

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

Appeal No. E/5594/2004 - EX[DB]

Date 26/08/2009

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

To :
M/S PRISM CEMENT LTD.
RAJDEEP REWA ROAD, SATNA M.P
M/S PRISM CEMENT LTD.

C.C.E.BHOPAL

Appellant

Vs
Respondent

EX[DB] dated 05-8-09

I am directed to transmit herewith a certified copy of Final order No. 544/2009-
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.BHOPAL

48 ADMINISTRATIVE AREA, HOSHANGABAD ROAD, BHOPAL

2. Adv. / Consult

MR. SANJAY GROVER

LAW OFFICES, E-500, GREATER KAILASH-II, NEW DELHI-110 048.

3 C.D.R

~~4 J.C.D.R.~~

5 Bar association, CESTAT, New Delhi

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

7 M/s Centax Publications Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi - 3

8 Commercial Laws of India Pvt Ltd. Post Bag No. 1033, No.2(Old No. 36), Vaithyaram Street, T. Nagar, Chennai -17

9 Raghuraman's 44-B, Regal Flat, Shipra Suncity, Indirapuram - 201010, Ghaziabad, DT, U.P.

10 M/s Manupatra Information Solutions Pvt Ltd. Excise & Customs Cases B-37, Sector - 1, Noida - 201301, Gautam Budh Nagar, (UP)

11 M/s. Deeparchie Publications, M-93, Marg. 46, Saket, New Delhi 110017

12 Taxindiaonline.com Pvt.Ltd, B-XI/8183, Vasant Kunj, New Delhi - 110070

13 Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh, New Delhi - 110026

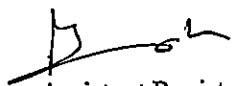
14 Easy Service Tax Online Dot Com Pvt.Ltd. 407A, Iscon Mall, Above Star India Bazar, Satellite Road, Ahmedabad-15

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

16 Office Copy

17 Guard file

18. HON'BLE PRESIDENT


Assistant Registrar
(Excise Appeal Branch)

**CUSTOMS EXCISE & SERVICE TAX
APPELLATE TRIBUNAL,**

West Block No.2, R.K.Puram, New Delhi

COURT-I

Date of hearing/decision:5.8.2009

Central Excise Appeal No.5594 of 2004

Arising out of the order in appeal No.333/CE/BPL/2004 dated 29.9.04 passed by the Commissioner of Customs & Central Excise (Appeals), Bhopal.

M/s Prism Cement Ltd.

....

Appellant

Vs.

C.C.E., Bhopal

....

Respondent

For Approval and Signature:

Hon'ble Shri Justice R.M.S. Khandeparkar, President
Hon'ble Shri M. Veeraiyan, 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?	Yes
2	Whether it should be released under Rule 27 of CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	No
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

Appearance:

Shri Sanjay Grover, Advocate for the appellants/applicants
Shri B.K. Singh, Authorized Departmental Representative (Jt.CDR) for the Revenue

Coram: Hon'ble Shri Justice R.M.S. Khandeparkar, President
Hon'ble Shri M. Veeraiyan, Member (Technical)

FINAL Oral Order No. 544 / 09 - EX

Per Shri Justice R.M.S. Khandeparkar:

Heard at length the learned Advocate for the appellants and the learned Jt.CDR for the respondent.

2. This appeal arises from the order dated 29.9.2004 passed by the Commissioner (Appeals), Bhopal whereby the challenge to the order dated 5th May, 2004 passed by the Additional Commissioner, Bhopal has been rejected. The Additional Commissioner vide his order dated 5th May, 2004 had confirmed the demand of duty to the tune of Rs.16,58,275/- under Section 11A of the Central Excise Act, 1944 and had also ordered payment of interest under Section 11AB of the said Act, while dropping the demand of duty to the extent of Rs.3,534/- on scrap/used filter bags. The Additional Commissioner also imposed penalty equal to amount of the duty confirmed by the said order.

3. The challenge to the impugned order is two fold – Firstly, that the respondent could not have invoked the extended period of limitation in the facts and circumstances of the case and particularly in view of the fact that all the relevant facts were known to the respondent when they had issued first show cause notice earlier to issuance of the impugned show cause notice and nearly one year prior to the show cause notice in question. Secondly, even on merits, the scrap generated and disposed of were not out of the inputs which were subjected to Cenvat credit, neither it was out of any manufacturing process and that the respondent had not been able to disprove the said fact established by the appellants and hence, there was no question of scrap being subjected to duty liability.

4. The impugned order is sought to be justified on the ground that the provisions of law do not require issuance of show cause notice

immediately on disclosure of the fact in relation to evasion of duty in the circumstances contemplated under Section 11A and 11AC of the said Act, besides that the show cause notice in question do not relate to the period more than 5 years as prescribed in the statutory provisions. Secondly, the maximum amount of scrap has been generated on account of processing of mechanical working in the factory of the appellant. Apart from mere claim of non-availment of the Cenvat credit, the contention in that regard has not been established by the appellants. In the facts and circumstances of the case which disclose non-availability of either scrap or inputs for the verification by the Department, it was not possible for the Department in 2002 to know the source of generation of the scrap during the period from 1998 to 2002.

5. The facts which are not in dispute are that pursuant to the letter dated 6th Feb. 2002 by the Superintendent, Central Excise, the appellants under their reply dated 8th April, 2002 informed the respondent that while they were engaged in the manufacture of cement clinker and Portland cement, waste and scrap of MS scrap was generated as the resultant of various repairs and maintenance work of plants and that MS Turning and Boring scrap consisting of iron chips were formed while making required size holes on the iron pieces, shaping of iron pieces to the required size etc. The details of such scrap was disclosed under the annexure to the said letter in relation to the period August 1998 to November 2000. They had also disclosed the details of electrical cables, copper scrap, plastic scrap etc. generated during the period December 1998 to December 2000 and the details of scrap as well as of used filter bags for the period June 1999 to August 2000.

6. It had been the case of the appellants that generation of such scrap and waste does not amount to manufacture within the meaning of said expression under the said Act nor any Modvat credit was availed on the inputs utilised in the process of generation of scrap nor there was any duty liability in relation to such scrap or waste. It is further case of the appellants they are not manufacturer of waste and scrap and in the absence of availment of any modvat credit on the inputs utilised in the process neither question of reversal of credit arise nor there is any duty liability in relation to scrap disposed of by the appellants. It is further case of the appellants that once it was revealed to the Department under the letter dated 8.4.2002, the details regarding generation of scrap and disposal thereof during the relevant period and having issued show cause notice dated 1.8.2002 merely in relation to the period from July 2001 to March, 2002, it was not open to the department thereafter to issue second show cause notice by invoking the extended period of limitation.

7. While challenging the impugned order, the learned Advocate appearing for the appellants submitted that it is a matter of record that pursuant to reply dated 8th April, 2002 by the appellants giving details about the scrap which was generated by the appellants from the relevant period they have thought it fit and proper to restrict proceeding against the appellants in relation to the period July, 2001 to March, 2002 in relation to scrap so generated and disposed of by the appellants, it was not open to the respondent thereafter to issue second show cause notice by invoking the extended period of limitation for the relevant period. He further submitted that it is pertinent to note that the first show cause notice has not been adjudicated even till this date. Placing reliance in the

decision of the Apex Court in the matter of Nizam Sugar Factory vs. C.C.E., A.P. – 2006 (197) ELT 465 (SC), he submitted that the law on this point is well settled and therefore, it is not permissible for the Department having once issued one show cause notice to issue another show cause notice on the same set off facts by invoking extended period of limitation. In any case, he submitted that once the department has chosen to restrict action for period of one year after furnishing all the details for the relevant period to the respondent, the question of invocation of extended period of limitation cannot arise by exercise of powers under the statutory provision which deal with the applicability of extended period of limitation.

8. Further placing reliance in the decisions in the matter of U.O.I. vs. J.K. Industries Ltd. – 2008 (223) ELT 343 (Raj.), U.O.I. vs. Hindustan Zinc Ltd. – 2008 (225) ELT 50 (Raj.), C.C. vs. Auto Ignition Ltd. – 2008 (226) ELT 14 (SC), Kissan Co-operative Sugar Factory vs. C.C.E., Meerut II – 2008 (226) ELT 196 (Tri.-Del.) and Larsen & Toubro Ltd. vs. C.C.E., Mumbai II – 2008 (228) ELT 294 (Tri.-Mumbai) and C.C.E., Jaipur vs. Grasim Industries – 2009 (233) ELT 412 as well as Prism Cement Ltd. v. C.C.E., Bhopal – 2008 (232) ELT 564, the learned Advocate submitted that the appellants had been asserting right from April 2004 that scrap has not been generated out of any manufacturing process nor there has been any modvat credit availed on any inputs which might have been used in the process of generation of such scrap and the Department failed to disprove the said facts repeatedly brought on record by the appellants. He further submitted that the appellants could not have been expected to prove the negative fact of non-availing of modvat credit. The burden

in that regard was on the Department to prove that the appellants had availed the modvat credit.

9. Learned Advocate for the appellants drawing our attention to the decision in their own case reported in 2008 (232) ELT 564 submitted that the Tribunal has already held that MS scrap, borings, turnings etc. generated in the course of maintenance of repair work cannot be subject to duty liability. That was in relation to the period January 2001 to September 2002. He further submitted that true to his knowledge there was no challenge to the said decision till date. In the circumstances, it is not open to the Department to take contrary view from what has been held by the Tribunal in the said decision. He further submitted that even otherwise, the materials on record do not disclose any additional factor which would justify the view different from the one taken by the Tribunal in the said decision.

10. On the other hand, the learned Jt.CDR submitted that the records placed in the matter revealed that the scrap out of turning and boring process which is clearly out of mechanical work in manufacturing process and hence the scrap so generated would clearly warrant duty liability.

11. Though various points have been raised in the matter including the alleged arbitrary invocation of extended period of limitation, failure to discharge the burden on the Department to establish the availment of modvat credit by the appellants etc., in our considered opinion, it is not necessary to address to those grounds in the matter.

12. Undisputedly, in relation to the period from January 2001 to September 2002, the scrap so generated in the appellants factory had

been the subject matter of the proceedings between the parties which culminated in the appeal before this Tribunal being Excise Appeal No.4657 & 4666/04 which came to be disposed of by this Tribunal on 18th August, 2008. It is the same decision reported in 2008 (232) ELT 564, therein it was clearly held –

"6. We have carefully considered the submissions from both the sides. The appellant is not involved in the manufacture of iron and steel products but only in maintenance and repair work. Further it is not disputed that no credit has been taken on the items used in such repair and maintenance. Therefore, we hold that no duty is liable on MS scrap, borings, turnings, etc. generated by them in maintenance and repair work".

13. The point as to whether the scrap generated in the factory of the appellants for the period from January 2001 to March, 2002 was out of manufacturing process or not has been clearly answered in favour of the assessee and against the Department in the said decision.

14. Nothing has been brought to our notice which can reveal any challenge to the said decision by the Department before the Apex Court. In the facts and circumstances, in our considered opinion, there is no scope for re-adjudication of the same issue which has been already decided between the same parties in relation to the same subject matter by this Tribunal. The question on re-adjudication of the same issue for the different period in relation to the same product generated in the factory of the appellants themselves cannot arise, unless additional evidence which would justify such adjudication is brought on record. Being so, we do not find any justification to take a different view in relation to the remaining period which is the subject matter of the

present proceedings. On this limited ground itself, the appeal succeeds and is accordingly allowed and the impugned order is hereby set aside with consequential benefit.

(Justice R.M.S. Khandeparkar)
President

(M. Veeraiyan)
Member (Technical)

scd/