FAX : 0532-2400149 REGISTERED / AD

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

Dated: 28/06/2016

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. A/70284/2016-EX[DB] dated 13/06/2016

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/MISC/70281/2016	E/56068/2014	INDO SOLAR PVT LTD 3-C/1, ECOTECH-II, UDYOG VIHAR, GREATER NOIDA U.P.
		Name and Address of Respondent
2		C.C. & C.E. & S.T.-Noida C-56/42...SECTOR 62, NOIDA,UTTAR PRADESH-201307

Copy To

3Advocate(s) / Consultant(s):

A. P. MATHUR,ADV
167, TAGORE TOWN,
ALLAHABAD,UTTAR PRADESH

5 Bar Association, CESTAT, ALLAHABAD

6 Director Publications, Customs, Excise, I.P. Estate, Delhi

7 M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, New Delhi-3

8 Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17
9 Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005
10 Easy Service Tax Online Dot Com Pvt. Ltd., 407A, Iscon Mall, Satellite Road, Ahmedabad-15
11 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)
12 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070
13 Mark Professional Services Pvt. Ltd., 308, Everest Block, Aditya Enclave, Hyderabad – 38
14 The ICFAI society, 52, Nagarjuna Hill,Punjagutta Hyderabad.-500082
15 M/S Knowledge Processing Pvt. ltd.(taxmanagementindia.com),FF-19,1st Floor,Cross River Mall,CBD Ground,Near Karkardooma Court,Delhi-110032
16 C.D.R. 17 Office Copy 18 Guard File

Asstt. Registrar

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

REGIONAL BENCH : ALLAHABAD
COURT No. I
E/Misc/70281/2016
APPEAL No.E/56068/2014-EX(DB)

(Arising out of Order-in-Appeal No. NOI/EXCUS/000/APPL/177/13 dated 27/08/2013 passed by Commissioner of Central Excise & Customs (Appeals), Noida)

For approval and signature:

Hon'ble Mr. Anil Choudhary, Member (Judicial)
and
Hon'ble Mr. Anil G. Shakkarwar, Member (Technical)

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

M/s. Indo Solar Ltd. **Appellant**

Vs.

Commissioner of Customs, CE & ST, Noida **Respondent**

Appearance:

Shri A.P. Mathur, Advocate for Appellant
Shri D.K. Deb, Assistant Commissioner (AR), for Respondent

CORAM:

Hon'ble Mr. Anil Choudhary, Member (Judicial)
Hon'ble Mr. Anil G. Shakkarwar, Member (Technical)

Date of Hearing : 13/06/2016
Date of Decision : 13/06/2016

FINAL ORDER NO. 70284/2016

Per: Anil Choudhary

This appeal is filed by M/s. Indosolar Ltd against Order-in-Appeal No. NOI/EXCUS/000/APPL/177/13 dated 27/08/2013.

2. The appellant a hundred percent EOUs is in appeal against order of Commissioner (Appeals) whereby the disallowance of Cenvat credit have been upheld.

3. As per SCN dated 16/10/12 the appellant had applied for refund of Rs.4,60,11,733/- under Rule 5 of Cenvat Credit Rules, 2004, read with notification number 5/2006–CE on account of accumulated Cenvat credit received on and admissible input services availed by them and used in the manufacture of finished goods which were cleared for export under Bond/LUT for the period April, 2010 to March, 2012. It appeared to revenue that the appellant, as they are clearing their finis hed products without payment of duty, they are not entitled to Cenvat credit in terms of Rules 6(1) read with 6(4) of CCR, 2004. Accordingly, the appellant was required to show cause why the refund amount should not be denied and disallowed. The appellant did not appear and contest the SCN and vide the ex-parte O-I-O dated 30/11/12 the refund claim was held liable to be rejected as the credit was held to be availed in contravention of Rule 6(1) read with 6(4) of CCR, 2004. Being aggrieved the appellant had preferred appeal before the Commissioner (Appeals) who vide the impugned order dated 27/08/13, was pleased to observe that inspite of 4 opportunities the

appellant has not appeared for hearing. The appeal was dismissed and the order in original was upheld. Being aggrieved the appellant is before this Tribunal.

4. The learned Counsel appearing for the appellant states that as the appellant was before the settlement commission and the issue involved in this appeal was also one of the issues before the settlement commission and that was the reason why they had not appeared before the Court's bellow. In the final order of settlement commission number 3689/2013 to 3694/2013 dated 13/5/13 while the other disputes were settled, but as regards the issue of Cenvat credit the settlement commission observed as follows:-

"10.2 The Bench observed that the Revenue has sought to deny cenvat credit by invoking Rule 6 of the Cenvat credit Rules. This provides that cenvat credit shall not be allowed on such quantity of input used in or in relation to the manufacture of the exempted goods or for the provisions of exempted services or input service used in or in relation to the manufacture of exempted services. However, it has been pointed out by the appellant that sub rule 6 of Rule 6 of the Cenvat credit Rules provides that the sub rule (1), (2), (3) and (4) shall not be applicable in case the excisable goods are cleared to a 100% export oriented undertaking.

11.1. Since duty has been demanded on different and unrelated issues, the Bench decided to address each of these separately. The Revenue has sought to deny cenvat credit availed by the applicant on inputs, capital goods and input services. This denial is in terms of Rule 6(1) of the Cenvat Credit Rules. The applicant had taken cenvat credit amounting to Rs.23,94,652/- on inputs, Rs. 15,53,024/- on capital goods and Rs.6,63,53,497/- on inputs services respectively. A part of this has been utilized for payment of duty foregone which, the applicant has admitted, is improper.

11.2 Capital goods and inputs procured by a 100% EOUs are exempted from payment of Customs and Central Excise duty in terms of notification No.52/2003-Cus. and 22/2003-CE respectively. There is, however, no such exemption available for Services received by

100% EOUs. The applicant claimed that the cenvat credit has accumulated on account of availment of credit of service tax paid by them on services such as housekeeping, security services, banking and financial services, insurance, cargo handling service, repair and maintenance services, etc.

11.3 The Revenue had submitted that Rule 6(1) of the Cenvat Credit Rules provides that cenvat credit shall not be allowed on any input or input services availed for the manufacture of exempted goods or for provision of exempted services. The applicant had highlighted that Rule 6(6) of the Cenvat Credit Rules lays down that the provisions of sub rule (1) are not applicable in case the excisable goods removed without payment of duty are cleared to a 100% EOU. On that basis, they had sought to argue that the entire amount of Cenvat Credit availed by the applicant is valid. However, the bench observed that this exclusion would only apply to units which are supplying inputs or capital goods to a 100% EOUs in order to enable such suppliers to avail cenvat credit on duty paid inputs acquired by them, since supplies to a 100% EOUs are free of excise duty.

11.4 However, service tax would be on a different footing. There is no exemption from service tax on services utilized by a 100% EOUs. The Bench observed that the applicant would be entitled to avail Cenvat Credit of the Service Tax paid by them on the input services utilized by them proportionately to the extent of the value of goods exported. The applicant also submitted that Chapter 6 of the Foreign Trade Policy (FTP) 2009-2014 contains provisions relating to 100% EOUs. Para 6.11C(iv) provides that 100% EOUs will be entitled to cenvat credit on the service tax paid on the services provided to 100% EOUs. In fact Rule 5 of the Cenvat credit Rules, 2004 specifically provides for refund of accumulated cenvat credit in case the final product is exported without payment of duty. This rule also provides the manner for determining the amount of such refund. The Bench observed that the applicant was entitled to cenvat credit to the extent provided for in the Cenvat Credit Rules.

11.5 The Bench observed that the applicant was entitled to cenvat credit of Service Tax paid on eligible input services utilized. The Bench, however, observed that it would not be appropriate for the Settlement Commission to scrutinize the transaction wise availment and utilization of such credit. It would be appropriate for the jurisdication officers to ensure the proper availment and utilization of such credit."

5. We find that the issue lies in a narrow compass as to the availability of Cenvat credit. Further, we find that due to non

appearance by the appellant before the Court bellow, the issue has not been examined with respect to the availability of Cenvat credit in terms of rule 6(6) of the Cenvat Credit Rules, 2004. Accordingly, in interest of Justice we allow the appeal by way of remand. We remand the matter to the adjudicating authority, who shall examine the issue as regards both availability and impediment to avail Cenvat credit with respect to the provisions of Cenvat Credit Rules, particularly Rule 6(6) of the Cenvat Credit Rules. We, further, direct that such an order will be passed within a period of 45 days from the date of receipt of a copy of this order. Further, we direct the appellant's to appear before the concerned authority within a period of 20 days from the date of receipt of a copy of this order along with their reply/representation and evidences they want to rely in support of the refund claim and entitlement of Cenvat credit. If the appellants are found entitled to refund the same shall be disbursed to them within a further period of 30 days from the date of passing of the order, in terms of this order.

6. This appeal is allowed by way of remand with directions. The Miscellaneous Application for early hearing also stands disposed off

(Dictated in Court)

(Anil G. Shakkarwar)
Member (Technical)

(Anil Choudhary)
Member (Judicial)

प्रमाणित प्रति / Certified True Copy

8.7.16

सहायक पंजीकार / Asstt. Registrar
सीमाशुल्क, उत्पादशुल्क एवं सेवा कर
अपील अधिकरण / (C.E.S.T.A.T.)
38, एम. जी. मार्ग, इलाहाबाद-211001
38, M. G. MARG, ALLAHABAD-211001