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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL  
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066  
EXCISE APPEAL BRANCH

Appeal No. E/3939 2003-3941 2003

Date 02.11.2007

Assistant Registrar  
C.E.S.T.A.T. New Delhi

To 2 SH. VIJAY AGARWAL, M.D., 3. SH VIPIN SHARMA, PROP.,  
1. M.S ACTION CONSTRUCTION EQUIPMENT (P) LTD.

IAJRU ROAD, 25<sup>th</sup> MILE STONE, MATHURA  
ROADBALLABGARH, FARIDABAD-121004

M.S ACTION CONSTRUCTION EQUIPMENT (P) LTD.

Appellant

C.C.E. DELHI IV

Vs  
Respondent

I am directed to transmit herewith a certified copy of Final order No. 526-528/07-Ex dated 01-10-07  
passed by the Tribunal under Section 35-C(1) of Central Excises Act, 1944

Assistant Registrar  
(Excise Appeal Branch)

Copy to :

1. Respondent

C.C.E. DELHI IV

NEW CGO COMPLEX, NH-IV, FARIDABAD,  
HARYANA 121001.

2. Adv. Consult SH. A.K. MISHRA, CONSULTANT, B-25, LAJPAT NAGAR - 3, NEW DELHI -24

3. C.D.R.

4. J.C.D.R.

5. Bar association, CESTAT, New Delhi

6. M.s. Deeparchi Publications, M-93, marg, 43, saket, New

7. M.s. Centax Publications (P) Ltd., 1512-E, Bhishm Pitamah

8. Excise & Customs cases, B-37, Sector -1, NOIDA - 201301

9. R. Venkatraman Constt. 44-B, S.Suncity, Ghaziabad -

10. Nidheshak publications, I.P.Estate, new Delhi

11. Taxmann Allied Service Pvt Ltd., 21-35, West Punjabi Bagh,

12. Co. Law Institution

13. TAX INDIA, B-XI/8183, Vasant Kunj, New Delhi - 110070

14. Office Copy

15. Guard file

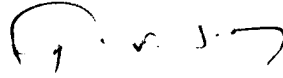
Assistant Registrar  
(Excise Appeal Branch)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,**  
**PRINCIPAL BENCH, NEW DELHI**  
**COURT NO. III**

Excise Appeal Nos. 3939 & 3941 of 2003

[Arising out of Order-in-Appeal No. 318 to 320 /CE/ APPL/ ADC/ DIV.IV/ DLH-IV/2003 dated 22.9.2003 passed by Commissioner of Central Excise (Appeals), Faridabad. ]

For approval and signature:



Hon'ble Dr. T.V. Sairam, Member (Technical)

Hon'ble Mr. P.K. Das, 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? Yes
  
  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 Their Lordships wish to see the fair :  
copy of the Order? Seen
  
  4. Whether Order is to be circulated to the :  
Departmental authorities? Yes
- 

M/s. Action Construction Equipment (P) Ltd.

Appellant

Vs.

Commissioner of Central Excise  
Faridabad

Respondent

Appearance:

Shri A.K. Mishra, Consultant for the Appellant  
Shri H.K. Thakur, DR for the Respondent

**CORAM:** Hon'ble Dr. T.V. Sairam, Member (Technical)  
Hon'ble Mr. P.K. Das, Member (Judicial)

Date of decision : 1.10.2007

*Final* ORDER NO. 526 - 528/2007 EX

**Dr. T.V. Sairam** (for the Bench):

The appellant is challenging the order of Commissioner (Appeals) made on 22.9.03. The following extracts from the said impugned order as appearing in para 9 - 11 cover the background:

*"9. I have carefully considered the matter. The first issue to be decided is whether the clearances are to be treated as effected by the appellant. The appellant's name is Action Construction Equipment P.Ltd. and on their letter head on record, the capital words ACE which admittedly is the brand name of appellant in red are printed on top right side. The name of the other unit which is claimed as proprietary concern of Shri Vipin Sharma has also been given as ACE Industries which to an independent person would look as the same. Shri Vipin Sharma who was Manager Accounts and authorized signatory of the appellant even on the date of visit submits resignation and floats as proprietary unit to manufacture the goods which were manufactured by the appellant. Shri Sharma admits that there is no manufacturing activity at the premises occupied by them i.e. ACE Industries. He further admitted that all manufacturing activity shown to be performed by M/s. ACE Industries at Vill Purithla is a concoction to evade*

payment of duty and that the three cranes shown to be cleared by them were manufactured by M/s. Action Construction Equipment P Ltd. Shri Vijay Aggarwal, Director of the appellant no. 1 vide his statement stated that "in fact the spare parts/ sub-assemblies invoiced by their spare parts division were assembled at their factory (appellant No. 1) at Jajru Road where the same were assembled to check fitments and adjustments. Thereafter these cranes were brought into SKD condition and transferred to M/s. ACE Industries Vill Prithla where they were re-assembled and dispatched". Shri Pankaj Kumar working as Engineer Product support stated that SPD was shifted to Prithla on 1.5.99 and that there is no manufacturing activity at the premises at Prithla. The transporter stated that mobile power cranes are always transported in dismantled condition in dispatch. The rent agreement for premises at prithla is again between appellant no. 1 and Shri Vipin Sharma and it is dated 10.5.99 and the premises belongs to appellant No. 1.

10. One of the clearance documents is also signed by Shri Kailash Ahuja the employee of appellant No. 1. The findings of the adjudicating authority that the second concern M/s. ACE Industries had been created by Shri Vijay Aggarwal with the help of Shri Vipin Sharma to evade CE duty by showing clearances as SSI unit are correct. The facts and circumstances show that the said cranes were manufactured by

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*appellant No. 1 but clearances were shown in the name of other concern. The contravention alleged stands proved. The duty has already been paid by the appellant no. 1.*

*11. The second issue is admissibility of modvat credit. When it has been held that the goods had in fact been manufactured by the appellant no. 1, they would also be eligible to modvat credit. The declaration is not to be filed for each crane. They were already availing modvat after following the procedures. The credit will therefore be admissible. They have claimed modvat credit after following the procedures. When the goods were manufactured by them credit would also have been availed. There is no one to one relation for availing modvat. No concrete evidence has been submitted to show that credit was not availed on the part number or engine number etc. to establish that credit was not availed, therefore for availing credit amounting to Rs.2,52,712/- remains unsubstantiated and is not admissible. Following the Tribunal decision cited by the appellants, I hold that the price charged is to be treated as cum-duty-price. The assessable value comes to Rs.22,09,827/- and the duty @16% comes to Rs.3,53,573/-."*

2. In view of the clear-cut findings made by the Commissioner (Appeals), we find that the contention of the learned Counsel for the appellants before us is somewhat narrow. The grievance, now, of the

appellant it appears to us, is only with regard to the denial of modvat facility, which alone is fiercely contested before us. It was contended that in spite of furnishing full particulars in respect of duty paid on components by the appellant on 20.3.01, the learned Commissioner (Appeals) in his order has arrived at a conclusion that "no concrete evidence was submitted to show that credit was not availed on the part number or engine number etc."

3. According to the Learned DR, the provisions of law relating to the modvat are quite lucid. The appellants according to him, is not entitled for the credit facility in view of the provisions under sub-rule (1) to (4) of Rule 57(I) Central Excise Rules, 1944. According to him, in this case the credit of duty paid on inputs had been taken wrongly by reason of fraud which stands established and hence under sub-rule (4), the facility has to be denied. It was contended that under such circumstances the provisions are clear that even the person would become liable to pay an amount equal to the credit disallowed in such cases.

4. Having heard both sides and perusing the records, we prima facie find that the authorities below have not considered the documents relating to the components produced by the appellants on 20.3.01. Without examining the same, the order has been passed by the learned Commissioner that "no concrete evidence" was made available by the appellants, which appears to us prima facie wrong. We, therefore, direct that the matter be remanded to adjudicating authority for a fresh decision after going through the relevant

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papers and documentary evidence as submitted by the appellants as a proof for payment of duty on the components / parts admittedly stock transferred to Spare parts Division in their factory

5. In view of the overwhelming evidence, we find that the charge leveled against the appellant relating to clandestine removal stands proved. Therefore, the adjudicating authority has to pass order only in respect of the availability or otherwise of the adjustment of modvat credit sought by the appellant in such circumstances. Accordingly, the orders passed by the authorities below are partially modified with the direction that the issue raised by the appellant with regard to the admissibility or otherwise of modvat facility may be examined with reference to the law and the facts of the case and after going through the documents furnished by them. The matter is accordingly remanded for a fresh consideration on this limited issue only. In our view, no change is called for in terms of penalties and fines which stand imposed under the impugned order.

5 Appeals are disposed of accordingly,  
(Dictated in the open Court)

( 1 - v 3 )

( Dr. T.V. Sairam )  
Member(Technical)



( P.K. Das )  
Member(Judicial)