunal under Section 35-C(1) of Central Excises Act, 1944


Assistant Registrar
(Excise Appeal Branch)

Copy to :

1. Respondent

PEE JAY INTERNATIONAL LTD.

DORAH, LUDHIANA

2. Adv. / Consult

MR. B. L. NARSIMHAN

B-6/10, SAFDARJUNG ENCLAVE, NEW DELHI-110029

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 Publications 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 (Harvana)

16 Office Copy

17 Guard file

18 HON'BLE PRESIDENT.


Assistant Registrar
(Excise Appeal Branch)

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

Date of hearing/decision: 26.11.2009

Excise Appeal No. 6069 of 2004

[Arising out of order in Original No. 262/Ldh/2003 dated 28.11.2003 passed by the Commissioner of Central Excise, Ludhiana].

For approval and signature:

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

1.	Whether Press Reporters may be allowed to see the 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?	No
3	Whether Their Lordships wish to see the fair copy of the Order?	See
4	Whether Order is to be circulated to the Departmental authorities?	Yes

CCE, Ludhiana

Appellants

Vs.

M/s Pee Jay International Limited

Respondents

Appearance.

Appeared for the Appellants – Shri Anil Khanna, DR

Appeared for the Respondents – Shri B.L. Narasimhan, Advocate

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

FINAL Oral Order 1272/09-EX

Per Shri Justice R.M.S. Khandeparkar:

Heard at length the learned DR for the appellants and learned Advocate for the respondents. Perused the records placed before us including the order No. 396-398/05-B dated 1.3.2005 passed in Appeal No. E/1458 to 1460/04-B.

2. The appellants challenge the order dated 1.12.03 passed by the Commissioner, Ludhiana whereby the Commissioner has restricted the disallowance of the credit to the tune of Rs. 44,09,228/- instead of the amount of Rs.4,08,71,796/- claimed by the department under show cause notice dated 31.1.2002.

3. The respondents have their factory at Doraha, Ludhiana and are engaged in the manufacture of woollen yarn, acrylic yarn and woollen blended yarn. The products manufactured by the respondent fall under chapter 51 & 54 of the first Schedule to the Central Excise Tariff Act, 1985. Acting upon intelligence report regarding alleged involvement of the respondents in evasion of excise duty by fraudulently availing the modvat credit in relation to the raw materials allegedly diverted to the market investigation was carried out by the department which culminated in issuance of show cause notice dated 31.1.02 to the respondents alleging that the respondents had illegally availed modvat credit to the tune of Rs. 4,08,71,796/-. The respondents contested the proceedings and the Commissioner by the impugned order confirmed the claim of the appellants only to the tune of Rs. 44,09,228/-.

4. The respondents herein being aggrieved by the impugned order filed appeal being No. E/1451 of 2004 which came to be disposed of by order dated 1.3.2005 by this Tribunal. By the said order, the Tribunal held that the Commissioner was not justified in confirming the claim of the appellants even to the tune of Rs. 44,09,228/- and the respondents were entitled to claim modvat credit for the entire amount for which they had claimed and department had failed to establish clandestine diversion of the inputs in respect of which the credit was sought to be denied.

5. The appellants herein being aggrieved by confirmation of only part of the amount claimed under the show cause notice, filed the present appeal. It is the case of the appellants that the Commissioner erred in vacating the demand for Rs.3,64,62,568/-, and also in relation to the demand for interest and penalty.

6. When the matter came up for hearing on 11.11.2009, it was brought to the notice of the Tribunal that the appeal filed by the respondents against the impugned order has already been disposed of. However, the department being dis-satisfied with the order passed by this Tribunal in the appeal filed by the respondents has preferred appeal before the High Court and the same is pending. In the facts and circumstances of the case, the department was therefore, required to satisfy the Tribunal as to why the present appeal should not be dismissed.

7. When the matter came up for hearing today, learned DR submitted that the issue in the appeal filed by the respondents was restricted to the demand of Rs.44,09,228/- with reference to specific transactions whereas the issue involved in the present appeal relates to all other transactions involving an amount of Rs.3,64,62,568/- out of the total demand made under the show cause notice to the tune of Rs. 4,08,71,796/-. It is also

submitted that the order passed in the appeal which was filed by the assessee is also under challenge before the High Court. On the other hand, it has been submitted by the learned Advocate for the respondents that apart from the difference in amounts, the issue as such involved in both the matters is one and the same, and considering the fact that the order of the lower authority having already merged in the order already passed by the Tribunal, the present appeal would not lie. He however fairly submitted that the respondents have no objection if the matter is also considered on merits.

8. It can hardly be disputed that the issue involved in the case in hand relates to diversion of inputs in relation to which the modvat credit is sought to be claimed pertaining to the duty paid thereon. In this regard, the issue involved in the appeal already disposed of was not different. It is, however, true that while deciding the earlier appeal, the Tribunal had restricted the disposal of the appeal to the extent the matter was sought to be agitated before the Tribunal in the said appeal and, therefore, it would not be appropriate for the Tribunal to reject the present appeal on technicalities. Indeed, para 18 of the order dated 1.3.05 by the Tribunal in the earlier appeal clearly states that "Consequently the impugned order to the extent to which it has been challenged in this appeal....." which apparently discloses that the Tribunal had restricted adjudication in the said appeal to the extent the dispute was sought to be raised in that appeal and the same essentially restricted to sum of Rs. 44,09,228/- and not to the entire amount of demand under the show cause notice. Being so, the matter will have to be considered on merits.

9. It is the contention on behalf of the appellants that the Commissioner did not take into consideration the materials which would disclose

clandestine diversion of the inputs and illegal availment of the modvat credit by the respondents. In that regard, attention was drawn to para 3.12 and 3.13 of the impugned order vis-à-vis para Nos. 13.2.1, 13.2.2, 17.1, 17.2, 18, 19, 22.8, 24, 24.1, 24.2, 24.3, 25, 26 and 27 of the show cause notice. Learned DR submitted that plain reading of these paras would reveal that inspite of the fact that the co-relation based on verification of the records maintained by the appellants and the connected persons having been established in relation to the inputs which were meant for the respondents but diverted to other parties and as the credit being sought to be availed by the respondents and these facts having been clearly established, the Commissioner failed to appreciate the materials in that regard and disposed of the matter by merely observing that the investigation though raise serious doubt about the practice adopted by the respondents, the same is not sufficient to confirm the demand. According to learned DR the verification of the records would clearly establish illegal availment of the modvat credit by the respondents in relation to the inputs diverted to other parties. The Commissioner having totally ignored this aspect, the impugned order cannot be sustained and the same needs set aside, and the demand as made under the show cause notice should be confirmed.

10. Learned Advocate for the respondents on the other hand submitted that proper verification of the records maintained by the appellants would clearly reveal that the respondents were lawfully entitled to avail modvat credit in relation to the inputs in question, in the absence of cogent material being produced by the appellants to establish the allegation of diversion of those materials to the other parties. Drawing our attention to para 3.12, 3.13 and 3.14, learned Advocate submitted that the Commissioner after taking note of the verification of the records maintained by the respondents

has held that the appellants were able to establish allegation only to the extent of Rs.44,09,228/- which has also been set aside by the Tribunal in the appeal filed by the respondents. He further submitted that the appellants have not been able to establish even from the verification of the records that the respondents had failed to utilize the inputs for manufacture of their final product. Merely because initially the inputs were received by the dealers of the respondents that can not lead to a conclusion that those inputs were never received by the respondents and were not utilized by the respondents. More particularly, in view of the fact that receipt of those inputs and utilization thereof by the respondents is clearly reflected from the statutory records maintained by the respondents which were duly verified and confirmed by the authorities. He has also drawn our attention to the fact that the practice followed by the respondents in receiving the inputs through the dealers was made known to the department much prior to the relevant period and that is reflected in the letter dated 19.8.96 and in that regard attention was drawn to para 3.11 of the Commissioner's order wherein there is reference to the said fact. According to learned Advocate, therefore, there is no case for interference in the impugned order on the ground of alleged by the appellants. It was also sought to be contended that though it is sought to be argued that the Commissioner failed to consider the matter in relation to the amount on or about Rs.44,09,228/- in the manner it was required to be considered, there is no specific ground in that regard in the memo of appeal.

11. The perusal of the impugned order discloses that the Commissioner on going through the records had confirmed the demand to the tune of Rs.44,09,228/- by referring to certain evidence which according to the Commissioner was sufficient to confirm the demand in that regard. It would not be appropriate for us at this stage to analyse the said finding as

the matter in that regard was already considered by the Tribunal in the earlier order dated 1.3.05 and the matter is presently pending before the Hon'ble High Court.

12. As regards the demand in relation to the remaining amount, the Commissioner has clearly stated that the department has failed to establish co-relation between the allegations made in various statements with the actual transaction in relation to the inputs which are alleged to have been diverted to the market or being received and utilized by the respondent. While arriving at the said finding, the Commissioner has referred to the records disclosing periodical stock verification report, annual stock verification report etc. as also to the test report of the samples drawn from the final product manufactured by the respondents. Learned DR however, drawing our attention to various paras of the show cause notice has sought to contend that the said finding is contrary to the records placed before the Commissioner.

13. Undoubtedly, statements of certain persons like Shri R.M. Bhute of M/s DCL Polyester Ltd., Nagpur, Shri Jaya Nandgopal Pillai V.P. Marketing (Yarn), Shri Waman B. Wankhade, Clerk of M/s New Golden Transport Co. and Shri Ashok Kumar, Accountant of M/s Bhawana / Ashish Enterprises, Ludhiana make reference to documents like LRs with specific numbers and dates, GRs with specific numbers and dates, and the facts like dispatch of inputs in the name of the respondents, delivery thereof and receipt by M/s Ashish Enterprises or M/s Bhawana Enterprises, transportation of inputs from the manufacturer to those dealers of the respondents etc. The test report also discloses that some of the final product did not disclose presence of PFY as one of the elements having been utilized in the manufacture of such final product. As against this, it is

equally true that the stock verification records maintained by the respondents did not disclose any infirmity which could reveal non receipt of any part of such inputs which were allegedly diverted to other parties. Undisputedly, the records do not disclose infirmity of any sort inspite of the fact that some of the final products revealed absence of PFY element therein, nor the records disclosed any discrepancy which could reveal and/or co-relate to the inputs allegedly diverted to other parties. In fact, as rightly observed by the Commissioner, there appears to be no attempt made at any point of time in the course of investigation to establish such co-relation between the inputs alleged to have been diverted and the final product which was found without the presence of the PFY element. In fact, it was purely elementary which the investigation agency ought to have known in order to establish the charge of clandestine disposal of the inputs without utilization thereof in the manufacture of the final product. This aspect should have been clearly established by the investigation machinery. In this regard, neither there was any proper investigation nor appropriate efforts on the part of the department ^{to} bring on the record the appropriate and cogent evidence.

14. Merely because the numbers and dates of LR's and GR's in the statement of the representatives of the manufacturer of the inputs and the representative of the dealers as well as of the transporters from the manufacturer of inputs to the dealers tally, that by itself, will not be a conclusive and satisfactory evidence about diversion of the inputs by the respondent in the open market, in the facts and circumstances of the case. It is not in dispute that the dealers as well as the respondents both are having their establishment in the District of Ludhiana. It is not in dispute that the statutory records maintained by the respondents do not disclose absence of receipt of such inputs by the respondent in their factory. It is

not in dispute that the records maintained by the respondents were never doubted by the department. On the contrary, the same were verified and confirmed. In these circumstances, in the absence of cogent evidence about the clandestine disposal of the inputs without utilization thereof in the manufacture of the final product by the respondent, we fail to understand as to how the demand in relation to the amount over and above Rs.44,09,228/- can be sustained.

15. It is also sought to be contended that the statements which have been referred to in the show cause notice should be considered as the conclusion proof of the charge against the respondents since those statements were never retracted by the deponent. As already noted above, even assuming that what has been stated by the dealers in their statements to be the whole truth, that itself, in the absence of proper correlation being established between the inputs which were delivered and received by the dealers and the final product which disclose absence of PFY element, it is difficult to establish the contention that there is any cogent evidence in relation to the charge against the respondents.

16. In the circumstances, therefore, we find no case for interference in the impugned order and hence the appeal fails and is hereby dismissed.

(Justice R.M.S. Khandeparkar)
President

(Rakesh Kumar)
Member (Technical)

/Pant/