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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

[redacted]
Appeal No. : E/274/2006-EX[DB]

Dated: **16/08/2012**

Assistant Registrar
C.E.S.T.A.T. New Delhi
To,
RAJASTHAN PRTRO SYNTHETICS
PVT. LTD UDAIPUR
F-210-223 UDYOG VIHAR, RIICO
INDL. AREA, SUKHER, UDAIPUR.

RAJASTHAN PRTRO SYNTHETICS
PVT. LTD UDAIPUR (Appellant)

VS

C.C.E. UDAIPUR (Respondent)

I am directed to transmit herewith a certified copy of Final Order No. **A/949/2012-EX[DB]** dated **08/08/2012** passed by the Tribunal under section **35-C(1) of the Central Excise and Salt Act, 1944.**

Assistant Registrar
EXCISE Appeal Branch

Copy To,
1. Respondent
C.C.E. UDAIPUR
N.C.R.Building, Statue Circle, "C"
Scheme, Jaipur 302005.

2. Advocate(s) / Consultant(s):
Bipin Garg
B-1/1289,A-Vasant Kunj, New 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 Publications 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

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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/decision: 8.8.2012

Central Excise Appeal No.274 of 2006

Arising out of the order in appeal No.511(HKS)CE/JPR-II/2005 dated 7.9.2005 passed by Commissioner , Customs & Central Excise (Appeals II), Jaipur.

Hon'ble Mr. Justice Ajit Bharihoke, President
Hon'ble Mr. Rakesh Kumar, 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?	
2	Whether it should be released under Rule 26 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?	
4	Whether Order is to be circulated to the Departmental authorities?	

M/s Rajasthan Petro Synthetics Pvt. Ltd. .. Appellant

Vs.

C.C.E., Udaipur .. Respondent

Present for the appellant : Shri Mayank Garg, Advocate
Present for the respondent: Shri Sanjay Jain, A.R.

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

FINAL Order No. A/949/2012-EX (BR)

Per Justice Ajit Bharihoke (Oral):

This appeal is directed against the order in appeal No. 511(HKS)CE/JPR-II/2005 dated 7.9.2005 whereby the Commissioner (Appeals) partly accepted the appeal while maintaining the duty demand of Rs.2,33,293/-. Commissioner (Appeals) set aside the order in original relating to interest and penalty imposed on the appellant.

2. Briefly stated facts relevant for disposal of the appeal are that the appellant is engaged in manufacture of Polypropylene Multi Filament Yarn (for short, PPMFY) of various deniers falling under chapter 54 of the schedule to the Central Excise Tariff Act, 1985. During the period March 1993 to June, 1993, the appellant purportedly cleared 210 denier without payment of excise duty claiming exemption under Notification No.31/93-CE dated 28.2.93. As per the Notification, PPMFY of 210 deniers, the tolerance of + and less 4% was exempt from payment of duty.

3. Central Excise Department drew three samples each from three different lots of 210 denier yarn manufactured by the appellant. One set of sample drawn was sent to Central Revenue Control Laboratory (CRCL) for ascertaining of the denier of the sample. Test report received from the Chemical Examiner showed that the aforesaid three samples were of 166.8 denier, 221.6, denier and 219.3 denier respectively. The appellant on being informed about the test report disputed the correctness of the chemical analyst's report and requested the Department for sending second set of sample for retesting. The Department acceded to the request of the appellant and sent second set of sample to the Chemical Examiner. The Chemical Examiner vide his letter dated 14.3.95 informed the Department and that the results of second set of sample showed wide variation vis-à-vis the earlier test report and suggested that third set of sample may be sent for chemical analysis for ascertaining deniers of the sample. The Department accordingly sent the third set of sample to CRCL vide letter 25.1.95 with the request for chemical analysis. However the test report of the third sample was never received.

4. We may note that on receipt of the first test report three show cause notices raising demand were issued. The jurisdictional Additional Commissioner during adjudication proceeding sent reminders to Chemical Examiner for sending third report but the response was received that the office of CRCL did not receive the third set of sample. Thus jurisdictional authority after giving due hearing to the appellant confirmed the duty demand to the tune of Rs.2,33,293/- against the appellant with interest and also imposed equal amount of penalty. The Commissioner (Appeals) while disposing of the appeal against the order in original dropped the interest and penalty. However, he confirmed the duty demand.

5. Shri Mayank Garg, Ld.Advocate appearing for the appellant has assailed the impugned order on the ground that the adjudicating authority as well as the appellate authority were not justified in confirming demand particularly when admittedly, the two test reports pertaining to the samples drawn at the same time were at variance and the report of the third set of samples sent for chemical analysis were not received. It is contended that the adjudicating authority appellate authority have not taken pains to call for second test report which was stated to be at variance with the first test report. Ld. Counsel submits that the impugned order is also liable to be set aside for the reason that the third set of test report has never seen the light of the day.

6. Ld. Shri Sanjay Jain, A.R. for Revenue on the contrary has argued in support of the impugned order and he has reiterated the finding of the jurisdictional authority as well as the Commissioner (Appeals). He submits that the impugned order is based upon the report of chemical analyst which clearly show that none of the samples satisfied the parameters of the exemption notification. As such, the excise duty has been rightly confirmed against them.

7. We have considered the rival submission and perused the record. It is not in dispute that the preventive department of Central Excise drew three samples each from different lots of 210 deniers yarn purportedly manufactured by the appellant. It is also not in dispute that looking into the variance in respect of test report pertaining to three different samples on request of appellant second set of samples were sent for chemical analysis. From the record it is evident that the Chemical Analyst instead of sending test report of second set of samples informed the Department that second test report was at variance with the first report and requested for sending of third set of samples for analysis. It is not explained as to why the test report pertaining to second set of test report was not sent by the Chemical Examiner and why adjudicating authority did not insist on calling for the test report. In the absence of second test report pertaining to second set of samples we are at a loss to make out whether or not as per the second analysis the samples confirmed to the specification of 210 denier yarn with the tolerance limit of + / - 4% and was exempt from payment of excise duty under Notification No.31/1993-CE dated 28.2.93. It is obvious that the Department has withheld the second test, therefore, we are inclined to draw an adverse presumption against the Department that had the second test report been produced it would have gone against the Department. Further there is no explanation as to why the third set of sample did not reach the Chemical Examiner. Ld. D.R. has failed to explain as to how and by what mode the third set of sample was sent to the Chemical Analyst. No receipt from the office of Chemical Analyst is made available on record nor is there any evidence to show that the third set of test report was actually dispatched to the office of Chemical Analyst. This circumstance also go against the Department.

8. In view of the above discussion, we do not find it difficult to sustain the impugned order. Accordingly, the appeal is accepted and the impugned order is set aside.

(Justice Ajit Bharihoke)
President

(Rakesh Kumar)
Technical Member

scd/