FAX : 0532-2400149

REGISTERED / AD

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

Dated: **08/08/2016**

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. A/70626/2016-SM[BR] dated 05/08/2016

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/54587/2014	J G SPONGE & POWER P LTD 84, 37-42, UPSIDC INDUSTRIAL AREA, MASOORI ROAD, GHAZIABAD UP
		Name and Address of Respondent
2		C.C.E. & S.T.-MEERUT-II OPPOSITE SHAHEED SMARAK,DELHI ROAD...BHANSALI GROUND, MEERUT, UTTAR PRADESH-

Copy To

3Advocate(s) / Consultant(s):

Rajesh chibber
FA-9, KAVI NAGAR,
GHAZIABAD,
UP

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
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, 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

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
REGIONAL BENCH : ALLAHABAD

Appeal No.E/54587/2014-[SM]

Arising out of O/A No.MRT/EXCUS/002/APP/254/13-14 dated 28.03.2014 passed by Commissioner (Appeals), Customs & Central Excise, Meerut.

For approval and signature:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)

1.	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	: No
2.	Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	: Yes
3.	Whether His Lordship wishes to see the fair copy of the Order?	: Seen
4.	Whether Order is to be circulated to the Departmental Authorities?	: Yes

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J G Sponge & Power Pvt. Ltd. ...APPELLANT(S)

VERSUS

Commissioner of Central Excise, & S.T. Meerut-II ...RESPONDENT (S)

APPEARANCE

Shri Rajesh Chibber, Advocate for the Appellant (s)
Shri D.K. Deb Assistant Commissioner, (A.R.) for the Department

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)

DATE OF HEARING : 07.01.2016

DATE OF PRONOUNCEMENT : 05-08-2016

FINAL ORDER NO. (70626/2016)

सीमा शुल्क उत्पाद शुल्क एवं सेवा कर अपीलीय अधिकरण
CUSTOMS EXCISE & SERVICES TAX APPELLATE TRIBUNAL
सत्यमेव जयते

Per Mr. Anil Choudhary :

The appellant, a manufacturer of Ingots, is in appeal against Order-in-Appeal dated 28.11.2013, by which denial of Cenvat Credit of Rs.1,71,887/- have been confirmed along with interest and equal amount of penalty under Section 11 AC of the Act read with Rule 15 of CCR, 2004.

2. The brief facts are that the appellant had purchased input-Scrap from a first stage dealer namely, Khmeshwar Enterprises-Proprietor, Rakesh Kumar Agrawal. The purchase was made in March, 2008, being purchase of 10.390 MT of SS Scraps value at Rs.12,88,105/-. The case of Revenue, as per the SCN dated 12.10.2011, is that based on intelligence, M/s Khmeshwar Enterprises is a registered dealer and was involved in passing fraudulent credit by trading in excisable goods namely Metal Scrap. In the course of search, conducted in the premises of said M/s Khameshwar Enterprises and the residence of its proprietor Rakesh Agarwal and as per the statements recorded of the said Rakesh Agarwal, his accountant Mr. Navshad Ahmad and others, it appeared and observed as follows:

I. " Shri N.K. Jain (G.M Supply Chain) of M/s Jubilant Organosys Ltd have stated in his statement dated 25.01.2011 that Shri Rakesh Sharma forwarded the quotation on behalf of M/s Khameshwar Enterprises, C-111 BSR Insustrial Area Ghaziabad and quotation was signed by Shri Rakesh Sharma. He further stated that except Shri Rakesh Sharma no body from M/s Khmeshwar Enterprises ever met him. Therefore, it appears that material from M/s Jubilant Organosys Ltd, Gajraula was lifted by Shri Rakesh Sharma and not by Shri Rakesh Kumar Agarwal

Proprietor of M/s Khmeshwar Enterprises whereas invoices were issued in the name of M/s Khmeshwar Enterprises.

II. Shri Rakesh Agarwal Prop of M/s Khameshwar Enterprises in his statement dated 31.05.2011 also stated that the material was lifted by Shri Rakesh Pandit Ji from M/s Jubilant Organosys Ltd., Gajraula and Shri Rakesh Pandit provided only bill of M/s Jubilant Organosys ltd to him for further issuing the invoices of Cenvat credit to the manufacturers of excisable goods. However, Shri Rakesh Agarwal could not provide the address and contract no. of Shri Rakesh Pandit. The said Shri Agarwal also stated that Shri Rakesh Pandit sold the scrap so purchased from M/s Jubilant Organosys Ltd, Gajraula some where else and he does not know where Shri Rakesh Pandit sold the said scrap.

III. Shri Rakesh Agarwal in his statement dated 18.05.2011 have stated that **all the purchase & sale were made by him on paper only because of the fact that he was engaged in the work of purchase and sale of bill only on commission basis through brokers. He never hired the trucks for transportation of goods of purchase and sale of said scrap. He prepared only bills for sale as per advice of brokers.**

IV. During the course of statement of Shri Rakesh Agarwal, he was shown the details of payments of Rs.1,38,58,410/- as prepared from their account statement. He put his dated signatures on the said statement. On being asked about the other details of payment made by them to M/s Jubilant Organosys Ltd Gjaraula from their PNB a/c No.111600200029014 and the payments which have not been reflected in their said account was made by Shri Rakesh Pandit. However, the said Shri Agarwal in his further statement dated 04.07.2011 stated that they made payments to M/s Jubilant Organosys Ltd Gajraula from his accounts 1116002100029014 w.e.f. 05.05.2007 and prior to 05.05.2007 from his another PNB a/c No.1116002100026150. He also provided the copy of statement of the said account.

V. On scrutiny of the aforesaid bank statements as provided by Shri Agarwal, it was observed that only payments of Rs.2,47,04,250/- were made from these accounts as against the total payments of Rs.3,40,00,425/- shown as having been received by M/s Jubilant Organosys Ltd Gajraula from M/s

Khmeshwar Enterprses. A chart at Annexure-A containing the details of bank drafts issued from his accounts was shown to Shri Rakesh Agarwal on 04.07.2011 and on being asked about the said difference of Rs.92,96,175/-, Shri Rakesh Agarwal in his statement dated 04.07.2011 stated that the said amount of Rs.92,96,175/- was paid by Shri Rakesh Pandit from his account or from any other accounts which he does not know.

VI. On further scrutiny of both the above bank accounts, it was observed that the bank drafts which were sent to M/s Jubilant Organosys Ltd Gajraula were got prepared by depositing the same amount in cash on the same day. Shri Agarwal was asked during his statement on 04.07.2011 from where he arranged the cash for making drafts. Shri Agarwal in his said statement stated that the cash was provided by Shri Rakesh Pandit for making the Bank drafts in the name of M/s Jubilant Organosys Ltd, Gajraula in advance and he handed over the Bank drafts to Shri Rakesh Pandit for further onward handing over the same to M/s Jubilant Organosys Ltd, Gajraula.

VII. On scrutiny of the invoice books of M/s Khmeshwar Enterprises, it came to notice that they issued invoices S. No.01 dated 20.06.2007 to 29 dated 25.07.2007 from book no. 01 and thereafter they issued Invoices from S. No.523 dated 25.12.2007 to 88 29.03.2008 from book no.2. Therefore, it evinces that the invoices which were left blank were meant to be used to cover the transactions. No prudent businessman will function in a manner as M/s Khmeshwar Enterprises functioned. The irregular invoices issued by the said M/s Khameshwar Enterprises are indicative of illegal transactions. The purchases of scrap made from M/s Jubilant Organosys Ltd, Gajraula are irregular ones and were made with malafide intent to avail and pass on irregular credit by building up the papers only wherein physical transactions of goods were not at all involved.

VIII. During the course of search of the office premises of M/s Khameshwar Enterprises only few GRs relating to sale of goods, were recovered, as at SI. 126 & 129 of the Annexure to Panchnama dated 13.01.2011. On being asked about rest of the GRs, Shri Rakesh Agarwal stated that few G.Rs in respect of

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goods were issued and they did not have any other G.R. as they did not deal with the goods physically and only invoices were issued by them.

IX. During the course of search on 13.01.2011, a list containing various vehicles number (RUD-24), stationary of blank weighment slips of Om Dharam Kanta, Gahaziabad Dharam Kanta & Shardha Dharam Kanata, blank GR book of M/s Sharma Golden Transport Co. & M/s Jagdamba Roadlines, as resumed at S. No.202, 220 & 222 of Panchnama dated 13.01.2011 (RUD-25), were also recovered from office premises of M/s Khameshwar Enterprises. As per their convenience, M/s Khameshwar Enterprises used such papers and picked up the vehicle number suiting to them while dealing with the papers in relation to scrap & other materials. The above statement is corroborated from the averments made by Shri Naushad Accountant of M/s Khameshwar Enterprises in his statement dated 13.01.2011 (RUD-6) recorded on the spot, who clearly admitted to have built up papers and that they never received the goods physically in their premises.

X. In question No.10 of statement dated 04.07.2011, Shri Agarwal was asked to provide the complete details of the following transporters whose few GRs, which found issued in respect of excisable goods, were recovered from his office.

1. M/s Delhi Kashipur Moradabad Nainital Transport, Ghaziabad. Ar
2. M/s Hiway's Transport Co. Ghaziabad.
3. M/s Shiv Shankar Transport Co. Ghaziabad.
4. M/s Mahajan Road Lines, Ghaziabad.
5. M/s Jai Mata Road Lines, Ghaziabad.

Shri Agarwal in his statement dated 04.07.2011 stated that he did not know the details of the said transporters and that the GRs which have been recovered from his office were arranged through brokers for Sales Tax purpose. He did not remember the broker from whom the said GRs were arranged.

XI. In question No.11 of statement dated 04.07.2011, Shri Agarwal was remembered of his statement dated 31.05.2011 wherein he assured to provide the whereabouts of the brokers. In reply, he

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stated that he failed to gather the information and as such could not provide to the Department.

XII. In question No.12 of statement dated 04.07.2011, Shri Rakesh Agarwal was shown the statement dated 13.01.2011 (RUD-7) of Shri Rajiv Pasi S/o Sh. Bhushan Prakash owner of the Plot No.C-111, Bulandshahar Road Industrial Area, Ghaziabad wherein he stated that Shri Rakesh Agarwal had used their godown on rent only before six years. Further, on being questioned as to how he conducted his business when the godown was not in his possession during 2006-07, 2007-08 & 2008-09, Shri Agarwal stated that he had taken the said godwon on.rent and a rent agreement was made with the owner of said godown but at present he had no copy of said rent agreement or rent receipt. However, he had used the said godown upto March, 2008. From the above, it may be seen that Shri Agarwal has spoken a blatant lie, otherwise, he could have produced the rent agreement or at least a rent receipt, which point at the fact that the sasid godown was not in possession of Shri Rakesh Agarwal at the material point of time. The fact also goes on to prove that they were not physically deal with the materials and only the papers were cooked up.

XIII. Shri Nasushad Ahmad, Accountant of M/s Khameshwar Enterprises has also stated in his statement dated 13.01.2011 that they issued only bills as per direction of Shri Rakesh Kumar Agarwal and they never deal with the goods. He further stated that they also prepared GRs and Weighment slips in respect of bills issued by them to their office."

3. Accordingly, vide aforementioned show cause notice, invoking the extended period, the appellant was required to show cause as to why Cenvat Credit amounting to Rs.1,71,887/-, be not disallowed and recovered under Rule 14 of CCR, 2004, read with Section 11A of Central Excise Act, 1944 with proposal to appropriate equal amount of Cenvat Credit already reversed vide Entry No.219 dated 20.06.2011 and further, proposal to charge

interest and appropriate the amount of Rs.73,482/- already deposited through Challan dated 20.06.2011, and further, proposal to impose penalty under Rule 15 of CCR read with Section 11 AC of the Act.

4. The appellant appeared and contested the show cause notice, stating that they denied the allegations. Further, it has been urged that the whole case of Revenue is only based on the statements and they wish to cross-examine all such persons whose statements have been relied upon while issuing the show cause notice. Appellant further reserved their right to file a final reply, after the opportunity of cross-examination is allowed to them. It was further stated that they did receive the Scrap from the seller, namely, M/s Khameshwar Enterprise. They are not aware, if Khameshwar Enterprises have supplied them some other scrap or non-duty paid scrap and passed on illegitimate credit. It was further stated that they have utilized the scrap received and maintained proper records and have manufactured dutiable finished products, which have been removed on payment of duty. It was further stated that the suo motu, reversal of duty by them with interest was not as a result of any malpractice on their part but was a conscious decision to avoid litigation when they came to know about the fraudulent nature of activity on the part of Khameshwar Enterprise and the ongoing enquiry in the matter. It was further urged that reversal of the Cenvat Credit by them, does not amount to admission of any

guilt on their part. It was further urged, in view of the reversal of the credit, and the interest before the issue of show cause notice, is bad and against the provisions of Law. That there is no case of any collusion between the appellant and the said Khameshwar Enterprises. Accordingly, under the facts and circumstances, no penalty was imposable on them.

5. The SCN was adjudicated vide Order-in-Original dated 28.11.2013 passed by the Assistant Commissioner, who was pleased to confirm the proposed demand with interest and appropriated the same with the Cenvat Credit already reversed and interest deposited. Further, penalty of Rs.1,71,887/-, was also imposed under Rule 15 of CCR read with Section 11 AC of the Act.

6. Being aggrieved, the appellant preferred an appeal before the Ld. Commissioner (Appeals), who vide the impugned order, has pleased to confirm the order of the Assistant Commissioner, rejecting the appeal.

7. Being aggrieved, the appellant is in appeal before this Tribunal on the ground that the adjudicating Authority have failed to give them opportunity to cross-examine the witness of the Revenue. The whole case of the Revenue is based on the statement of Rakesh Kumar Agarwal proprietor of Khameshwar Enterprises and some others. The Revenue have not made out the case that the appellant have not received the inputs under the transaction in dispute. Further, the appellant have manufactured the taxable

finished goods and have cleared the same on payment of duty. Further, the deposit of duty by way of reversal along with the interest, prior to the enquiry conducted in the premises of appellant, and the statement recorded of their authorized signatory Mr. Abdul Haq, does not amount to any admission of guilt or malpractice on their part. Further, there have been miscarriage of justice, as the Assistant Commissioner have failed to allow them the opportunity to cross-examine the witness of the Revenue, particularly, in view of the fact that the whole case of Revenue is based on statements. The Ld. Commissioner (Appeals) have also failed to record the finding on the ground raised, regarding denial of opportunity of cross-examine, resulting into failure of justice. Further, it is urged that the Commissioner (Appeals) has observed at Para 5.2, wherein it has been held that the grounds of the Revenue are enough to substantiate that the appellant has received non-cenvatable scrap of Iron and Steel on one hand and duty paying documents from the trading firm to regularize the receipt of scrap and availed Cenvat credit. The learned Counsel has also relied on the ruling of Hon'ble Allahabad High Court in the case of CCE Vs. Juhi Alloys Ltd. 2014 (302) E.L.T. 487, wherein the Hon'ble High Court under the facts that where invoice of manufacturer was issued in the name of registered dealer or the first stage dealer was found fake, appreciating the facts that the purchaser/manufacturer had utilized road permit issued by Sales Tax Department for transportation of goods to his factory, had made the payment by cheque for the purchase of inputs and the transaction was properly recorded in the books and registers and further, the goods manufactured were cleared on payment of duty, it was held that it would be impractical to require the assessee to go behind the records maintained by the first stage dealer, assessee had duly acted with all reasonable diligence in its dealing with the first stage dealer within the meaning of Rule 9(3) of CCR, 2004, casting an impossible or impractical burden on the assessee would be contrary to the Rules. Accordingly, the appeal of the Revenue was dismissed by the High Court.

8. The learned AR for Revenue, Mr. D.K. Deb, relies upon the impugned order.

9. Having considered the rival contentions, I find that the appellant has admittedly paid the duty on the inputs in question by cheque. Further, no case of collusion is made out against the appellant. I further take notice of the fact that the case of Revenue is based on the statements of the said Rakesh Agarwal of Khameshwar Enterprise & others, and Revenue have failed to offer its witness for cross-examination in spite of prayer having been made by the appellant. This has resulted into miscarriage of justice for not giving any reasonable opportunity of hearing. Further, in view of the findings of the Ld. Commissioner (Appeals), we find that the appellant seems to have received some scrap along with the duty paying document, also establishes the absence of collusion and or mala fide on the part

of the appellant. I also take a notice of the fact that the appellant have, suo motu, reversed the Cenvat credit under dispute along with the interest prior to the enquiry initiated against them by the Revenue and issuing the show cause notice. I hold that no case of contumacious conduct or fraud, is made out against the appellant. Accordingly, I, set aside the penalty imposed under Rule 15 of CCR read with Section 11 AC of the Act. Under the facts and circumstances, the appellant will not be entitled to take re-credit of the amount reversed by them, suo motu. Thus, the appeal is allowed in part as indicated above.

(Pronounced in the open Court 05-8-16)

-Sd/-

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

Mishra

प्रमाणित प्रति / Certified True Copy
30.8

सहायक पंजीकार / Asstt. Registrar
सीमाशुल्क, उत्पादशुल्क एवं सेवा कर
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