

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/ 1355 -1356 /2007 –SM[BR]

Date 19/03/2008

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

To :

12) M/S MEHTA STONE EXPORT HOUSE,
SP-1/6, RIICO INDUSTRIAL AREA, SOTANALA,
BEHROR, DISTT. ALWAR

M/S MEHTA STONE EXPORT HOUSE,

C.C.E. JAIPUR I

Appellant

Vs

Respondent

I am directed to transmit herewith a certified copy of Final order No. 444-445 /2008 –SM[BR] dated 4.3.2008

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. JAIPUR I

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

2. Adv. / Consult SHRI. BIPIN GARG ADV.

B-1/1289-A, VASANT KUNJ NEW DELHI-110070

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

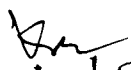
11. Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh,

12. Co, Law Institution

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

14. Office Copy

15. Guard file


Assistant Registrar
CSM Appeal Branch)

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

PRINCIPAL BENCH - COURT NO. 1

Excise Appeal Nos. 1355-1356 of 2007

(Arising out of Order-in-Appeal No. 25-27(GRM)CE/JPR-I/2007 dated 27.02.2007 passed by the Commissioner of Central Excise (Appeals), Jaipur).

**DATE OF HEARING : 04.03.2008
DATE OF DECISION : 04.03.2008**

FOR APPROVAL AND SIGNATURE :

HON'BLE MR. JUSTICE S.N. JHA, PRESIDENT

1.	Whether Press Reporters may be allowed to see the order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982 ?.	NO
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 Mehta Stone Export House

Appellants

(Rep. by Sh. Atul Gupta, CS)

VERSUS

CCE, Jaipur-I

....

Respondent

(Rep by Sh. Sumit Kumar, DR)

CORAM : HON'BLE MR. JUSTICE S.N. JHA, PRESIDENT

FINAL ORDER NO. 444-445 / 2008 - SM / BR

PER JUSTICE S.N. JHA :

These two appeals by the assessee arising from common order of the Commissioner (Appeals) are disposed of by this common order.

2. As a matter of fact, by the order-in-appeal three appeals – two preferred by the appellant herein; and one by M/s Malbros Stone Exports, were disposed of. The appeal filed by M/s Malbros Stone Exports before this Tribunal being Appeal No. E/1294/07 has been allowed by Single Member Bench on 21.06.2007 holding that the findings of the Commissioner (Appeals) are illegal, while the order of the original authority was in accordance with rules. The impugned order being common, in the ordinary course, I should have simply noticed the said order and allowed these two appeals as well. In fairness to the parties, however, I propose to record a brief order in view of the contention advanced on behalf of the Revenue that the Single Member Bench passed the said order ignoring the provisions of rule 5 of the Cenvat Credit Rules, 2004 and without taking into consideration the provisions of rule 6(1) of the said Rules.

3. The case of the Revenue is that in terms of rule 6(1) of the Cenvat Credit Rules, cenvat credit is not allowable on the input or input service used in the manufacture of exempted goods or exempted services except in the circumstances

mentioned in sub-rule (2) and as the appellant is engaged in the manufacture of exempted goods, it was not entitled to cenvat credit and the order of the Assistant Commissioner allowing refund in favour of the appellant was not in accordance with Rules.

3. At this stage, it may be mentioned that the appellant is a hundred per cent export oriented undertaking (EOU) engaged in the manufacture of tiles of slates/sand stones for export falling under Chapter sub-headings 25140000 and 25162200 classified as non-excisable. They are paying service tax on freight for their inputs used in the manufacture of slate/sand stone tiles and on transport services for the export of goods. The case of the appellant is that the service tax paid on transportation charges is not utilized by them as their final product is chargeable to nil rate of duty, therefore, in terms of rule 5 of the Cenvat Credit Rules, they are entitled to refund of the amount paid as service tax.

4. Rule 5 of the Cenvat Credit Rules provides that where any input or input service is used in the final products which is cleared for export under bond or letter of undertaking, as the case may be, or used in the intermediate products cleared for export, or used in providing output service which is exported, the cenvat credit in respect of the input or input service so used shall be allowed to be utilized by the manufacturer or provider of

output service towards payment of (i) duty of excise on any final products cleared for home consumption or for export on payment of duty; or (ii) service tax on output service, and where for any reason such adjustment is not possible, the manufacturer shall be allowed refund of such amount subject to such safeguards, conditions and limitations, as may be specified by the Central Government by notification. In terms of the first proviso, no refund is to be allowed if the manufacturer or provider of output service avails of drawback allowed under the Customs and Central Excise Duties Drawback Rules, 1995 or claims a rebate of duty under the Central Excise Rules, 2002, in respect of such duty.

5. As mentioned above, the stand of the Revenue is that the benefit under rule 6(1) of the Cenvat Credit Rules, cannot be allowed on inputs or input service used in the manufacture of exempted goods or exempted service and, therefore, the appellant was not entitled to cenvat credit and hence not entitled to refund. The case of the appellant, on the other hand, is that the goods manufactured by them are chargeable to nil rate of duty and, therefore, it cannot be said to be 'exempted goods' so as to attract rule 6(1) of the Cenvat Credit Rules. Alternatively, it is submitted that by virtue of notification no. 23/03-CE dated 31.03.2003, the appellant is liable to duty @ Rs. 4.50 being 30% of the then prevailing

customs duty @ Rs. 15/-. The relevant part of the Notification reads as under :

“In exercise of the powers conferred by sub-section (1) of Section 5-A of the Central Excise Act, 1944.....the Central Government being satisfied that it is necessary in the public interest so to do, hereby exempts excisable goods of the description specified in column (3) of the table below.....from so much of the duty of excise leviable thereon under Section 3 of the Central Excise Act as specified in the corresponding entry in column (4) of the said Table.”

6. It was submitted that in accordance with the formula laid down in the Notification, the liability of the appellant works out to Rs. 4.50 being 30% of the then prevailing rate of customs duty and, therefore, it cannot be said that the slates/sand stones/tiles manufactured by the appellant were exempted goods.

7. It is relevant to mention here that though, ordinarily, all goods included in the First and the Second Schedules to the Central Excise Tariff Act, 1985 are excisable goods by virtue of the definition of ‘excisable goods’ under Section 2(d) of the Central Excise Act, chargeable to duty at the rates mentioned in the relevant column of the Schedule unless exemption is granted from duty, for the purpose of Cenvat Credit Rules, 2002, ‘exempted goods’ has been given a somewhat different meaning in rule 2(b) whereunder it has been defined to mean “excisable

goods which are exempted from whole of the duty of excise leviable thereon and includes goods which are chargeable to nil rate of duty". In other words, notwithstanding the fact that the goods find mention in the Schedule to the Central Excise Tariff Act and, therefore, are excisable goods and notwithstanding further that they are chargeable to nil rate of duty, the goods will be deemed to be exempted goods even though there is no exemption notification under Section 5A of the Central Excise Act. It will follow that for the purpose of rule 6(1) of the Cenvat Credit Rules, cenvat credit is allowable not only on input or input service used in the manufacture of exempted goods or exempted services, but, also on goods which are chargeable to nil rate of duty.

8. In the above view of the matter the observation of the learned Single Member in the case of **M/s Malbros Stone Exports** (supra) that rule 5 of the Cenvat Credit Rules is a self contained rule does not appear to be a correct statement of law. As the appeal of M/s Malbros Stone Exports was allowed without taking into consideration rule 6(1) of the Cenvat Credit Rules, perhaps, I would have considered referring the case to a Larger Bench. However, it is not necessary to take that course. The goods manufactured by the appellant, namely, slate/sand stone tiles despite the exemption granted by Notification No. 23/03-CE dated 31.03.2003 is excisable to duty @ Rs. 4.50 being 30% of

the then prevailing rate of customs duty i.e Rs. 15 In other words, the provisions of rule 6(1) of the Cenvat Credit Rules do not stand in the way of the appellant. That being the position, the appellant was entitled to refund of the cenvat credit on such quantity of cenvat credit which could not be adjusted. It may be noted that the case of the appellant is that since it is a hundred per cent Export Oriented Undertaking (EOU) and no clearances were made to the Domestic Tariff Area (DTA), it was entitled to 100% refund. Learned DR submits that this aspect of the matter requires verification and the facts may have to be looked into.

9. Having clarified the legal position, as above, the appeals are disposed of with direction to the Asstt. Commissioner to look into the matter and after verifying the records, pass consequential order in the light of this order.

(Dictated and pronounced in the open Court on the 4th day of March, 2008)

(JUSTICE S.N. JHA)
PRESIDENT

Golay