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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/305 /2008-306 /2008-SM[BR] Date 20/06/2008

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

To :

1. M/S SOORAJMULL BAIJNATH INDUSTRIES PVT. LTD.
2. SHRI J.P. GUPTA, DIRECTOR
E-4, INDUSTRIAL AREA, SONEPAT,
HARYANA.

M/S SOORAJMULL BAIJNATH INDUSTRIES PVT. LTD. Appellant

Vs

C.C.E. DELHI III Respondent

I am directed to transmit herewith a certified copy of **Final order No**. 983 -984 /2008 –SM[BR]&S/ 383- 384/08 dated 14.3.2008

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. DELHI III
UDYOG MINAR, UDYOG VIHAR, VANIJYA NIKUNJ, PHASE V, GURGAON - 122016 (HARYANA)
2. Adv. / Consult
MR.BIPIN GARG
B-1/1289,A-VASANT KUNJ, NEW DELHI
3. S.D.R.
4. ~~J.C.D.R~~.
5. Bar association, CESTAT, New Delhi
6. M/s. Deeparchi Publications, M-93, Marg. 46, Saket, New Delhi 110017
7. M/s Centax Publictions (P) Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -
8. Excise & Customs cases, B-37, Sector -1, NOIDA - 201301 Gautam Budh Nagar, (U.P.)
9. Raghuraman's 44-B, Regal Flat,Shipra Suncity, Indirapuram - 201010,Ghaziabad, DT, U.P.
10. Nidheshak publications, I.P.Estate, new Delhi
11. Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh, New Delhi - 110026
12. Commercial Laws of India Pvt Ltd Post Bag No. 1033, No.70(Old No. 88), Thyagaraya Road, T. Nagar,Chennai 60017
13. Taxindiaonline.com Pvt.Ltd, B-XI/8183,Vasant Kunj, New Delhi - 110070
14. Office Copy
15. Guard file

Assistant Registrar
(SM Appeal Branch)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
COURT NO.II

E/Stay No.337-338/08, E/Appeal No.305-306/08

(Arising out of order in appeal No.489/KKG/RTK/07 dated 28.11.07 passed by the Commissioner of Central Excise (Appeals), Gurgaon)

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 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?

No

M/s Soorajmull Baijnath Industries (P) Ltd Appellant
(Rep. by Shri Bipin Garg, Advocate)

Vs

CCE, Delhi-III Respondent
(Rep. by Shri S. Gautam, DR)

Coram: **Hon'ble Mr P.K. Das, Member(Judicial)**

Date of Hearing: 14.3.08

Final Order No. 983-984 /2008-SM(BR)
Stay Order No: 383-384/2008-SM(BR)

Per **P.K. Das**:

After hearing both the sides and on perusal of the record, I find that the issue involved in this case is in narrow compass and therefore, after granting the stay applications, the appeals are being taken up for hearing.

2. The issue involved in this case is as to whether the Cenvat credit is admissible on Bill of Entry wherein duty has been paid through DEPB Scheme. The learned Advocate on behalf of the appellants fairly submits that the Larger Bench of the Tribunal in the case of Essar Steel Ltd Vs CCE Vishkhapatnam reported in 2004 (173) ELT 239 (Tri.-LB) has decided this issue against the assessee. He submits that the demand is barred by limitation.

3. The learned Advocate submits that they availed credit on the basis of Bills of Entry which are duly recorded in the RG 23-A Part I and Part II records. Thus, there is no suppression of fact with intent to evade payment of duty. He relied upon the decisions of the Hon'ble Supreme Court as under:-

a) Larsen & Toubro Ltd Vs CCE, Pune-II
2007 (211) ELT 513 (SC)

b) CCE Vs HMM Ltd
1995 (76) ELT 497 (SC)

c) Continental Foundation Jt Venture Vs CCE, Chandigarh-I
2007 (216) ELT 177 (SC)

d) Gopal Zarda Udyog Vs CCE, New Delhi
2005 (188) ELT 251

4. The learned DR on behalf of the Revenue reiterates the finding of the Commissioner (Appeals). He submits that the appellants never declared to the Department that they had taken inadmissible credit on such documents and the extended period was rightly invoked. He further submits that the Commissioner (Appeals) had correctly observed that the law on the issue is quite clear and there is no scope of ambiguity. He further submits that the Bill of Entry was endorsed by importer without having registration of

Central Excise as dealer which was not within the knowledge of the Revenue. So, there is suppression of fact with intent to evade payment of duty.

5. After hearing both the sides and on perusal of the record, it is seen from the order of the Commissioner (Appeals) that the officers of Internal Audit party while auditing the record, noticed that the appellants availed Cenvat credit against the Bill of Entry No. 353060 dated 15th April, 2004 wherein the Additional Customs Duty (CVD) was paid through DEPB Scheme. It has been alleged that as per para 4.3 of Exim Policy, the benefit of Cenvat credit is not admissible paid through DEPB. It has also been alleged that the Bill of Entry was endorsed by the importer without having registration of Central Excise as dealer. It has further been alleged that the fact of having Cenvat credit for inadmissible documents was never disclosed to the Department. Hence the extended period of limitation would be invoked. I find that admittedly the appellants availed the credit on the basis of Bill of Entry and duly recorded in their statutory record namely RG 23 Part I and Part II. So, the allegation that the document was not disclosed by the appellants is not sustainable.

6. The issue involved in this case is as to whether the appellant is entitled for modvat credit on the strength of Bill of Entry wherein CVD is paid through DEBP Scheme. There were conflicting views on this issue which were ultimately decided by the Larger Bench of the Tribunal in the case of Essar Steel Ltd Vs. CCE reported in 2004 (173) ELT 239 (Tri.-LB). It is seen that the appellants availed credit on the basis of Bill of Entry dated 11th April, 2004 (i.e. before the decision of the Larger Bench). The Hon'ble

Supreme Court in the case of Continantal foundation Jt. Venture (supra) held that when the correctness of judgement by CESTAT was doubted and the matter was referred to the Larger Bench, extended period for limitation not available and demand of duty is not justified. I also notice that Show Cause Notice does not indicate specifically the suppression of fact with intent to evade payment of duty. The Hon'ble Supreme Court in the case of Larsen & Touro Ltd (supra) held that act of fraud or suppression must be specifically pleaded and allegation in regard to suppression of facts must be clear and explicit so as to enable the noticee to reply thereto effectively. The Hon'ble Supreme Court in the case of Gopal Zarda Udyog (Supra) held that mere failure or negligence on the part of manufacturer either not to take out licence or not to pay duty in cases where there is scope for doubt, does not attract extended period of limitation.

7. In the present case, the Tribunal in the case of Polyhos India Pvt Ltd Vs Commissioner reported in 2003 (152) ELT 361 (Trib) passed by the Single Member Bench took the view that modvat credit can be taken on the CVD by debit in the DEPB. It is noted that the said decision was later followed by the Division Bench of the Tribunal in the case pf Spic Ltd Vs CCE Chennai reported in 2004 (61) RLT 671 (Trib). The matter was referred to the Larger Bench. In the case of Essar Steels Ltd (Supra), the Larger Bench decided the issue against the assessee. Thus, it cannot be said that the appellant was withholding information deliberately with intent to evade payment of duty. So, the payment of duty for the extended period of limitation cannot be invoked. Accordingly, demands of duty and penalty are

set aside on the ground of limitation. The appeals are allowed with consequential relief.

(Order dictated and pronounced in the open Court).

(P.K. Das)
Member(Judicial)

MPS*