

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
EXCISE APPEAL BRANCH

Appeal No. E/1135/2005 - EX[DB]

Date 09/08/2010

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

To :
M/S VOHRA DYEING.

TAJPUR ROAD LUDHIANA
M/S VOHRA DYEING.

C.C.E. LUDHIANA

Appellant

Vs
Respondent

2010 EX[DB] dated 06-8-10

I am directed to transmit herewith a certified copy of Final order No. 542/
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

CENTRAL EXCISE HOUSE, 'F' BLOCK, RISHI NAGAR, LUDHIANA 141001 (PUNJAB)

2. Adv. / Consult

MR.R. SANTHANAM

C-3/210, JANAK PURI, NEW DELHI - 110 058.

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 Publications Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi - 3

8 Company Law Institute of India Pvt Ltd., No.2 (Old No. 36), Vaithyaram Street, T. Nagar, Chennai -17

9 M/s. Deeparchie Publications, M-93, Marg. 46, Saket, New Delhi 110017

10 Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi - 110005

11 Easy Service Tax Online Dot Com Pvt.Ltd. 407A, Iscon Mall, Above Star India Bazar, Satellite Road, Ahmedabad-15

12 LAWCRUX Advisors Pvt Ltd, LAW House, 1-8, Sector - 10, Faridabad 121003 (Harvana)

13 TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor, Vasant Arcade, Nelson Mandela Road, Vasant Kunj, New Delhi - 110070

14 Office Copy

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16, HON'BLE PRESIDENT.


Assistant Registrar
(Excise Appeal Branch)

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
West Block No.2, R. K. Puram, New Delhi.

Date of hearing: 01.07.2010

Date of decision: 6.8.2010

For approval and signature:

Hon'ble Shri 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.	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?	See
4	Whether Order is to be circulated to the Departmental authorities?	For

Excise Appeal No. 1135 of 2005

[Arising out of Order-in-Appeal No. 07/CE/Appeal/Ldh/05 dated 20.01.2005 passed by the Commissioner (Appeals), Central Excise, Ludhiana].

M/s Vohra Dyeing

Appellants

Vs.

CCE, Ludhiana

Respondent

Appearance: Mr. R. Santhanam, Advocate for the appellants.
Rep. by Sh. B.L. Soni, DR for the respondent.

Coram: Hon'ble Sh. Justice R.M.S. Khandeparkar, President
Hon'ble Sh. Rakesh Kumar, Member (Technical)

FINAL Oral Order No. 542 / 10-EX

Per: Shri Justice R.M.S. Khandeparkar:

This appeal arises from order dated 20.01.2005 passed by the Commissioner (Appeals), Ludhiana. By the impugned order, the appeal filed by the appellants against the order passed by the adjudicating authority has been dismissed. The Assistant Commissioner, Ludhiana by his order dated 16.01.2004 had confirmed the demand of Rs. 69,216/- against the appellants alongwith the interest thereon and the penalty of equal amount.

2. The appellants were engaged in manufacture of man made processed knitted fabrics classifiable under tariff sub heading No. 6002.93 of the first Schedule to the Central Excise Tariff Act, 1985. The tariff rate of Central Excise duty for such goods had been prescribed @ 16% advelorem as basic excise duty plus 8% as additional excise duty. The appellants however, were paying duty at the concessional rate claiming the benefit under Notification No. 14/2002-CE dated 01.03.2002. The said notification prescribed the concessional rate of duty for such goods subject to compliance of specified conditions. In terms of Sl. No. 16 of the table to the said notification read with the proviso (a) thereof, such goods were chargeable to concessional rate of 8% basic excise duty plus 4% additional excise duty totaling to 12% advelorem duty, subject to condition that the goods were made from textile fabrics on which appropriate duty of excise had been paid. However, the raw materials out of which the said goods were manufactured by the appellants were exempt from payment of duty of excise and no duty was therefore paid on inputs by their manufacturer. As the condition of payment of appropriate duty on the inputs was not fulfilled, the appellants were not entitled to avail the benefit under the said notification, more particularly in view of the decision of the Apex Court in the matter of

CCE Vs. Dhiren Chemical Industries reported in 2002 (139) ELT 3 (S.C.) read with the Board Circular No. 667/58/2002-CX dated 26th September 2002 and, therefore, a show cause notice dated 1st October 2003 came to be issued to the appellants. The proceedings were sought to be contested by the appellants without any success.

3. The impugned order is sought to be assailed by the learned Advocate for the appellants while contending that appellant's factory is a composite mill within the meaning of the said expression under Notification No. 14/2002-CE dated 01.03.2002 and, therefore, the appellants were squarely entitled to avail the benefit under the said notification. Reliance is placed in the decision of the Tribunal in the matter of **Commissioner Vs. Prem Industries** reported in 2009 (242) ELT 588. This aspect however, was totally overlooked by both the authorities below and, therefore, the decisions arrived at by both the authorities cannot be sustained and are liable to be set aside and matter remanded to decide afresh about the said claim of the appellants. He further submitted that the authorities below erred in not even considering this aspect and failing to record any finding in that regard. He further submitted that in any case, there was absolutely no intention to evade the duty as such and, therefore, there was no justification for imposition of penalty. Further, drawing our attention to Circular No. 680/71/2002-CX dated 10.12.2002 he submitted that the appellant's factory is a composite mill as has been defined in the said circular which squarely applies to the appellants' case.

4. Without prejudice to the above submissions, the learned Advocate further submitted that even assuming that the appellants are not entitled for the benefit of Notification No. 14/2002, at least they are entitled for the

benefit of Notification No. 6/2002-CE (N.T.) dated 01.03.2002 as has been held by the Delhi High Court in the matter of **Commissioner of Central Excise vs. M.B. Dyers** reported in 2010 (253) ELT 402 (Del.).

5. Learned DR on the other hand submitted that the appellant's factory is not a composite mill either within the meaning of the said expression under Notification No. 14/2002-CE dated 01.03.2002 or under Notification No. 6/2002-CE (NT) dated 01.03.2002 as also under Circular No. 680/71/2002-CX dated 10.12.2002. According to the learned DR, the appellants are not engaged in the process of manufacture of yarn from fibres, which is essential function to constitute a composite mill. According to learned DR the case is fully covered by the decision of the Tribunal in **Auro Textile vs. Commissioner of C. Ex. Chandigarh** reported in 2010 (253) ELT 35 (Tri. Del.) He further submitted that the decision of the Delhi High Court is in respect of cenvat credit and, therefore, is not applicable to the facts of the case in the matter in hand. Attention was also drawn to the decision of the Apex Court in the matter of **Collector of Central, Bombay vs. Kohinoor Mills** reported in 1995 (77) ELT 42

6. As far as merits of the case is concerned, the impugned orders are sought to be assailed only on ground that the authorities below failed to consider the defence of the appellants that theirs is a composite mill and, therefore, they are entitled for the benefit of the Notification No. 14/2002 dated 01.03.2002 and more particularly in view of the explanation VII(2) to the said notification. In other words, it is the case of the appellants that the appellants being a composite mill, they are entitled for the exemption benefit under the said notification.

7. With persistent enquiry with the learned Advocate for the appellants, it was hesitantly conceded by him that the ground he was canvassing to assail impugned order was not specifically raised in the memo of appeal filed in the Tribunal, nor it was raised in the appeal before the Commissioner (Appeals). In fact, it was not even raised in defence to the show cause notice. When we asked the learned Advocate to point out such ground, if any, taken in the memo of appeal before the Tribunal our attention was drawn to ground 'L'. The said ground reads thus:-

"L) The appellant has already paid the appropriate duty legitimately payable on the man-made processed fabrics under Notification No. 14/2002-CE dated 01.03.2002 and all the assessments have become final and conclusive and therefore there can be no reassessment to enhance duty the liability and to deny the benefit of duty concession rightly allowed earlier to the appellant".

8. Plain reading of the above ground nowhere discloses any ground relating to the claim of the appellants that the appellant's factory is a composite mill. There is not even a statement of fact to that effect made anywhere in the memo of appeal filed either before this Tribunal or even in the reply to the show cause notice. In other words, the ground on which the impugned orders are sought to be assailed was never raised by the appellants before the lower authorities.

9. Certainly, interference in the orders passed by the lower authorities on a ground extraneous to the matter in the sense that the basic facts required to deal with the same having not been pleaded cannot be entertained nor on this ground there could be interference in the orders of the lower authorities. The law in this regard is well settled.

10. Rule 10 of CESTAT Rules, 1982 clearly provides that the appellant shall not, except by leave of the Tribunal, urge or be heard in support of any grounds not set forth in the memorandum of appeal, but the Tribunal, in deciding the appeal, shall not be confined to the grounds set forth in the memorandum of appeal or those taken by leave of the Tribunal under these rules provided that the Tribunal shall not rest its decision on any other grounds unless the party who may be affected thereby has had a sufficient opportunity of being heard on that ground. Rule therefore clearly requires the appellants to confine to the grounds of challenge disclosed in the memo of appeal. Apart from those grounds, the appellants can raise new grounds subject however to the leave in that regard being obtained from the Tribunal.

In the case in hand, the appellants have not obtained any such leave. Even the learned Advocate for the appellants has not disclosed any reason for not raising the ground at any earlier point of time.

11. The question as to whether it is a composite mill or not is not a pure question of law. There has to be facts on record to decide such issue. Apart from the facts to decide such issue, it is also necessary for the party raising such point to raise the same at the earliest available opportunity, so that the opposite party gets ample opportunity to meet the said point by placing necessary facts to counter the said contention of the claimant. Basic principles of natural justice also require the party raising a point based on facts, to plead such facts at the earliest opportunity and give fair opportunity to other side to meet the case. Admittedly, no such plea was raised either in the reply to the show cause notice, nor during the course of pendency of the proceedings before the adjudicating authority and not even in the memo of appeal.

12. Even otherwise assuming that the appellants are entitled to raise the above ground, we proceed to deal with the same. -

13. Plain reading of Explanation VII to the said notification would reveal that in order to constitute a factory to be a composite mill, the manufacturer therein should be one who is engaged in processing of fabrics alongwith spinning of yarn from fibres and weaving or knitting or crocheting of fabrics within the same factory. Besides the manufacturer who is engaged in processing of fabrics alongwith weaving or knitting or crocheting of fabrics in the same factory has also to satisfy the requirement of condition under column (5) of the said notification in order that factory be a composite mill. Condition 5 clearly requires that "If made from textile fabrics, whether or not processed, on which the appropriate duty of excise leviable under the First Schedule to the said Central Excise Tariff Act and the Additional Duties of Excise (Goods of Special Importance) Act, read with 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". In other words, a factory cannot constitute a composite mill unless there is processing of fabrics alongwith spinning of yarn from fibres and there is payment of appropriate excise duty as stated above.

14. Explanation VII(2) of the said notification provides that for the purpose of exemption to processed textile fabrics, specified in the Table against any of the Sl. Nos. 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. Nos. is intended to have been satisfied if the said processed fabrics are manufactured from textile fibres or yarns, as the case may be, on which the appropriate duty of excise leviable under the First or the Second Schedule to the said Central Excise Tariff Act read with 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. As far as the case of the appellants is concerned, it is governed by Sl. No. 16 in the table to the said notification which reads thus:-

Sl.No.	Chapter or heading No. or sub-heading No.	Description	Rate of duty	Condition
(1)	(2)	(3)	(4)	(5)
16	6001.12, 6001.22 6001.92, 6002.10 6002.20, 6002.30 6002.43 or 6002.93	Knitted or crocheted fabrics, other than of cotton, subjected to any process	16%	5

15. If we peruse circular dated 10.12.2002, the explanation regarding the term composite mill is nothing but reproduction of its definition in explanation VII(2) of the said notification. Similar is the case in relation to Notification No. 6/2002-CE (N.T.) dated 01.03.2002. Therein, the composite mill has been defined to mean a manufacturer who is engaged in processing of fabrics with the aid of power alongwith the spinning of yarn from fibres and weaving or knitting or crocheting of fabrics within the same factory and includes multi locational composite mill, i.e. public limited company which is engaged in the processing of fabrics with the aid of power alongwith the spinning of yarn from fibres and weaving or knitting or

crocheting of fabrics in one or more factories owned by the same public limited company. In other words, the definition discloses the requirement of processing of fabrics alongwith spinning of yarn from fibres, and both these functions are undisputedly not conducted in the factory of the appellants. Besides, the definition of the composite mill under notification No. 6/2002 is only for the purpose of said notification.

16. To claim the benefit under Notification No. 14/2002, we have to understand the composite mill as defined in the said notification itself. In fact, that has been clearly stated in Explanation VII itself as the said explanation begins with the expression "in this notification" and are followed by the words "for the purposes of exemption". In other words in order to justify the claim of exemption benefit under the said notification, the factory has to be composite mill as defined under the said Explanation VII. It is settled law that no amount of exclusion or inclusion of words is permissible under the guise of interpretation in case of an exemption notification. An exemption notification has to be understood in terms of what has been stated in the notification. Neither any addition nor subtraction is permissible. When the notification itself defines the term for the purpose of claiming benefit under notification, it is not permissible to take resort to the definition of similar word in some other notification.

17. The Apex Court in **Kohinoor Mills** case while dealing with the issue that when yarn was manufactured in spinning department of a composite textile mill and was captively consumed in the weaving department for manufacturing fabrics there from, whether any excise duty was payable on the manufactured yarn prior to 15.07.77 when an earlier notification dated 18.06.77 exempting such yarn from the payment of excise duty was in

operation, only because the ultimate fabrics got manufactured from such yarn from 15.07.77 when the earlier notification stood rescinded, and dealing with the Notification No. 132/77 as well as Notification No. 226/77-CE dated 15.07.77 and referring to the term composite mill held that "composite textile mill is one which contains two departments among other, namely, spinning and weaving department.

18. For the reasons stated above, the appellants claim about composite mill is totally devoid of substance.

19. The Delhi High Court, in **M.B. Dyers** case, referring to Notification No. 6/2002 held that "A plain reading of the said notification shows that a distinction has been drawn out between the composite mills and other than composite mills. Explanation 2 to Clause (6) of the notification makes it clear as to what is meant by a composite mill. It means a manufacturer who is engaged in the processing of fabrics with the aid of power alongwith the spinning of yarn from fibres and weaving or knitting or crocheting of fabrics within the same factory etc. The respondent, as already mentioned above, is not a composite mill. It manufactures its final product-processed fabrics not by spinning of the yarn from fabrics but from grey fabric purchased from the market. Explanation 3 is also relevant inasmuch as it clarifies that the provisions of the notification would not apply where the processed fabric itself is used as an input for further processing. The consequence of this explanation and clarification is that if there is any processed fabric and the same is further processed into the final product namely processed fabric, the same would not be eligible for the benefit under the said notification. However, insofar as yarn/fabric is concerned the same, admittedly, finds mention in the table of inputs in Column-2 of the said notification".

20. Needless to say that the decision on the scope of the term composite mill was with reference to the said expression used in the notification which was under the consideration before the Delhi High Court. The same cannot be applied even to the similar expression used in a totally different notification. The phraseology of the definition attached to the term "composite mill" under Notification No. 6/2002 is different from one used in Notification No. 14/2002. The decision of the Delhi High Court in **M.B. Dyers** case is, therefore, cannot be applied to the cases relating to the claim of benefit under Notification No. 14/2002.

21. As regards the claim relating to deemed credit, reliance is placed in the decision of the Delhi High Court in **M.B. Dyers** case; however, the same cannot be of any help to the appellants at this stage. Undisputedly, no such claim was made before the adjudicating authority or lower authority. Besides that was in relation to cenvat credit. The appellant's claim relates to certain exemption in the matter of payment of duties. In case the appellants wants to make any claim based on Notification No. 2/2002 which was issued under Rule 11 of the Cenvat Credit Rules, 2002, the appellants have to file proper claim in that regard by following the procedure known to law. In case such claim is made, needless to say that the authorities will have to deal with the same in accordance with provision of law. It is too premature for the Tribunal to express any opinion in that regard.

22. Once we find no substance in the claim of the appellants regarding composite mill as rightly submitted by the learned DR, the case stand fully covered by the decision of the Tribunal in the matter of **Auro Textile** case.

23. The decision in **Prem Industries** case is of no help to the appellants.

In **Prem Industries** case the dispute was only in respect of quantity of processed knitted fabrics which was manufactured out of grey /unprocessed fabrics purchased from the market which according to the Revenue could not have been treated as duty paid fabrics as serial No. 14 of the same exemption notification also exempted knitted unprocessed fabrics from whole of the duty subject to certain conditions specified therein. That was a totally different issue unconnected with the issue under consideration in the matter in hand.

24. Once it is found that the appellants, without disclosing all the facts, had illegally sought to avail the benefit of notification when in fact they were not entitled to claim the same, the question of non imposition of penalty does not arise.

25. In the result, appeal fails and is hereby dismissed.

[Justice R.M.S. Khandeparkar]
President

[Rakesh Kumar]
Member [Technical]

/Pant/