

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/170 /2009 – SM[BR]

Date 21/05/2009

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

To :
M/S XPRO INDIA LTD.,
2-3, NIT INDUSTRIAL AREA, FARIDABAD.
M/S XPRO INDIA LTD.,

C.C.E. DELHI IV

Appellant

Vs
Respondent

I am directed to transmit herewith a certified copy of Final order No. 446 / 2009 –SM[BR]&S/230/2009 dated 19.3.2009
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. DELHI IV

NEW CGO COMPLEX, NH-IV, FARIDABAD, HARYANA 121001.

2. Adv. / Consult

MR.V. LAXMIKUMARAN

B-6/10, SAFDARJUNG ENCLAVE, NEW DELHI-110029

3 S.D.R

~~4 J.C.D.R.~~

5 Bar association, CESTAT, New Delhi

6 Director Publications, Customs, Excise, I.P. Estate, New Delhi

7 M/s Centax Publications Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi - 3

8 Commercial Laws of India Pvt Ltd. Post Bag No. 1033, No.2(Old No. 36), Vaithyaram Street, T. Nagar, Chennai -17

9 Raghuraman's 44-B. Regal Flat, Shipra Suncity, Indirapuram - 201010, Ghaziabad, DT, U.P.

10 M/s Manupatra Information Solutions Pvt Ltd. Excise & Customs Cases B-37, Sector - 1, Noida - 201301, Gautam Budh Nagar, (UP)

11 M/s. Deeparchie Publications, M-93, Marg. 46, Saket, New Delhi 110017

12 Taxindiaonline.com Pvt.Ltd. B-XI/8183, Vasant Kunj, New Delhi - 110070

13 Taxmann Allied Service Pvt Ltd., 21/35, West Puniabi Bagh, New Delhi - 110026

14 Easy Service Tax Online Dot Com Pvt.Ltd. 407A, Iscon Mall, Above Star India Bazar, Satellite Road, Ahmedabad-15

15 LAWCRUX Advisors Pvt Ltd, LAW House, 1-8, Sector - 10, Faridabad 121003 (Harvana)

16 Office Copy

17 Guard file

Assistant Registrar
(SM Appeal Branch)

**IN THE CUSTOMS, EXCISE & SERVICE
TAX APPELLATE TRIBUNAL,
WEST BLOCK NO. 2, R.K. PURAM,
NEW DELHI**

COURT – III

**E/STAY NO. 174/2009-SM IN &
EXCISE APPEAL NO. 170 OF 2009-SM**

[Arising out of Order-in-Appeal No. 80/CE/DLH-IV/2008 dated 22.10.2008 passed by the Commissioner (Appeals), Central Excise, Delhi-IV, Faridabad]

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 would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	12
3.	Whether their Lordships wish to see the fair copy of the order?	
4.	Whether order is to be circulated to the Departmental authorities?	Y-vj

M/s. Expro India Limited

Appellant

Vs.

CCE, Delhi-IV

Respondent

Appearance:

Shri Raghuram Srinivasan for the appellant;
Shri R.K. Verma, D.R. for the Revenue;

Coram:

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

Date of hearing/decision: 19th March, 2009

FINAL ORDER NO. 446/09-sm(BR) **dated** 19.3.09

Per P.K. Das: Stay order No. 230/09-sm(BR)

As the issue involved in this case is in narrow compass appeal itself is being taken up for hearing after granting waiver of pre-deposit of duty and penalty.

2. After hearing both sides and on perusal of the records, I find that the credit was denied on the ground that the appellants availed credit on the basis of supplementary invoice No. 562 dated 14.10.2005 issued by the supplier Electrolux Kelvinator Ltd. who paid the duty consequent upon Final Order No. 44/CEX/2005 dated 13.10.2005 of the Settlement Commission. Both the authorities below proceeded on the basis that the show cause notice dated 16.11.2004 issued to Electrolux Kelvinator Ltd. alleging that they had colluded with Xpro India Ltd. who did not utilize 100% raw material i.e. HIPS granules supplied to them and availed excess credit to the extent of 3%. It has been alleged that the appellants availed credit on the basis of supplementary invoice which is covered under Exclusion Clause (b) of Sub-rule (1) of Rule 7 of CENVAT Credit Rules. Learned Advocate submits that the issue has already been decided by the Larger Bench of the Tribunal in the case of Bosch Chassis Systems India Ltd. vs. CCE, Delhi-III, Gurgaon, reported in 2008 (232)

ELT 622 (Tri.-LB). The relevant portion of the decision of the Larger Bench of the Tribunal is reproduced below:-

“12. In the instant case, as seen above, the controversy has arisen in context of admissibility of the supplementary invoice in respect of additional duty in view of clause (b) of Rule 7(1) of Cenvat Credit Rules in terms of which supplementary invoice cannot be taken as proof of payment of duty where duty had become recoverable on account of non-levy or short-levy by reason of fraud, collusion or willful misstatement or suppression of facts or contravention of any provisions of the Central Excise Act or Customs Act or Rules made thereunder with intent to evade payment of duty. In a nutshell, the benefit of Cenvat credit can be denied only in cases of fraud, collusion, etc., but the assessee can establish that no case of fraud, collusion etc. was made out against him. Thus, whether in the particular case, the benefit of Cenvat credit has rightly been disallowed should be left to the appellate forum to consider.

13. In the above view of the matter, Issue Nos. 2 and 3 are answered in the negative, that is, in favour of the assessee and against the Revenue, and it is held that the mere filing of application before Settlement Commission under Section 32E of the Act for waiver of interest, penalty and immunity from prosecution and suo motu payment of duty as per show cause notice may not necessarily per se construed as admission of the allegations in the show cause notice as regards the fraud, collusion etc. Inference in this regard may be drawn from the

contents of the application, that is, pleadings of the applicant and finding of the Settlement Commission, if any. Issue No. 2 pertains to the merits of the case and parties generally agreed that the same may be decided by the Division Bench at the stage of final disposal of the appeal.”

3. The Larger Bench of the Tribunal held that the credit cannot be denied taken on the basis of supplementary invoice merely on the ground that the supplier filed application before the Settlement Commission. It has been further held that pleading of the appellants in the Settlement application and finding of the Settlement Commission pertains to the merits of the case are relevant. In the present case, I find that both the lower authorities below had not considered the application and the findings of the Settlement Commission. So, the matter is required to be examined by the original authority in the light of the decision of the Larger Bench of the Tribunal in the case of Bosch Chassis Systems India Ltd. (supra).

4. In view of that impugned order is set aside. The matter is remanded back to the original authority to decide afresh on the basis of the above decision. Appeal is allowed by way of remand. Stay application is also disposed of.

(Dictated & pronounced in the Open Court.)

(P.K. DAS)
MEMBER (JUDICIAL)

RK