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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/2485 – 2488 / 2007 –SM[BR] Date 07/10/2009

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

To :

(1-4) J.K.CEMENT WORKS
KAILASH NAGAR, NIMBAHERA, DISTT.
CHITTORGARH (RAJASTHAN)

J.K.CEMENT WORKS Appellant

Vs

C.C.E. JAIPUR II Respondent

I am directed to transmit herewith a certified copy of **Final order No. 1190 - 1193 / 2006-SM[BR]** dated 23.9.2009

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. JAIPUR II
   N.C.R.BUILDING, STATUE CIRCLE, "C" SCHEME, JAIPUR 302005.
2. Adv. / Consult
   SHRI BIPIN GARG ADV.
   B-1/1289-A, VASANT KUNJ NEW DELHI
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 Publictions 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 Punjabi 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 (Haryana)
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-110066.
Principal Bench, New Delhi.

E/2485-88/07-SM

(Arising out of Order-in-Appeal No.392, 393, 389 & 390(HKS)CE/JPR-II/2007 dt.26.6.07 passed by the Commissioner(Appeals), Jaipur)

M/s. J.K.Cement Works & Others — Appellant

Versus

CCE, Jaipur — Respondent

Appearance
Sh. Bipin Garg, Adv. For Appellant

Sh. S.N.Srivastava. DR for Respondent

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

Date of Hearing: 11.8.09
Date of Decision: 23/9/09
FINAL Order No. 1190-1193/2009 SM(Br)

Per Rakesh Kumar:

The issue involved in appeal No.E/2485-86/07-SM is as to whether Oxygen, Acetylene and Helium gases used for repair and maintenance of the plant and machinery are eligible for Cenvat Credit ~~either~~ as inputs and the issue involved in Appeal No.E/2487-88/07-SM is as to whether 'welding electrodes' used with welding machines for repair and maintenance of plant and machinery are eligible for Cenvat credit as capital goods.

2. Heard both the sides.

2.1 Shri Bipin Garg, Advocate, Ld. Counsel for the Appellant pleaded that Hon'ble Rajasthan High Court in the case of Hindustan Zinc Ltd. vs UOI reported in 2008(228)ELT.517 (Raj.)has held that welding electrodes used for repairs and maintenance of plant and machinery would be eligible for Cenvat credit as inputs as well as capital goods; that in this judgment Hon'ble Rajasthan High Court has over-ruled Larger Bench judgment of the Tribunal in the case of Jay Pee Rewa Plant vs CCE reported in 2003(159)ELT.553 and that applying the ratio of this judgment of Hon'ble Rajasthan High Court, Oxygen, Acetelene and Helium gases used for repair and maintenance of plant and machinery would also be eligible for Cenvat credit. He also cited the Tribunal's Final Order No.107/2009-SM dt.20.1.09 in the case of Ganga Kisan Sahkari Chini Mills Ltd. wherein, relying upon Hon'ble Rajasthan High Court in the case of Hindustan Zinc Ltd.(supra) it was held that welding electrodes would be eligible for Cenvat credit and that in this case it was also observed that though the Tribunal in the case of SAIL vs CCE, Ranchi reported in 2008(222)ELT.233 had held that welding electrodes are not eligible for Cenvat credit and SLP filed by M/s. SAIL against this judgment of the Tribunal was dismissed by the Hon'ble Supreme Court, this dismissal of SLP being by a non-speaking order, does not lay down any law and would not be a binding precedent. Shri Garg also pleaded that welding electrodes are used as part of welding machine, which ~~while~~ being classifiable under heading 84.68 are covered by the definition of 'capital goods' and hence the welding electrodes being part of the welding machine, would also be covered by the definition of 'capital goods'.

2.2 Shri S.N.Srivastava, Ld. DR pleaded that in the case of SAIL vs CCE, Ranchi reported in 2008(222)ELT.233, the SLP against the Tribunal's judgment had been dismissed by the Hon'ble Supreme Court with the words - "delay condoned. On the facts of this case, the matters stand dismissed"; that the wording of the Hon'ble Supreme Court's order shows that it is a speaking order and hence this judgment would be a binding precedent effect and that the Division Bench of the Tribunal in a recent Division Bench of Tribunal's judgment in the case of Vikram Cement vs CCE, Indore (final order No.603/09 dt.10.9.09) relying upon Hon'ble Supreme Court's judgment in the case of Kunhayammed vs State of Kerala reported in 2001(129)ELT.11(SC), has held that Hon'ble Supreme Court's order in the case of SAIL vs CCE, Ranchi(supra) dismissing SLP on the facts of the case is a speaking order, which will be binding on all the Courts and that this judgment of Hon'ble Supreme Court had not been considered by Hon'ble Rajasthan High Court in the case of Hindustan Zinc Ltd.(supra).

3. I have carefully considered the submissions from both the sides and perused the records. All the four items in dispute - Helium, Oxygen and Acetelene gases and welding electrodes are used for maintenance and repairs of the plant. However, welding electrodes is used as a part of the welding machine. The question to be decided in these cases is as to whether these items which are used for maintenance and repair of the plant and machinery

would be eligible for Cenvat credit as inputs / capital goods or not.

4. <u>Is Cenvat credit admissible in respect of welding electodes as capital goods?</u>

4.1 The question which was to be decided by the Hon'ble Rajasthan High Court in the case of Hindustan Zince Ltd.(supra) was as to whether "welding electrodes' used for maintenance and repair of plant and machinery are eligible for Cenvat credit as capital goods as well as inputs. This question was decided by the Hon'ble Rajasthan High Court in favour of Hindustan Zinc Ltd. relying upon Hon'ble Supreme Court's judgment in the case of J.K.Cotton & Spg. & Wvg. Mills Co. Ltd. reported in 1997)91)ELT.34(SC) and also Hon'ble Supreme Court's judgment in the case of CCE vs Jawahar Mills Ltd. reported in 2001(132)ELT.3(SC) and in this judgment Hon'ble Rajasthan High Court specifically over-ruled the Larger Bench judgment of the Tribunal in the case of Jaypee Rewa Plant vs CCE reported in 2003(159)ELT.553. The Division Bench of this Tribunal in a recent judgment in the case of Vikram Cement vs CCE, Indore(Final Order No.603/09 dt,10.9.09) cited by Ld. DR wherein the ~~period~~ point of dispute was as to whether 'welding electrodes' used for repair and maintenance of plant and machinery are eligible for Cenvat credit as inputs, has considered the judgment of Hon'ble Rajasthan High Court in the case of Hindustan Zinc Ltd.(supra) and has held that Hon'ble Rajasthan High Court while arriving at this decision has not considered the fact that the Tribunal's judgment in the case of Jaypee Rewa Plant(supra) had been followed by the Division Bench of the Tribunal in the case of SAIL vs CCE, Ranchi reported in 2008(222)ELT.233 and SLP filed by SAIL to Hon'ble Supreme Court against this judgment was dismissed by the Hon'ble Supreme Court with the words – "delay condoned. On the facts of this case, the matters stand dismissed"; that this judgment of Hon'ble Supreme Court had not been brought to the notice of Hon'ble Rajasthan High Court and that this judgment has to be treated as a binding precedent, in view of Hon'ble Supreme Court's judgement in the case of Kunhayammed vs State of Kerela reported in 2001(129)ELT.11(SC). In this regard the relevant portion of the Tribunal's judgment is reproduced below:

> "In the facts and circumstances of the case, therefore, though it cannot be said that the decision of the Hon'ble Rajasthan High Court has been over-ruled by the Apex Court while dismissing the SLP in SAIL's case, fact remains that the Apex Court refused to interfere in the said decision for reason disclosed in the order dismissing the SLP, and hence bearing in mind the ruling of the Apex Court in the case of Kunhayammed read with in Dhanwanti Devi case it would be binding upon the Tribunal. Having said so, we hasten to clarify that the decision of the Hon'ble Rajasthan High Court would undoubtedly be binding on the parties to the said case. However, the said decision would have to be read alongwith the order of the Apex Court in the SLP in SAIL's matter. Undoubtedly, in SAIL's matter, the decision in Jaypee Rewa case has been followed. Being so, the ratio of Jaypee Rewa would be binding upon this Tribunal being the decision of the Larger Bench".

4.2 On going through the judgment of the Division Bench in the case of Vikram Cement(supra), I find that in this case only the eligibility of welding electrodes for Cenvat credit as inputs has been considered and the Tribunal has held that in this regard it is the judgment of the Tribunal in the case of SAIL vs CCE, Ranchi(Supra) as affirmed by the Hon'ble Supreme Court, which would be binding. However, in this case the eligibility of welding electrodes for Cenvat Credit as capital goods has not been considered while Hon'ble Rajasthan High Court in the case of Hindustan Zinc Ltd. has held that welding electrodes would be eligible for Cenvat credit as capital goods also. Moreover, the welding electrodes are used as part of the welding machine, which being classifiable under Chapter heading 84.68, is covered by Clause (i) of Rule 2(a) of Cenvat Credit Rules,2004 and the welding electrodes being a part of welding machine would be covered by Clause(iii) of Rule 2(a) of Cenvat Credit Rules,2004. I, therefore, hold that welding electrodes are eligible for Cenvat credit as capital goods.

5. Eligibility of Oxygen, Acetylen & Helium gases, used for repair & maintenance of plant and machinery for Cenvat credit as inputs.

5.1 As regards the eligibility of Oxygen, Acetylene and Helium gases used for the purpose of maintenance and repair of plant and machinery, the same cannot be treated as inputs, as, ~~are~~ held by Division Bench of this Tribunal in case of Vikram Cement(supra), only those goods which forms part of the process carried out by a manufacturer for converting raw-material into finished goods can be considered as inputs and the goods which are not integrally connected with the process of manufacture resulting in utilization of such product directly or indirectly in the manufacture of the finished product, cannot be said to be input. Therefore, Oxygen, Helium and Acetylene gases used for repair and maintenance of plant and machinery are not covered by the definition of inputs.

6. In view of the above discussion while I hold that Cenvat credit is eligible in respect of welding electrodes as capital goods, the Cenvat credit is not available in respect of Oxygen, Helium and Acetylene gases used for maintenance and repair of the plant and machinery.

7. Accordingly while the Appeal No.E/2487/07-SM and E/2488/07-SM against order-in-appeal No.389 and 390(HKS)CE/JPR-II/07 dt.26.6.07 where the only issue involved is regarding eligibility of welding electrodes for Cenvat credit as capital goods are allowed, the Appeal No.E/2486/07-SM and E/2485/07-SM against order-in-Appeal No.392-393(HKS)CE/JPR-II/07 dt.26.6.07 where the issue involved is regarding eligibility of Oxygen, Acetylene and Helium gases used for repair and maintenance of plant and machinery for Cenvat credit as inputs, are dismissed.

(Order pronounced on 23/9/09)

(Rakesh Kumar)
Member Technical

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