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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 **09/05/2012**

Appeal No. E/2451/2011 - EX[DB]
E/S/3192/2011-EX

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

To :
M/S RISHAB SPINNING MILLS,
(PROP. NAHAR SPG. MILLS LTD.) 373, INDUSTRIAL
AREA "A", LUDHIANA.
141003

M/S RISHAB SPINNING MILLS, Appellant

Vs

C.C.E. LUDHIANA **STAY ORDER NO. 756/2012-EX** Respondent

I am directed to transmit herewith a certified copy of **Final order No. A/521** **2012** **EX[DB]** dated 04-4-12 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.DSK LEGAL, ATTORNEY & SOLICITORS
21 UGF,ANTARIKSH BHAWAN,KASTURBA GANDHI MARG, N DELHI.

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 AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI, PRINCIPAL BENCH NEW DELHI

Date of Hearing:04.04.2012
Date of Decision:04.04.2012

Hon'ble Mr. Justice Ajit Bharihoke, 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.	
2	Whether it should 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 Departmental authorities?	

Excise Stay Application No.3192 of 2011 in
Appeal No.2451 of 2011
(Arising out of Order-in-Original No.17/LDH/2011/4260 dated 14.07.2011 passed by the Commissioner of Central Excise, Ludhiana).

M/s. Rishabh Spinning Mills ...Appellant

Vs.

CCE, Ludhiana ...Respondent

Coram: Hon'ble Mr. Justice Ajit Bharihoke, President
Hon'ble Mr.Rakesh Kumar, Member (Technical)

Appearance: Shri Balbir Singh, Advocate for the appellants.
Shri Nagesh Pathak, AR for the respondent.

STAY Order No. 766/2012-Ex(BR)
FINAL Order No. A/524/2012-Ex(BR)

Per Rakesh Kumar:

The facts leading to this appeal and stay application are, in brief, as under:-

1.1 The appellants are manufacturers of cotton /polyester blended yarn, cotton yarn and polyester yarn chargeable to central excise duty. They also availed Cenvat credit of duty paid on certain items in accordance with the provisions of Cenvat Credit Rules, 2004. The period of dispute in this case is from 2005 to 2010. The appellant were not availing Cenvat credit in respect of Polyester Fiber. During this period, though the tariff rate of duty on the appellant's final product was 16% Adv., notification No.29/04-CE dated 9.7.2004 prescribed concessional rate of duty of 4 % Adv. and this rate was applicable even if the Cenvat Credit of duty paid on inputs and service tax paid on input services used had been availed. Another exemption notification No.30/CE dated 9.7.2004 fully exempted final products subject to condition that no cenvat credit of duty paid on inputs or service tax paid on input services is availed. During the period of dispute, the appellant were availing of both the exemptions. However, there is no dispute that no cenvat credit of duty paid on the Polyester Fiber has ever been taken by the appellant. Cenvat credit has been taken only of central excise duty paid on packing materials and service tax paid on GTA services from the factory to port and service of foreign commission agents for procuring of export orders availed in respect of the yarn cleared on payment of duty for export out of India. In course of manufacture of spun yarn, waste also arises which is fully exempt from duty. The department has alleged that the appellant have used common cenvat credit availed inputs and input services in the manufacture of dutiable final product (yarn) and exempted final product (waste) and since they have not maintained separate accounts and inventory in respect of the inputs and input services used in the manufacture of exempted final product and dutiable final products, the provisions of Rule 6(3) would be attracted and , therefore, in respect of the clearances of the waste, they would be liable to pay an amount equal to 10% / 8% of the sale value. It is on this basis that show cause notice dated 6.5.2010 was issued to the appellant for –

(a) Recovery of an amount of Rs.4,54,84,476/- in respect of clearances of waste during 2005-2010 period which is payable in terms of the provisions of Rule 6(3) of the Cenvat Credit Rules, 2004 along with interest on this amount under Section 11 AB and

(b) Imposition of penalty on the appellant under Rule 15(2) of Cenvat Credit Rules, 2004 read with Section 11 AC Central Excise Act, 1944.

In course of adjudication proceedings before the Commissioner, the appellant pleaded that they have not taken cenvat credit of duty paid in respect of polyester fiber and that cenvat credit has been availed only of the duty paid on the packing materials and of the service tax paid on services like GTA services for transport of export consignments from factory to the port and as the service of foreign commission agents for procuring export orders, that the waste generated is fiber/yarn waste and since no cenvat credit has been taken in respect of the fiber, there is no question of any common inputs or the input services having been used in the manufacture of dutiable and exempted final products. It was also pleaded that the service of GTA and foreign commission agents and packing materials have been exclusively used in respect of the yarn exported and hence, there is no possibility of any cenvat credit availed inputs or input services having been used in waste and, therefore, the provisions of Rule 6(3) would not be applicable in respect of waste. But these pleas of the appellant were not accepted by the Commissioner on the ground that the appellant have used dyes/chemicals in respect of which cenvat credit has been availed. The commissioner, accordingly, vide order-in-original no.17/LDH dated 14.7.2011 confirmed the entire demand of Rs. 4,54,84,476/- against the appellant under Rule 14 of the Cenvat Credit Rules, 2004 read with Section 11 A (1) of the Central Excise Rules along with interest on it at the applicable rate under Section 11 AB of Central Excise Act and besides this, imposed penalty of equal amount on the appellant under Rule 15(2) of the Cenvat Credit Rules, 2004 read with Section 11 AC of the Act. Against this order of the Commissioner, this appeal along with stay application has been filed.

2. This matter was initially heard on 15.3.2012 and thereafter on 4.4.2012. Though on these dates the matter has been listed for hearing of stay application only, after hearing the matter, the Bench was of the view that the matter can be taken for final disposal. Accordingly, the pre-deposit was waived and with the consent of both the sides, the matter was heard for final disposal.

3. Shri Balbir Singh, Advocate, ld. Counsel for the appellant pleaded that there is no dispute about the fact that the appellant have not availed cenvat credit of duty paid on polyester or any other synthetic yarn used in the manufacture of spun yarn, that there is no question of availing any cenvat credit on cotton as there is no excise duty on it, that the appellant during the period of dispute were availing exemption under Notification No.30/04-CE dated 9.7.2004, which provides full duty exemption to the spun yarn subject to the condition that no credit of excise duty paid on any inputs or service tax paid on input services is taken and also the exemption under notification no.29/04-CE dated 9.7.2004 which prescribes a concessional rate of duty of 4% with cenvat credit facility, that cenvat credit has been availed only respect of the clearances of the goods on payment of duty at the rate of 4%Adv under Notification No.29/04-CE for export, that

in respect of export consignments, the cenvat credit has been taken only in respect of the packing materials, the services of outward transport from the factory to the port and the Business Auxiliary Services of Commission Agents abroad for procuring export orders, that there is no question of generation of fiber waste from the packing materials, that the entire fiber/yarn waste on which an amount of Rs.4,54,84,476/- has been demanded under Rule 6 (3) of Cenvat Credit Rules, is generated from the fiber in course of manufacture of yarn, while there was no dispute that no cenvat credit has been availed in respect of fibre, that in view of this, the provisions of Rule 6(2) are not applicable and no amount at the rates prescribed under Rule 6(3) can be demanded on the clearances of fiber/yarn waste, that the Commissioner's findings that the dyes and chemicals had been used in the manufacture of spun yarn is factually incorrect, as the appellant have not availed any cenvat credit in respect of the dyes and chemicals, that even in the show cause notice there is no such allegation and that in view of this, the impugned order is incorrect and is no sustainable. He, however, pleaded that he has no objection if the matter is remanded for de novo adjudication after ascertaining as to whether any cenvat credit availed on dyes and chemicals had been used in or in relation to the manufacture of spun yarn.

4. Shri Nagesh Pathak, ld. Sr. Departmental Representative defended the impugned order reiterating the findings of the Commissioner on it.

5. We have carefully considered the submissions from both the sides and perused the records.

6. The appellant manufacture cotton and polyester spun yarn and cotton/polyester blended yarn for which their principal raw materials is cotton and polyester fiber. There is no dispute that no cenvat credit of excise duty paid on polyester fibers has been taken. The cenvat credit has admittedly been taken on packing materials for packing of yarn for export, the services of foreign commission agents and GTA services from the factory to the port and according to the appellant, this cenvat credit has been taken only in respect of the goods which after payment of duty has been exported out of India. The demand of Rs.4,54,84,476/- under Rule 6(3) of the Cenvat Credit Rules is in respect of yarn/fiber waste and admittedly, no cenvat credit had been taken in respect of fiber. The department also does not dispute that the packing materials in respect of which cenvat credit had been availed and the services of foreign commission agent for procuring export orders and GTA services of transportation from factory to port have been used in respect of the consignments cleared for export and thus, as

such, in respect of yarn/fiber waste, there is no possibility of any common input services like GTA services or Business Auxiliary services or common inputs like packing materials having been used. However, according to the department, the appellant had also availed cenvat credit in respect of the dyes and chemicals, which have been used in the manufacture of dutiable final products as well as waste. The appellant on the other hand, deny having used any such duty paid dies or chemicals and having availed cenvat credit. If cenvat credit in respect of dyes and chemicals, if any used, has been taken, the same can be ascertained from the records and if it is found from the records that no such cenvat credit had been availed , the demand in respect of clearance of waste under Rule 6(3) would not be sustainable. However, for this purpose, the matter has to be remanded for de novo adjudication.

7. In view of the above discussion, the impugned order is set aside. The matter is remanded to the Commissioner for de novo adjudication in terms of our directions in this order.

[pronounced in the open court]

(Justice Ajit Bharihoke)
President

(Rakesh Kumar)
Member (Technical)