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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/1614/2007 – SM [BR] Date 16/02/2009

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

To :
THE GENERAL MANAGER
OSWAL OVERSEAS LTD

NAWABGANJ (DISTT. BAREILLY)

OSWAL OVERSEAS LTD Appellant

Vs

C.C.E. MEERUT II Respondent

I am directed to transmit herewith a certified copy of **Final order No. 168 / 2009 – SM[BR]** dated 19.1.2009

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. MEERUT II

OPP. SAHEED PARK (NEAR ASHOK KI LAT) DELHI ROAD, MEERUT (UP)

2. Adv. / Consult

MR.KAPIL VAISH

B-51, BUTLER PLAZA, 95, CIVIL LINES, BAREILLY.

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 - 3
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
13 Taxindiaonline.com Pvt.Ltd, B-XI/8183,Vasant Kunj, New Delhi - 110070
14 Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road,Ahmedabad-1
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Assistant Registrar
(SM Appeal Branch)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No.2, R.K.Puram, New Delhi-110066.
Principal Bench, New Delhi.

E/1614/07-SM

(Arising out of Order-in-Appeal No.34-CE/APPL/MRT-II/07 dt.19.3.07 passed by Commissioner(Appeals), Meerut)

Hon'ble Mr. RAKESH KUMAR, MEMBER (TECHNICAL)

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?

3. Whether their Lordships wish to see the fair : copy of the order?

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

The Gen. Manager Oswal Overseas Ltd. Appellant

Versus

M/s. CCE, Meerut Respondent

Appearance
Shri Kapil Vaish, Chartered Accountant, for Appellant
Shri Sansar Chand, Authorised Departmental Representative(DR) For Respondent

Coram: Hon'ble Mr. RAKESH KUMAR, MEMBER (TECHNICAL)

Date of decision: 19.1.09
Final Order No. 168/09-SM (BR)

Per Rakesh Kumar:

This is an appeal against order-in-appeal dt.19.3.07 passed by Commissioner(Appeals), Meerut-II by which the Commissioner(Appeals) has upheld the Cenvat credit demand of Rs.124297/- confirmed against the Appellant and a penalty of equal amount imposed on the Appellant by the Asstt. Commissioner vide order-in-original dt.18.10.06. The point of dispute in this case is as to whether during the period of dispute i.e. during the period from April'04 to Oct'04, the Appellant is eligible for Cenvat credit in respect of Welding Electrodes used for repair and maintenance of the machinery and asbestos jointing sheets used for sealing the leaking tubes and pipes. The Appellant had initially taken capital Cenvat credit in respect of these two items but subsequently a SCN was issued on 22.11.05 invoking extended period for recovery of Cenvat credit in respect of these two items alongwith interest and imposing penalty on the Appellant.

2. Heard both the sides.

2.1 Shri Kapil Vaish, Chartered Accountant, the Ld. Counsel for the Appellant pleaded that so far merits of this case are concerned, the Appellant is eligible for Cenvat credit in respect of both the items. He pleaded that Cenvat credit is available in respect of welding electrodes in view of recent judgment of the Hon'ble High Court of Rajasthan in the case of Hindustan Zinc Ltd. vs UOI reported in 2008(228)ELT.517(Raj.) wherein the Hon'ble High Court held that Cenvat credit is available in respect of welding electrodes used for repairs and maintenance of plant and machinery as input as well as capital goods. At this stage Ld. DR brought to my notice the judgment of the Tribunal in the case of SAIL vs CCE, Ranchi reported in 2008(222)ELT.233 wherein a contrary view had been taken and SLP appeal filed by SAIL against which before the Hon'ble Supreme Court has been dismissed by the Hon'ble Supreme Court vide judgment reported in 2008(229)ELT.A127(SC). Shri Vaish in respect of this judgment of the Hon'ble Supreme Court dismissing the SLP against the Tribunal's judgment in the case of SAIL vs CCE, Ranchi(supra) pleaded that mere summary dismissal of SLP does not lay down any law and in this regard, he relied upon the Larger Bench judgment of this Tribunal in the case of Asstt. Engineer(Civil) PCC Poles Factory & Others vs CCE, Raipur reported in 2008(89)RLT.216(LB) wherein the Tribunal held that it is well settled that summary dismissal of SLP/Civil Appeal by Supreme Court does not amount to affirmation of the judgment/order of Court/Tribunal appealed against on merit and it merely means that Supreme Court had declined to interfere in the matter. Shri Vaish also cited the judgment of the Hon'ble Supreme Court in the case of Kunhayammed vs State of Kerala reported in 2001(129)ELT.11(SC) wherein Supreme Court in paras 14, 16 44 & 44, held that there are two stages in the disposal of Special Leave Petition filed under Article 136 of the Constitution - the first stage is granting the special leave to appeal and second stage is hearing the appeal, and Once leave to appeal is granted, the order appealed against is put in jeopardy, though it continues to be binding unless it is nullity or is stayed by a specific order of the Court and if the petition is dismissed (or "dismissed on merits") at the stage of special leave without a speaking or reasoned order, there is no resjudicata, no merger of the lower order and the petitioner retains the statutory right, if available, of seeking relief in review jurisdiction of the High Court." In view of the above, Shri Vaish pleaded that the judgment of the Apex Court in the case of SAIL vs UOI reported in 2008(229)ELT.A127(SC) being summary dismissal of SLP does not lay down any law and at present the only judgment on merit on the issue of eligibility of welding electrodes for Cenvat credit as of Hon'ble Rajasthan High Court in the case of Hindustan Zinc Ltd.(supra).

2.1.1 As regards the other item ~~of~~ asbestos jointing sheets, he stated that it is used for ~~ceiling~~ sealing the tubes and pipes, and since the machinery can not function properly without this item, the same has to be treated as an accessory and would be eligible for Cenvat credit. In this regard, he relied upon the Tribunal's order in the case of KCP Sugar & Inds. Ltd. vs CCE, Guntur reported in 2004(178)ELT.275.

2.1.2 Shri Vaish pleaded that the demand time is barred as SCN has been issued by invoking the extended period and the same was not available to the Deptt. as all the facts were known to the Department.

2.2 Shri Sansar Chand, Ld. DR defended the impugned order by placing reliance on the Hon'ble Supreme Court's judgment in the case of

Steel Authority of India Ltd. vs Commissioner (supra) wherein the Hon'ble Supreme Court has dismissed the SLP filed by the same against the Tribunal's order in the case of SAIL vs CCE reported in 2008(222)ELT.233. He emphasized that from the words of the Supreme Court's order, it is clear that SLP has been dismissed after considering the facts of the case and therefore, this judgment has to be treated as law laid down by the Supreme Court on this issue. He also pleaded that Cenvat credit is not available, in respect of asbestos jointing sheets, on, as observed in the order-in-original, the issue of eligibility of Cenvat credit in respect of asbestos jointing sheets has been referred to a Larger Bench. On the question of limitation, he pleaded that while submitting the details of Cenvat credit in monthly returns/declaration filed, there was no mention of the specific use of the said items which is a vital fact of deciding the admissibility of Cenvat credit in respect of spares, components and accessories and therefore, the Asstt. Commissioner has rightly invoked the extended period.

3. I have carefully considered the submissions from both the sides. The first point of dispute is regarding eligibility of welding electrodes used for maintenance and repairs of sugar mills for Cenvat credit. On this issue, while on one hand there is judgment of the Tribunal in the case of SAIL vs CCE, Ranchi(Supra), SLP against which has been dismissed by the Supreme Court, on the other hand is the judgment of the Hon'ble High Court of Rajasthan in the case of Hindustan Zinc Ltd. vs

UOI, which is a detailed judgment and in which the Hon'ble High Court has held the welding electrodes used for repairs & maintenance of the machinery and plant would be eligible for Cenvat credit both as input as well as capital goods. I agree with the Appellant that dismissal of SLP by Supreme Court against Tribunal's judgment in the case of SAIL vs CCE, Ranchi does not lay down any law, as it is only summary dismissal and in this regard, I am supported by the judgment of this Tribunal in the case of Asstt. Engg.(Civil)P.C.C. Poles Factory & Others vs CCE, Raipur reported in 2008(89)RLT.216 wherein the Larger Bench of the Tribunal has clearly held that it is well settled that summary dismissal of SLP/Civil appeal by Supreme Court does not amount to affirmation of the judgment of the order of the Court/Tribunal appealed against on merit and merely means the Supreme Court has declined to interfere in the matter. I also find that the ~~same~~ this view ~~has been expressed~~ is supported by Hon'ble Supreme Court in the case of Kunhayammed vs State of Kerala (supra). Therefore, I hold that Cenvat credit is available in respect of welding electrodes used for maintenance and repairs of the plant and machinery.

4. As regards the asbestos jointing sheet, the same is used for sealing the leaking pipes and tubes without which the sugar plant cannot function. In my view the ratio of Hon'ble Rajasthan High Court in the case of Hindustan Zinc Ltd. holding that welding electrodes are eligible for Cenvat credit would also apply with equal force in respect of asbestos jointing sheet as the same are also used for repair and maintenance of the sugar mill

machinery – sealing the leaking pipes and tubes. I also find that the same view has been taken by this Tribunal in the case of KCP Sugar & Inds. Ltd. vs CCE reported in 2004(178)ELT.275. In view of this, I hold that Cenvat credit is available in respect of packing jointing also.

5. I also find that in this case, the Cenvat credit demand for period from April'01 to May'04 period has been raised vide SCN dt.22.11.05 invoking extended period under proviso to Section 11A(1) of the Central Excise Act,1944 on the ground that – "while submitting the details of Cenvat credit in the monthly returns/declarations filed earlier, there was no mention of the specific use of welding electrodes and asbestos jointing sheets which is a vital fact for deciding the admissibility of Cenvat credit in respect of spares, components or accessories of capital goods and thus the respondents have suppressed the fact of specific use of the said items with intention to avail the inadmissible Cenvat credit on the said items under the garb of spare, components or accessories". When the Department acknowledges that the fact of taking Cenvat credit in respect of welding electrodes and asbestos jointing sheets had been declared by the Appellants in the Cenvat credit declaration, it cannot allege that the Appellants have suppressed this information from it – the Departmental officers, while checking ~~clearing~~ the Cenvat credit declaration and ER-1/R.T.12 returns could have asked the Appellant about the specific use of these items. Hon'ble Supreme Court in a series of judgments ~~in~~ cases of CCE vs Chemplur Drugs & Laminates reported in 1989(40)ELT.276(SC),

CCE, Mumbai vs Bell Granite reported in 2006(198)ELT.161(SC) and Kores India Ltd. vs CCE, Chennai reported in 2004(174)ELT.7(SC) has held that something positive, other than mere inaction a failure on the part of a manufacturer or producer or conscious – ~~a~~ or deliberate with-holding of information ~~whether~~ when the manufacture knew otherwise, is required before he is saddled with duty liability for period beyond the normal limitation period. In view of this, I hold that the circumstances for invoking proviso to Section 11A(1) do not exist in this case and since the demand for period from April'01 to May'04 has been raised vide SCN dt.22.11.05, the same is time barred.

6. In view of the above, I hold that the impugned order is not sustainable either on merit or on limitation and the same is set aside. The appeal is allowed.

Order dictated in the open Court.

(Rakesh Kumar)
Member Technical

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