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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/1611/2006-SM[BR] Date 29/04/2008

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

To :
C.C.E. LUDHIANA
CENTRAL EXCISE HOUSE, 'F' BLOCK, RISHI NAGAR,
LUDHIANA 141001 (PUNJAB)
C.C.E. LUDHIANA Appellant

Vs

M/S INDIAN SPECIAL CASTINGS P LTD. Respondent

I am directed to transmit herewith a certified copy of **Final order No.** 664 /2008 –SM[BR] dated 17.4.2008

passed by the Tribunal under Section 35-C(1)of Central Excises Act, 1944

Assistant Registrar
(SM Appeal Branch)

Copy to :
1. Respondent
   M/S INDIAN SPECIAL CASTINGS P LTD.
   INDL AREA,C SHANDARI KALAN,LUDHIANA(PB)
2. Adv. / Consult SHRI PAWAN KUMAR ADV.
   M/S RESPONDENT;-------------

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, R.K. PURAM, W.B. NO.2, PRINCIPAL BENCH NEW DELHI, COURT NO. I

Excise Appeal No. 1611 of 2006-SM (Br.)

[Arising out of order in appeal No. 445/CE/Appl/Ldh/2005 dated 26.12.2005 passed by the Commissioner (Appeals) Central Excise, Ludhiana]

Date of Hearing/ Decision: 17.04.2008

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.	:	
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?	:	No
4. Whether Order is to be circulated to the Departmental authorities?	:	

CCE, Ludhiana — Appellant
[Rep. by Mr. Sumit Kumar, DR]

Vs.

M/s Indian Special Castings (P) Ltd., — Respondent
[Rep. by Mr. Pawan Kumar, Advocate]

CORAM: Hon'ble Mr. Justice S.N. Jha, President

Final **ORDER** No. 664/08-SM(BR)

Per Mr. Justice S.N. Jha

This appeal by the Revenue arises from the order-in-appeal of Commissioner (Appeals), Central Excise, Ludhiana dated 26.12.2005 setting aside the order-in-original of the Adjudicating authority dated 25.8.2005.

By the said order, the Assistant Commissioner as Adjudicating authority disallowed credit of Rs. 1,83,445/- and directed recovery of the amount under Rule 57I(1)(ii) of the Central Excise Rules, 1944 read with Section 11A of the Central Excise Act, 1944 with interest under section 11AB of the Act read with Rule 57I(5) of the Rules, 1944. Penalty of equal amount was also imposed under Rule 173Q(1)(bb) of the Central Excise Rules, 1944 read with Section 11AC of the Central Excise Act, 1944.

2. The respondent who is a manufacturer of excisable goods had contravened the provisions of Rules 57AC and 57AE of the Central Excise (Amendment) (Second Amendment) Rules, 2000 as applicable during the relevant period by wrongly availing modvat credit amounting to Rs.1,83,445/- on the basis of sham invoices issued by M/s HBR Steel Corporation. Show cause notice was issued in this regard after visit of the business premises of M/s HBR Steel Corporation by the officials of the Preventive Wing of the Central Excise Department on 7.2.2001. At the time of visit, the record showed "nil" stock, no stock was found in the approved godown too. Nineteen invoices however were recovered. The statement of Ved Parkash, proprietor of M/s HBR Steel Corporation, was recorded under section 14 of the Central Excise Act, 1944 who stated that the business was being looked after by his son Happy Gupta. Statement of Happy Gupta was also recorded on the same day. Later he was summoned to produce records and tender further statement. His further statement was finally recorded on 7.3.2001. He admitted recovery of nineteen invoices. As regards the goods covered by those invoices, he stated that soon after receipt, the goods were shifted to the nearby godown owned by his friend Anil Jain. He was unable to give details as to quantity of the goods. Statements of Taranjit Singh,

authorized signatory of M/s HBR Steel Corporation, O.P. Arora who were looking after the excise work of M/s HBR Steel Corporation, and Anil Jain were also recorded. Statements of a few transporters, namely, Sanjay Mehta, Nachttat Singh and Baldev Singh were also recorded. They denied that their vehicles were used in transporting the goods against invoice nos. 10 & 12 dated 12.4.2000, 17 dated 17.4.2000 and 43 dated 25.4.2000, respectively. The investigation revealed that as many as 133 vehicles allegedly used in transporting goods were, in fact, gypsy, three wheeler, motor cycles, scooters, motor cars, oil tankers and so on, or non-existent and they apparently would not have been used for transporting goods. It may be mentioned here that the particulars and description of the vehicles were verified from the Transport Department of the Government of Punjab. Based on these facts, notice was issued to the appellant to show cause why modvat credit amounting to Rs.1,83,445/- availed of by the appellant on the basis of invoices of M/s HBR Steel Corporation should not be reversed and the amount recovered as per the provisions of Central Excise Act and Central Excise Rules with interest, and penalty be not imposed for violation of the relevant provision of the Central Excise Act and the Rules.

3. The respondent in its reply did not explain the alleged transportation of goods by scooters, gypsy, motorcars, three wheelers or oil tankers etc or fictitious vehicles. It is clear that these vehicles could not be used for transporting goods at all. It is clear that the so-called transportation of goods was fake and fictitious. The conclusion is irresistible that the goods were never received by the appellant against which modvat credit could be claimed.

4. Counsel for the respondent was called upon to explain how the vehicles in question could be used for transporting the goods. It was submitted that no opportunity was given to the appellant to verify that the vehicle in question was gypsy, motor cars, scooters three wheelers etc. I find no substance in the submission, for, details of the vehicles were disclosed in the annexures to the show cause notice. It may be re-called that three of the vehicle owners namely, Sanjay Mehta, Nachttar Singh and Baldev Singh were examined who in their respective statements clearly denied the use of their vehicles for transporting goods from M/s HBR Steel Corporation to M/s Indian Special Castings (P) Limited i.e. appellant herein.

5. Counsel for the respondent tried to take shelter under the plea of limitation. It was submitted that the material facts became known to the Department on or about 7.2.2001 in course of search of the business premises and, therefore, show cause notice could not be issued on 23.3.2005 by invoking the extended period. The submission has been noticed only to be rejected. Section 11A of the Central Excise Act envisages issuance of show cause notice within the period one year from the relevant date as defined therein. Where the duty of excise has not been levied or paid or has been short levied or short paid or erroneously refunded, but where such non-levy or non-payment, short-levy or short payment or erroneous refund is actuated by fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of the Act or the Rules, the notice can be issued within five years from the relevant date, as per proviso to sub-section (1) of Section 11A. May be that the material facts became known to the Department on or about 7.2.2001 but once the non-levy or non-payment was found to be on account of fraud, collusion etc, the extended

period of limitation of five years could be invoked and the fact that the material facts become known to the Department on 7.2.2001 was totally irrelevant. This is evident from a bare reading of the proviso which may be quoted verbatim as under:-

> Section 11A(1) Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded. –
>
> Provided that where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of fraud, collusion or any willful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, by such person or his agent, the provisions of this sub-section shall have effect, as if for the words one year, the words "five years" were substituted".

6. The instant case involved illegal availment of modvat credit by fraudulent means. When the fraud is established, whether the material facts had become known to the Department on or about 7.1.2001, was totally irrelevant. The Department was well within its power to issue show cause notice within the period of five years, and, therefore, show cause notice dated 23.3.2005 i.e. within five years was within the period of limitation. I thus do not find any substance in the submission that the proposed action was time barred.

7. Counsel also submitted that even if it is accepted that no transportation took place by the vehicles specified in the show cause notice, it cannot be said that the movement of goods covered by other invoices too was fictitious. The observation of the Commissioner was also to the effect that there was every possibility of a clerical mistake in noting the vehicles numbers etc on the invoice because most of the truck drivers and staff engaged in the transport of the goods are illiterate. It may be, as observed by the Commissioner, that under the Central Excise Law, benefit can not be

denied because of wrong or non mentioning of the vehicle number on the invoices, but this could be so when mistakes are isolated. As seen above, as many as 133 cases of transportation were found to be fake. Besides, some of the owners of the concerned vehicles were examined on oath. It is clear that the goods were not received by the appellant and, therefore, the availment of credit was patently illegal and fraudulent. As such, the order of the adjudicating authority disallowing the modvat credit and directing reversal thereof did not warrant any interference by the Commissioner (Appeals).

8. In the result, the order of the Commissioner (Appeals) dated 26.12.2005 is set-aside and that of the Assistant Commissioner dated 25.8.2005 is restored. The appeal is thus, allowed.

(Dictated and pronounced in the open Court)

[Justice S.N. Jha]
President

[Pant]