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

Appeal No. E/3939/2006 – SM [BR] WITH E/ MISC / 650 /2008 Date 06/01/2009

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

To :
C.C.E. KANPUR
117/7, SARVODAYA NAGAR,KANPUR
208005

C.C.E. KANPUR Appellant

Vs

M/S JAGMINI MICRO KNIT PVT. LTD. Respondent

I am directed to transmit herewith a certified copy of **Final order No**. 1670 / 2008- **SM[BR] &M /350 /2008** dated 26.12.2008 passed by the Tribunal under Section 35-C(1)of Central Excises Act, 1944

Assistant Registrar
(SM Appeal Branch)

Copy to :
1. Respondent
   M/S JAGMINI MICRO KNIT PVT. LTD.
   C-19/A, PANKI INDUSTRIAL AREA, KANPUR
2. Adv. / Consult SHRI MOHAN LAL ADEV.
   B-67, FLATTED FACTORY COMPLEX,
   OKHLA PHASE-III, NEW DELHI-110020

3 S.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-1
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16 Guard file

Assistant Registrar
(SM Appeal Branch)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
<u>NEW DELHI</u>

PRINCIPAL BENCH – COURT NO. 1

Excise Appeal No. 3939 of 2006-SM with
Excise Misc. Application No. 650 of 2008-SM

(Arising out of Order-in-Appeal No. 489-CE/APPL/KNP/06 dated 11.10.2006 passed by the Commissioner of Customs & Central Excise (Appeals), Kanpur).

DATE OF HEARING : 27.11.2008
DATE OF DECISION : 27.11.2008

FOR APPROVAL AND SIGNATURE :

HON'BLE MS. JYOTI BALASUNDARAM, VICE-PRESIDENT

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

CCE, Kanpur .... **Appellant**
(Rep by Sh. S.Gautam, DR)

versus

M/s Jagmini Micro Knit Pvt. Ltd. .... **Respondents**
(Rep. by Sh. Mohan Lal, Adv.)

CORAM : HON'BLE MS. JYOTI BALASUNDARAM, VICE-PRESIDENT

Misc order No. 350/08-SM(BR)

Final **ORDER NO.** 1670/08-SM(BR)

PER JYOTI BALASUNDARAM :

The miscellaneous application filed by the Revenue for taking on record the Review Order passed by the Committee of Commissioners on the note sheet of File No. IV-216/R/O/2006 is allowed and the Review Order is taken on record.

2. Now I take up the appeal for decision. The respondents, a 100% EOU, ~~were~~ engaged in the manufacture of Cotton/Nylon/ Woollen Wolen/Synthetic Socks, availed Cenvat credit of duty paid on inputs used in or in relation to the manufacture of final products and utilized it towards payment of duty under DTA clearance as per Rule 17 of the Central Excise Rules, 2002, as amended by Notification No. 18/2004-CX dated 06.09.2004. During the period November, 2004 to August, 2005, they availed Cenvat credit of Rs. 7,58,277.42 on High Speed Diesel Oil on the strength of invoices issued by M/s Indian Oil Corporation Ltd. Subsequently, they reversed an amount of Rs. 4,83,000/-. Balance credit of Rs. 2,75,277.42 was held to be inadmissible to the respondents for the reason that HSD was not a specified input in terms of Rule 2(K) of the Cenvat Credut Rules, 2004 read with Explanation-I. Show cause notice dated 06.12.2005 was issued proposing disallowing of Cenvat credit wrongly availed, together with interest and penalty, which was adjudicated by the Assistant Commissioner vide order dated 13.04.2006 disallowing credit and confirming the demand together with interest and imposing penalty. The Commissioner (Appeals) set aside the impugned order. Hence this appeal by the Revenue.

3. I have heard both sides. The case of the Revenue is that, Cenvat Credit Rules, 2004 clearly denied the benefit of the scheme to High Speed Diesel Oil. The benefit of credit cannot be extended only because HSD Oil has been recognized as an input for the limited purpose of duty free import by 100% EOU and ~~that~~ DGFT Policy Circular No. 37(RE-2005)/2004-2009 dated 05.12.2005 is not binding on Customs authorities.

4. The Commissioner (Appeals) has extended the benefit of credit not only on the basis of DGFT Policy Circular, but also on the basis of Notification No. 22/2003-CE dated 31.03.2003 and 18/2004-CE dated 06.09.2004. The findings of the Commissioner (Appeals) are produced herein below :

> **"I have gone through the above circular dated 05.12.05 of the DGFT which is in respect of reimbursement of excise duty paid on fuels procured from depots of domestic oil companies. It is observed that as per para 8.3 of the Foreign Trade Policy, the supplies to EOUs are treated as "Deemed Export". The drawback rate prior to withdrawal of warehousing facility for Furnace Oil and High Speed Diesel (HSD) was fixed by DGFT after taking into account the customs duty on crude oil deemed to have been imported by the oil companies. But the situation changed when fuel was procured by EOUs on payment of duty from depots. Accordingly, the DGFT decided to reimburse this duty in the form of Terminal Excise Duty in addition to drawback, provided the recipient unit does not avail Cenvat credit/rebate on such goods. This implies that in the event when EOUs do not claim reimbursement of Terminal Excise Duty they are eligible for Cenvat credit under Notification 18/2004-CE(NT) dated 06.09.2004.**
>
> **Thus, it is evident from the above that the EOUs are entitled to avail benefits of Cenvat Credit Scheme consequence to**

withdrawal of warehousing facility for utilizing the Cenvat Credit towards payment of excise duty on DTA clearances. It is an additional facility in the form of reimbursement of terminal excise duty and the general provisions of Cenvat Credit Rules are neither attracted nor applicable for the goods specified under Notification No. 22/03-CE dated 31.03.2003. The Notification has also specified FUEL which otherwise, is not defined either as a capital goods or as an input for manufacturer in genera. It is also noticed that the DGFT in their above circular have clearly referred FUEL as "Furnace Oil and High Speed Diesel". In the appellant's case, CT-3 were issued in pat for procurement of HSD Oil for generation of electricity for captive consumption, as such, Cenvat credit is not deniable to the appellant subsequent to withdrawal of warehousing facility and I hold it accordingly. It is settled law that when demand is not maintainable, penalty cannot be imposed."

5. There is no challenge in the appeal of the Revenue to the findings based on the two notifications, above mentioned. I have gone through the relevant notifications and find that ~~the subject~~ provision has been made for 100% EOU and FUEL (HSD). Since the respondents are 100% EOU, the notifications entitle them to take credit and accordingly I find that there is no valid reason to interfere with the impugned order and accordingly uphold the same and reject the appeal.

(Dictated and pronounced in the open Court on the 27th day of November, 2008)

(JYOTI BALASUNDARAM)
VICE-PRESIDENT

Golay