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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/2365 & E / 2446 / 2009-SM[BR]** Date **22/09/2011**

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

To :
**M/S JAINDENDRA INDUSTRIES (P) LTD.**
PLOT NO. 116-117,
SECTOR-25, FARIDABAD (HR)
**M/S JAINDENDRA INDUSTRIES (P) LTD.**

**[2] M/S FRIENDS FORGINGS (P) LTD.**
**PLOT NO. 9, SAMAYPUR INDL. ESTATE**
**SAMAYPUR ROAD, SECTOR-25, FARIDABAD.**

Appellant
Vs
Respondent

**C.C.E. DELHI IV**

I am directed to transmit herewith a certified copy of **Final order No. 634 – 635/2011-SM[BR]** dated 13.9.2011 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. DELHI IV**
NEW CGO COMPLEX, NH-IV,
FARIDABAD, HARYANA 121001.

2. Adv. / Consult SHRI K.K.SHARMA ADV.
A-115, GROUND FLOOR ASHOKA ENCLAVE-II,
SECTOR-37, FARIDABAD

3. C.D.R
4. Bar association, CESTAT, New Delhi
5. Director Publications, Customs, Excise. I.P. Estate, New
6. M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -
7. Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
8. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi -
9. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road, Ahmedabad-15
10. LAWCRUX Advisors Pvt Ltd, LAW House,1-8,Sector - 10, Faridabad 121003 (Haryana)
11. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
12. Office Copy
13. Guard file

Assistant Registrar
(SM Appeal Branch)

# CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
# West Block No. 2, R.K. Puram,
# NEW DELHI

## COURT-II

**Central Excise appeal No. 2365 & 2446 of 2009-SM**

Date of hearing/decision: 13th September, 2011

M/s. Jaindendra Industries (P) Ltd.,
M/s. Friends Forgings Pvt. Ltd., Appellants
Reptd. By Shri K.K. Sharma, Advocate

Versus

CCE, Delhi-IV Respondent
Rept. By Shri S.K. Panda, Jt. CDR

Coram: Hon'ble Shri D.N. Panda, Judicial Member;

**FINAL ORDER NO.** 634-635/2011 SM (Br) **DATED**

**Per D.N. Panda:**

1.1 Learned Counsel submits that CBFS was usable as substitute to the furnace oil and that was an input for manufacture. Such input having been purchased and used usability thereof is not questionable. But, Revenue relying on the report obtained from various authorities discarded claim of the appellant in both the cases. While report obtained by Appellant from Reliance Industries indicating that CBFS can also be used as fuel was discarded, the matter being of technical nature, that should have been considered by both the authorities below. But they failed to do so. He further submits that there is a certificate from Friends Forging Pvt. Ltd. indicated that CBFS can be used as substitute to furnace oil.

1.2 Prayer of the learned Counsel is that when duty has been paid there should not be levy of penalty.

2.1 Learned Jt. CDR on the other hand points out that pleading of the appellant has no legs to stand when they did not receive CBFS at all in their factory but paper credit was enjoyed on fake documents. Such a fact is clear from Para 1 of show cause notice in both the cases. He also points out that statement recorded from Shri G.L. Mehta on 2.3.2006 who was General Manager of Jaindendra Industries Pvt. Ltd. clearly demonstrate that furnace oil was used as fuel but CBFS is not used to his knowledge.

2.2 Appellants were given ample opportunity to explain about the nature and property of CBFS exposing them report of Ministry of Science and Technology. When they failed to explain about receipt of goods in question and use thereof they failed to get relief if any permissible. Such failure of appellant is recorded in Para 13 of the appellate order. Consequence of law followed accordingly.

2.3 It is also case of Revenue that technical report was not obtained from any other private party but was from Science and Technology Department of Government of India. It was reported that When the goods in question has fairly high aromatic contents due to which it is difficult to burn, it gives rise to thick/heavy smoke and that is not ideally suited as furnace oil, ~~for which~~ that cannot be substituted as furnace oil. Similar was the version of a public sector concern undertaking i.e. Hundustan Petroleum Corporation. Therefore, the appellant fails to succeed on both counts before the Tribunal. To this proposition learned Counsels submits that the Tribunal has already taken a view in the case of CCE, Ghaziabad vs. Chaudhary Hammer Works Ltd. - 2010 (260) ELT 451 (Tri. - Del.) to grant relief in respect of use of CBFS.

3. Heard both sides and perused the record.

4.1 Show cause notice mde clear that it has a foundation to make allegation. Firstly the appellants did not receive inputs and secondly inputs in question claimed to have been used was not usable on the basis of technical report issued by a Government Department and a Public Sector. The appellants did not seek cross examination of the authorities who had issued technical report when that went against it. They also failed to lead evidence to claim genuineness of transition of goods from origin to destination. The Appellate Authority recorded all averments of the appellants and found that in absence of evidence to discard the allegation in the show cause notice, adjudication was sustainable.

4.2 In the certificate issued by Friends Forgings Pvt. Ltd. to the Appellant there is an indication that shortage of furnace oil is mitigated by mixing CBFS with that and that is not used on regular basis because that gives rise to smoke as compared to furnace oil. Communication from Reliance Industries relied upon by the appellants is a bald statement saying that it can also be used. Such a statement is also not signed by any body. Appellants' plea that it is able to succeed on the basis of Tribunal's decision is baseless for the reason that in that decision, in Para 6, it is made clear that Commissioner (Appeals) held that disputed materials were used by the assessee as an alternative fuel. In the present case there is totally negative opinion against the appellant. So also this case suffers from further draw back of no receipt of goods. If claim of the appellant is permitted that shall amount to legalizing illegality. So also when the goods in question were not received in the factory of the Appellant and there was no genuine transaction the appellant appears to had oblique motive in the deal and not entitled to Cenvat credit. This can be said following the ratio laid down by Hon'ble High Court of Punjab & Haryana in the case of Ranjeev Alloys Ltd. vs. CCE, Chandigarh - 2009 (247) ELT 27 (P&H).

5. At this stage learned Counsel's prayer was to remand the matter. That is not entertainable for the reason that the department need not prove its case with mathematical precision or formula. Onus of proof was on the appellant to satisfactorily explain receipt of goods as well as use thereof following the judgment of the Hon'ble High Court of Madras in the case of Alagappa Cements Pvt. Ltd. vs. CEGAT, Chennai - 2010 (260) ELT 511 (Mad.). When the appellant failed to prove it made its claim

fatal. On merits, the appellants do not succeed in its appeal on both counts.

6. So far as penalty aspect is concerned it is submission of the appellants that duty was paid before issuance of show cause notice for which penalty should not be imposed. Such a plea does not sustain following Apex Court decision in the case of UOI vs. Rajasthan Spg. & Wvg. Mills - 2009 (238) ELT 3 (S.C.). Therefore, it is not possible to waive penalty fully.

7. After dictation of order, learned Counsel earnestly prays that penalty may be confirmed but quantum there of may be reduced. Such a proposition deserves consideration in the light of judgement of Hon'ble High Court of Delhi in the case of K.P. Pouches (P) Ltd. vs. UOI - 2008 (228) ELT 331 (Del.) and judgement of Hon'ble High Court of Punjab & Haryana in the case of Bajaj Travels - 2011 (21) STR 497 (P&H). In the later case while granting relief of reduced penalty, the Tribunal did not find any denial mandate of legislature to consider the proposition of reduced penalty in the case where Section 78 of Finance Act, 1994 was applicable and view of Tribunal was upheld by Hon'ble High Court of Punjab & Haryana. In the present case penalty was proposed under Rule 15(2) of Cenvat Credit Rules, 2004 read with Section 11AC of Central Excise Act, 1944. Perusal of that Rule indicates that essential ingredient of Section 11AC if present penalty shall follow under that rule. It appears that provision of Section 78 of Finance Act, 1994 and Rule 15(2) of Cenvat Credit Rules, 2004 read with Section 11AC

of Central Excise Act, 1944 are at par. Therefore, denial of relief on the quantum of penalty may render injustice to this appellant. Accordingly penalty is reduced to 25% of the duty payable due to disallowance of Cenvat credit.

8. Both the appeals are dismissed on merit except granting partial relief on quantum of penalty as indicated above.

(Dictated & pronounced in the Open Court.)

(D.N. PANDA)
JUDICIAL MEMBER

RK