

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

Appeal No. E/2715/2007IN E/S/2376/07

Date 25/01/2008

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

To :  
BHAGWATI GASES L TD  
BANAWAS, KHETRI NAGAR, JHUNJHUNU,  
RAJASTHAN.

BHAGWATI GASES L TD

C.C.E. JAIPUR I

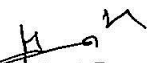
STAY ORDER NO. 72/08-EX

I am directed to transmit herewith a certified copy of Final order No. 28/2008 Excise  
passed by the Tribunal under Section 35-C(1) of Central Excises Act, 1944

Appellant

Vs  
Respondent

dated 09-1-08

  
Assistant Registrar  
(Excise Appeal Branch)

Copy to :

1. Respondent

C.C.E. JAIPUR I

N.C.R. BUILDING, STATUE CIRCLE, "C" SCHEME,  
JAIPUR 302005.

2. Adv. / Consult

MR.S.C. KAMRA & CO.

B-2/210(BASEMENT), SAFDARJUNG ENCLAVE, NEW DELHI- 110029

3. S.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 Const. 44-B, S.Suncity, Ghaziabad -

10. Nidheshak publications, LP.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)

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,  
PRINCIPAL BENCH,  
NEW DELHI, COURT NO.1**

**EXCISE STAY APPLICATION NO.2376 OF 2007 IN AND EXCISE  
APPEAL NO. 2715 OF 2007**

**Date of Hearing/Decision:9.1.2008**

[Arising out of Order-in-Appeal No.250(GRM)CE/JPR-1/2007 dated 13.8.2000 passed by the Commissioner (Appeals), Customs and Central Excise, Jaipur]

**Date of Hearing/Decision: 9.1.2008**

For approval and signature:

**Hon'ble Mr. Justice S.N. Jha, President**  
**Hon'ble Mr. T.K. Jayaraman, Member (Technical)**

- 
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 Their Lordships wish to see the fair copy :  
of the Order?
  4. Whether Order is to be circulated to the Departmental :  
authorities?
- 

Bhagwati Gases Ltd.

Applicant

Versus

CCE, Jaipur-1

Respondent

Appearance:

Mr. S.C. Kamra, and G.K. Mahajan Advocates for the Appellant  
Mr. V.Chaudhry, Authorized Representative (DR) for the Respondent

Coram: Mr. Justice S.N. Jha, President  
Mr. T.K. Jayaraman, Member (Technical)

*Final ORDER NO 28/2008EX*  
*STAY ORDER NO. 72/2008EX*

**Per Justice S.N.Jha:**

This appeal on behalf of the assessee is directed against the order of  
the Commissioner (Appeals), Customs and Central Excise, Jaipur dated

13.8.2008 dismissing its appeal holding the same to be not maintainable. The learned Commissioner observed that the communication impugned in the appeal before him was advisory in nature and no direction had been issued to the appellant. The impugned communication may be <sup>quoted</sup> in extenso at the outset as under :-

*"Please refer to your letters No.BGL/DEL/2006-07/202 dated 27.10.2006 and 210 dated 06.11.2006 on the above subject.*

*2.The matter was re-examined by the competent authority and I have directed to inform you that your request can not be acceded because the categorization of capital goods made by the Hon'ble Tribunals as 'used capital goods' which is different from capital goods removed as such' is under challenge and has not been finally accepted.*

*3.Your request for applying depreciation on capital goods, at the rate mentioned in the erstwhile rule 57 S(2) of Central Excise Rules, 1944 also can not be acceded as there is no provision to provide depreciation under Cenvat Credit Rules, 2004.*

*You are therefore advised to remove Capital goods only on payment of the Cenvat credit taken on said capital goods."*

2. The case of the appellant is that it is engaged in the manufacture of oxygen gas in two oxygen plants of 120 tonnes and 50 tonnes per day capacity at Khetri Nagar Dist. Jhunjhunu in the State of Rajasthan. The appellant availed modvat/cenvat credit on inputs and capital goods used in or in relation to manufacture of their dutiable final product. In 1994, it availed modvat credit of Rs.86,20,506/- on various capital goods under permission granted by the jurisdictional Assistant Commissioner. Intending to set up another plant of 120 tonnes per day capacity falling under the tax jurisdiction of Nagpur Commissionerate, involving modvat/cenvat credit on shifting of major capital goods to the tune of Rs.16,51,800/-, the appellant approached the jurisdictional Commissioner seeking permission to shift the plant/equipments as well as for transfer of accumulated cenvat credit lying in the excise records. Correspondence took place between the appellant and the authorities and, finally, the impugned communication was made in terms

of which the appellant can remove the capital goods only on payment of cenvat credit taken on the said capital goods.

3. The appeal came up for hearing on the point of waiver of pre-deposit of duty. Opposing the prayer, the Departmental Representative submitted that the appeal before the Commissioner was not maintainable as no cause of action had arisen to the appellant to approach the Commissioner and, on the same reasoning, therefore the present appeal too is not maintainable. According to the learned Departmental Representative, the impugned communication cannot be read as a decision or order within the meaning of Section 35 of the Central Excise Act and therefore, the appeal was/is not maintainable.

4. In view of the order we propose to pass we do not want to express any opinion on merit. The Commissioner has not gone into merits of the case and dismissed the appeal summarily, and therefore, it <sup>will</sup> not be proper on our part to consider the merits. The only point for consideration is whether the appeal before the Commissioner was maintainable.

5. It is true that there was no adjudication order as such, but it cannot be said that the impugned communication was a letter simplicitor. The appellant was informed in clear terms that it could remove the capital goods only on payment of cenvat credit taken on capital goods leaving no option to it but to pay the duty before removing the capital goods or, else, face consequences. Under Section 35 of Central Excise Act, appeal lies not only against a decision but also an order and we are inclined to think that where the order impugned determines the rights of the party or is likely to affect its rights, communication thereof cannot be said to be a communication simplicitor. It is common knowledge, more often than not, that orders are

passed in the file and they are communicated by letters. The point for consideration is whether the impugned communication creates any limitation on the right of the appellant in the matter of removal of capital goods without payment of cenvat credit or not.

6. - On behalf of the Revenue certain orders of this Tribunal were brought to our notice. In **Inox Air Products Ltd. Vs. CCE, Hyderabad**, 2004 (174) ELT 217, the communication which was subject matter of the appeal merely informed the party that in terms of the relevant rule no permission could be granted. In **Punjab Castings Pvt. Ltd. Vs. CCE, Chandigarh**, 2001 (130) ELT 761- the communication stated that benefit available under Section 3A(1) of the Central Excise Act was not admissible. In **Lumbini Beverages Pvt. Ltd. Vs. CCE, Patna**, 2005 (192) ELT 682, the communication intimated that the appellants are entitled to take cenvat credit on the inputs installed subject to the verification of documents. In **CCE, Belgaum Vs. Southern Ferro Ltd.**, 2006 (205) ELT 695, rejection of the request of the appellant for re-determining annual capacity was informed by the impugned communication. In **Smdithline Beecham Asia Ltd. Vs. CCE, Vishakhapatnam**, 2002 (146) ELT 307, the appellant was informed about the permission for release of subject goods seized subject to certain conditions. In **Sidwal Refrigeration Indus. P. Ltd. Vs. CCE, Delhi-II**, the communication simply referred to the audit objection.

7. On behalf of the appellant, on the other hand, reliance was placed on **Gujarat Ambuja Cement Ltd. 2006(197) ELT 39**. By the said communication which was subject matter of appeal in that case, the Assistant Commssioner informed the appellants that the benefit of exemption for clinkers used for captive consumption was not available and

the appellant was not entitled to provisional assessment and there was no dispute relating to valuation and rate of duty. It was held that the communication was in the nature of an order affecting the rights of the party for the reason that the claim to avail exemption had been denied and hence the communication was held to be an order and the appeal was held to be maintainable. In **CCE, Noida Vs. Electron Energy Equipments Pvt. Ltd.**, 2007 (81) RLT 369, appeal against the letter of the Superintendent of Central Excise to the effect that suo-moto modvat credit transferred by the appellants was inadmissible, was held to be maintainable. On merit of the case certain decisions of the Tribunal were cited on behalf of the appellant. As we are not going into the <sup>is</sup> question of merit, we do not intend to refer to those decisions.

8. It would thus appear that the question as to whether particular letter or communication amounts to order or decision so as to make the appeal maintainable would depend on facts of each case. If on consideration of the facts and circumstances, it is found that the order communicated by the impugned letter is such as to affect the rights of the party, the appeal should be maintainable. We put a pointed question to the learned departmental representative that if the appeal is held to be not maintainable, what would be the remedy of the appellant. The law does not countenance a situation where the person is <sup>rendered</sup> remediless. In the circumstances of the case, the only option available to the appellant was to approach the Commissioner and the Commissioner was obliged to decide the matter on merit. The order of the Commissioner holding the appeal to be not maintainable cannot, therefore, be sustained. Accordingly, we set-aside the order of the Commissioner and remit the matter back to him to pass a fresh order on merit in accordance

with law as early as possible preferably within two months of receipt of a copy of this order.

· [Dictated and pronounced in the open Court]

[Justice S.N. Jha]

President

[T.K. Jayaraman]

Member (Technical)

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