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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/193 /2005 – SM[BR] and E/CO/60/05-SM(BR) Date 11/02/2010

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

To :
C.C.E. JAIPUR I
N.C.R.BUILDING, STATUE CIRCLE, "C" SCHEME,
JAIPUR 302005.

C.C.E. JAIPUR I Appellant

Vs

M/S WELKIN POLYMERS (P) LTD. Respondent

I am directed to transmit herewith a certified copy of **Final order No.** 183 / 2010 –SM[BR] dated 22.1.2010 passed by the Tribunal under Section 35-C(1)of Central Excises Act, 1944

Assistant Registrar
(SM Appeal Branch)

Copy to :

1. Respondent
   M/S WELKIN POLYMERS (P) LTD.
   66-A, INDUSTRIAL AREA, JHOTWARA, JAIPUR,(RAJ)
2. Adv. / Consult SHRI BIPIN GARG ADV.
   B-1/1289-A, VASANT KUNJ NEW DELHI
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
15. LAWCRUX Advisors Pvt Ltd. LAW House.1-8.Sector - 10. Faridabad 121003 (Haryana)
16. Office Copy
17. Guard file

Assistant Registrar
(SM Appeal Branch)

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
NEW DELHI, PRINCIPAL BENCH NEW DELHI

Appeal No.E/193/05-SM and E/CO/60/05-SM

[Arising out of Order-in-Appeal No.331(MPM)/CE/JPR-I/04 dated 18.10.2004 passed by the Commissioner of Central Excise (Appeals-I), Jaipur]

Date of Hearing/ Decision:22.01.2010

For approval and signature:

Mr. M. Veeraiyan, Member (Technical)

1. Whether Press Reporters may be allowed to see 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?	:	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, Jaipur-I ...Appellants
(Rep. by Shri I. Baig, SDR)

Vs.

M/s.Welkin Polymers (P) Ltd. ...Respondent
(Rep. by Shri Atul Gupta, Co. Secretary)

CORAM: **Hon'ble Mr. M. Veeraiyan, Member (Technical)**

Final Order No.183/2010-SM(BR)/Dated:22.01.2010

Per M. Veeraiyan:

This is an appeal by the Department against the order of the Commissioner (Appeals) No.331(MPM)/CE/JPR-I/04 dated 18.10.2004. Cross objection no.CO/60/05-SM is connected to this appeal.

2. Heard both sides.

3. The respondent is a manufacturer of Bottles/Jars/Pre-form of Bottles/Jars of Polyethylene Terephthalate etc. and some quantity of Pet packing resin. They procured the same from 100% EOU. The duty payable on the clearances made from 100% EOU is based on Customs Tariff. But for the exemption under Notification No.2/95-CE dated 4.1.95, the consignment received by them should have paid a duty of Rs.1,31,200/- (7346.8082 BCD + 45,80.32 AED + 13,73.29 SAD) but because of Notification No.2/95-CE dated 4.1.95 they were required to pay only 50% of the customs duty equivalent and, therefore, they paid Rs.65,600/-. The respondent took a credit of Rs.1,31,200/- even though the supplier has actually paid an amount of Rs.65,600/-. However realising the mistake, they reversed the credit taken by them amounting to Rs.65,600/-. The Original Authority held that they are eligible for the credit of Rs.22,540/- only (50% of AED amounting to Rs.45,080/-) and accordingly, he confirmed demand of Rs.43,060/-. He also order for recovery of interest and imposed penalties amounting to Rs.43,060/- + Rs.16,400/-. The Commissioner (Appeals) set aside the entire order of the Original Authority. Hence, the Department is in appeal.

4. Ld. SDR submits that the respondent is eligible to take credit of CVD portion of customs duty equivalent which was actually paid by the respondent. He also submits that the decision of the Larger Bench in the case of Vikram Ispat reported in 2000 (120) ELT 800 (T-LB) was

issued in the context of Notification No.2/95-CE read with Notification No.5/94-CE issued under Rule 57 A of the Central Excise Rules. The present case involves interpretation of Notification No.2/95-CE in the context of Cenvat Credit Rules, 2001.

5. Ld. Co. Secretary for the respondent submits that the prayer in the appeal by the Department should not be allowed in toto. He fairly submits that the Commissioner (Appeals) setting aside the entire demand of Rs.1,08,660/- was wrong. The respondents are eligible for a credit of Rs.45,080/-, which is equal to the amount of duty payable, if they have procured the similar goods from DTA source. He submits that in respect of the goods cleared from 100% EOU, the entire duty paid is only central excise duty even though the same is calculated as equivalent of customs duty as if the goods were imported and 50% of the said amount is charged in view of the Notification No.2/95-CE dated 4.1.95. He submits that the Cenvat Credit Rules, 2001 is a liberalisation over the Notification No.5/94-CE insofar as the same relates to extent of modvat credit available on the goods procured from 100% EOU and, therefore, he relies on the ratio of the decision of the Larger Bench in the case of Vikram Ispat cited supra particularly para-17.

6.1 I have carefully considered the submissions from both sides. When inputs are imported by the manufacturer, they are eligible to take Modvat credit/Cenvat credit of Additional duty paid which is calculated with reference to the Central Excise Tariff. If the manufacturer procures the inputs from a DTA unit, they are eligible for credit of the entire excise duty paid by them in terms of Section 3 of the Central Excise Act and other Excise levies. When they are getting inputs from 100% EOU, the duty paid on the inputs is only central excise duty. However, there is a clear restriction on the quantum of duty paid that can be taken as credit. It is limited to duty paid on such goods procured from other sources. The decision of the Larger Bench of the Tribunal in the case of Vikram Ispat has dealt with the issue and held as under:-

> *"17. The question then arises is how to determine the quantum of Modvat credit available to the manufacturer in respect of the goods procured from a 100% E.O.U. The only method, which, we feel, is available to the Revenue is as suggested by the learned Counsel, i.e. ascertain firstly the additional duty of customs leviable on like goods, if imported into India from outside India; ascertain the actual amount of duty paid by the 100% E.O.U. on the goods cleared to any part in India under Notification No. 2/95; after ascertaining these two elements the Modvat credit has to be allowed to the manufacturer on the basis of the first proviso to notification No. 5/94-C.E. As per first proviso to this notification credit shall be restricted to the extent of duty which is equal to the additional duty leviable on like goods. If the additional duty is less than the actual duty paid on the inputs cleared from 100% E.O.U., the manufacturer in India shall be eligible only for the credit equivalent to the additional customs duty. On the other hand if the duty actually paid by 100% E.O.U. on inputs cleared by them is less than the additional duty of customs payable on like goods the manufacturer shall be eligible only to the extent of actual duty paid by 100% E.O.U. The reading of first proviso to notification No. 5/94 does not indicate at all that the credit of specified duty shall be restricted to the components of additional customs duty actually paid by 100% E.O.U. as excise duty. Had this been the intention of the Government, the proviso would not have been termed in the present form. In that situation the proviso should have provided*

that the credit of specified duty shall be restricted to the extent of portion of excise duty which is equivalent to the additional duty of customs paid by the 100% E.O.U. The phrase "equivalent to the duties of excise specified under (i) & (ii) above paid on such inputs" refers to the payment of (a) duty of excise under the Central Excise Act and (b) additional duty of excise under the Additional Duties of Excise (Textiles and Textile Articles) Act. If the Additional Customs duty leviable on like goods includes any other excise duty, such as duty under the Additional Duties of Excise (Goods of Special Importance) Act, 1957, the Modvat Credit will not be available in respect of such duty.

6.2 The restrictions imposed on the extent of Modvat credit in terms of Notification No.5/94-CE(NT) dated 1.3.94 are as follows:-

Provided that,-

(1) credit of specified duty in respect of any inputs produced or manufactured –

(a) in a free trade zone and used in the manufacture of final products in any other place in India; or

(b) by a hundred per cent export-oriented undertaking or by a unit in an Electronic Hardware Technology Park and used in the manufacture of final products in any place in India,

shall be restricted to the extent of duty which is equal to the additional duty leviable on like goods under Section 3 of the Customs Tariff Act, 1975(51 of 1975), equivalent to the duties of excise specified under (i) and (ii) above paid on such inputs,

6.3 With reference to the above restrictions, the decision of the Larger Bench in the case of Vikram Ispat cited supra has been rendered. The provisions relating to restriction of

Cenvat credit relating to inputs received from 100% EOU in Cenvat Credit Rules, 2001 reads as under:-

"*(6) Notwithstanding anything contained in sub-rule(1),--*

(i) in a free trade zone or a special economic zone and used in the manufacture of the final products in any other place in India; or

(ii) by a hundred per cent export-oriented undertaking or by a unit in an Electronic Hardware Technology Park or Software Technology Park and used in the manufacture of the final products in any place in India;

shall be restricted to the extent which is equal to the additional duty leviable on like goods under Section 3 of the Customs Tariff Act, 1975 (51 of 1975) paid on such inputs or capital goods;

6.4 The provisions in Cenvat Credit Rules, 2001 is substantially the same as provisions in Notification no.5/94-CE. insofar as the present matter is concerned.

7. The issue involves fine interpretation of legal provisions and does not involve any suppression, mis-statement on the part of the respondents. There is no scope for imposition of penalty.

8. In view of the above, the appeal of the Department and the connected cross objections are disposed of by

(a) setting aside the order of the Commissioner (Appeals) insofar as setting aside the demand is concerned and restoring the order of the Original Authority in this regard and while restoring the order of the Original Authority, permitting credit to the extent of Rs.45,080/- only and directing that the differential duty payable shall be determined accordingly,

(b) upholding demand for interest as applicable to the above redetermined amount

(c) upholding the order of the Commissioner (Appeals) insofar as the same relate to setting aside the penalty.

Order dictated & pronounced in open court on 22.01.2010.

(M. Veeraiyan)
Member (Technical)

Ckp.