TELEGRAM : CEGCANAL
Website : www.cestat.gov.in

REGISTERED / AD
Email : cestat08@gmail.com

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066

EXCISE APPEAL BRANCH

Appeal No. E/1856/2005 - EX[DB] Date **28/02/2012**

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

To :
C.C.E.JAIPUR
N.C.R.B.STATUE CIRCLE C-SCHEME JAIPUR
302005

C.C.E.JAIPUR Appellant

Vs

M/S VANSTHALI TEXTILE INDUSTRIES LTD. Respondent

I am directed to transmit herewith a certified copy of **Final order No.A/230/ 2012 EX[DB]** dated 27-2-12 passed by the Tribunal under **Section 35-C(1)of Central Excises Act, 1944**

Assistant Registrar
(Excise Appeal Branch)

Copy to :

1. Respondent
M/S VANSTHALI TEXTILE INDUSTRIES LTD.
F-3-5, RLLCO INDUSTRIAL AREA
SHAHJANPUR DISTT ALWAR
RAJASTHAN

2. Adv. / Consult
MR.R. KRISHNAN
297-E, POCKET-II, PHASE-I, MAYUR VIHAR DELHI-110091.

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-3
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

Assistant Registrar
(Excise Appeal Branch)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.
Principal Bench, New Delhi

COURT NO. III

Excise Appeal No. 1856 of 2005

[Arising out of the Order-in-Appeal No. 53 (MPM) CE/JPR-I/2005 dated 07/03/2005 passed by The Commissioner (Appeals-I), Central Excise, Jaipur.]

For Approval and signature :
Hon'ble Ms. Archana Wadhwa, Member (Judicial)
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?	:
2.	Whether it would be released under Rule 27 of the 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?	:
4.	Whether order is to be circulated to the Department Authorities?	:

CCE, Jaipur – I Appellant

Versus

M/s Vansthali Textile Industries Ltd. Respondent

Appearance

Shri S.R. Meena, Authorized Representative (DR) – for the appellant.

Shri R. Krishanan, Advocate - for the Respondent.

CORAM : **Hon'ble Ms. Archana Wadhwa, Member (Judicial)**
Hon'ble Shri Rakesh Kumar, Member (Technical)

DATE OF HEARING : 29/11/2011.
DATE OF DECISION : 27/2/2012

Final Order No. A/230/2012-Ex (BR) Dated : 27/2/2012

Per. Rakesh Kumar :-

The respondent are a 100% EOU engaged in manufacture of cotton terry towels, chargeable to Central Excise Duty under sub-heading 6302.00 of the Central Excise Tariff for export. For manufacture of cotton terry towels, they were procuring cotton yarn free of excise duty under CT-3 certificates. Dispute in this case is about rate of duty on DTA clearance of terry towels. There is no dispute that in respect of DTA clearances they are eligible for exemption under Notification No. 8/97-CE and therefore duty payable is the duty equal to that payable on the same goods being manufactured and cleared by DTA units. The point of dispute is as to whether in respect of DTA clearance, they are also eligible for concessional rate of 12% adv. (as against tariff rate of 16% adv.) under Notification No. 15/02-CE (Sl. No. 17). According to Department, they are not eligible for this exemption as they do not satisfy condition No. 6 of the notification for the reason that terry towels had not been manufactured out of duty paid woven fabrics. On this basis, the Deputy Commissioner vide order-in-original dated 23/11/04 disallowed the exemption and confirmed the duty demand of Rs. 1,53,123/- alongwith interest against the appellant and imposed penalty of Rs. 10,000/- on them under Rule 25 of the Central Excise Rules, 2002. On appeal to Commissioner (Appeals), the Deputy Commissioner's order ~~were~~ was set aside vide order-in-appeal dated 7/3/05 on the ground that the cotton yarn procured by the respondent will be deemed to be duty paid and hence the condition for this exemption, as prescribed in the notification stands satisfied. Against this order of CCE (Appeals), this appeal has been filed by the Revenue.

2. Heard both the sides.

3. Both the sides agree that identical issue with regard to similar Notification No. 14/02-CE stands decided against the respondent by the Tribunal's judgment in case of **Auro Textile vs. CCE, Chandigarh** reported in **2010 (253) E.L.T. 35 (Tri. – Del.)**. In this regard para 27 to 25 of the judgment are reproduced below.

> "27. Coming to the contentions which are sought to be raised in relation to Explanation II, it would be worthwhile, at the cost of repetition, to reproduce the said Explanation. The same reads as under :-
>
> > "For the purposes of the condition specified below, textile yarn or fabrics to be deemed to have been duty paid even without production of the documents evidencing payment of duty thereon".
>
> 28. It is settled law that while interpreting a provision creating a legal fiction, the Court or Tribunal has to ascertain purpose for which the fiction is created. After ascertaining the same, the Court or Tribunal has to assume of those facts existence of which is incidental or inevitable to give full effect to the fiction; but in the process, the fiction can not to be extended beyond the purpose for which it is created. However, it must also be remembered that what can be deemed to exist under a legal fiction, are the facts and not legal consequences which do not flow from law as it stands.

29. It is also settled law that an explanation has to be read to harmonize with and clear up any ambiguity in the main section and should not be so construed to widen the ambit of that section. The meaning to be given to an explanation would really depend upon its terms are not on any theory of its purpose unless it is to be inferred from the language used in the explanation clause itself.

30. If we read the Explanation, it would be apparent that the same has been incorporated with a specific purpose and directly in relation to certain obligation which is required to be discharged by an assessee in order to enable him or her to claim the benefit under the notification. The purpose specified therein relates to the condition, the obligation of the assessee prescribed under condition relates to discharge of duty liability. The explanation specifies that even without production of any document evidencing payment of duty, the assessee would be entitled to claim the benefit under the notification, in other words, the explanation absolves the assessee from the primary obligation of an assessee which is otherwise required to be performed while claiming any benefit under a taxing statute and it relates to the proof of payment of duty. It is settled law that it is always for the assessee to establish that he has discharged the liability regarding the payment of duty of tax. Only when this primary burden is discharged, the onus shifts upon the department to establish that the assessee is a defaulter. In case of claim benefit under the notification in question, however, the executives have made an exception in favour of the assessees claiming benefit under the said notification. The assessee is absolved of such primary burden The fiction that is created under the notification therefore essentially relates to the requirement of evidence pertaining to the discharge such burden. It cannot be extended beyond the said scope of the fiction. If it is extended to the fact of

actual payment itself, it will virtually amount to rewriting the explanation. As already observed above, in order to give full effect to a legal fiction, the Courts and Tribunals are not empowered to create another fiction which is not contemplated under the provision.

31. Explanation II to the said notification which is essentially for the purpose of condition specified thereunder creates a deeming provision regarding the discharge of duty liability by the assessee cannot be construed to mean payment of duty even in cases where the assessee has not actually paid the duty. To resume payment of duty even in a case of no such payment having been made, it would amount to create another fiction which is not contemplated under the said explanation.

32. In *S. Teja Singh* case, the Apex Court was dealing with the question as to whether under Section 28(1) read with Section 18-A(9)) of the Indian Income Tax Act 1922, the Income tax authorities were empowered to impose a penalty on a person who had failed to comply with Section 18-A(3) of the Act. While dealing with the said question and after noting the legal fiction that had been enacted under Section 18A(9)(b) of the Act to the effect when a person had failed to send an estimate of tax on his income under Section 18-A(3), he was deemed to have failed to furnish the return of his income, it was held that Section 18-A(9)(b) did not merely say that an estimate under Section 18-A(3) should be deemed to be a return but it enacted that the failure to send an estimate in accordance with Section 18-A(3) would be deemed to be a failure to make a return. While rejecting the contention that there could be no failure to make a return unless notice have been issued under Section 22(1) or Section 22(2), it was held that it was a deeming fiction regarding compliance of requirement of service of notice as the failure to send an estimate was itself to be deemed to be

a failure to send a return which necessarily involved the fiction that notice had been issued under Section 22 and yet that had not been complied with. It was specifically held that "it is a rule of interpretation well settled that in construing the scope of a legal fiction it would be proper and even necessary to assume all those facts on which alone the fiction can operate". After quoting the observations of Lord Asquith in *East End Dwellings Co. Ltd.* v. *Finsbury Borough Council* reported in 1952 AC 109, 132 to the effect "If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imaging as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it...............The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs", it was ruled that "fiction under Section 18A(9)(b) therefore that failure to send an estimate under Section 18A(3) is to be deemed to be a failure to send a return must mean that all those facts on which alone there could be a failure to send the return must be deemed to exist, and it must accordingly be taken that by reason of this fiction, the notices required to be given under Section 22 must be deemed to have been given, and in that view, Section 28 would apply on its own terms".

33. The Apex Court, therefore, has clearly rule that the fiction created under Section 18A(9)(b) which presumed failure to send return leads to presumption about compliance of requirement of service of notice. Because in the absence of service of notice under Section 22(1) and 22(2) of the Indian Income Tax Act, 1922 there could not have been any obligation to comply with the requirement of filing of the return and, therefore, the power to impose

penalty could not have been exercised. Reverting to the explanation in the matter in hand, it deems the existence of proof of the payment of duty without the production of the documents evidencing the payment, in other words, while dealing with the fiction regarding the proof of the payment of duty whatever is required for compliance and fulfillment of the obligation regarding the payment of duty can be presumed to have been done. At the same time such presumption is exclusively related to the condition attached to the notification. As already quoted above, the condition clearly speaks of actual payment. Consequently the existence of the facts which could be presumed for giving full effect to the deeming provision would be in relation to the actual payment of duty as contemplated under the condition. The presumption of existence of the fact cannot be of those facts which are not required for compliance of the condition attached to the notification. The presumption cannot be of those facts which are neither incidental nor inevitable, but has necessarily to be of those facts which are incidental or inevitable in relation to the payment of duty, since the provision being essentially related to the actual payment of duty as contemplated under the condition, and not otherwise.

34. In *Voltas Limited* case, the Apex Court was dealing with the appeals filed under Section 55 of the Monopolies and Restrictive Trade Practices Act, 1969 and the point relating to the deeming provision under Section 33 of the Act. Referring to sub-section (1) of Section 33, it was observed that it mandates that the agreements covered under different clauses of sub-section (1) thereof should be deemed, for the purposes of the Act, to be the agreements relating to restrictive trade practices. It was observed that by the deeming clause one is not required to treat any imaginary state of affairs as real but to treat the agreements

specified and enumerated in sub-section (1) of Section 33 as the agreements relating to restrictive trade practices. It can be said that Parliament after having examined different trade practices, had identified such trade practices which were to be held as the restrictive trade practices for the purposes of the Act. To keep such trade practices beyond controversy in any proceeding, a deeming clause has been introduced in sub-section (1) of Section 33 saying that they should be deemed to be restrictive trade practice and in that background there was no much scope for argument that although a particular agreement was covered by one or the other clauses of sub-section (1) of Section 33, still it should not amount to an agreement containing conditions which could be held to be restrictive trade practices within the meaning of the Act. Referring to the said deeming clause it was specifically observed by the Supreme Court that "The legislature by a statute may create a legal fiction saying that something shall be deemed to have been done which in fact and truth has not been done, but even then Court has to give full effect to such statutory fiction after examining and ascertaining as to for what purpose and between what parties such statutory fiction has been resorted to, in the case in hand, the deeming provision relates of the existence of documentary proof relating to discharge of duty liability and not to the factum of "actual payment of duty."

35. In *Moon Mills Ltd.*, case, the Apex Court was dealing with the reference in relation to the issue as to whether in the facts and circumstances of the case before it, the sum of Rs. 27,06,593/- was assessable as a profit of the assessee company for the previous year relevant to the assessment year 1949-50 in accordance with the fourth proviso to Section 10(2)(vii) of the Indian Income Tax Act. 1922. Section 10(2) of the Income Tax Act was dealing with the statutory allowances as distinguished from deductions those

could be made in commercial practice for ascertaining the profits of a business. Under the said clause where any building, machinery or plant was discarded, demolished or destroyed, an allowance was given in respect of the amount by which the written down value of the such building machinery or plant exceeded the amount for which it was sold or its scrap value. But the 4th proviso introduced a fiction that in ease any insurance, salvage or compensation money was received in respect of the such property exceeded the difference between the written down value and the scrap value, so much of the excess as mentioned therein was to be deemed to be the profits of the previous year in which such monies were received. Though in fact the said compensation represented a capital asset to the extent mentioned in the proviso the compensation was deemed to be the profits of the previous year in which such monies were received. The proviso, therefore, introduced a fiction. What was not a profit in the previous year was deemed to be a profit in that year. The previous year was that year in which such monies were received. The fiction was an indivisible one. It could not be enlarged by importing another fiction, namely, that if an amount was receivable during the previous year it was deemed to have been received during that year. In the case in hand, the deeming clause relates to the existence of documentary proof of payment of duty and not relating to the payment of duty itself. In other words, while claiming the benefit under the notification, the assessee need not produce documentary proof of payment of duty. But if it is shown by the department that the assessee has not paid any duty on the products specified in the conditions, then certainly the claim for benefit under the notification can be denied.

36. The Apex Court, therefore, has clearly ruled that undoubtedly efforts should be to give full effect to the fiction

created under a statute. However, in the process of giving full effect to a fiction created under a statute, the Courts and Tribunals are not empowered to create another fiction and thereby extend the benefits of the legal fiction under a statute to a totally different situation.

37. Undoubtedly, the explanation in question creates a fiction about the presumption of payment of the duty for the purpose of condition. It does not enlarge the scope of the condition. However, every presumption is rebutable. To interpret the fiction created under the explanation to mean that even in case of a product which is subjected to nil rate of duty to be presumed to have been subjected to the payment of duty would not only result in enlarging the scope of the explanation, but also scope of the condition itself."

4. Since in this case, the terry towels have been made out of non-duty paid fabrics, the condition No. 6 is not satisfied and the concessional rate of duty would not be available.

5. In view of the above, the impugned order is not sustainable. The same is set aside. The Revenue's appeal is allowed.

(Pronounced in the open court on 27/2/2012)

(Archana Wadhwa)
Member (Judicial)

(Rakesh Kumar)
Member (Technical)

PK