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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

Date **27/05/2011**

Appeal No. E/3900/2010 - EX[DB] WITH
E/S/3733/2010, E/COD/504/2010-EX

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

To :
SMT SUSHILA DEVI PROP
MITTAL FOLL INDUSTRIES, 22/9 SHAKTI NAGAR,
DELHI.
110007

SMT SUSHILA DEVI PROP Appellant

Vs

C.C.E. ROHTAK **STAY ORDER NO. 583/2011-EX** Respondent
MISC ORDER NO. 301/2011-EX

I am directed to transmit herewith a certified copy of **Final order No.446/ 2011 EX|DB|** dated 24-5-11 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. ROHTAK
SCO NO,6 SECTOR 1, ROHTAK.

2. Adv. / Consult SH. ASMITA A.NAYAK, ADV,
NO. D/619, 1ST FLOOR, C.R. PARK,
NEAR MARKET NO. 2, N. DELHI-19

3. C.D.R
4. Bar association. CESTAT. New Delhi
5. Director Publications. Customs. Excise. I.P. Estate. New Delhi
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 - 110005
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
14. 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:25.4.2011

Stay Application No.3733 of 2010 in
Central Excise Appeal No.3900 of 2010

Arising out of the order in appeal No.174/MA/RTK/2009 dated 23.7.2009 passed by the Commissioner, Central Excise (Appeals), Delhi III.

Smt. Sushila Devi, Prop. M/s Mittal Foil Industries ... Appellant

Vs.

C.C.E., Rohtak .... Respondent

Appearance:

Ms. Asmita Nayak, Advocate for the appellants/applicants
Shri N. Anand, Authorized Departmental Representative (DR) for the Revenue

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

STAY Oral Order No. 583/2011-EX

Per Shri Justice R.M.S. Khandeparkar:

Heard the Advocate for the appellant and the DR for the respondent. As we propose to dispose of the appeal itself, the application is disposed of without insisting for pre-deposit with the direction to the registry to place the appeal for final disposal. Application accordingly stands disposed of.

(Justice R.M.S. Khandeparkar)
President

(Mathew John)
Technical Member

scd/

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

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

COURT-I

Date of hearing: 25.4.2011

Condonation Application No.504 of 2010 in
Central Excise Appeal No.3900 of 2010

Smt. Sushila Devi, Prop. M/s Mittal Foil Industries ... Appellant

Vs.

C.C.E., Rohtak .... Respondent

Appearance:

Ms. Asmita Nayak, Advocate for the appellants/applicants
Shri N. Anand, Authorized Departmental Representative (DR) for the Revenue

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

Misc Oral Order No. 301/2011-EX

Per Shri Justice R.M.S. Khandeparkar:

Heard the Advocate for the appellant and the DR for the respondent. In view of the fact that the appellant's contention that the impugned order was never communicated to the appellant has not been countered by the respondent by filing proper affidavit in reply nor any material in support of service of copy of the impugned order upon the appellant has been placed on record, hence, the, application is allowed and delay is condoned.

(Justice R.M.S. Khandeparkar)
President

(Mathew John)
Technical Member

scd/

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

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

COURT-I

Date of hearing: 25.4.2011
Date of decision: 24.5.2011

Central Excise Appeal No.3900 of 2010

Arising out of the order in appeal No.174/MA/RTK/2009 dated 23.7.2009 passed by the Commissioner, Central Excise (Appeals), Delhi III.

For Approval and Signature:

Hon'ble Shri Justice R.M.S. Khandeparkar, President
Hon'ble Shri Mathew John, Technical Member

1	Whether Press Reporter may be allowed to see the Order for publication as per Rule 26 of the CESTAT (Procedure) Rules, 1982?	Yes
2	Whether it should be released under Rule 26 of 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

Smt. Sushila Devi, Prop. M/s Mittal Foil Industries ... Appellant

Vs.

C.C.E., Rohtak .... Respondent

Appearance:

Ms. Asmita Nayak, Advocate for the appellants/applicants
Shri N. Anand, Authorized Departmental Representative (DR) for the Revenue

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

FINAL Oral Order No. 446/2011-EX.

Per Shri Justice R.M.S. Khandeparkar:

This appeal was heard in terms of the order passed in Stay Application No.3733 of 2010 on 25.4.2011. We have also perused the written submissions filed on behalf of the appellant and various judgments sought to be relied upon.

2. This appeal arises from the order dated 23.7.2009 passed by the Commissioner (Appeals), Gurgaon. By the impugned order, the appeal filed by the appellant against the order of the adjudicating authority has been dismissed in exercise of the powers conferred under Section 35F of the Central Excise Act, 1944. The Assistant Commissioner , Sonepat (Haryana) by his order dated 26.3.2008 had confirmed the recovery of cenvat credit to the tune of Rs.4,65,086/- and cess amount of Rs.9,303/- which was availed by the appellant for the period from June 2006 to February 2007 and cenvat credit of Rs.58,204/- and of Rs.1,665/- which was availed by the appellant during the period from March 2007 to June, 2007 along with interest. No penalty was imposed. The appellant preferred appeal against the same and also filed application for waiver of the requirement of pre-deposit. By order dated 10.6.2009, the Commissioner (Appeals) directed the appellant to deposit a sum of Rs.1,50,000/- on or before29.6.2009 for the purpose of compliance of the requirement of Section 35F of the said Act. The appellant failed to deposit the amount and instead filed an application dated 6.7.2009 for review of the said order. The appeal was heard on 29.7.2009 wherein the appellant was represented by her Advocate. Thereafter, the impugned order came to be passed, dismissing the appeal for non-compliance of the requirement of pre-deposit.

3. The appellant seeks to challenge the said order essentially on the ground that the Commissioner (Appeals) erred in dismissing the appeal without intimating the appellant his decision on her application for modification of the stay order dated 10.6.2009 and without granting further opportunity for compliance of the said order. The appellant has also sought to challenge the decision on the merits of the case. The written submissions also include various grounds of challenge which are not included in the memo of appeal.

4. Taking into consideration the rival contentions, the first issue which arises for consideration is whether it was necessary for the Commissioner (Appeals) to decide and dispose of the application for modification of interim stay order dated 10.6.2009 prior to and independently of the appeal. The second point which requires for consideration is whether in the facts and circumstances of the case, the

Commissioner (Appeals) should have given further opportunity to the appellant for compliance of the said order dated 10.6.2009, before dismissing the appeal.

5. The impugned order clearly records that the appellant failed to deposit the amount of Rs.1,50,000/- which was directed to be deposited by 29.6.2009 under the order passed by the Commissioner (Appeals) on 10.6.2009. It also records that the appellant filed an application for review of the said order. The contention is that it was an application for modification of the order dated 10.6.2009.

6. Perusal of the impugned order discloses that after filing of the application for review or modification of the order dated 10.6.2009, the appellant was granted personal hearing on 23.7.2009 by the Commissioner (Appeals). During personal hearing, the appellant was represented by her Advocate Shri M.K. Saxena. The Advocate argued the matter on behalf of the appellant and submitted that the appellant was not in a position to deposit the amount directed to be deposited under order dated 10.6.2009. There is no dispute that the impugned order correctly records those facts. Admittedly, apart from the contention that the appellant was not in a position to deposit the amount ordered to be deposited under order dated 10.6.2009, no material was placed on record to make out a case of financial hardship if any, to the appellant to deposit the said amount. In the absence of any material in that regard on record, therefore, it was difficult to accept the contention about the inability of the appellant to deposit the amount.

7. Section 35F makes it obligatory for the appellant to deposit the amount payable under the order sought to be challenged in the appeal. The proviso thereto gives option to the appellant to invite an order of the appellate authority for waiver either of the entire or partial amount demanded under the impugned order. Undoubtedly, the same has to be on satisfaction of the appellate authority. The appellate authority has to arrive at the satisfaction in that regard based on materials on record. Once it is not disputed that no material has been placed on record to arrive at any such satisfaction, and in any case, the appellant was directed to deposit only a sum of Rs.1,50,000/-, we do not find any justifiable cause having been shown for interference in the impugned order. In fact, the impugned

order has been obviously passed as a result of failure on the part of the appellant to comply with the requirement of Section 35F.

8. The fact that the appellant had failed to comply with the obligation under Section 35F was to the knowledge of the appellant and, therefore, it was the appellant herself who had filed an application for modification of the order dated 10.6.2009. The matter in that regard was heard on 29.7.2009 wherein the appellant was represented by her Advocate. In other words, even after expiry of the period within which the appellant was required to comply with the requirement of Section 35F in terms of the order dated 10.6.2009, the appellant was given sufficient opportunity to satisfy the Commissioner (Appeals) as to why the appeal should not be dismissed for non-compliance of the said requirement of pre-deposit, however, the appellant failed to satisfy the Commissioner (Appeals) in that regard. Only option in such circumstances which was left to the Commissioner (Appeals) was to dismiss the appeal in terms of Section 35F.

9. Once the appellant fails to comply with the requirement of pre-deposit in terms of the order passed by the appellate authority under the proviso to Section 35F, there is no further provision to grant further opportunity for complying with the order of the pre-deposit. Only remedy thereafter which is available to the appellant is to satisfy the Commissioner (Appeals) against dismissal of the appeal and in case of failure to satisfy the appellate authority in that regard, consequences are to be in the nature of disposal of the appeal and that is what has happened in the case in hand. There is no requirement of law that in case of application for modification of stay order, the same should be decided independently of the appeal and prior to the disposal of the appeal.

10. The appellant has also challenged the said order on merits of the case. Once the impugned order has been passed in exercise of the powers under Section 35F of the said Act without going into the merits of the case, it is not open to the appellant to challenge the said order on merits of the case. In the absence of interference in the impugned order, the question of the Tribunal going into the merits of the case does not arise.

11. It is however to be noted that the issue involved in the matter is whether the printing of aluminium foils and slitting and cutting of the same to the smaller size amounts to manufacture in term of Section 2(f) of the Central Excise Act, 1944 or not. The said issue is no more res integra as it stands settled in view of the decision of the Apex Court in the matter of **C.C.E., New Delhi vs. S.R. Tissues Pvt. Ltd** reported in 2005 (186) ELT 385 (SC) and the decisions in the matter of **Union of India vs. J.G. Glass Industries Ltd**. reported in 1998 (97) ELT 5 (SC), **C.C.E., Chennai II vs. Tarpaulin International** reported in 2010 (256) ELT 481, **C.C.E., Madras vs. Paper Products Ltd**. reported in 2000 (115) ELT 277 read with the decision of the Bombay High Court in the matter of **C.C.E., Mumbai V vs. GTC Industries Ltd.** reported in 2011 (266) ELT 160 and in **C.C.E. vs. Printorium** reported in 1996 (87) ELT 432 (SC). All these above decisions having been considered, the Tribunal in unreported decision in the matter of Printo India Graphics (P) Limited vs. C.C.E., Delhi I in Excise Appeal No.3181 of 2010 delivered on 28.4.2011 wherein it has clearly been held that the process in relation to the product in question does not amount to the manufacture and therefore, the assessees are not entitled to avail the cenvat credit. Further in referring to the decision of the Apex Court in **Union of India vs. Indo-Swift Laboratories Ltd.** reported in 2011 (265) ELT 3 (SC), it has been held that issue relating to liability to repay the credit with interest clearly stands answered by the said decision of the Apex Court. Hence even on merits the appellant has no case at all.

12. Hence considering as above, we find no case for interference in the impugned order. The appeal, therefore, fails.

(Pronounced in the open Court on 24.5.2011)

(Justice R.M.S. Khandeparkar)
President

(Mathew John)
Technical Member

scd/