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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/5541/2004 - EX[DB] Date 01/04/2010

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

To :
M/S SHRI GANESH TEX FAB LTD.
18 KM.STONE,CHITTOR ROAD
HAMIRGARH,BHILWARA RAJASTHAN
M/S SHRI GANESH TEX FAB LTD. Appellant
Vs
Respondent
C.C.E.JAIPUR

I am directed to transmit herewith a certified copy of **Final order No. 138/ 2010 EX[DB]** dated 23-2-10 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.JAIPUR
   N.C.R.BUILDING STATUE CIRCLE C-SCHEME JAIPUR
2. Adv. / Consult SH. BIPIN GARG, ADV., B-1/1289A, VASANTKUNJ, N. DELHI-70
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
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Assistant Registrar
(Excise Appeal Branch)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH - COURT NO. 1

Excise Appeal No. 5541 of 2004

(Arising out of Order-in-Appeal No. 506(RM)CE/JPR-II/2004 dated 17.08.2004 passed by the Commissioner of Central Excise (Appeals), Jaipur-II).

DATE OF HEARING : 23.02.2010
DATE OF DECISION : 23.02.2010

FOR APPROVAL AND SIGNATURE :

HON'BLE MR. JUSTICE R.M.S. KHANDEPARKAR, PRESIDENT
HON'BLE MR. 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 ?	Yes
2.	Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not ?	No
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

M/s Shri Ganesh Tex Fab Ltd. ..... **Appellants**
(Rep by Sh. Bipin Garg, Adv.)

VERSUS

CCE, Jaipur ..... **Respondent**
(Rep. by Shri Sunil Kumar, DR)

CORAM : HON'BLE MR. JUSTICE RMS KHANDEPARKAR, PRESIDENT
HON'BLE MR. RAKESH KUMAR, MEMBER (TECHNICAL)

FINAL **ORAL ORDER NO.** 138/10-Ex

PER JUSTICE R.M.S. KHANDEPARKAR :

This appeal arises from the order dated 17.08.2004 passed by the Commissioner (Appeals), Jaipur, dismissing the appeal which was filed by the appellants against the order of the adjudicating authority. The adjudicating authority by its order dated 14.02.2003 had confirmed the demand to the extent of Rs. 31,65,458/- on the ground that the appellants had unlawfully availed the cenvat credit of the said amount and, therefore, recovery thereof was ordered along with interest and imposition of penalty of Rs. 10,000/-.

2. The appellants are engaged in the manufacture of processed man made fabrics classifiable under Chapter 54 and 55 of the Schedule to the Central Excise Tariff Act, 1985. The appellants received capital goods during the period from April, 2000 to February, 2001 on which 50% of cenvat credit was sought to be availed on 30.03.2001 and balance 50% on 01.11.2001. The Department disputed the right of the appellants to avail the credit to the extent of Rs. 31,65,458/- on the ground that the capital goods on which the said credit was sought to be availed were received by the appellants prior to 01.03.2001 and sought to deny the said credit referring to Rule 57-AB, as was amended w.e.f. 01.03.2001 under Notification No. 6/01-CE(NT) dated 01.03.2001 and, therefore, issued show cause notice in that regard on 14/15.03.2002 to the appellants. The appellants contested the proceedings while contending that, though Rule 57-AB was

amended w.e.f. 01.03.2001, the provisions comprised under Rule 57-C read with Rule 57-AB, as it existed prior to 01.03.2001, clearly permitted the appellants to avail 50% cenvat credit in the financial year in which the goods were received in the factory and the balance 50% in the subsequent financial year, and that accordingly the 50% cenvat credit was availed in the financial year in which the goods were received and the balance 50% cenvat credit was availed in the subsequent financial year. The adjudicating authority rejected the contention sought to be raised by the appellants and confirmed the demand, as stated above. The appeal against the same before the Commissioner (Appeals) did not yield fruitful result to the appellants. Hence, the present appeal.

3. Drawing our attention to the impugned order as well as the order passed by the adjudicating authority, the learned advocate submitted that, both the authorities below proceeded on wrong assumption that the issue involved in the matter was as to whether an independent textile processor working under the compounded levy scheme was eligible to avail the cenvat credit of duty paid on the capital goods received during the period April, 2000 to February, 2001 after 01.03.2001 as per the provisions of Rule 57-AB(1) of the Central Excise Rules, 1944, as applicable at the relevant time, when, in fact, the proceedings were initiated against the appellants by issuing the show cause notice merely on the basis that the appellants were not entitled to avail credit in terms of the provisions of law comprised under Rule 57-AB

pursuant to Notification No. 6/01-CE(NT) dated 01.03.2001 in relation to the goods which were received in the factory prior to 01.03.2001 and under no other ground. Referring to Rule 57-AB, as it stood prior to 01.03.2001, and Rule 57-AC, the learned advocate submitted that, the law at the relevant time clearly permitted the assessee to claim 50% of the credit in the financial year in which the goods were received and the balance 50% in the subsequent financial year. He further submitted that, the records clearly disclose and it is undisputed fact that 50% of the cenvat credit on the goods received in the financial year 2000-01 was availed in the same financial year as the records disclose that 50% of the credit was availed on 30.01.2001. Being so, according to the learned advocate for the appellants, the authorities below could not have found fault with the credit availed by the appellants merely on the ground that the goods were received prior to 01.03.2001. He further submitted that, Notification No. 19/2000-CE dated 01.03.2000 in relation to the compounded levy scheme was not the subject matter of the show cause notice and, therefore, the authorities below could not have decided the matter by taking resort to the said provision of law. He also submitted that, even though the provisions of law comprised under Section 57-AB were amended pursuant to issuance of Notification No. 6/01-CE (NT), the provisions comprised under Rule 57-AC continued to remain the same and, therefore, the appellants were entitled to avail the credit which was assured to them in terms of the earlier provision of law as the right in that respect had already accrued in favour of the appellants. Attention was also drawn to the decision of the Bombay High Court in the matter of **Baboobhai Patel & Company vs Collector of Customs,** reported in 1993 (68) ELT 734 (Bom.).

4. The learned DR, on the other hand, submitted that, though the authorities below did frame the point for consideration with reference to the compounded levy scheme, the authorities below have also decided the issue independently of the applicability of the said scheme and in that regard the attention was sought to be drawn to the findings in the impugned order and certain portion of the reasonings preceding the said finding. Drawing our attention to Notification No. 19/2000-CE dated 01.03.2000, the learned DR submitted that, the same clearly disentitled the appellants to avail credit in respect of the goods received by the appellants, the latter having availed the benefit of compounded levy scheme. He further submitted that, undisputedly the appellants had sought to avail 50% of the cenvat credit on 30th March, 2001 on the basis of law which was not prevalent on the said date and, therefore, the appellants were not entitled to claim the said credit. He further submitted that, the law, as comprised under Rule 57-AB which was prevalent from 01.03.2001, did not permit to avail the credit in respect of the goods which were received prior to 01.03.2001 and, therefore, the appellants could not have availed 50% of the cenvat credit on 30th March, 2001 in respect of the goods which were undisputedly received prior to 01.03.2001. He further submitted that, reliance on the rule not in

force on the day when credit is sought to be availed is not permissible and on the basis of such rule, the appellants cannot justify the availment of the credit. According to the learned DR, merely because there is reference to Notification No. 19/2000-CE to arrive at the conclusion about disentitlement of the appellants to avail the credit, that will not render the impugned order to be bad in law as the impugned order was also passed after taking into consideration the disentitlement of the appellants to avail the credit which was the subject matter of the show cause notice.

5. If one peruses the show cause notice, undoubtedly, the same was issued on the basis that the appellants had sought to avail the cenvat credit on 30th March, 2001 in relation to the capital goods which were received in the factory prior to 01st March, 2001 as the same was not permissible in terms of the provisions of law comprised under Rule 57-AB(1) as was amended under Notification No. 6/01-CE(NT) dated 01.03.2001. Paras 3 and 4 of the show cause notice clearly refer to the ground on which the show cause notice was issued and the same read thus :

> **"Further the assessee have taken credit of the balance 50%, amounting to Rs. 15,82,729/- vide RG 23-C Part II Entry No. 64 dated 1.11.2001. The total CENVAT credit amounting to Rs. 31,65,458/- has been taken by the assessee during the period 30.03.2001 to 30.11.2001, which appears to be taken under Rule 57-AB of the Central Excise Rules, 1944 effective during the relevant period. According to Rule 57-AB(1) "A manufacturer or producer of final products shall be allowed to take credit of the duty .... Paid on any inputs or capital goods received in the factory on or after the first day of March, 2001 ...." As per Notification No. 6/2001-CE(NT) dated 1.3.2001.**
>
> **Keeping in view the provisions of Rule 57-AB of the Central Excise Rules, it is clear that the assessee was entitled to take CENVAT credit of duty on or such Capital goods which were received on or after 1st day of March, 2001 whereas**

the assessee have taken the CENVAT credit on those capital goods which were received by them before 01.03.2001."

6. The order passed by the adjudicating authority discloses the point for consideration having been framed as under :

> **"The point to be decided in the present case is whether an independent textile processors working under compounded levy scheme is eligible to avail the cenvat credit of duty paid on capital goods received during the period April, 2000 to February, 2001 after 1.3.2001 as per the provisions of Rule 57AB(1) of erstwhile Central Excise Rule, 1944 as applicable at the relevant time."**

7. The Commissioner (Appeals) while dealing with the matter before him also observed thus :

> **"The basis issue to be decided is whether an independent textile processor working under the compounded levy scheme and paying duties of excise in terms of Notification No. 19/2000 dt. 01.03.2000 was eligible to avail the cenvat credit of duty paid on capital goods received by them during the period April 2000 to Feb. 2001 after 01.03.2001, in terms of provisions of Rule 57-AB(1) of erstwhile Central Excise Rules, 1944 as stood applicable at the relevant time."**

8. Undoubtedly, perusal of the orders passed by the authorities below thus disclose that both the authorities proceeded to consider the matter from the point of view, as to whether an independent textile processor working under the compounded levy scheme was eligible to avail cenvat credit of duty paid on capital goods received by them during the period from April 2000 to February 2001 consequent to the implementation of the provisions comprised under Rule 57-AB(1) under Notification No. 6/01-CE(NT) dated 01.03.2001. Both the authorities also make specific reference to Notification No. 19/2000-CE(NT) dated 01.03.2000.

The said Notification clearly provides that, the independent processors of the processed textile fabric were not eligible to avail any credit of duty paid on the inputs on the capital goods under the Central Excise Rules, 1944 or any other Notification issued thereunder.

9. As already observed above, perusal of the show cause notice nowhere discloses any reference to Notification No. 19/2000-CE(NT) dated 01.03.2000 nor to the fact that the appellants being independent processor of processed textile fabrics were not eligible to avail any credit of the duty paid on inputs or capital goods under the Central Excise Rules, 1944 or any other Notification issued thereunder. The show cause notice was squarely in relation to Rule 57-AB as it stood w.e.f. 01.03.2001. Being so, the authorities below were not entitled to travel beyond the scope of the show cause notice in order to justify the claim against the assessee. The law in that regard is well settled. The decision in **Baboobhai Patel & Company**'s case (supra) refers to absence of powers to the authority to decide a matter on extraneous ground.

10. Undoubtedly, therefore, on the ground on which the impugned order sought to be assailed is well justified and on that count the order would not be sustainable. The contention on behalf of the respondent, however, is that, apart from the said ground, the authorities below have also held that the appellants were not entitled to claim the cenvat credit in view of the

provisions of law comprised under Section 57-AB as it stood w.e.f. 01.03.2001.

11. While making good his contention in this regard, the learned DR has brought to our notice the following observations from the impugned order passed by the adjudicating authority :

> **"The contention of the assessee that Rule 57AB was regulated by the condition imposed/prescribed under Rule 57AC and therefore, on fulfilment of condition of Rule 57AC the rule 57AB should be applicable is nothing more than the misinterpretation of the law only. Rule 57AC simply lays down the manner of availment of credit, whereas it is the Rule 57AB, which decides the admissibility of cenvat credit. Therefore, it is incorrect to interpret the statutory provisions in the matter that on fulfilment of condition of Rule 57AC the Rules 57AC would be applicable. Admissibility or otherwise of cenvat credit in respect of inputs or capital goods were governed by the Rule 57AB of the erstwhile Central Excise Rules, 1944 only as applicable at the relevant time."**

He further submitted that, based on the said reasoning the authority has arrived at the finding as under :

> **"Thus I find that the assessee have irregularly availed cenvat credit amounting to Rs. 31,65,458/- in contravention of Rule 57AB of Central Excise Rules, 1944 in respect of capital goods received prior to 1.3.2001 and the same is recoverable from them under provisions of Section 11A of Central Excise Act, 1944 read with Rule 57AB of the erstwhile Central Excise Rules, 1944 and Rule 12 of Cenvat Credit Rules, 2001."**

12. Referring to the above finding in the order passed by the adjudicating authority, it is sought to be contended that, mere reference to the compounded levy scheme or Notification No. 19/2000-CE(NT) dated 01.03.2000 would not render the order to be bad in law in view of the fact that the authorities below have

also considered the ground on which the show cause notice was issued and on the same ground the demand has been confirmed.

13. Undoubtedly, it is true that the adjudicating authority, apart from making reference to Notification No. 19/2000-CE(NT) dated 01.03.2000 and the provision regarding compounded levy scheme comprised thereunder has also referred to the ground on which the show cause notice was issued to the appellants as is apparent from the portion of the order which is quoted hereinabove. But the fact remains that, while dealing with the entire matter both the authorities below have essentially proceeded on the basis of the compounded levy scheme and the effect thereof and have proceeded to analyse the materials on record on the basis of applicability of the said scheme to the appellants. Equally it is true that there is also reference to the ground which was disclosed in the show cause notice. In such circumstances, it cannot be ascertained as to whether the authority below while arriving at the findings adverse to the assessee was to what extent influenced by the extraneous ground on which both the authorities below proceeded to decide the matter against the assessee. In such circumstances, therefore, the contention on behalf of the appellants that this itself could be a ground for interference in the impugned order cannot be totally brushed aside.

14. The undisputed fact in the matter in hand discloses that the appellants did receive the goods during the financial year 2000-01. He availed the 50% cenvat credit on such goods on

30.03.2001. The date 30.03.2001 forms part of the financial year 2000-01.

15. It cannot be disputed that Rule 57-AB was amended under Notification No. 6/01-CE(NT) dated 01.03.2001. The relevant portion prior to amendment of the said Rule read thus :

> **"57AB. CENVAT credit. - (1) A manufacturer or producer of final products shall be allowed to take credit (hereinafter referred to as the CENVAT credit) of,-**
>
> **(i) the duty of excise specified in the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) (hereinafter referred to as the said First Schedule), leviable under the Act;**
>
> **(ii) the duty of excise specified in the Second Schedule to the Central Excise Tariff Act, 1985, leviable under the Central Excise Act, 1944 in relation to the goods falling under sub-heading Nos. 2401.90, 2404.99, 5402.20, 5402.32, 5402.42, 5402.43, 5402.52, 5402.62, 8415.00, 8702.10, 8703.90, 8706.21 and 8706.39 of the said First Schedule;**
>
> **(iii) the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Textile and Textile Articles) Act,1978 (40 of 1978);**
>
> **(iv) the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957); and**
>
> **(v) the additional duty leviable under section 3 of the Customs Tariff Act, 1975, equivalent to the duty of excise specified under clauses (i), (ii), (iii) and (iv) above,**
>
> **paid on any inputs or capital goods received in the factory on or after the first day of April, 2000.**
>
> ***Explanation.* - For removal of doubts it is clarified that the manufacturer of the final products shall be allowed CENVAT credit of additional duty leviable under section 3 of the Customs Tariff Act, 1975 (51 of 1975) on goods falling under Chapter heading No. 98.01 of the First Schedule to the said Customs Tariff Act."**

16. Pursuant to the amendment, the relevant portion of the said Rule reads as under :

"4. In the said rules, in rule 57AB

(A) for sub-rule (1), the following shall be substituted, namely:-

"(1) A manufacturer or producer of final products shall be allowed to take credit (hereinafter referred to as the CENVAT credit) of,-

(i) the duty of excise specified in the First Schedule to the Central Excise Tariff Act, 1985 (hereinafter referred to as the said First Schedule), leviable under the Act;

(ii) the duty of excise specified in the Second Schedule to the Central Excise Tariff Act, 1985, leviable under the Act;

(iii) the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Textile and Textile Articles) Act, 1978;

(iv) the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957;

(v) the National Calamity Contingent duty leviable under clause 129 of the Finance Bill, 2001, which clause has, by virtue of the declaration made in the said Finance Bill under the Provisional Collection of Taxes Act, 1931, the force of law: and

(vi) the additional duty leviable under section 3 of the Customs Tariff Act, 1975, equivalent to the duty of excise specified under clauses (i), (ii), (iii), (iv) and (v) above,

paid on any inputs or capital goods received in the factory on or after the first day of March, 2001, including, the said duties paid on any inputs or capital goods used in the manufacture of intermediate products, by a job-worker availing the benefit of exemption specified in the notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 214/86- Central Excise, dated the 25th March, 1986, published in the Gazette of India vide number GSR 547(E), dated the 25th March, 1986, and received by the manufacturer for use in or in relation to the manufacture of final products, on or after the first day of March, 2001."

17. The relevant portion of Rule 57AC(2) reads thus :

"57AC. Conditions for allowing CENVAT credit.-

(2) (a) The CENVAT credit in respect of capital goods received in a factory at any point of time in a given financial year shall be taken only for an amount not exceeding fifty per cent. of the duty paid on such capital goods in the same financial year.

(b) The balance of CENVAT credit may be taken in any financial year subsequent to the financial year in which the capital goods were received in the factory of the manufacturer, provided that the capital goods are still in the possession and use of the manufacturer of final products in such subsequent years."

18. Referring to the above provisions of law, it was the contention on behalf of the appellants that Rule 57-AB, which existed prior to its amendment, clearly permitted availment of credit of the duty of excise paid on any capital goods received in the factory on or after 1st day of April, 2000 and during the financial year 2000-01. Rule 57AC(2)(a) permitted the appellants to avail cenvat credit in respect of the capital goods which were received in the factory at any point of time in a given financial year to take 50% of the duty paid on such capital goods in the same financial year and the balance 50% in the subsequent financial year. Being so, considering the fact that 50% of the credit was availed in the financial year 2000-01 i.e. on 30.03.2001, the authorities could not have denied the same to the appellants. The contention on behalf of the Department, however, is that, once Rule 57AB was amended w.e.f. 01.03.2001 there was no occasion for the appellants to avail the credit on the basis of Rule which was no more in existence. According to them the credit from 01.03.2001 could have been availed only in terms of amended rule.

19. Notification No. 6/01-CE(NT) dated 01.03.2001 clearly specifies that the same came into force from 01.03.2001. The show cause notice issued in the matter also clearly specified the ground for issuance thereof being the fact that the credit was sought to be availed on 30.03.2001 relating to the capital goods received prior to 01.03.2001. In such circumstances, obviously, it was necessary for the authorities to deal with the effect of the Notification No. 6/01-CE on the entire issue involved in the matter. Though, the learned DR is right in contending that the adjudicating authority has referred to the ground mentioned in the show cause notice, neither the adjudicating authority nor the Commissioner (Appeals) has dealt with the relevant aspect of the matter. On the contrary, as pointed out by the learned advocate for the appellants, both the authorities below essentially proceeded on the basis of applicability of compounded levy scheme to the appellants and, therefore, the appellants being not entitled to avail the credit. Though we are not ignoring the finding of the adjudicating authority that since the goods were received prior to 01.03.2001 the appellants were not entitled to claim credit in respect thereof after 01.03.2001 to which our attention was drawn by the learned DR, having said so, it also needs to hold that it was necessary for the authorities to deal with the aspect about the effect of the Notification. We find no such exercise by both the authorities below. In the circumstances, therefore, while agreeing with the learned advocate for the appellants that the authorities could not have saddled the appellants with the demand of Rs. 31,65,458/-,

without considering the effect of the notification, bearing in mind, the undisputed facts on records, also it would be appropriate to set aside the orders passed by both the authorities below and remand the matter to the adjudicating authority to deal with the matter afresh in accordance with the provisions of law and bearing in mind the parameters fixed under the show cause notice and the observations made hereinabove.

20. The appeal accordingly stands disposed of in the above terms.

(JUSTICE R.M.S. KHANDEPARKAR)
PRESIDENT

(RAKESH KUMAR)
MEMBER (TECHNICAL)

Golay