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: 29/11/2016

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. A/71071/2016-SM[BR] dated 18/11/2016

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/CROSS/227/2009	E/868/2009	CCE LUCKNOW 7-A, ASHOK MARG, LUCKNOW.
		Name and Address of Respondent
2		VISAKA INDUSTRIES LTD. VILL- KANNAWAN, P.S.- BACHHRAWAN, RAEBARELI. ,,

Copy To

3 Advocate(s) / Consultant(s): SH T.K.SRIVASTAVA,ADV
311, MURLI BHAWAN
ASHOK MARG, LUCKNOW

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 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)

10 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070

11 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad – 38
12 The ICFAI society, 52, Nagarjuna Hill,Punjagutta Hyderabad.-500082
13 M/S Knowledge Processing Pvt. ltd.(taxmanagementindia.com),FF-19,1st Floor,Cross River Mall,CBD Ground,Near Karkardooma Court,Delhi-110032
14 C.D.R. 15 Office Copy 16 Guard File

Asstt. Registrar

5/12-H

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH : ALLAHABAD
COURT No. I

APPEAL No. E/868/2009-EX[SM] With
CROSS Application No. E/CROSS/227/2009

(Arising out of Order-in-Appeal No. 237-CE/LKO/2008 dated 29/12/2008 passed by Commissioner of Central Excise & Customs (Appeals), Lucknow)

For approval and signature:

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

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

Commissioner of Central Excise, Lucknow **Appellant**

Vs.

M/s Visaka Industries Ltd., **Respondent**

Appearance:

Shri Pawan Kumar Singh, Superintendent (AR), for Appellant
Shri T.K. Srivastava, Advocate, for Respondent

CORAM:

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

Date of Hearing & Date of Decision: 18/11/2016

FINAL ORDER NO. 71071/2016

Per: Anil Choudhary

The present appeal is filed by Revenue against Order-in-Appeal No. 237-CE/LKO/2008 dated 29/12/2008 passed by Commissioner of Central Excise & Customs (Appeals), Lucknow.

2. The brief facts of the case are that the issue in this appeal by Revenue is whether the respondent assessee is entitled to Cenvat credit on capital goods received, prior to 25/12/2005, when the trial production was started and thereafter commercial production started from 04/01/2006. The appellant was registered for manufacture of Asbestos Cement Sheets falling under Chapter Heading No.68114010 of Central Excise Tariff Act, 1985 & taxable @ of 8% Adv. at the relevant time.

3. The admitted facts of the case are that the Asbestos Cement Sheets falling under Chapter Heading No.68114010 of Central Excise Tariff Act, 1985 & taxable @ of 8% Adv. But the goods, namely the Asbestos Cement Sheets/products attracted Nil rate of duty under Notification No. 06/2002-CE dated 01/03/2002, on fulfilling the condition that the said goods contained not less than 25% Fly Ash or Phospho-gypsum or both. This notification was rescinded vide Notification No.21/2006-CE dated 01/03/2006 and another Notification No.05/2006-CE dated 01/03/2006 was issued which provided duty @ 8% adv. on the said goods that is

where 25% Fly Ash or Phospho-gypsum or both is contained. The appellant applied permission for exemption under said Notification No.02/2002-CE, which was granted to them vide communication by the Superintendent dated 17/02/2006. Thus the respondent assessee wholly availed exemption for the period from 04/01/2006 to 28/02/2006.

4. The Show Cause Notice was issued, dated 19/01/2007 by the appellant, as it appeared to Revenue that the respondent is not entitled to take Cenvat credit as they were manufacturing Tax free good during the period when they received the capital goods. Accordingly, it was proposed to disallow the Cenvat credit amounting to Rs.31,55,344/- including Education Cess under Rule 14 of Cenvat Credit Rules, 2004 & further penalty was proposed. The Show Cause Notice was adjudicated on contest and the proposed disallowance of Cenvat credit was confirmed and equal amount of penalty was imposed under Rule 14 of Cenvat Credit Rules, 2004.

5. Being aggrieved the respondent assessee preferred appeal before ld. Commissioner (Appeals) who vide the impugned Order-in-Appeal No. 237-CE/LKO/2008 dated 29/12/2008, was pleased to allow the appeal observing and, following the Division Bench ruling of this Tribunal in the case of ACE Times *Versus* Commissioner of Central Excise reported at 2004 (05) LCX0135 (T) (DB) as follows:-

The Tribunal has observed that "the appellants had received the capital goods during the year 2000-01. However they could not take any credit on the capital goods as they were working under exemption. However from 01/04/2001, they started paying duty and opted for the Cenvat Credit Scheme. Therefore they are eligible to take Cenvat credit of duty on the capital goods during the year 2001-02. Under Rule 57AC(2)(a) at the relevant time, the provision was that the Cenvat credit in respect of capital goods received in a factory at any point of time in a given financial year shall be taken only for an amount not exceeding 50% of the duty paid on such capital goods in the same financial year. The Rule 57AC(2)(b) of the Central Excise Rules provides that balance of Cenvat credit may be taken in any financial year subsequent to the financial year in which capital goods were received in the factory of the manufacture. We find that corresponding provisions are made in Rule 4(2)(a) & (b) of Cenvat Credit Rules, 2002. We find that these provisions do not deny credit, if it is not taken in the same financial year in which the capital goods were received. It only restricts that in the financial year in which capital goods were received, the credit not exceeding 50% of duty paid on such capital goods can be taken as credit in that financial year. Therefore, denial of 50% credit to the appellants on the ground that they had not taken the same in the same financial year in which the capital goods were received is contrary to the Rules. The rules do not provide that if 50% credit is not taken in the same financial year in which capital goods were received, then it will lapse. We, therefore, allow the appeal and direct that 50% credit denied to the appellants should be allowed to them."

6. The ld. A.R. for Revenue relies on grounds of appeal and also relies on the Larger Bench ruling of this Tribunal in the case of Spenta International Ltd. *Versus* Commissioner of Central Excise, Thane reported at 2007 (2016) E.L.T. 133 (Tri. –LB) wherein in respect of eligibility of 50% credit on capital goods, the question was – whether the Credit eligibility to be determined with reference to the dutiability of the final product on the date of receipt of capital goods permitting eligibility of 50% credit on capital goods, used exclusively in manufacture of exempted goods. Accordingly, held, the credit eligibility was to be determined with reference to the dutiability of final product on the date of receipt of capital goods.

7. Having considered the rival contentions, I find that in the facts of the present case, it is an admitted fact that the Asbestos Cement Sheets, for which the respondent assessee registered with Revenue, falling under Chapter Heading No.68114010 of Central Excise Tariff Act, 1985 is dutiable. The appellant had only availed a conditional exemption for a

short period which under the facts had been applied for and availed subsequent to the receipt of capital goods. Even, on the basis of Larger Bench of this Tribunal, in the case of Spenta International Ltd. the products of the appellant, being Asbestos Cement Sheets was taxable under Chapter Heading No.68114010 of Central Excise Tariff Act, 1985. Accordingly, the credit eligibility is determined in favour of respondent with reference to the dutiability of final product on the date of receipt of capital goods. Further, I hold that availing of a conditional exemption, subsequently for sometime will not debar the respondent in availing the Cenvat credit on capital goods. I also placed reliance on the decision of Superior Judicial Forum of this Tribunal, West Zonal Bench, Ahmedabad in the case of Commissioner of Central Excise *Versus* Gujarat Propack reported at 2009 (234) E.L.T. 409, wherein the capital goods received for manufacture of Granules out of waste arising in manufacture in assessee's unit, which was cleared under exemption. Since as per the assessee's claim, they were not of requisite quality, gradually assessee refined manufacturing process to obtain Granules of requisite quality and most of which quantity is used in the manufacture of film. There was no intention to produce Granules to be cleared on exemption, but to produce Granules for use in the manufacture of film. But in the trial period they could not produce Granules of requisite quality and had to clear them under exemption and that the use of the machine is to be seen with regard to its working life and not utilization in a short specific period.

8. Accordingly, I dismiss the appeal of Revenue and uphold the Order-in-Appeal. The Cross Application also stands disposed of and the respondent will be entitled to consequential benefits, if any, in accordance with law.

(Dictated and pronounced in Court)

(Anil Choudhary)
Member (Judicial)

Ansari

प्रमाणित प्रति / Certified True Copy
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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