

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

Appeal No. E/2352/2004 - EX[DB]

Date 11/04/2011

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

To :
M/S MARKFED HDPE SACKS PLANT
ANANDPUR SAHIB, DISTT ROPAR
M/S MARKFED HDPE SACKS PLANT

Appellant

Vs
Respondent

C.C.E. LUDHIANA

I am directed to transmit herewith a certified copy of **Final order No.339**
passed by the Tribunal under **Section 35-C(1) of Central Excises Act, 1944**

2011 EX[DB] dated 08-4-11


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 *SH. EHRAZ HUSAIN, ADV, C/O*
MR. JOY KUMAR,
FLAT NO 261/1, SEC 45-A, CHANDIGARH.

3. C.D.R
4. Bar association, CESTAT, New Delhi
5. Director Publications, Customs, Excise, I.P. Estate, New Delhi
6. M/s Centax Publications 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. M/s. Deeparchie Publications, M-93, Marg. 46, Saket, New Delhi 110017
9. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi - 110005
10. Easy Service Tax Online Dot Com Pvt.Ltd. 407A, Iscon Mall, Above Star India Bazar, Satellite Road, Ahmedabad-15
11. LAWCRUX Advisors Pvt Ltd, LAW House.1-8, Sector - 10, Faridabad 121003 (Harvana)
12. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor, Vasant Arcade, Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
13. Office Copy
14. Guard file
15. HON'BLE PRESIDENT.


Assistant Registrar
(Excise Appeal Branch)

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

West Block No.2, R.K.Puram, New Delhi

COURT-I

Date of hearing: 24.1.2011

Date of pronouncement: 8.4.2011

Central Excise Appeal No.2352 of 2004

Arising out of the order in original No.36/Ldh/04 dated 31.3.2004 passed by the Commissioner, Central Excise, Ludhiana.

For Approval and Signature:

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

Hon'ble Shri Rakesh Kumar, Technical Member

1	Whether Press Reporter 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 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?	Seen
4	Whether Order is to be circulated to the Departmental authorities?	Yes

M/s Markfed HDPE sacks Plant

.. Applicant/appellant

Vs.

Commissioner of Central Excise,
Ludhiana

.... Respondent

Appearance:

Shri Ehraz Husain, Advocate for the appellants

Shri N.Anand, Authorized Departmental Representative (DR) for the Revenue

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

FINAL Oral Order No. 339 / 2011-EX

Per Shri Justice R.M.S. Khandeparkar:

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

2. This appeal has been heard pursuant to the order of remand dated 24.8.2010 passed in C.E.A. No.89 of 2008 by the Hon'ble High Court of Punjab and Haryana.

3. The appellants herein were engaged in the manufacture of goods namely, HDPE woven sack/bags, HDPE cover sheets, HDPE tape and HDPE fabrics classifiable under Tariff Heading No.3923 and 3920 of the First Schedule to the Central Excise Tariff Act, 1985. In the course of the audit of the appellants' records in relation to the period from April 2002 to March 2002, ^{from} it was observed that ~~since~~ 10.9.2001 to 22.11.2001, the appellants had received back 2616 rejected LDPE cap covers valued at Rs.1,18,27,985/- involving duty of Rs.18,92,478/- from their branch offices. Those goods were manufactured by the appellants. The process of the manufacture involved joining of ends of bought out LDPE film received from M/s Essen Multipack Ltd., Rajkot by heat and press treatment and fixing of eyelets. At the time of receipt of the film, Cenvat credit on those LDPE film was availed by the appellants. The appellants cleared those goods after manufacture and each piece weighing approximately 61 kgs. was cleared originally at the rate of Rs.5949/- and accordingly, duty was paid. Some of those goods were received back without any cenvatable document issued by the branch offices under cover of challans issued by those branches. The appellants on receipt of the said goods removed the top cover/portion of the LDPE cap covers and replaced LDPE film therein with newly bought out LDPE film ^{procured} ~~produced~~ from the manufacturer of LDPE film. The said film for the purpose of replacement was purchased by the appellants on payment of duty and the cenvat credit in respect thereof was also availed. After repairing the LDPE cap cover, the goods were again sent back to the respective branches. However, the LDPE cap covers received during the period 10.9.01 to 22.11.01 were sent back without any payment of duty. In respect of LDPE covers received subsequent to that period, cenvat credit was availed on the strength of self invoices and the same were cleared after payment of duty at the same value

on which they were initially cleared. During the period from 10.9.01 to 22.11.01, the appellants received rejected LDPE cap covers valued at Rs.,1,18,27,985/- involving duty of Rs.18,92,478/- for replacement of top cover and resealing.

4. In the above factual background, when the matter came up for hearing before the Tribunal while disposing the appeal, the Tribunal while dealing with the order passed by the adjudicating authority reduced the penalty to Rs.1 lakh from Rs.8,57,094/- which was imposed by the adjudicating authority.

5. The remand of the case has been essentially to deal with the issue relating to 100% penalty under Section 11AC of the Central Excise Act, 1944. The Hon'ble High Court while remanding the matter has observed thus

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" We find from the order of the Tribunal that there is no finding of concealment on the part of the assessee. Once there is a finding that the matter falls under Section 11AC of the Act, penalty had to be minimum. In absence of finding to that effect, penalty was not justified. This being the position, there is an error in the order of the Tribunal and penalty could be justified only if the case falls under Section 11AC of the Act. If the case falls under Section 11AC, penalty had to be at the rate mentioned therein".

Having observed as above, the Hon'ble High Court has directed thus -

" In view of the above, there being patent error in the order of the Tribunal, the order to the extent of reducing penalty to Rs.1 lakh is set aside. The matter is remanded to the Tribunal for fresh decision on merits on the issue of penalty in accordance with law".

6. The only issue, therefore, to be decided in this matter at this stage is relating to the penalty under Section 11AC. It is to be seen whether the penalty is justified in the facts and circumstances of the case or not.

7. Learned Advocate for the appellants submitted that the imposition of penalty was in relation to the issue pertaining to the admissibility of the cenvat credit in respect of inputs utilised in repairs of the rejected goods which were cleared at the same price. Drawing our attention

to Rule 16 of Central Excise Rules, 2002, learned Advocate for the appellants submitted that the authorities below erred in applying the provisions of sub-rule (2) of Rule 16 when, in fact, the authority ought to have applied the provisions of sub-rule (1). On the other hand, the DR submitted that no fault can be found with the finding arrived at by the authority below in relation to the obligation of the appellants while availing cenvat credit.

8. Learned Advocate for the appellants also submitted that the Tribunal in the appellant's own case under order dated 28.3.2008 has clearly held that in the absence of material showing any positive intention on the part of the appellants which is a Government undertaking, to evade duty or unless there is a case of fraud, collusion etc., imposition of penalty is not justified and considering the same, there cannot be any justification for imposition of any penalty. The DR on the other hand, placing reliance in the matter of Union of India vs. Dharamendra Textile Processors reported in 2008 (231) ELT 3 (SC) and Union of India vs. Rajasthan Spinning & Weaving Mills reported in 2009 (239) ELT 3 (SC) submitted that the proceedings in the case in hand were initiated by invoking the extended period of limitation under Section 11AC and the finding in that regard had attained finality and the factum of suppression of facts also stand established and therefore, the provisions of Section 11AC in relation to the penalty are clearly attracted.

9. Perusal of the records and the order of the Hon'ble High Court apparently disclose that the matter on merits was decided against the appellants and the appeal against the same also stood decided against the appellants. In fact, the Tribunal had merely reduced the penalty amount. However, the said order of reduction in penalty was challenged by the Department before the High Court and by the said order, the High Court set aside the said part of the order of the Tribunal while observing that reduction was without any appropriate finding.

10. Perusal of the earlier order of the Tribunal passed on 11.7.2007 discloses that in relation to the merits of the case, the Tribunal had recorded thus –

" We find that admitted facts of the case are that the appellants are undertaking repair of the goods which were cleared on payment of duty and they are using some inputs on which credit has been taken for repair only. It is a well settled law that repair is not a manufacturing activity and the credit can only be availed in respect of the inputs which are used in the manufacture of excisable goods. In view of the settled position, we find no infirmity in the impugned order where the input credit was denied on the ground that the inputs are used only for repair purposes".

11. Undisputedly, the appellants did not challenge the order any further. Obviously, therefore, the said order on merits attained finality.

12. As regards the issue of suppression and bar of limitation, the adjudicating authority had clearly held thus –

" The noticee has tried to justify his credit on the ground that these invoices were used for repair of the rejected goods which cleared on payment of duty. I observe that in this regard, the noticee is trying to adopt two different standards for the same job. The duty demand in respect of the goods received during the period 10.2.2001 to 22.11.2001 was challenged by them on the ground that it was a repair work and the same job for subsequent period cannot be termed as manufacture in terms of sub-rule (2) of Rule 16, if the process to which the goods are subjected before being removed does not amount to manufacture, the manufacturer shall pay an amount equal to the pay duty on cenvat credit taken and in any other cases he is required on the date of removal. In this case, the noticee has already paid the duty which was equivalent to the amount of credit availed by them, but this does not entitle them to avail credit on the inputs used. In repair of the goods which does not tantamount to manufacture as per their own stand. Thus, they were not eligible to avail credit of Rs.8,57,094/- which is recoverable from them under the provisions of Rule 12 of Cenvat Credit Rules, 2001 read with Section 11A of the Act by invoking extended period of limitation. The noticee had never declared/intimated the department that the said inputs were used for repair of rejected goods and there was a specific allegation in this regard in the show cause notice which was never contested".

13. Plain reading of the order of the adjudicating authority and earlier order of this Tribunal would apparently disclose that as far as merits

of the case is concerned ~~and~~ the issues in that regard stand answered against the appellants and the issue relating to the suppression resulting in invocation of extended period of limitation also stand answered against the appellants by the adjudicating authority and all those findings ^{were} ~~are~~ not interfered with by the Tribunal or by the High Court. Undoubtedly, the matter has been remanded to decide the penalty issue without interfering with any of the findings ^{of} ~~by~~ the adjudicating authority and on observation that the Tribunal had interfered with the order of penalty without any finding to justify such interference.

14. It is the contention of the Advocate for the appellants that the appellant's bona fide belief that the provisions of Rule 16(1) of the said Rules were attracted and not Rule 16(2) thereof and hence, there is no case for imposition of any penalty. Secondly, it is sought to be contended that since the appellant is a Government undertaking, in the absence of material showing positive intention on the part of the appellants to evade duty, the imposition of penalty is not justified.

15. As regards the bona fide belief, the claim of applicability of Rule 16(1) of the said Rules, the contention is to be rejected as we do not find any such claim having been made by the appellants at any time before the adjudicating authority or even in the appeal before the Tribunal. Besides, Rule 16(1) of the said Rules provides that where any goods on which duty had been paid at the time of removal thereof are brought to any factory for being remade, refined, reconditioned or for any other reason, the assessee shall state the particulars of such receipt in his records and shall be entitled to take Cenvat credit of the duty paid as if such goods are received as inputs under Cenvat Credit Rules, 2002 and utilise this credit according to the said rules. Apart from the fact that the rule nowhere provides that the concept of repairs having been included in this provision, it further specifically provides that the utilisation of such cenvat credit has necessarily to be in accordance with the Cenvat Credit Rules. The Cenvat Credit Rules

nowhere permit utilisation of the credit when the final product is exempt from payment of duty or the process undertaken does not amount to manufacture. Besides, Rule 16(1) which is confined to the activity "remaking, refining, reconditioning". It also use an expression "for any other reason". However, the same has to be read without forgetting principle of ^{ejusdem} ~~ejusdem~~ *generis*.

16. As far as sub-rule (2) of Rule 16 is concerned, it covers all the situations to which sub-rule (1) is not applicable. It provides that if the process to which the goods are subjected before being removed does not amount to manufacture, the manufacturer shall pay an amount equal to the cenvat credit taken under sub-rule (1) and in any other case the manufacturer shall pay duty on goods received under sub-rule (1) at the rate applicable on the date of removal and on the value determined under sub-section (2) of Section 3 or Section 4 or Section 4A of the Act, as the case may be. In other words, even though manufacturer on return of the goods seeks to avail of cenvat credit, he will have to pay the amount equal to such credit in case a process under which the returned product undergoes does not amount to manufacture. In the case in hand, admittedly, returned goods ^{did} ~~do~~ not undergo any process of manufacture. Being so, there cannot be any dispute that the provision of Rule 16(2) were clearly attracted and there was no occasion for the appellants to claim the benefit under sub-rule (1) of Rule 16. The claim of the appellants that they bona fide believed about the applicability of Rule 16(1) is absolutely devoid of substance.

17. It is pertinent to note that the appellant is not a living person. It is a corporate body. Being so, in order to claim the bona fide belief on the basis of the wrong application of the provision of law, it is always necessary for the claimant thereof to disclose the name of the person who is responsible for such bona fide belief. Bona fide belief can be of living person and not non-living person. Obviously, if the living person who is in-charge of

the affairs of the corporate body establishes the bona fide belief, the corporate body can certainly claim the bona fide belief. In other words, a corporate body can claim the bona fide belief if it discloses the identity of the person who was in charge of the affairs of the corporate body at the relevant time and who might have acted under bona fide belief. There is no such disclosure by the appellants.

18. As rightly pointed out by the DR in view of clear finding by the adjudicating authority about suppression of fact and consequential invocation of extended period of limitation and failure on the part of the appellants to establish their specific plea of bona fide belief, we are left no alternative than to hold that it is a clear case of suppression of fact leading to evasion of duty warranting penalty in terms of the provisions of section 11AC. In the result, therefore, there is no case for interference in the impugned order on the issue of penalty of equal. The decision of the Apex Court in the matter of **Dharamendra Textile Processors and Rajasthan Spinning and Weaving Mills** are clearly applicable.

19. Hence the appeal fails and is hereby dismissed.

(Pronounced in the open Court on 8.4.2011)

(Justice R.M.S. Khandeparkar)
President

(Rakesh Kumar)
Technical Member

scd/