TELEGRAM : CEGCANAL
Website : www.cestat.gov.in

REGISTERED / AD
Email : delhi@cestat.gov.in

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

Appeal No. E/81 /2005 - EX[DB] Date 10/11/2009

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

To :
C.C.E. JAIPUR I
N.C.R.BUILDING, STATUE CIRCLE, "C" SCHEME,
JAIPUR 302005.
C.C.E. JAIPUR I Appellant
Vs
M/S CAPITAL IMPLEX PVT LTD. Respondent

I am directed to transmit herewith a certified copy of **Final order No. 884/ 2009 EX[DB]** dated 07-10-09 passed by the Tribunal under Section 35-C(1)of Central Excises Act, 1944

Assistant Registrar
(Excise Appeal Branch)

Copy to :
1. Respondent
M/S CAPITAL IMPLEX PVT LTD.
G-1071-B RIICO INDUSTRIAL AREA, PHASE III,BHIWARI (RAJASTHAN)
2. Adv. / Consult MS. REENA KHAIR, R-163, GNDFLOOR, G.K. PART-I, N. DELHI-48
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 Publictions 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 (Haryana)
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: 07.10.2009
Date of decision: 07.10.2009

Excise Appeal No. 81 of 2005
[Arising out of Order-in-Appeal No. 379-382(MPM)CE/JPR-I/04 dated 19.11.2004 passed by the Commissioner (Appeals-I) Central Excise, Jaipur]

For approval and signature:

Hon'ble Shri Justice R.M.S. Khandeparkar, President
Hon'ble Shri Rakesh Kumar, 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.	Yes
2	Whether it should be released under Rule 27 of the 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

CCE, Jaipur — Appellant

Vs.

M/s Capital Impex (P) Ltd., — Respondent

Appearance:

Appeared for the Appellant – Shri Anil Khanna, DR

Appeared for the Respondent – Ms. Reena Khair with Sh. Abhishek Jaju, Advocates

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

Final Oral Order No. 884/09

Per Shri Justice R.M.S. Khandeparkar:

Heard at length the learned DR for the appellants and learned Advocate for the respondents.

2. This appeal arises from order dated 29.10.2004 passed by the Commissioner (Appeals), Jaipur. By the impugned order, the Commissioner (Appeals) has allowed four appeals filed by the respondents against the four orders passed by the Deputy Commissioner on 09.08.2004 with reference to four different show cause notices. The said show cause notices were issued on 11.05.2004 in relation to rebate claim made by the respondents. The Deputy Commissioner by his orders had rejected the said rebate claims. The Commissioner (Appeals) has set aside those orders and has allowed the rebate claim in all four matters. Hence, the present appeal.

3. It is the case of the appellants that the respondents were engaged in manufacture of stainless steel falling under heading 7323.90 of the schedule to the Central Excise Tariff Act, 1985. The said product was exempt from the payment of excise duty under Notification No. 10/2003-CE dated 01.03.2003. However, the respondents paid the duty at the rate originally prescribed under the said schedule for the said product on clearance thereof, which were then exported under the claim of rebate of duty. The entire such duty for the period December 2003 and January 2004 was sought to be paid by availing cenvat credit in relation to the duty paid on inputs amounting Rs. 17,86,663/- in respect of which the claim of the rebate of duty was sought for.

4. Placing reliance in the decision in the matter of Punjab Tractors Ltd., vs. CCE, Chandigarh reported in 2005 (181) ELT 380 (SC) and CCE vs. Parle Exports (P) Ltd., reported in 1988 (38) ELT 741 (SC) and drawing our attention to the amended provision in Section 5A of the Central Excise Act, 1944 learned DR submitted that the product in question having been totally exempted from the payment of duty, the respondents were not entitled to pay duty thereon and for the same reason they were not entitled to claim rebate under Rule 18 of the Central

Excise Rules 2002 nor they were entitled to avail cenvat credit as the final product was exempted from payment of duty. He further submitted that provisions of Section 5A(1A) though were brought into force w.e.f. 13.05.2005, the same being of clarificatory nature, would apply retrospectively and considering the same the respondent could not have paid the duty as a matter of right once the product was totally exempted from the liability to pay the duty thereof. He further submitted that the impugned order is essentially based on the decision of the Tribunal in the case of Reliance Industries Limited vs. CCE& Cus., Ahmedabad reported in 2003 (152) ELT 423 (Tri. Mumbai), however, the said decision is under challenge by the department before the Hon'ble Supreme Court.

5. On the other hand, learned Advocate for the respondent drawing our attention to Rule 6 of the Cenvat Credit Rules, 2002 and further placing reliance in the decision of Commissioner vs. Jayant Oil Mills reported in 2009 (235) ELT 223, CCE, Delhi-I vs. Punjab Stainless Steel reported in 2009 (234) ELT 605, CCE & Cus. (Appeals) Ahmedabad vs. Narayan Polyplast reported in 2005 (179) ELT 20 (SC), Hico Products Ltd., vs. CCE reported in 1994 (71) ELT 339 (SC), CCE, Pune vs. Pudumjee Pulp & Paper Mills Ltd., reported in 2006 (198) ELT 330 (SC) and unreported order of the Tribunal in the matter of M/s Punjab Stainless Steel Industries vs. CCE, Delhi-I delivered on 25.01.2008 submitted that in cases of exemption under the Excise Act, it is the right of the assessee either to opt to avail benefit of exemption or to pay the duty as prescribed under the tariff provisions. The respondent having chosen to pay the duty, they can not be denied the benefits which they thereafter entitled to avail under the statutory provisions and, therefore, no fault can be found with the claim of rebate under Rule 18 of the said Rules in respect of the duty already paid by the respondent. She further submitted that in cases of the product cleared for export, the bar prescribed under Rule 6(1) of the Cenvat Credit Rules for availing cenvat credit in case of duty free products is not applicable and, therefore, the Department is not right in contending that the respondents were not entitled to avail cenvat credit in the matter in hand.

She further submitted that even assuming that the duty was wrongly paid when there was no such liability upon the respondents to pay the duty, the amount having been wrongly accepted by the department, that would be otherwise refundable and bearing in mind the provisions of section 11B, explanation (A) thereto, the concept of refund will include the claim regarding the rebate. She further submitted that the issue relating to right of the assessee either to avail the exemption or to pay the duty is no more res-integra as the same has been finally set at rest in the matter of Jayant Oil Mills read with the order in Pudumjee Pulp & Paper Mills case. As regards the amended provision of Section 5A are concerned, learned Advocate submitted that the same would not be attracted in the matter in hand as the claim for rebate relates to the period prior to coming into force of the amendment to Section 5A of the said Act.

6. It cannot be disputed that Commissioner (Appeals) by the impugned order has granted the rebate essentially based on the ruling in Reliance Industries case read with the decision in Hico Products. In Reliance Industries case, the Tribunal had held that once the party pays the amount, he pays it as the duty only and thereby he discloses his unwillingness to take the benefit of the notification. When a situation gives rise to two rates of duty, one under the Tariff Act and another under the exemption notification, then the party has a choice and it is purely at his discretion.

7. It is pertinent to note that the decision in Reliance Industries case was delivered on 23.08.2002. The said appeal was in relation to the order passed by the Commissioner (Appeals) Ahmedabad on 09.07.2001, obviously the matter related to the period prior to July 2001.

8. In Hico Products case, the Apex Court has held that exemption from payment of duty issued under Rule 8 does not take away the levy or have the effect of erasing levy of duty and object of the exemption notification is to forgo due duty and confer certain benefits upon the manufacturer or the buyer, or the consumer through the manufacturer, as the case may be.

9. The Apex Court in the said matter was dealing with various issues including the classification of the product, but the same was for the period from August 1982 to January 1983.

10. In Jayant Oil Mills case, the Hon'ble Gujarat High Court while dealing with the issue as to whether an assessee who has exported goods on which duty is leviable can claim rebate of duty paid without availing of exemption granted under a notification, held as under:-

> "It cannot be disputed that levy of duty is prescribed by provisions of the Central Excise Act, 1944 and the rate of duty is prescribed by the Tariff Act. Therefore, once the duty is validly levied in accordance with the provisions of the statute, the said levy does not disappear or cannot get obliterated merely because by virtue of a notification, partial or full exemption is granted. Therefore, there is no question of an assessee exercising any option as such. There are two rates of duty prescribed by the statute: [1) as per the Tariff Act, and [2] As per the exemption notification. An assessee may pay duty, in such circumstances, either at the prescribed rate or at the rate specified in the exemption notification. Revenue cannot insist, unless the statute provides for such a situation, that in such a factual matrix, an assessee is bound to claim exemption while manufacturing excisable goods. The fallacy in the stand of Revenue is exposed when one tests the proposition in a case where only partial exemption is granted under a notification".

11. The Gujarat High Court was dealing with the matter wherein facts of the case were more or less similar to the facts of the case in hand wherein the rebate of duty was sought to be claimed in relation to the period prior to May 2002.

12. In Punjab Stainless Steel case, the Tribunal while dealing with the issue relating to entitlement to claim of cenvat credit relating to the goods exported held thus:-

> "8. I find that Rule 5 of CENVAT Credit Rules, 2004 provides that manufacturer is entitled to utilize CENVAT Credit in respect of inputs used in exported goods for payment of duty on other goods. Further, I find that Rule 6 of Rules provides that where a manufacturer is manufacturing dutiable and exempted goods both, he has to maintain separate records

regarding common inputs used in manufacture of both the goods and the manufacturer is not entitled for credit in respect of inputs used in exempted goods. Sub-rule (v) of Rule 6 further provides that provisions of this rule is not applicable in case of exported goods as the goods is removed without payment of duty and cleared for export.

9. Supplementary Central Excise Manual further clarified that the expression 'export goods used in Central Excise Rules' refers to excisable goods (dutiable or exempted) as well non-excisable goods. It is also clarified that the benefit of input stage rebate can be claimed on exported goods of all finished goods, whether excisable or not. In view of the above provisions of Central Excise Rules which has been clarified in manual a manufacturer is entitled for credit in respect of inputs used in exported goods whether exempted or dutiable. Further, if the goods were dutiable and exported under bond without payment of duty the manufacturer is entitled for refund of duty paid on inputs. In these situation the manufacturer who exported the goods which are exempt from payment of duty cannot be put on disadvantageous position".

13. In Pudumjee Pulp & Paper Mills case, the Apex Court while dealing with the effect of amendment to Section 5A observed that prima facie the amended provision appears to have come into force from 13th May , 2005 and it does not appear to be of retrospective in nature. However, the Apex Court did not express any final opinion on the said issue and left the question open.

14. In Narayan Polyplast case, the Apex Court did not interfere with the order of the Tribunal on the ground that the issue which was sought to be raised was already decided by the Tribunal in another matter and that was not subjected to any further challenge by the department.

15. The decision of the Tribunal in Punjab Stainless Steel Industries case was sought to be challenged before the Hon'ble High Court of Delhi without any success. While rejecting the appeal, it was observed that it is the option of the assessee either to claim the drawback or to claim the refund of credit.

16. In Punjab Tractors case, the Apex Court held that it was not in dispute that the manufacturer had in fact paid the duty on the procured components for the junior tractors and that the credit was not reversed ultimately when the junior tractors were cleared and that they had violated the provisions of Rule 57C and 57F of the Central Excise Rules and this fact was not questioned or challenged by the manufacturer. While observing that for admitted violation, the manufacturer would undoubtedly be liable to pay the penalty as prescribed under the rules for such violation and while upholding the decision of the Tribunal to that extent, the Apex Court set aside the decision of the Tribunal in so far as it related to the demand of duty. The matter therein also related to the period prior to March 1987.

17. In Parle Exports case, it is essentially on the point of interpretation of exemption notification, and has absolutely no relevancy to the matter in hand.

18. In the facts and circumstance of the case as narrated above and under the law laid down by the Apex Court and in other decisions, we find hardly any scope for interference in the impugned order. However, as rightly pointed out by the learned DR, it is to be noted that the provisions of Section 5A(1A) are apparently clarificatory in nature and, therefore, it cannot be said that they would not apply to the cases relating to the period prior to 13th May 2005. The applicability thereof would obviously depend upon the facts of each case. However, in the case in hand, even if we assume its applicability to the facts of the case, the conclusion which is to be arrived at cannot be different from the one arrived at by the Commissioner (Appeals). As rightly pointed out by the leaned Advocate for the respondent, even assuming that the respondent might have paid the amount which was not due in terms of provisions of law, nevertheless it would amount to deposit of the money belonging to the respondent with the appellant and to that extent the respondent would be entitled to get the same appropriated for the purpose of clearance of the duty liability and for the same reason they would be entitled to claim the rebate under Rule 18 in respect of the said amount.

19. As far as the claim of cenvat credit is concerned, it is true that in terms of sub-rule (1) of Rule 6 of Cenvat Credit Rules the final product being exempted from duty liability, the manufacturer would not be entitled to avail credit in relation to the duty paid on the inputs procured for utilization thereof in the manufacturing process of the final product. However, sub-rule (5) of the said Rules which was in force at the relevant time, clearly provided that the provision to sub-rule (1) would not be applicable in case the exempted goods were cleared for export under bond in terms of the provision of the Central Excise Rules 2002. Considering the said provision, certainly the assessee could have availed the benefit under the said provisions and, therefore, it cannot be said that the respondent would be disentitled for the rebate on the said ground.

20. In the facts and circumstances of the case, therefore, we find no case made out for interference in the impugned order. Appeal therefore, fails and hereby dismissed.

(Justice R.M.S. Khandeparkar)
President

(Rakesh Kumar)
Member (Technical)

/Pant/