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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

Date 08/07/2008

Appeal No. E/1396/2006-SM[BR]

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

To :
C.C.E. JAIPUR II
N.C.R.BUILDING, STATUE CIRCLE, "C" SCHEME,
JAIPUR 302005.

C.C.E. JAIPUR II — Appellant

Vs

J.M.METALS — Respondent

I am directed to transmit herewith a certified copy of **Final order No.** 1045 /2008 –SM[BR] dated 2.6.2008 passed by the Tribunal under Section 35-C(1)of Central Excises Act, 1944

Assistant Registrar
(SM Appeal Branch)

Copy to :
1. Respondent
   J.M.METALS
   E-21 (A), MIA IIND PHASE, JODHPUR, RAJASTHAN
2. Adv. / Consult SHRI HEMANT BAJAJ ADV.
   A-5, BASEMENT LAJPAT NAGAR –III,
   NEW DELHI 110024
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)

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI
PRINCIPAL BENCH NEW DELHI

Excise Appeal No.1396 of 2006 –SM (BR)

[Arising out of Order-in-Appeal No.115(HKS)CE/JPR-II/2006 dated 3.2.2006 passed by the Commissioner of Central Excise (Appeals-II), Jaipur]

Date of Hearing/ Decision:2.6.2008

For approval and signature:

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

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1. Whether Press Reporters may be allowed to see 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? :

CCE, Jaipur-II ...Appellants
[Rep. by Shri B.S. Suhag, DR]

Vs.

M/s. J.M. Metals ....Respondent
[Rep. by Shri H. Bajaj, Advocate]

CORAM: **Mr. P.K. Das, Member (Judicial)**

FINAL Order No.1045/08-SM/Dated:02.06.2008

Per P.K. Das:

Revenue filed this appeal against the order of the Commissioner (Appeals), whereby Adjudication Order was set aside.

2. The relevant facts of the case, in brief, are that during the audit of central excise records, it was noticed by the Central Excise Officers that the Respondents availed Income Tax benefit as well as Cenvat Credit on the capital goods for the year 2000-2001. Being pointed out by the Central Excise Officers, the Respondent filed revised Income Tax Return on 20.08.2004, whereby the amount of Cenvat Credit was reduced. A show cause notice was issued proposing to disallow the credit for violation of Rule (4) of Cenvat Credit Rules, 2001. The Adjudicating Authority disallowed the Cenvat Credit of Rs.44,310/- and imposed penalty of Rs.10,000/- (Rupees Ten Thousand only) along with interest. The Commissioner (Appeals) set aside the Adjudication Order. Hence the Revenue filed this appeal before this Tribunal.

3. Ld. DR on behalf of the Revenue reiterates the grounds of appeal. He submits that in this case, the Respondent availed the double benefit in the year 2000-2001. The Central Excise Officers detected ire-regularity and thereafter, they filed revised Income Tax Return on 20.08.2004. He further submits that they have claimed the benefit under the Income Tax Act and have not produced any evidence that the Income Tax Authorities had accepted their revised Return. So, the Adjudicating Authority rightly disallowed the Credit.

4. Ld. Advocate on behalf of the Respondent reiterates the findings of the Commissioner (Appeals). He submits that the Commissioner (Appeals) passed the order following the decision of the Tribunal in the

case of Alcobex Metals Ltd. Vs. CCE, Jaipur-II reported in 2003 (161) ELT 350 (Tribunal-Delhi). He further submits that the Hon'ble Bombay High Court in the case of CCE, Nagpur Vs. Maharashtra Electrosmelt Ltd. Reported in 2008 (86) RLT 9 (Bombay) held that depreciation on capital goods claimed in Income Tax Return, which was adjusted/reduced in revised return, the assessee cannot be said to have claimed depreciation. He also produced the Chartered Accountant's certificate. He further submits that the Respondent had not utilised the Credit and, therefore, imposition of penalty and interest are not sustainable.

5. After hearing both the sides and on perusal of the records, Rule 4(4) of the Cenvat Credit Rules, 2001 provides that the Cenvat Credit in respect of capital goods shall not be allowed ~~in respect of~~ that part of the value of the capital goods, which represents the amount of duty on such capital goods, which the manufacturer claims as depreciation under Section 32 of the Income Tax Act, 1961. In the present case, the Respondent availed Cenvat Credit as well as depreciation under Section 32 of the Income Tax Act, 1961. It is seen that the Central Excise Officers detected the irregularity and thereafter, the Respondent filed the Income Tax Return on 20.08.2004, where the amount has been reduced in their Return. In support of this, ld. Advocate produced the certificate of the Chartered Accountant certifying that no double benefit of Modvat Credit as well as depreciation was availed and claimed by the Respondent. It has further been certified that Income Tax assessment had

been completed under Section 143 (3) of the said Act while the Assessing Officers had revised Income Tax Return filed by the Respondent. The Tribunal in the case of M/s. Abhishek Synthetics Pvt. Ltd. Vs. CCE, Hyderabad reported in 2005 (182) ELT 339 held that Modvat credit cannot be denied when the assessee filed the revised Income Tax Return. So, the Commissioner (Appeals) rightly set aside the denial of credit. I find that the Respondent availed the double benefit in the year 2000-2001, which was detected by the Central Excise Officers during audit and thereafter, the Respondent filed the revised Income Tax Return on 20.08.2004. Therefore, the penalty should be imposed on the Respondent.
by the adjudicating authority
Accordingly, the imposition of penalty is justified. The appeal is disposed of in the above terms.

Order dictated & pronounced in open court on 02.06.2008.

(P.K. Das)
Member (Judicial)

Ckp.