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CUSTOMS. EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
EXCISE APPEAL BRANCH

Appeal No. E/5502/2004 - EX[DB]

Date 06/04/2009

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

To :
M/S HINDALCO IINDUSTRIES LTD.
RENUKOOT,DISTT-SONEBHARA U.P.
M/S HINDALCO IINDUSTRIES LTD.

Appellant

C.C.E ALLAHABAD

Vs
Respondent

I am directed to transmit herewith a certified copy of **Final order No.** ~~256~~ 259/2009 2009 **EX[DB]** dated 01.04.2009 passed by the Tribunal under Section 35-C(1)of Central Excises Act, 1944

Assistant Registrar
(Excise Appeal Branch)

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1. Respondent
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3. S.D.R
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5. Bar association. CESTAT. New Delhi
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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.)
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10. Nidheshak publications. I.P.Estate. new Delhi
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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 Kuni. New Delhi - 110070
14. Easy Service Tax Online Dot Com Pvt.Ltd.407A.Iscon Mall.Above Star India Bazar.Satellite Road.Ahmedabad-15
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Assistant Registrar
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IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No.2, R.K.Puram, New Delhi-110066.
Principal Bench, New Delhi.

E/5502/04

(Arising out of Order-in-Appeal No.610-CE/Appl/ALLD/2004 dt.17.8.04 passed by Commissioner(Appeals), Allahabad)

Hon'ble Mr. D.N.PANDA, JUDICIAL MEMBER
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: :

M/s. Hindalco Industries Ltd. Appellant

Versus

CCE, Allahabad Respondent

Appearance
Shri B.L.Narsimhan, Adv. For appellant

Shri Virender Chaudhary, Authorised Departmental Representative(JCDR) For respondent

Coram: Hon'ble Mr. D.N.PANDA, JUDICIAL MEMBER
Hon'ble Mr. RAKESH KUMAR, MEMBER (TECHNICAL)

Date of decision: 23.3.09
FINAL Order No. 259/09-EX

Per Rakesh Kumar:

This is an appeal against order-in-appeal No.610-CE/APPL/ALLD/2004 dt.17.8.04 passed by Commissioner(Appeals), Allahabad, upholding the order-in-original No.MP(Dem-1/2003) 18/04 dt.29.3.04 passed by Jt. Commissioner of Central Excise, Allahabad confirming Cenvat credit demand of Rs.18,88,869/- alongwith interest against the Appellant under Rule 57I(1)(ii)/57AH of Central Excise Rules,1944 read with Section 11A and 11AB of Central Excise Act,1944/Rule 57I(5) of Central Excise Rules,1944 and imposing penalty of equal amount on the Appellant under Section 11AC of Central Excise Act,1944/Rule 57I(4) of Central Excise Rules,1944. The Appellants are engaged in the manufacture of Aluminium and products thereof. For manufacture of Aluminium and its products, a number of duty paid inputs are procured by the Appellant on which Cenvat credit is taken. The dispute in this case is about C.P.Coke, Hard Pitch, Silicon Metal, Furnace oil and Light Diesel Oil received during the period from April'96 to March'2000. These inputs on being received by the Appellants' factory are weighed by the Appellant on their weighing scales and the record is kept of the quantity received and the difference, if any, between the quantity mentioned in the invoices and the quantity ascertained on receipt in the factory. The Jurisdictional Central Excise Officers, in the course of checking of Central Excise records of the Appellant, compared the quantity of the inputs received as mentioned in the invoices; with the quantity received in the factory, as mentioned in the Appellant's record and on this basis it has been alleged that the Appellant during the period from April'96 to March'2000 have taken Cenvat credit to the tune of Rs.18,88,869/- on the inputs which had not been received. It is on this basis that after issue of show cause notice, the Jt. Commissioner vide order-in-original dt.29.3.04 confirmed Cenvat credit demand of Rs.18,88,869/- along with interest against the Appellant and besides this, imposed penalty of equal amount. The appeal filed by the Appellant before the Commissioner(Appeals) was rejected vide impugned order-in-appeal dt.17.8.04. It is against this order that the present appeal has been filed.

2. Heard both the sides.

2.1 Shri B.L.Narsimhan, Advocate, Ld. Counsel for the Appellant pleaded that the inputs – C.P.Coke, Hard Pitch, Furnace Oil and LDO had been received from the manufacturers/suppliers against duty paid invoices and denial of credit is based only on weighment records of the Appellant wherein certain quantities of inputs have been shown as short received; that the Appellants have clarified to the Department that the difference in weighment at the Appellant's premises has occurred because of difference in the two weighing scales namely, weighing scales of the supplier and weighing scales used at the Appellant's premises, that commercially, the differences which have been indicated are well within the acceptable norms and therefore, the same cannot be attributed as shortages; that in regard to the inputs in liquid form, the difference has occurred because of the method adopted for measurement, namely, dip reading and besides this, density of the material in the oil tank also affects the reading; that in regard to differences noticed in quantity, no claim has been made by the Appellants to the suppliers on the ground of short supply, that there are many instances when the weighments at the Appellant's premises ~~show~~ showed a higher figure than that reflected in the invoices for which the Appellants have never been asked to pay more to the suppliers of inputs; that the differences in quantity is very minor amounting to hardly 0.08% to 0.38%; that such variation is quite normal in the industry and on this basis, it is totally incorrect to deny the Cenvat credit; that Hon'ble Rajasthan High Court in the case of UOI vs Bhilwara Spinning Ltd. reported in 2008(222)ELT.362(Raj.) has held that when it is not in dispute that there is no diversion of inputs received under the invoices and the entire goods received under the consignment have been put to the intended use for manufacture of the finished products by the assessee and the transit loss was found by the Tribunal to be normal loss due to evaporation, Cenvat credit on such short receipt of the inputs cannot be denied. Judgments of the Tribunal in the case of CCE, Aurangabad vs Sipta Coated Sales reported in 2000(125)ELT.578 were cited wherein the Tribunal observed that it is a common occurrence that when we purchase goods from the shop, if any customer has a weighing scale in his house, when weighing the goods, there can be a margin of error because it depends on calibration of both the weighing machines — one at the shop and ~~one~~ the other at the consumer's place. Another judgment cited was the Tribunal's judgment in the case of P.K.P.N.Spinning Mills vs CCE reported in 1997(89)ELT.588 wherein the Tribunal held that even though the quantity of goods which was received by the assessee was a little less than the quantity on which duty was paid, the same is not on account of any deliberate act or omission on the part of the manufacturer or recipients and in such a situation, the Cenvat credit cannot be denied. In view of the above, it was pleaded that the impugned order is not correct.

2.2 Shri Virender Chaudhary, Ld. JCDR reiterating the Commissioner's(Appeals) findings in the impugned order emphasized that the Modvat credit is available to a manufacturer only on the quantity of inputs actually used in or in relation to manufacture and since in this case, undisputedly, certain quantity was not received, the Department has correctly denied the Modvat credit on this quantity.

3. We have carefully considered the submissions from both the sides and perused the records. There is no dispute about the fact that the Appellants while receiving C.P.Coke, Hard Pitch, Silicon Metal, Furnace Oil and Light Diesel Oil were checking the quantity of the goods by weighing the same on their weighing scale and whenever there was any variation – positive or negative, the same was being recorded. There is also no dispute about the fact that the short receipt of inputs varies from

0.08% to 0.38%. When these records of the receipt of the inputs came to the notice of the Department, the Department took the view that the Appellant would not be eligible for Cenvat credit in respect of quantity short received and it is only on this basis that Cenvat credit demand of Rs.18,88,869/- has been confirmed against the Appellant along with interest and penalty of equal amount has been imposed. On going through the show cause notice and other case records, we find that there is no allegation that the short receipt was attributable to any malafide intention like illicit diversion of the Cenvated inputs for uses other than use in the manufacture of the finished goods. The shortage of this magnitude - 0.08% to 0.38%, which is basis of the proceedings against the Appellant, can be due to difference in the weighing scales used by the supplier and the Appellant and in case of liquidate inputs due to differences in dip reading. We are unable to appreciate that reasonable transit loss or such small difference in quantity due to difference in weighing scale or difference in dip reading can result in denial of the Modvat credit to the Appellant. More so, when the show cause notice does not bring any allegation about the Appellants, having illucitly diverted the inputs in respect of which Cenvat credit had been taken. We also find that Hon'ble Rajasthan High Court in the case of UOI vs Bhilwara Spinning Ltd.(supra) has held that when there was no diversion of goods covered under the invoices and the entire goods received under the invoices have been put to the intended use by the assessee, Cenvat credit cannot be denied on the transit loss which was found to be normal loss due to evaporation. Ld. DR has not explained as to how the present case is different from the case of UOI vs Bhilwara Spinning Ltd.(supra) decided by the Hon'ble Rajasthan High Court. We also find that similar view has been taken by the Tribunal in the cases of CCE, Aurangabad vs Sipta Coated Sales(Supra), P.K.P.N. Spinning Mills vs CCE, Coimbatore(Supra) and Neera Enterprises vs CCE reported in 1988(104)ELT.382. In another judgment of the Tribunal in the case of Neera Enterprises vs CCE, Chandigarh reported in 1998(104)ELT.382which has been relied upon by the Tribunal in the judgements in cases of Ghanda Chemicals Ltd. vs CCE, Mumbai reported in CCE, Bhopal vs Jaypee Rewa Plant, reported in 2005(182)ELT.397 and Triveni Glass Ltd. vs CCE, Allahabad reported in 2008(221)ELT.306, the Tribunal has held that mere 2% difference in weight is not significant as it may be due to difference in weighing scales when there is no evidence of any deliberate and illicit diversion of the inputs and on the basis of such difference, Cenvat credit cannot be denied. The Tribunal in the case of Hindustan Organic Chemicals Ltd. vs CCE, Belapur reported in 2005(191)ELT.959 has held that it is well settled law that availment of Cenvat credit to the extent of full amount of duty shown on supplier's invoice inspite of ~~heavy~~ having received a little lesser quantity than the actual quantity shown in the supplier's invoice is permissible and ~~reversed~~ reversal of Cenvat credit on the amount of short receipt of inputs is not required. Thus, from a series of judgments on the issue involved in these cases, it is clear that the settled legal position is that Cenvat credit to the extent of full amount of duty shown in the supplier's invoice is permissible, even if the quantity actually received is somewhat short provided the shortage is meager, attributable to difference in weighing scales and/or transit loss due to evaporation in case of liquids, and there is no evidence of deliberate illicit diversion. In this case, the shortage of 0.08% to 0.38% is meager – attributable to difference in weighing scales or transit loss in case of LDO/furnace oil and there is absolutely no allegation of illicit diversion of the cenvated inputs. In view of this, reversal of credit on 0.08% - 0.38% shortage on receipt of inputs is not called for.

4. In view of the above discussion, we hold that the impugned order is not sustainable. The same is set aside and the appeal is allowed.

(Reasons of decision and decision was already pronounced in the open Court).

(D.N.Panda)
Judicial Member

(Rakesh Kumar)
Member Technical

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