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: 07/07/2016

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. A/70334/2016-SM[BR] dated 17/06/2016

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/571/2012	**BHARAT ROLLING MILLS,** SHAHGANJ, JAUNPUR, (U.P.)
		Name and Address of Respondent
2		-C.C.E Allahabad 38,M.G.Marg, civil Lines, Allahabad

Copy To

3Advocate(s) / Consultant(s):

Bipin Garg
B-1/1289, A - Vasant Kunj,
New Delhi

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

Ex. Appeal No.571/12

Arising out of OIA No.236/CE/Alld/2011 dated 11.11.2011 passed by Commr. (Appeals) of Central Excise, Allahabad.

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? :
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 His Lordship wishes to see the fair copy of the Order? :
4. Whether Order is to be circulated to the Departmental Authorities? :

M/s Bharat Rolling Mills ...APPELLANT(S)

VERSUS

Commissioner of Central Excise, Allahabad RESPONDENT (S)

APPEARANCE

Shri Bipin Garg, Adv. for the Appellant (s)
Shri V. K. Shastri, A.C. (A.R.) for the Department

CORAM:

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

DATE OF HEARING & PRONOUNCEMENT : 28. 10. 2015

Final ORDER NO. 70334/2016

Per Mr. Anil Choudhary :

The Appellant, M/s Bharat Rolling Mills, is in Appeal against Order-in-Appeal No.236/CE/Alld/2011 dated 11.11.2011 passed by Commr. (Appeals) of Central Excise, Allahabad.

2. The facts in brief are that the appellant is a manufacturer of MS Rounds, MS Strips & M.S.Square falling under chapter sub-heading 72221119, 72111450 of the first schedule to the CETA, 1985. The appellant was availing exemption as an SSI unit under notification number 08/2003-CE dated 01.03.03. As the appellant exceeded the SSI limit of Rs. 150 lakhs on 17.11.2009, they gave intimation to the revenue that on and from 18.11.2009, they will pay tax at normal rate and also be availing Cenvat credit. Request was also made for verification of stock. That Rule 3 (2) of Cenvat credit Rules provides, an assessee being a manufacturer of final products is allowed to take Cenvat credit of the duty paid on inputs lying in stock or in process on inputs contained in the final products lying in the stock on the date on which such goods manufactured by the said manufacturer, ceased to be exempted goods.

2. The revenue authority came for inspection on 25/11/09 wherein they found that the appellant in the Financial Year 2009-10 have crossed the exemption limit of 150 lakhs. It also appeared that under Rule 3 sub rule 2 of CCR the appellant was entitled to take/ avail Cenvat credit of the duty paid on inputs lying in stock or in process on inputs contained in final products lying in stock as on 18/11/2009. However the authority found that the appellant have taken credit in the Account from 19/10/2009. Accordingly it appeared that the credit

taken on inputs lying in stock as on 18/11/2009, prior to that date, is not proper and the appellant have violated the provisions of Cenvat credit rules read with rule 2 (iii) of notification number 8/2003 which provides that a manufacturer shall not avail the Cenvat credit of duty on inputs under Rule 3 or 11 of the Cenvat credit rules used in manufacture of the specified goods, cleared for home consumption during the period of exemption (SSI). Accordingly show cause notice dated 11/3/2010 was issued calling upon the appellant as to why not the Cenvat credit amounting to Rs.1,30,864/- availed on inputs during the period 01/4/09 to 18/11/09 be not demanded and recovered along with interest under section 11 A read with rule 14 of CCR. It further appeared that the appellant is using simultaneously two books of Invoices to clear final products for home consumption with effect from 1/4/09 and it appeared that the same is in violation of rule 11 (4) of the Central Excise Rules and accordingly the appellant was required to show as to why not penalty be imposed under rule 27 of the Rules.

3. The appellant contested the show cause notice by filing reply. It is explained that so far availing of Cenvat credit is concerned the credit was taken during the last one month from 18.11.2009 in anticipation and under conscious knowledge that the inputs on which credit had been taken shall not be utilized in clearance of goods under exemption. It was further contended that the appellant had only taken credit and not utilized the same and as such there is only a technical breach of the provisions of rule 3 (2) of the CCR as

admittedly there had been no utilisation of the credit. As regards the usage of two invoices books simultaneously the appellant informed to revenue vide their letter dated 03/4/2009 duly acknowledged by the revenue on 08/4/2009 wherein it had informed that they are going to use one set for tax invoice under Trade Tax (Sales Tax) and the other for compliance under the Central Excise Act/Rules. It was further contended that the utilization of the 2 set of invoice books was made under proper intimation to the revenue and no misgiving was found on the part of the appellant. As such no adverse inference is called for and the proposed penalty is fit to be dropped.

4. The SCN was adjudicated vide order-in-original dated 30/3/2011 wherein the Cenvat credit of Rs.1,30,864/- was demanded, being held inadmissible under section 11 A(1) read with rule 11 (2) of CCR along with interest. Further equal amount of penalty was imposed under rule 15 (1) of CCR observing that on the plain reading of rule 3 of CCR, makes it clear that the manufacturer of the final product shall be allowed to take Cenvat credit of the duty paid on inputs lying in stock or in process or contained in final products lying in stock on the date on which the said manufacturer ceased to be exempted. Therefore Cenvat credit is not admissible to the appellant and accordingly, the amount was held recoverable. As regards violation of Rule 11 of CER for it was held that only one copy of invoice book shall be used at the time, unless so allowed by the proper authority. In absence of any permission from the proper authority it was held that the appellant have violated the rule and is liable to penalty and accordingly penalty of Rs.5000/- was imposed under rule 27.

5. Being aggrieved the appellant preferred appeal before the Commissioner Appeals, vide the impugned order dated 11/11/2011, held that the Provisions are mandatory as the phrase "shall be" and "shall avail" manifestly emphasize that the manufacturer are not allowed to avail the credit of duty on inputs until the aggregate value of first clearances does not exceed the exemption limit. It was further held that there is no accommodation in the law for the averments of the appellant that provisions under the Cenvat credit rules and notification 8 of 2003, creates legal fiction as that the manufacturer can take Cenvat credit on such inputs which are intended for use in the manufacture of dutiable final products and accordingly the impugned order was confirmed and appeal rejected.

6. Being aggrieved the appellant is in appeal before this Tribunal. The ld. Counsel urges that under the facts and circumstances there is only a venial breach of the provisions of law. That there is no case made out of availing inadmissible Cenvat credit. Accordingly the court below erred in disallowing the Cenvat credit and holding the same is recoverable. The ld. Counsel urges that as the credit is legally admissible, only for the sake of venial breach, the substantial benefit should not be denied. As regards penalty under rule 27 for the violation of the provisions of Rule 11 for of Central Excise rules, he states that the same was a regular practice by the appellant assessee and never any objection was raised. Further it is an admitted fact that the appellant was utilising 2 sets of books under intimation to the revenue. Further no case of any clandestine activity was found. Accordingly he prays that the penalty is fit to be set aside.

7. The ld.DR relies on the impugned order. He further states that in view of the provisions of Rule 3 to of CCR which provides that Cenvat credit can be taken on the date the assessee starts paying tax for clearances, and not prior to that. Had the appellants taken credit on 18/11/09 of the amount in question, the same would have been in order. But as the assessee have taken the credit prior to that date, during the period of exemption the appellant have violated the provisions of law and accordingly prays for upholding the impugned order.

8. Having considered the rival contentions, in view of the fact that the appellant have only taken and not utilized the Cenvat credit prior to 18/11/09, when it started paying tax on the clearances, I hold that it is only a venial breach of the provisions. In such circumstances the substantial benefit should not be denied to the appellant. Accordingly this issue is decided in favour of the appellant and the appellant is h~~o~~eld entitled to the Cenvat credit so availed. However, as the appellant have made venial breach of the provisions, the penalty of Rs.5000/- imposed under Rule 27 is confirmed.

9. Thus, the appeal is allowed in part as indicated above.

(Dictated and pronounced in the open Court)

Sd/-

(Anil Choudhary)
MEMBER (Judicial)

प्रमाणित प्रति / Certified True Copy
15.7.16

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

mm