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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

22

Appeal No. E/3777/2006 – SM[BR] Date 21/01/2010

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

To :
M/S VISHAL TEX FAB PVT. LTD
1, NEW GARDEN COLONY, MAJITHA ROAD,
AMRITSAR(PB)

M/S VISHAL TEX FAB PVT. LTD Appellant
Vs
C.C.E. JALLANDHAR(HQ. AT CHANDIGARH) Respondent

I am directed to transmit herewith a certified copy of **Final order No.** 96 / 2010 –SM[BR] dated 7.1.2010 passed by the Tribunal under Section 35-C(1)of Central Excises Act, 1944

Assistant Registrar
(SM Appeal Branch)

Copy to :

1. Respondent
   C.C.E. JALLANDHAR(HQ. AT CHANDIGARH)
   C.R.BUILDING, PLOT NO. 19, SECTOR 17-C, CHANDIGARH.
2. Adv. / Consult
   MR.R.SANTHANAM
   C-3/210, JANAK PURI, NEW DELHI - 110 058.

3 S.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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Assistant Registrar
(SM Appeal Branch)

West Block No.2, R. K. Puram, New Delhi
COURT-I

Date of hearing/decision: 07.01.2010

Excise Appeal No. 3777 of 2006-SM

[Arising out of order in appeal No. 264/CE/Jal/2006 dated 31.8.2006 passed by the Commissioner of Central Excise & Customs (Appeals), Chandigarh].

For approval and signature:

Hon'ble Shri Justice R.M.S. Khandeparkar, President

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 Vishal Tax Fab (P) Ltd., Appellants

Vs.

CCE, Jallandhar (Chandigarh) Respondent

Appearance:

Appeared for the Appellant – Shri R. Santhanam, Advocate

Appeared for the Respondent –Shri I. Baig, SDR

Coram: Hon'ble Shri Justice R.M.S. Khandeparkar, President

Oral Order 96/2010 SM (Br)

Per Shri Justice R.M.S. Khandeparkar:

Heard the learned Advocate for the appellants and learned DR for the respondent and perused the record.

2. The present appeal arises from order dated 31.08.2006 passed by the Commissioner (Appeals), Chandigarh. By the impugned order, the Commissioner (Appeals) dismissed the appeal filed by the appellants against the order of the adjudicating authority. The Assistant Commissioner, Amritsar by its order dated 30.11.2005 had confirmed the demand of duty to the tune of Rs. 1,16,129/- for a period from 12.03.99 to 19.3.99 under the compounded levy scheme at pro-rata basis and the duty for the period from 20.3.99 to 30.4.99 was ordered to be recovered at advalorum basis and to be adjusted from the duty deposited under compounded levy scheme. Further, there was direction for recovery of interest @ 36% on the outstanding amount and penalty of Rs. 1,16,129/- for not discharging the duty liability and for violating the provisions of Rule 96ZQ(5). While passing the order, the proceedings in relating to the show cause notice dated 16.09.99 which was covered by the show cause notice dated 29.06.1999 was sought to be dropped. The proceedings against the appellants were sought to be commenced in terms of show cause notices dated 29.06.99 and 16.09.99.

3. The appellants were engaged in processing of man made fabric falling under Chapter heading 52, 54, 55 and 60 of schedule to the Central Excise Tariff Act, 1985. During the period 1998-99 the appellants filed declaration dated 15.03.99 under Rule 3(1) of the Hot Air stenter Independent Textile Processors Annual Capacity Determination Rules 1998 consequent to the introduction of compounded levy scheme w.e.f. 16.12.1998. The production capacity and duty liability in that regard was provisionally fixed by order dated 20.04.99 whereby the monthly liability per chamber was fixed @ Rs. 1.50 lacs. As per the said order, there was one stenter consisting of three chambers installed in the appellant's factory during the period from 1998-99 and as a result the total duty liability was that of Rs. 4.50 lacs per month. The appellants sought to debit duty

amounting to Rs. 3,29,579/- for the period from 12.03.99 to 30.04.99 while presenting letter dated 25.03.99 claiming that the scheme was not applicable to the units of the appellants as they were not covered by the definition of the independent processors given in Explanation III of Notification No.42/98-CE (NT) dated 10.12.98. Appellants had discharged the duty liability suo moto under compounded levy scheme from 13.04.99 onwards. Show cause notice dated 29.06.99 came to be issued to the appellants proposing the recovery of Central Excise duty amounting to Rs.4,10,744/- for the period from 12.03.99 to 30.04.99 alongwith interest, besides penal amount. Yet another show cause notice dated 16.09.99 came to be issued proposing to demand the duty amounting to Rs. 4.5 lacs for the month of March 1999 alongwith interest and penal amount. The matter was contested by the appellants and in the adjudication proceedings the demand was confirmed as stated above. Being aggrieved, the matter was carried in appeal before the Commissioner (Appeals) without any success. Hence, the present appeal.

4. Before taking note of the rival contentions in the matter, it is necessary to record few facts relevant for the decision in the matter. While the Commissioner had provisionally determined the capacity of the appellants' unit under Notification No. 42/98-CE (N.T.) dated 10.12.98 under order dated 22.04.99, an application dated 16.03.99 was presented by the appellants claiming that they had started their knitting factory for further processing in their unit and as per Notification No. 42/98 dated 10.12.98 and subsequent Trade Notice No. 34-CE/98 dated 18.12.98 they fall beyond the scope of compounded levy scheme and that they had started paying duty on actual production from 15.03.99. Consequently, a notice dated 22.04.99 issued to the appellants granting them opportunity to present their case and make submissions. Upon hearing the appellants, the Commissioner, Chandigarh by his order dated 26.04.2000 held that the

appellants are duly covered under the compounded levy scheme under Section 3A in terms of Notification No. 41/98-CE(N.T.) and 42/98-CE (N.T.) both dated 10.12.98 (as amended) issued under Section 3A of the Central Excise Act, 1944 and were required to pay duty as determined by the Commissioner, Chandigarh-II under provisional order issued vide C. No. IV(16)FAB/03/ Tech-II/98 dated 30.12.1998 and further directed the appellants to pay penal amount of Rs. 6,12,150/- alongwith interest @ 36% on the outstanding amount to be calculated for the outstanding period and a penalty equal to the amount of the duty short paid. Being aggrieved, the appellants preferred appeal before CEGAT and by its order dated 13.11.2000 the CEGAT set aside the said order and directed the Commissioner of Central Excise to examine afresh the question whether the appellants were "independent processors" within the meaning of this expression in Notification No. 41/98-CE(NT) in the light of the decisions of the Supreme Court referred to by the Tribunal in the matter of **Aar Kay Processors** vs. **CCE, Chandigarh** reported in 2000 (121) ELT 74 (T). On remand, the Commissioner after hearing the parties held that at the relevant time the appellants were not covered under definition of the independent processors and hence they were not liable to pay the duty under compounded levy scheme. Accordingly, the demand of Rs. 6,12,150/- made under the earlier order of the Commissioner was dropped.

5. It was after the conclusion of the above proceedings that the present adjudication proceedings were proceeded with and concluded

6. While assailing the impugned order, learned Advocate for the appellants submitted that once the Commissioner pursuant to the remand of the matter had held that the appellants were not the independent processors at the relevant time and the relevant time included the month of March 1999, it was not permissible for the Assistant Commissioner to arrive at a finding contrary to the one which was arrived at by the

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Commissioner in its order dated 31.05.2005. According to the learned Advocate, the issue as to whether the appellants were independent processors or not for the relevant period stood concluded by the said order dated 31.05.2005 and, therefore, it was not permissible for the Assistant Commissioner to reopen the same in the present proceedings. He further submitted that consequent to the order of the Commissioner dated 31.05.2005, even the provisional order dated 22.04.1999 determining the capacity and duty liability, did not subsisted and in the absence of any fresh order determining the capacity and the duty liability of the appellants in terms of the compounded levy scheme, it was not open to the Assistant Commissioner to confirm the demand under the compounded levy scheme. It was contended by the learned Advocate for the appellants that the period for which the Assistant Commissioner has held that the appellants were "independent processors" within the meaning of the said expression under compounded levy scheme was fully covered by the order dated 31.05.2005. As regards the declaration dated 15.03.99, it was sought to be contended that the same was filed at the instance of the departmental personnel. In any case, according to the learned Advocate, the claim of the department that the appellants were an "independent processors" was duly contested and in the lawful adjudication proceedings the competent authority had held that the appellants were not processors at the relevant time and the said finding of the competent authority had attained finality in the absence of proper challenge to the same by the department.

7. Learned DR on the other hand, submitted that the order dated 31.05.2005 clearly recorded that the appellants were not independent processors in view of the fact that they by taking knitting unit on lease had acquired propriety interest in the unit engaged in manufacturing of fabrics from 20.03.99. In any case, according to the learned DR the order speaks

of the status of the appellants not to be of independent processors for the relevant time and as per the claim of the appellants themselves the relevant time commences from 16.03.99 and, therefore, the order of the Commissioner dated 31.05.2005 cannot be said to be related to the period prior to 16.03.99 and hence it was open to the Assistant Commissioner to deal with the period prior to 16.03.1999. He further submitted that there is a clear finding in the order of the Assistant Commissioner that Shri Kanwal Nayyar in his statement dated 26.03.99 had admitted that they started the production w.e.f. 12.03.99 and hence no fault can be found with the impugned order fixing liability for the period from 12/03 till 15/03. It was sought to be contended that the show cause notices dated 29.06.99 and 16.09.99 were not the subject matter of the earlier proceedings which culminated in the order dated 31.05.2005 and, therefore, the Assistant Commissioner was not without jurisdiction to deal with the matter and certainly not in relation to the period which was not the subject matter of the adjudication under order dated 31.05.2005.

8. It is not in dispute and it cannot be in disputed that the entire proceedings related to availment of benefit under the compounded levy scheme. Under the scheme, there is a procedure prescribed for availing benefit thereunder as well as for imposing the duty liability in terms of the scheme. Time and again the Tribunal as well as the High Courts and the Supreme Court have also held that the provisions in this regard are to be properly complied with. The obligation in that regard does not merely rest upon the manufacturer but also upon the department. While the manufacturer in order to avail the benefit thereunder have to comply with the requirement of the scheme strictly as also the department for imposing and recovery of the duty liability thereunder have to follow the prescribed procedure thereunder.

9. In the case in hand, it is apparent that the appellants in March 1999 itself had disputed their status as that of independent processors based on the lease deed dated 20.03.99. The Commissioner who had adjudicated the matter, pursuant to the remand thereof by the Tribunal, was fully aware and conscious that under order dated 22.04.99 there was provisional determination of the capacity and corresponding duty liability of the appellants. The Commissioner was also fully aware that under application dated 16.03.99, the appellants had disputed their status as independent processors and this is apparent from the order itself and in particular para 2, 3 and 4 of the order dated 31.05.2005.

10. The order dated 31.05.2005 relates to certain facts as were placed before the authority by the appellants. The same disclose that appellants' knitting unit came into existence in March 1999 and was registered on 12.03.99. It was on 15.03.99 that they took over a knitting unit from M/s Adarsh Textile Mills. On 16.03.99, they intimated the jurisdictional Superintendent about acquiring of propriety interest in knitting unit. The knitting unit manufactured 141114 linear mtr. knitted fabrics during the period 16.03.99 to 31.05.99 and for that purpose they consumed 4440 kg. of polyester yarn and 2270 kgs. of nylon yarn. They also furnished month-wise detail of gray fabric produced and sent to the parent unit for the period from 16.03.99 to 31.05.99. It was stated that from 16.03.99 to 31.03.99 28650 linear mtr., for the month of April 1999, 50315 linear mtr. and for the month of May 1999, 62150 linear mtr. fabric was produced in knitted unit and was sent to parent unit for processing and the knitted fabric, so produced in the knitted unit was not sold in the open market. The order does not disclose the claim made in that regard by the appellants having been disputed at any time by the department. In the background of facts and figures which were submitted to the adjudicating authority and based on which the Commissioner arrived at the finding that

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for the relevant period the appellants were not covered by the definition of independent processors under the said scheme. It is difficult to accept the contention on behalf of the department about the production having started from 12/03 solely on the basis of the statement of Sh. Kanwal Nayyar dated 26.03.99 referred by the Assistant Commissioner in his order. Nothing prevented the Assistant Commissioner to ascertain from the records as to whether really there was production during the period from 12/03 till 15.03.99 and not to base the finding on the statement of Sh. Kanwal Nayyar more particularly in view of detail facts and figures disclosed by the assessee in the adjudication proceedings before the Commissioner and which were forming part of the order dated 31.03.2005 of the Commissioner. It is also pertinent to note that show cause notice dated 29.06.99 did not refer to any such statement of Sh. Kanwal Nayyar.

11. In any case, once the adjudicating authority had held that the appellants were not independent processors for the relevant period after taking into consideration all the aspects of the matter including the production and period for which the production was carried out in the month of March 1999, and such an order had attained finality, in the absence of any challenge thereto by the department, it was certainly not open to the department to reopen the same issue under the guise that the earlier order was essentially based on the finding that the appellants did not satisfy the requirement of status of independent processors on the basis of the lease deed dated 20.03.1999. The fact that the lease deed was dated 20.03.99 was very much known to the Commissioner when the order dated 31.05.99 was passed. In such circumstances, it cannot be presumed by any stretch of imagination that the order of the Commissioner was restricted only to the period either from 20/03 or atleast from 16/03, with reference to the expression "the relevant period" used by the Commissioner in his order. Besides the status of the appellants as the

independent processors under the compounded levy scheme was necessarily to be decided with reference to the month of March 1999. The duty liability under the compounded levy scheme is always with reference to the month and even if the manufacturer wants to claim any abatement in relation to any part of a month during which there was no production, the manufacturer is initially bound to pay the duty for the entire month and thereafter the claim abatement. Being so, while deciding the status of the manufacturer, it has to be decided essentially for the month. Hence, it cannot be presumed that the decision of the Commissioner was restricted to the period either after 20th or after 16.03.99 and not prior thereto.

12. Learned Advocate for the appellants is also justified in contending that in view of order dated 31.05.2005, the provisional order dated 22.04.1999 ceased to exist as in view of declaration that the appellants were not covered by the definition of the independent processors and hence were not liable to pay the duty under the compounded levy scheme, automatically the provisional order stood vacated. It is not the case of the department that subsequent to the order dated 31.05.2000, there was any efforts on the part of the department to reassess the production capacity and to refix the liability of the appellants. In such circumstances, question of demanding any duty either for the period from 12th March to 19th March or even upto 15th March cannot arise.

13. It is also to be noted that the order dated 31.05.2005 not only declared the status of the appellants but also had dropped the demand of Rs.6,12,150/- as is apparent from the order dated 26.04.2000.

14. Plain reading of the order passed by the Assistant Commissioner discloses that he was fully aware of the fact that the Commissioner by his order dated 31.05.2005 has clearly held that appellants were not the independent processors for the relevant period and they were not liable to

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pay the duty under compounded levy scheme. He was also aware that demand of Rs. 6,12,150/- was vacated by the Commissioner. Inspite of that, one wonders how the Assistant Commissioner could have arrived at the finding that the order of the Commissioner was restricted to the period w.e.f. 20.03.99 onwards solely because the lease deed was dated 20.03.99. The order passed by the Commissioner clearly discloses that the Commissioner was fully aware of the fact that the lease deed was dated 20.03.99. Commissioner's order specifically refers to the period of production from 15.03.99 and has held that the appellants were out of the scope of the definition of the independent processors under the said scheme. It was to the knowledge of the Assistant Commissioner that the said order of the Commissioner was not challenged by the department. Being so, it was absolutely not open to the Assistant Commissioner to arrive at any finding which could be contrary to the findings arrived at by the Commissioner on the same subject matter and to hold that the appellants were covered by the scheme and that they were independent processors prior from which 20.03.99 which clearly amounts to arrive at a finding contrary to the one arrived at in the order passed by the Commissioner dated 31.05.2005. The Commissioner (Appeals) under the impugned order does not appear to have considered the same.

15. For the reasons stated above, therefore, the impugned order cannot be sustained and is liable to be set aside with consequential relief.

16. Accordingly, the appeal succeeds, the impugned order is hereby set aside with consequential relief.

(Justice R.M.S. Khandeparkar)
President

/Pant/