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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/5648/2004 - EX[DB] Date 12/04/2010

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

To :
M.M.DYEING AND FINISHING MILLS P.LTD.
JASSIAN ROAD,LUDHIANA

M.M.DYEING AND FINISHING MILLS P.LTD. Appellant
Vs
C.C.E.LUDHIANA Respondent

I am directed to transmit herewith a certified copy of **Final order No.** 177/ **2010 EX[DB]** dated 09-4-10 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.LUDHIANA
F-BLOCK RISHI NAGAR LUDHIANA
2. Adv. / Consult SH. ATUL GUPTA, ADV, L/D
MR.BIPIN GARG
B-1/1289,A-VASANT KUNJ, NEW DELHI
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
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18. HON'BLE PRESIDENT.

Assistant Registrar
(Excise Appeal Branch)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.
Principal Bench, New Delhi

COURT NO. I

Excise Appeal No. 5648 of 2004

[Arising out of the Order-in-Appeal No. 563/CE/Appeal/Ldh/2004 dated 31/08/2004 passed by The Commissioner (Appeals), Central Excise, Ludhiana.]

For Approval and signature :

Hon'ble 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?	:
2.	Whether it would 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 Department Authorities?	:

M/s M.M. Dyeing and Finishing Mills (P) Ltd. — Appellant

Versus

CCE, Ludhiana — Respondent

Appearance

Shri Atul Gupta, Company Secretary – for the appellant.

Shri B.K. Singh, Authorized Representative (Jt. CDR) – for the Respondent.

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

DATE OF HEARING : 23/02/2010.
DATE OF DECISION : 9/4/2010

Final Order No. 177/2010 EX Dated : ___________

Per. Rakesh Kumar :-

The appellant are manufacturers of processed knitted fabrics of man made fibre/yarn, chargeable to Central Excise Duty under sub-heading 6002.93 of the Central Excise Tariff. The dispute pertain to rate of duty on the processed knitted fabrics of man made yarn/fibre during the period from 1/9/02 to 31/3/03. During this period, while the Appellant were clearing these fabrics on payment of concessional rate of duty of 12% advalorem under Sl. No. 16 of the table annexed to the exemption notification No. 14/02-CE dated 1/3/02, while according to the Department, the concessional rate of duty was not applicable for the reason that the processed fabrics had been made out of the fabrics on which the appropriate central excise duty and AED (GSI) had not been paid as per the condition of the exemption, as in terms of Sl. No. 14 of the table annexed to the Notification No. 14/02-CE, dated 1/3/02, unprocessed fabrics are fully exempt from duty and accordingly the Appellant was liable to pay the duty at the tariff rate of 24% advalorem. It is on this basis that a show cause notice dated 1/10/03 was issued to the Appellant for –

(a) demand of differential duty of Rs. 13,21,097/- from the Appellant under Section 11A (1) of the Central Excise Act, 1944, alongwith interest on this duty at the applicable rate as per the provisions of Section 11AB ibid and

(b) imposition of penalty on the appellant under Rule 25 (1) of the Central Excise Rules, 2002.

1.1 The show cause notice was adjudicated by the Joint Commissioner vide order-in-original dated 24/2/04 by which the duty demand alongwith interest was confirmed and penalty of Rs. 13,21,099/- was imposed on the Appellant under Rule 25 of Central Excise Rules, 2002, readwith Section 11AC of Central Excise Act.

1.2 On appeal to CCE (Appeals), the Jt. Commissioner's order was upheld vide order-in-appeal No. 563/CE/Appeal/LDH/04 dated 31/8/04. It is against this order of CCE (Appeals) that the present appeal has been filed.

2. Heard both the sides.

2.1 Shri Atul Gupta, Company Secretary, the learned counsel for the appellant made the following submissions.

(1) The CCE (Appeals) has ignored the Explanation – II to the exemption notification according to which –

for the purpose of the conditions for this exemption notification specified therein, the textile yarn, or fabrics shall be deemed to have been duty paid even without production of documents evidencing payment of duty thereon. Therefore there was no need for giving evidence of duty payment on the unprocessed fabrics. The Board has also discussed this Explanation – II in its Circular No. 680/02.

(2) The respondent have wrongly interpreted the plain provisions of the notification as well as intention of the government. There was no intention of the Government to

levy duty at the tariff rate when the processed fabrics had been made out of duty paid unprocessed fabrics.

(3) As per Explanation – VII to notification No. 14/02-CE, a composite mill or a processor engaged also in manufacture of grey fabrics, are also liable to pay duty at the rate of 12% advalorem on processed fabrics and he is also entitled to Cenvat credit. They are also eligible for the benefit of Cenvat credit. Appellant is also entitled to Cenvat credit, but if he is asked to pay duty at the rate of 24% advalorem. There will thus be two rates of duty for the same product manufactured by two different manufacturers without any intention to differentiate on the part of the Government. Two rates of duty for the same product cannot be levied.

(4) Tribunal's judgment in case of **CCE, Ludhiana vs. Prem Industries** reported in **2009 (168) ECR – 133 (Tri. – Del.)** is applicable to the facts of this case.

(5) The appellant during the period of dispute, were entitled to deemed Cenvat credit of 66.67% of aggregate of duties of excise as per notification No. 6/2002-CE (NT) dated 1/3/02. If the contention of Department is accepted, net duty payable after allowing the deemed Cenvat credit would be Rs. 4,40,367/-. If the benefit of cum duty is extended, the differential duty payable would be about Rs. Four Lakhs as against the duty demand of Rs. 13,21,099/-.

(6) Since in this case, dispute is only about interpretation of exemption notification, there is no justification for imposition of penalty.

2.2 Shri B.K. Singh, the learned Jt. CDR defending the impugned order, emphasised that since the unprocessed knitted fabrics from which the processed fabrics had been manufactured, were fully exempt from duty vide Sl. No. 14 of the table annexed to the notification No. 14/02-CE, the condition for concessional rate of duty for processed fabrics is not satisfied and therefore the processed fabrics would be liable to duty at the tariff rate of 24% advalorem and that the Tribunal's judgment in case of CCE, Ludhiana vs. Prem Industries (supra) is not applicable to the facts of this case as that judgment is based on the Board's Circular No. 680/71/2002-CX dated 10/12/02, in respect of composite mills while the Appellant are not a composite mill.

3. We have carefully considered the submissions from both the sides and perused the records. First of all, we find that neither the show cause notice, nor the order-in-original passed by Jt. Commissioner nor the order-in-appeal passed by CCE (Appeals) mentiones as to whether the Appellant are an independent processor or a processor also engaged in manufacture of fabrics from yarn by weaving or knitting or are a composite mill. The point of dispute in this case is as to whether the processed knitted fabrics of man made yarn/fibre manufactured by the Appellant is eligible for concessional rate of duty of 12% advalorem under Sl. No. 16 of the table annexed to notification No. 14/02-CE. According to the Department, the concessional rate of duty is not available to the Appellant as the same is subject to the condition that the processed knitted fabrics have been made from the fabrics on which "appropriate duty of Excise leviable under 1st Schedule to Central Excise Tariff Act and the AED (GSI) under AED (GSI) Act readwith any

notification, for the time being in force, or the additional customs duty under Section 3 of the Customs Tariff Act, 1975, as the case may be, has been paid, and this condition is not satisfied as under Sl. No. 14 of the table annexed to this notification, the unprocessed knitted fabrics of man made fibre/yarn is exempt from duty. According to Appellant, by virtue of Explanation – II to the notification No. 14/02-CE, the grey knitted fabrics is deemed to be duty paid without requiring the production of documents evidencing the payment of duty. They have also pleaded that by virtue of Explanation – VII added to this exemption notification by Notification No. 37/02-CE dated 3/7/02, for the purpose of exemption to processed knitted fabrics under Sl. No. 16 of the table annexed to notification No. 14/02-CE, if manufactured by a composite mill or by a manufacture engaged in processing of fabrics alongwith weaving or knitting or crocheting of fabrics within the same factory, the condition for exemption is intended to have been satisfied if the processed knitted fabrics are manufactured from duty paid textile fibres or yarn, as a result of which, for the same product i.e. processed knitted fabrics of man made fibre/yarn, there would be two rates of duty if the Department's view is accepted and the rate of duty would depend upon whether the manufacture is a composite mill/manufacturer engaged in processing as well as weaving/knitting of fabrics in the factory or is an independent processor while there was no intention to make such differentiation on the part of the Government.

4. In Sl. No. 16 of the table annexed to the notification No. 14/02-CE, the condition for concessional rate of duty for the goods covered by this serial No., "processed knitted fabrics of man made fibre/yarn" being one of items covered by this serial No., is as under –

> " If made from textile fabrics, whether or not processed, on which the appropriate duty of excise leviable under 1st Schedule to the said Central Excise Tariff Act and Additional Duties of Excise (Goods of Special Importance) Act, readwith any notification for the time being in force, or the additional duty of customs leviable under Section 3 of the Customs Tariff Act, 1975, as the case may be, has been paid".

4.1 As per Explanation – II to this exemption,

> " For the purposes of the conditions specified below, textile yarn or fabrics shall be deemed to have been duty paid without production of documents evidencing payment of duty thereon."

4.1.1 By notification No. 37/02-CE dated 3/7/02, issued under Section 5A (2A) of the Central Excise Act, 1944, an Explanation – VII was added to notification No. 14/02-CE from retrospective effect. The Explanation – VII is as under –

> "In this notification –
>
> (1) for the removal of doubt, it is hereby clarified that in Explanation – II and in condition No. 1 & 2 specified below the Table, the expression – "textile yarn" is intended to include therein "textile fibres" also.

(2) for the purposes of the exemption to processed textile of fabrics, specified in the table against any of the Sl. No. 3,4,6,7,8,13 and 16, manufactured by a composite mill (i.e. a manufacturer engaged in processing of fabrics alongwith the spinning of yarn from fibres and weaving or knitting or crocheting of fabrics within the same factory), or by a manufacturer engaged in processing of fabrics alongwith weaving or knitting or crocheting of fabrics within the same factory, the condition specified in column (5) against each of the said respective Sl. No. is intended to have been satisfied if the said processed fabric are manufactured from textile fibres or yarn, as the case may be, on which the appropriate duty of excise leviable under 1st or second Schedule to the Central Excise Tariff Act readwith any notification, for the time being in force, or the additional customs duty leviable under Section 3 of the Customs Tariff Act, 1975, as the case may be, has been paid.

(3) this Explanation shall have effect as if it had always been part of this notification."

5. Now two questions arise –

(i) whether the goods chargeable to 'nil' rate of duty or fully exempt from duty under some exemption notification, can be said to be the goods on which appropriate duty of Excise and AED (GSI) or as the case may be, additional customs duty under Section 3 of the Customs Tariff Act, 1975, has been paid.

(2) What is the effect of Explanation II and VII to the condition for the exemption under notification No. 14/02-CE? Do these explanations have the effect of nullifying the condition for concessional rate of duty in Sl. No. 16 that the

unprocessed knitted fabrics must have suffered the appropriate Excise duty and AED (GSI).

5.1 As regards the question (1) above, Hon'ble Supreme Court in case of **CCE, Vadodara vs. Dhiren Chemical Industries** reported in **2002 (139) E.L.T. – 3 (S.C.)** has held that the goods not liable to excise duty or on which excise duty is nil, cannot be said to be the "goods on which appropriate duty of excise has been paid."

5.2 As regards the question (2) above, if the processed fabrics has been manufactured in a composite mill starting from spinning of yarn from fibre, weaving/knitting of grey fabrics from yarn and thereafter processing of grey fabrics or by a manufacturer engaged in processing of fabrics alongwith weaving or knitting of fabrics within the same factory, in term of Explanation VII, the condition for concessional rate of duty for processed fabrics will be deemed to be satisfied if the yarn or fibre from which the processed fabrics have been manufactured, is duty paid. But Explanation – VII does not cover "independent processor". The question now arises as to whether in case of independent processor engaged only is processing of fabrics without undertaking weaving/knitting of grey fabrics and spinning of yarn, who are not covered by Explanation – VII, Explanation - II will have the effect of nullifying the condition that for enjoying concessional rate of duty on processed fabrics, the unprocessed fabrics must be duty paid. On this point, a Division bench of the Tribunal in case of **Auro Textile & others vs. CCE, Chandigarh** (order in appeal No. 1276-1346/09-EX dated 11-12/11/09) in para 36, 37 and 38 of the judgment has held as under –

> **"36. The Apex Court, therefore, has clearly ruled that undoubtedly efforts should be to give full effect to the fiction created under a statute. However, in the process of giving full effect to fiction created under a statute, the Courts and Tribunals are not empowered to create another fiction and thereby extend the benefits of the legal fiction under a statute to a totally different situation.**
>
> **37. Undoubtedly, the explanation, in question, creates a fiction about the presumption of payment of the duty for the purpose of condition. It does not enlarge the scope of the condition. However, every presumption is rebuttable. To interpret the fiction created under the explanation to mean that even in case of a product which is subjected to nil rate of duty to be presumed to have been subjected to the payment of duty would not only result in enlarging the scope of the explanation, but also scope of the condition itself.**
>
> **38. Under the guise of interpretation of any statutory provision relating to taxing matter, there is no power vested in the Tribunal to enlarge the scope of the exemption notification or to modify the same."**

5.2.1 Therefore in case of an independent processor engaged in processing of fabrics out of unprocessed fabrics obtained from outside, for claiming concessional rate of duty on the processed fabrics, the condition regarding appropriate duty having been paid on the unprocessed fabrics will have to be satisfied and for this purpose, in terms of Explanation – II to the notification, while presumption regarding duty paid nature of unprocessed fabrics received/purchased from outside will be available, it will be a rebuttable presumption and if the Department produces evidence that the unprocessed fabrics is fully exempt or non duty paid, it cannot be presumed to be duty paid for the purpose of concessional rate of duty on the processed fabrics.

6. In the present case, the show cause notice seeks to deny the concessional rate of duty on processed knitted fabrics of man made yarn/fibre under Sl. No. 16 of the table annexed to the notification No. 14/02-CE only on the ground that the unprocessed knitted fabrics is fully exempt from duty under Sl. No. 14 of the table annexed to the same notification. However, the exemption to "unprocessed knitted fabrics of man made yarn/fibre" under Sl. No. 14 is not an unconditional exemption. It is a conditional exemption subject to condition that the unprocessed fabrics has been made out of duty paid yarn/fibre and no Cenvat credit of duty paid on inputs or capital goods has been taken under Rule 3 or Rule 11 of the Cenvat Credit Rules, 2002. Therefore just because "unprocessed knitted fabrics other than of cotton" are covered by Sl. No. 14 of the table annexed to the notification with nil rate of duty against this serial No., it cannot be presumed that the same would always be fully exempt from duty. If the appellant are an independent processor engaged in [illegible] unprocessed fabrics acquired from outside, while presumption

regarding its duty paid character would be available in terms of Explanation – II, it will be a rebuttable presumption and if there is evidence indicating that unprocessed fabrics is non-duty paid, concessional rate of duty would not be available in respect of processed fabrics. If the appellant are a composite mill or a processor engaged in manufacture of fabrics from yarn, Explanation VII would be applicable and conditions for concessional rate of duty on processed fabrics will be treated as satisfied if the yarn or fibre from which grey fabrics is manufactured, is duty paid. But on this case neither the show cause notice nor the order-in-original or order-in-appeal disclose as to whether in this case, the Appellant are a composite mill or a manufacturer engaged in processing of knitted fabrics alongwith knitting of fabrics from yarn in the same factory, in which case they would be entitled to the benefit of Explanation VII to the notification, or they are an independent processor in which case, while for the purpose of fulfilling the condition for concessional rate of duty on processed fabrics, presumption regarding duty paid nature in respect of unprocessed fabrics purchased/received from outside will be available in terms of Explanation – II, this presumption, as discussed above, will be a rebuttable presumption and if there is clear evidence indicating that the unprocessed fabrics is fully exempt, the same cannot be treated as duty paid. The case has to be decided only after ascertaining the factual position for which the same has to be remanded to the original adjudicating authority.

7. In view of the above discussion, the impugned order is set aside and the matter is remanded to the original adjudicating authority for de-novo adjudication in terms of our directions in para 5 and 6 above.

(Pronounced in the open court on 9/4/2010.)

(Justice R.M.S. Khandeparkar)
President

(Rakesh Kumar)
Member (Technical)

PK