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REGISTERED / AD

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
38,MG Marg Civil Lines,Old Red Building,Allahabad-211001
Regional Branch, Allahabad

Dated: 21/07/2016

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. A/70497/2016-SM[BR] dated 14/07/2016

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section 35-C(1) of the Central Excise and Salt Act, 1944.

Asstt. Registrar

Application	Appeal	Name and Address of Appellant
1	E/54415/2014	Commissioner of CUSTOMS-Meerut-ii OPPOSITE SHAHEED SMARAK, DELHI ROAD...BHANSALI GROUND,MEERUT,UTTAR PRADESH
		Name and Address of Respondent
2		JUBILANT LIFE SCIENCES LTD BHARTIAGRAM,GAJRAULA, J.P.NAGAR ,UTTAR PRADESH

Copy To

3Advocate(s) / Consultant(s):

Devinder Sharma,
J-185, SECTOR-25,
JALVAYU VIHAR,
NOIDA,UTTAR PRADESH
201301

4 Bar Association, CESTAT, Allahabad
5 Director Publications, Customs, Excise. I.P. Estate, Delhi
6 M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, New Delhi-3
7 Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17
8Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005
9 Easy Service Tax Online Dot Com Pvt. Ltd., 407A, Iscon Mall, Satellite Road, Ahmedabad-15
10 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)
11 TaxIndiaOnline.com Pvt. Ltd.; 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070
12 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad -- 38
13 The ICFAI society, 52, Nagarjuna Hill,Punjagutta Hyderabad.-500082
14 M/S Knowledge Processing Pvt. ltd.(taxmanagementindia.com),FF-19,1st Floor,Cross River Mall,CBD Ground,Near Karkardooma Court,Delhi-110032

15 C.D.R. 16 Office Copy 17 Guard File

Asstt. Registrar

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, REGIONAL BENCH: ALLAHABAD

SINGLE MEMBER BENCH

E/54415/2014-EX(SM)

Dated of Hearing/decision: 14/07/2016

[Arising out of Order-in-Appeal No. MRT-EXCUS-002-APP-18/2014-15 dated 13.05.2014 passed by Commissioner (Appeals), Customs & Central Excise, Meerut-II]

1.	Whether Press Reporter may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	No
2.	Whether it would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	Yes
3.	Whether their Lordships wish to see the fair copy of the order?	Seen
4.	Whether order is to be circulated to the Department Authorities?	Yes

C.C.E. & S.T. Meerut-II Appellant

Vs.

Jubilant Life Science Ltd. Respondent

Appearance:
Present for the Appellant: Shri Ashutosh Nath (Assistant Commissioner(A.R.
Present for the Respondent: Shri Devinder Sharma, Advocate

Coram: Hon'ble Shri Anil G. Shakkarwar, Member (Technical)

Final Order No. 70497/2016

Per: Anil G. Shakkarwar

The present appeal is filed by Revenue against Order-in-Appeal No. MRT/EXCUS/002/APP/18/2014-15 dated 13.05.2014 passed by Commissioner (Appeals), Customs & Central Excise, Meerut-II.

2. The respondent's unit was visited by audit team of Revenue and conducted audit of the records on October 2009 to September 2010. It appeared to the audit team that the appellants were procuring acetic acid through import and they were availing Cenvat credit of CVD paid on said inputs and also Cenvat credit of Service Tax paid on inward transportation of said inputs. Initially, audit team considered that such goods were procured only for the purpose of trading. The respondent through their letter dated 16/9/2011 informed the authorities that acetic acid was their input which was used in manufacture of final product and that input was also sold by them and while clearing said input as such they reversed Cenvat credit as required by Rule 3(5) of Cenvat Credit Rules 2004 and that they did not reverse Cenvat credit of Service Tax paid on inward transportation. There was exchange of correspondence between the respondent and Revenue. It appeared to Revenue that under the said rule respondent were required to reverse credit availed on account of Service Tax paid on inward transportation. Therefore, a show cause notice dated 08/10/2012 was issued by Additional Commissioner, Central Excise, Meerut-II to the respondent. On page 4 of said show cause notice revenue has stated as follows "Therefore, it appears that the party has imported acetic acid for their own requirement and for their sale to their customers." Further on Page 5 of said show cause notice it is stated as follows : "From the above it appears clearly that total Cenvat credit availed on the inputs should be recovered at the time of clearance of inputs as such because this is a trading activity." On Page 6 of the said show cause notice it is

stated that it appears to Revenue that Cenvat credit taken on input services on trading goods for the period September 2007 to March 2011 amounting to Rs.25,74,831/- availed and utilized are irregular and is not admissible them. The show cause had proposal to recover the said amount under Rule 14 of Cenvat Credit Rules 2004 with other proposals. The said show cause notice was adjudicated through Order-in-original No. 36/ADC/M-II/2013-14 dated 28.02.2014 wherein, at Para 4 of the Order-in-Original the percentage of the quantity out of total quantity of said inputs cleared as such is given and original authority has considered then and the said figures were once again quoted in his finding and after going through various pronouncements the original authority has confirmed the demand raised in the said show cause notice and imposed equal penalty.

3. Aggrieved by said Order-in-Original dated 28/2/2014 respondent filed appeal before Commissioner (Appeals), Meerut-II. Ld. Commissioner (Appeals), Meerut-II as held that the department has failed to established that the said inputs were only procured for trading purpose and that they were used in the manufacture of final products also by taking into consideration the information that was available in the order-in-original. Further he held that the inputs which were cleared as such were covered by Rules 3 (5) of said Rules and only reversal of credit availed on such inputs was required at the time of these clearances. He has relied on ruling by Hon'ble High Court of Punjab and Haryana in the case of Commissioner Central Excise Chandigarh-I Vs. Punjab and Haryana Steels reported at 2010 (21)

STR 5 (P&H). Through said Order-in-Appeal Commissioner (Appeals) set aside the said Order-in-Original dt. 28/2/2014

4. Aggrieved by the said Order-in-Appeal dated 13/5/2014 Revenue is in appeal before this Tribunal. The grounds of appeal by Revenue are given on Page 3,4,5, of their authorization for filing appeal which are as follows:-

" 1.That, the Rule 2(*I*) of the Cenvat Credit Rules, 2004 reads are under-;

"input service" means any service,-

(i) used by a provider of taxable service for providing an output service; or

(ii) used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products upto the place of removal,

and includes services used in relation to setting up, modernization, renovation or repairs of a factory, premises of provider of output service or an office relating to such factory or premises, advertisement or sales promotion, market research, storage upto the place of removal, procurement of inputs, activities relating to business, such as accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry, and security, inward transportation of inputs or capital goods and outward transportation upto the place of removal;

Thus, the goods, which have been brought into factory for trading activity, do not fall in the ambit of the definition. Thus, the services involved cannot be considered as input service as these had neither been used by a provider of taxable service for providing an output service, nor used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products, Therefore, the cenvat credit taken on the services availed in respect of such goods is not admissible.

The Hon'ble CESTAT, in the case of Orion Appliances Ltd. V/s Commissioner of Service Tax, Ahemadabad 2010(19) S.T.R. 205(Tri-Ahmd.), has held that cenvat credit of input services used in trading activity is not admissible.

2. The party started reversing cenvat credit of inputs services taken on inputs cleared 'as such' from 01/04/11 onwards after the amendment in the definition of 'exempted service' in Rule-2(e) of cenvat credit Rules, 2004 w.e.f. 01/04/2011, by which trading activity was also included within its ambit. The goods cleared prior to 01-04 2011 were also traded goods, but, the party deliberately twisted the facts towards Rule-3(5) of the Cenvat Credit Rules, 2004 to avoid reversal of cenvat credit of input service.

3. The Commissioner (Appeals) has placed reliance on the case of Chtrakoot Steel & Power Pvt. Ltd. V/s CCE Chennai[2008(100) STR 18(T-Chennai)], which is not applicable to this case as in that case the party had returned the inputs for not being up to the mark. In the present case, the party had procured goods for trading. Thus, cenvat credit of input and input service was not admissible to them.

4. That, the party had deliberately availed wrongly cenvat credit of input service on the goods which were procured for trading and the adjudicating authority had rightly imposed penalty under Rule-15 of Cenvat credit Rules, 2004 readwith section 11-AC of the Central Excise Act, 1944.

The Apex Court in the case of UNION OF INDIA Versus RAJASTHAN SPINNING & WEAVING MILLS cited in 2009 (238) E.L.T. 3 (S.C.) had held as under:-

Para 18.

"One cannot fail to notice that both the proviso to sub-section 1 of Section 11A and Section 11AC use the same expressions : "....by reasons of fraud, collusion or any wilful misstatement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty,.... " In other words the conditions that would extend the normal period of one year to five years would also attract the imposition of penalty. It, therefore, follows that if the notice under Section 11A(1) states that the escaped duty was the result of any conscious and deliberate wrong doing and in the order passed under Section 11A(2) there is a legally tenable finding to that effect then the provision of Section 11 AC would also get attracted. The converse of this, equally true, is that in the absence of such an allegation in the notice the period for which the escaped duty may be reclaimed would be confined to one year and in the absence of such a finding in the order passed under Section 11A(2) there would be no application of the penalty provision in Section 11AC of the Act. On behalf of the assessee it was also submitted that Sections 11A and 11AC not only operate in different fields but the two provisions are also separated by time. The penalty provision of Section 11AC would come into play only after an order is passed under Section 11A(2) with the finding that the escaped duty was the result of deception by the assessee by adopting a means as indicated in Section11AC."

Para 19.

"From the aforesaid discussion it is clear that penalty under Section 11Ac, as the word suggests, is punishment for an act of deliberate deception by the assessee with the intent to evade duty by adopting any of the means mentioned in the section."

5. Heard the department Counsel. He reiterated the grounds of appeal and submitted following case laws:-

(a) 2015 (39) S.T.R. 903 (Tri. – Mumbai)

SYNISE TECHNOLOGIES LTD.

Versus

COMMISSIONER OF CENTRAL EXCISE, PUNE

(b) 2015 (38) S.T.R. 431 (Tri. – Mumbai)

GODREJ & BOYCE MFG. CO. LTD.

Versus

COMMISSIONER OF CENTRAL EXCISE, MUMBAI-II

6. The ld. Counsel for the respondent has submitted that the show cause notice clearly indicated that Acetic Acid was their input. The Adjudicating authority has stated in the Order-in-Original the percentage of Acetic Acid which was cleared as such by them which was about 18% to 32% of their import and balance was consumed by them. Though the contention of the Revenue was that those goods were imported only for the purpose of trading which is not substantiated. He has further, brought to the notice of this Tribunal a latter F.No.96/85/2015-CX-I,dated 7/12/2015 issued by Central Board of Excise & Customs, New Delhi wherein the decisions regarding issues of assessment taken in Tariff Conference held on

28th & 29th October 2015 were circulated for clarity of understanding and uniformity of practice in assessment. Point B. 26 of the said letter is reproduced below:

B.26 – Meerut zone – CENVAT Credit – Reversal of Cenvat Credit in respect of Service tax Paid on Input Services:

Issue:

Rule 3(5) of the Cenvat Credit Rules, 2004 provides as under :

"when the inputs or capital goods, on which CENVAT credit has been taken, are removed as such from the factory, or premises of the provider of output service, the manufacturer of the final products or provider of output service, as the case may be shall pay an amount equal to the credit availed in respect of such inputs or capital goods and such removal shall be made under the cover of an invoice referred to in rule 9"

An audit objection has been raised that Cenvat credit taken in respect of service tax paid on input services like Customs Brokers charges, Clearing and Forwarding Agencies Services (C&F), GTA etc. used for procurement/transportation of inputs/capital goods, should also be reversed at the time of clearance of inputs/capital goods as such from the factory of the manufacturer. The present Rule 3(5) of the Cenvat Credit Rules, 2004 does not mention 'Input Services' amongst the credits required to be reversed and therefore it is not possible to demand reversal of credit of input services. There is need to amend the rules so that reversal of credit taken on input services can also be achieved.

Discussion & Decision

The conference noted that Rule 3(5) of the CENVAT credit Rules, 2004 does not provide for reversal in respect of input services for a reason. Input services are consumed once the inputs and capital goods are received in the factory. Thus on receipt of inputs and capital goods, the associated input services have to be considered as consumed within the factory and become a cost to the business. Demand for reversal of the input services credit, when such input services cannot be reused, unlike inputs and capital goods which are available for reuse would not be fair to the trade. Therefore, the conference concluded that the present rule represents the correct provision in accordance with the principles of input tax credit. Rule 3(5) of the Cenvat Credit Rules, 2004, does not need any amendment. Audit para may be replied accordingly.

7. He also relied on various pronouncements.

8. I have taken into consideration rival contentions. As stated in the brief facts it appeared to revenue that Acetic Acid was imported by the respondent for their own requirement as well as for sale and show cause notice was issued for recovery of Service Tax availed on input service paid on inward transportation. Impugned order passed by Commissioner (Appeals) has deliberated upon and allowed the appeal of the Respondent and set-aside the Order-in-Original establishing that the said transaction attracted the provisions of Rule 3(5) of Cenvat Credit Rules 2004 and also held that said provisions did not provide for reversal of Cenvat Credit availed on input services. The grounds of the appeal filed by revenue are already stated above. The contention in the grounds of appeal is that the respondent procured said inputs only for trading. The grounds of appeal also stated that they have taken Cenvat credit of the inputs services on the goods traded. It also claims that the party deliberately twisted the facts towards Rule 3 (5)

of said Rules. The show cause notice contended that the respondent imported Acetic Acid for their own requirement and for sale. The goods which are procured for own requirement and used in the manufacture satisfy the definition of input in said Cenvat credit Rules. Further when the inputs are cleared as such Cenvat credit to be reversed on such clearance of inputs is provided in said Rule 3(5). However the grounds of appeal stated that the party had deliberately twisted the facts toward Rules 3(5). It is very clear that the grounds of appeal are travelling beyond Show cause notice. Therefore, the grounds of appeal are not sustainable. Therefore, the appeal filed by Revenue is not maintainable. The appeal is dismissed with consequential relief if any to the respondents.

(Dictated and pronounced in the open Court)

// 2016

-Sd-

(ANIL G. SHAKKARWAR)
MEMBER (TECHNICAL)

(K. Gupta)

प्रमाणित प्रति / Certified True Copy

सहायक पंजीकार / Asstt. Registrar
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