

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

Appeal No. E/3873/2005-SM[BR]

Date 16/01/2008

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

To :
M/S LAFARGE INDIA PVT LTD
SONADH CEMENT PLANT, P.O RASEDA VIA-
BALODA BAZAAR, RAIPUR
493332

M/S LAFARGE INDIA PVT LTD

Appellant

Vs
Respondent

C.C.E RAIPUR

I am directed to transmit herewith a certified copy of Final order No. 103/2008-SM[BR] dated 11.1.2008
passed by the Tribunal under Section 35-C(1) of Central Excises Act, 1944


Assistant Registrar
(SM Appeal Branch)

Copy to :

1. Respondent
C.C.E RAIPUR
CENTRAL EXCISE BUILDING, TIKRAPARA, RAIPUR
(CHATTISGARH)
2. Adv. / Consult
MR.V.LAKSHMI KUMARAN
B-6/10, 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 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
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15. Guard file


Assistant Registrar
(SM Appeal Branch)

**IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL**
West Block No. 2, R.K. Puram, New Delhi – 110 066.
Principal Bench, New Delhi

COURT NO. III

Excise Appeal No. 3873 of 2005 – SM (BR)

[Arising out of the Order-in-Appeal No. 63/RPR-I/2005 dated 28/07/2005 passed by The Commissioner of Central Excise (Appeals – I), Raipur (Chattisgarh).]

For Approval and signature :

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? :
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? :
4. Whether order is to be circulated to the Department Authorities? :

M/s Lafarge India Pvt. Ltd.

Appellant

Versus

CCE, Raipur

Respondent

Appearance

Shri Ravi Raghvan, Advocate – for the appellant.

Shri A.K. Rastogi, Authorized Representative (SDR) – for the Respondent.

CORAM : Hon'ble Shri P.K. Das, Member (Judicial)

DATE OF HEARING : 02/12/2007.

DATE OF DECISION : 11.10.2008.

Final Order No. 103/08-5m(BE) Dated : 11.10.08

Per. P.K. Das :-

The appellant filed this appeal against denial of credit on welding electrodes and recovery of interest under Section 11 AB of the Central Excise Act, 1944 read with Rule 12 of the Cenvat Credit Rules 2001/2002. The Adjudicating Authority disallowed credit on welding electrodes used for repair and maintenance and imposed penalty of Rs. 1,00,000.00 under Rule 13 of Cenvat Credit Rules 2001-2002 along with recovery of interest. Commissioner (Appeals) set aside the penalty but upheld the denial of credit and recovery of interest.

2. The learned advocate on behalf of the appellant submits that the Hon'ble Rajasthan High Court in the case of **CCE, Jaipur vs. M/s Neer Shree Cement Ltd.**, Excise reference No. 9 of 2002 dated 08/8/03 rejected the reference application

filed by the revenue against admissibility of credit on welding electrodes. He further submits that in any event, the appellant had taken the credit but not utilized and therefore recovery of interest is not justified. In this connection, he relied upon the decision of the Hon'ble Punjab & Haryana High Court in the case of **CCE, Delhi-III vs. Maruti Udyog Ltd.** as reported in **2007 (81) RLT 804 (P&H)**, which was upheld by the Hon'ble Supreme Court as reported in **2007 (214) E.L.T. A50**. He also submits that the Hon'ble Supreme Court in the case of **CCE, Mumbai-I vs. Bombay Dyeing & Mfg. Co. Ltd. – 2007 (82) R.L.T. 117 (SC)** held that credit has been reversed before utilization, which amounted to not taking credit. He further submits interest is compensatory character as held by the Hon'ble Supreme Court in the case of **Pratibha Processors vs. Union of India** as reported in **1996 (88) E.L.T. 12 (S.C.)**. He also relied upon the decision of the Hon'ble Madras High Court in the case of **R.S. Mani vs. A. Palanimuthu Pillai** and another as reported in **AIR 1967 MADRAS 16 (V 54 C 7)**. He submits that the Tribunal in series of decisions held that interest is not recoverable unless duty is utilized by the assessee, as under :-

- (a) CCE, Pune vs. Ghodavat Foods International Pvt. Ltd. As reported in 2007 (213) E.L.T. 447 (Tri. – Mumbai).
- (b) Maruti Udyog Ltd. Vs. CCE, Gurgaon as reported in 2006 (196) E.L.T. 323 (Tri. – Del.).
- (c) Sagar Twisters vs. CCE, Mumbai as reported in 2005 (188) E.L.T. 497 (Tri. – Mumbai)

3. The learned DR on behalf of the revenue submits that the Larger Bench of the Tribunal in the case of **Jaypee Rewa Plant vs. CCE, Raipur** as reported in **2003 (159) E.L.T. 533 (Tri. – LB)** disallowed credit on welding electrodes used for maintenance and repairing purpose. Regarding recovery of interest, he submits that the case laws cited by the learned advocate are under Rule 57 (I) of the erstwhile Central Excise Rules, 1944. He submits that the present case relates to Rule 12 of Cenvat Credit Rules 2001/02, wherein it is categorically specified that Cenvat credit has been taken or utilized wrongly or has been erroneously refunded, the same shall be recovered along with interest from the manufacturer. He submits that Rule 12 particularly indicates for recovery interest when Cenvat credit taken wrongly, which was not

mentioned in Rule 57 (I) of the erstwhile Central Excise Rules. He submits that the appellant is liable to pay interest for taking of the credit even it was not utilized by them.

4. After hearing both the sides and on perusal of the records, I agree that the submission of the learned DR in respect of denial of credit on welding electrodes. It has been held by the Larger Bench of this Tribunal in the case of *Jaypee Rewa Plant vs. CCE, Raipur (Supra)* that credit is not admissible on welding electrodes used for maintenance and repairing purpose of machinery. The Tribunal in the case of **J.K. Cement Works vs. CCE, Jaipur** as reported in **2007 (211) E.L.T. 235 (Tri. – Del.)** after discussing the decision of the Hon'ble Rajasthan High Court held that credit is not admissible on welding electrodes used for repair and maintenance purpose. So, the denial of credit on welding electrodes is upheld.

5. Regarding the recovery of interest, I find force in the submission of the learned advocate. In the present case, recovery of interest is proposed under Rule 12 of Cenvat Credit Rules, 2001-02 which is reproduced below :-

“Rule 12. Recovery of CENVAT credit wrongly taken or erroneously refunded. – Where the CENVAT credit has been taken or utilized wrongly or has been erroneously refunded, the same along with interest shall be recovered from the manufacturer or the provider of the output service and the provisions of sections 11A and 11AB of the Excise Act or sections 73 and 75 of the Finance Act, shall apply *mutatis mutandis* for effecting such recoveries.”

6. The case laws cited by the learned advocate are under Rule 57 (I) of the erstwhile Central Excise Rules, 1944. So, the relevant portions of the said rules 57 (I) are reproduced below :-

“(3) Where a manufacturer or an assessee fails to pay the amount determined under sub-rule (1) or sub-rule (2) within three months from the date of receipt of demand notice, he shall pay, in addition to the amount so determined, interest at such rate, as may be fixed, by the Central Board of Excise and Customs under section 11AA of the Act, from the date immediately after the expiry of the said period of three months till the date of payment.

XXX XXX XXX XXX

(5) Notwithstanding anything contained in clause (iii) of sub-rule (1) or sub-rule (3), where the credit of duty

paid on inputs has been taken wrongly on account of fraud, willful mis-statement, collusion, or suppression of facts, or contravention of any of the provisions of the Act or the rules made thereunder with intent to evade payment of duty, the person who is liable to pay the amount equivalent to the credit disallowed, as determined under clause (iii) of sub-rule (1), shall also be liable to pay interest at such rate as may be fixed by the Board under section 11AA of the Act from the first day of the month succeeding the month in which the credit was wrongly taken, till the date of payment of such amount.”

7. The Hon’ble Punjab and Haryana High Court in the case of Maruti Udyog Ltd. (Supra) held that interest is not leviable under Rule 57 (I) of the erstwhile Rules as the credit was only taken as an entry in the Modvat record and was not in fact utilized. The Hon’ble High Court upheld the decision of the Tribunal. The decision of the Hon’ble High Court was also upheld by the Hon’ble Supreme Court as reported in 2007 (214) E.L.T. A50. The Hon’ble Supreme Court in the case of Pratibha Processors (Supra) held that interest is compensatory in-character and the relevant portion of the said decision is reproduced below :-

“13. In fiscal Statutes, the import of the words – “tax”, “interest”, “penalty”, etc. are well known. They are different concepts. Tax is the amount payable as a result of the charging provision. It is a compulsory exaction of money by a public authority for public purposes, the payment of which is enforce by law. Penalty is ordinarily levied on an assessee for some contumacious conduct or for a deliberate violation of the provisions of the particular statute. Interest is compensatory in character and is imposed on an assessee who has withheld payment of any tax as and when it is due and payable. The levy of interest is geared to actual amount of tax withheld and the extent of the delay in payment the tax on the due date. Essentially, it is compensatory and different from penalty – which is penal in character.”

The Hon'ble Supreme Court in the case of Bombay Dyeing & Mfg. Co. Ltd. (Supra) held as under :-

“8. However, when we come to the exemption on grey fabrics was admissible subject to the assessee paying duty on yarn before claiming exemption and subject to the assessee not claiming CENVAT credit before claiming exemption. The question of exemption from payment of duty on grey fabrics arose on satisfaction of

the said two conditions. In this case, payment of duty on yarn on deferred basis took place before clearance of grey fabrics on which exemption was claimed. Therefore, payment was made before the stage of exemption. Similarly, on payment of duty on the input (yarn) the assessee got the credit which was never utilized. That before utilization, the entry has been reversed which amounts to not taking credit. Hence, in this case, both the conditions are satisfied.”

The Tribunal in the case of Sagar Twisters (Supra) while dealing with the benefit of exemption notification subject to non-availment of Cenvat/Modvat credit observed that credit having not been utilized, the same cannot be said to have been availed.

8. Rule 57 (I) of the erstwhile Rules provides, that the manufacturer shall pay the interest in addition to the amount so determined and the Hon'ble High Courts held that interest is not leviable for taking credit unless it is utilized by the assessee. The contention of the learned DR is that in Rule 12 of Cenvat Credit Rules, the words “taken or utilized” indicate

that interest is recoverable even credit taken wrongly. The Hon'ble Supreme Court in the case of R.S. Mani (Supra) observed that

“so far as the word “avail” is concerned in Funk and Wanall’s Dictionary “avail oneself of” is stated to mean “to take advantage of” utilize”. The meaning given in Oxford Dictionary is also to the same effect. Webster’s Dictionary makes “avail” synonymous with ‘benefit’ ‘profit’ ‘use’ and ‘utility’. A person can be stated to have availed himself of something only if he had taken advantage or profited by that thing or utilized it to his benefit.”

9. It is seen from the aforesaid case laws that the payment of interest is arising out of withholding of the actual amount of tax and delay in paying the tax on the due date. To my mind, the expression “taken” under Rule 12 of Cenvat Credit Rules covers the situation where the assessee is benefited himself by taking credit. Further, Rule 12 provides recovery of interest and the provisions of Section 11 A and 11 AB of the Central Excise Act, 1944 shall apply recoveries. So,

where any duty of excise has not been levied or paid or has been short levied or short paid or erroneously refunded, the person who is liable to pay the duty as determined under Section 11 A, shall, in addition to the duty liable to pay interest. Thus, it is seen that merely credit was taken by the assessee and not utilized and not taken any advantage of such credit, payment of interest is not sustainable. In the present case, the Commissioner (Appeals) observed that the appellant wrongly taken credit. There is no allegation that the appellant utilized or taken any advantage of the credit and therefore recovery of interest is set aside.

10. In view of the above, the denial of credit on welding electrodes is upheld and recovery of interest is set aside. The Order of the Commissioner (Appeals) is modified accordingly.

(Pronounced in open court on 11.1.2008)

(P.K. Das)
Member (Judicial)

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