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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. ST/110 /2009 – SM[BR] Date 11/01/2010

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

To :
M/S MODINAGAR PAPER MILLS ,
SIKHERA ROAD, MODINAGAR, GHAZIABAD.

M/S MODINAGAR PAPER MILLS , Appellant

Vs

C.C.E. GHAZIABAD Respondent

I am directed to transmit herewith a certified copy of **Final order No**. 33 / 2010 –SM[BR] dated 29.12.2009 passed by the Tribunal under Section 129, (B) of the Customs Act,1962 & Financial Act 1994 relating to Service Tax

Assistant Registrar
(SM Appeal Branch)

Copy to :

1. Respondent
C.C.E. GHAZIABAD
C.G. O. COMPLEX-II, KAMLA NEHRU NAGAR, GHAZIABAD 201302
2. Adv. / Consult
MR.RAJESH CHHIBBER
FA/9, NEW KAVI NAGAR, GHAZIABAD
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
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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.

ST/110/09-SM

[Arising out of Order-in-Appeal No.260-CE/GZB/2008 dt.20.11.08 passed by the Commissioner(Appeals),Ghaziabad)

For approval and signature

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. Modinagar Paper Mills Ltd. Appellant

Versus

CCE, Ghaziabad Respondent

Appearance

None for Appellant

Sh. V.K.Saxena, JCDR For Respondent

Final

Date of decision: 29.12.09
Order No. 33/2010 SM(BR)

Per Rakesh Kumar:

The facts leading to this appeal are as under:

1.1 The appellants, manufacturer of paper chargeable to Central Excise Duty under heading 48.19 of the Tariff, sold the complete paper machinery worth Rs.32,30,000/- vide invoice

No.02 dt.1.3.03 alongwith used transformers worth Rs.1,25,000/- vide invoice No.01 dt.18.2.03. Even though the appellant explained to the Department that this machinery had been purchased in the year 1980-81 as capital goods and no Cenvat credit has been availed, Department was of the view that at the time of clearance of this old and used machinery, as per the provisions of sub-rule (4) of Rule 3 of Cenvat Credit Rules,2002, an amount equal to the duty at the prevailing rate chargeable on the transaction value of the goods determined under Section 4 of Central Excise Act,1944 is required to be paid, as the appellant have not been able to produce any evidence in support of their claim that no Cenvat credit had been availed. Another issue in this appeal is that the Department found that in respect of the inputs purchased under Invoice No.542 dt.16.3.4, 489 dt.14.3.04, 31 dt.19.1.04 and 32 dt.19.1.04 on the basis of which Cenvat credit had been taken, the appellant had issued debit notes and the duty involved on those debit notes was Rs.3684/-. The department was of the view that the credit of Rs.3684/- was not available to the appellant as the appellant is entitled only to the credit in respect of the quantity of inputs which was actually received and issue of debit notes indicates that the quantity had been short received. Another allegation against the appellant was that at the time of clearance of old and used paper machinery, Central Excise Duty amounting to Rs.5,36,800/- should have been paid.

1.2. Accordingly, a show cause notice dt.3.5.06 was issued to the appellant for recovery of (a) - Central Excise Duty amounting to Rs.5,83,800/-, (b) amount of Rs.5,36,800/- payable under Rule 3(4) of Cenvat Credit Rules,2002 and (c) Cenvat credit of Rs.3684/-, alongwith interest and also for imposition of penalty on the appellant under the provisions of Rule 13 of Cenvat Credit Rules,2002 and Rule 25(1) of Central Excise Rules,2002.

1.3 The show cause notice was adjudicated by the Asstt. Commissioner vide order-in-original dt.28.3.08 by which only the demand of Rs.5,36,800/- under Rule 3(4) of Cenvat Credit Rules,2002 and Cenvat credit demand of Rs.3684/- was confirmed alongwith interest under Rule 12 of Cenvat Credit Rules,2002 and besides this, penalty of Rs.5,40,484/- was imposed on the appellant under Rule 13 of Cenvat Credit Rules,2002 read with Section 11AC of Central Excise Act. On appeal to Commissioner(Appeals), the Commissioner(Appeals) by order-in-appeal 260-CE/GZB/08 dt.20.11.08 upheld the Additional Commissioner's order and rejected the appeal. It is against this order of the Commissioner(Appeals) that present appeal has been filed.

3. None appeared for the appellant.

3.1 Heard learned JCDR Shri V.K.Saxena who reiterating the Commissioner(Appeals)'s findings, defended the impugned order emphasising that since the appellant had cleared capital goods as such and no evidence has been produced that Cenvat credit had been availed in respect of those capital goods, as per the provisions of sub-rule 4 of Rule 3 of Cenvat Credit Rules,2002, an amount equal to the duty chargeable at the rate prevailing on the date of removal of the capital goods would be payable. He also pleaded that the debit notes issued by the appellant were only in respect of the quantity short receipt, as it is not the practice for the buyer of the goods to issue debit note for cash discount.

3. I have carefully considered the submissions from both the sides and perused the records. Coming to the demand of Rs.5,36,800/-, the same has been confirmed by invoking Rule 3(4) of Cenvat Credit Rules,2002. Rule 3(4) of Cenvat Credit Rule,2002, during the period of dispute, provided that when any inputs or capital goods on which Cenvat credit has been taken, are removed as such from the factory, the manufacturer of the final products shall pay an amount equal to the duty of excise which is leviable on such inputs at the rate applicable to such goods on the date of such removal and on the value determined for such goods under sub-section (2) of Section 3 or Section 4 or Section 4A, as the case may be, of Central Excise Act,1944. From a reading of this Rule, it is clear that this section comes in picture only when the inputs or capital goods, in respect of which Cenvat credit has been taken, are removed as such and this will not be applicable if in respect of the inputs as capital goods being removed as such, no Cenvat credit had been taken. In this case the appellant's plea from the very beginning is that old paper mill machinery which had been sold on 1.3.03 had been purchased in the year 1980-81 and there is no question of any taking Cenvat credit. The Department has also not produced any evidence to the contrary showing that any Cenvat credit had been taken. The amount under Rule 3(4) at the time of removal of old capital goods cannot be demanded on the presumption that Cenvat

credit had been taken when assessee pleads that no Cenvat credit had been taken and the department has no evidence or no records to prove the contrary. In view of this, Cenvat credit demand of Rs.5,36,800/- is not sustainable.

4. As regards the demand of Cenvat credit of Rs.3684/-, the appellant had issued some debit notes and according to them, these debit notes had been issued in respect of cash discount given by the supplier. The department contends that this is not the practice and that these debit notes much have been issued on the quantity of short receipt. Other than this presumption, there is no evidence regarding short receipt of the inputs. The Cenvat credit in respect of the short receipt of inputs can be denied only if there is evidence in this regard. While in this case, it is only the presumption of the Department. In view of this, Cenvat credit demand of Rs.3684/- is also not sustainable.

5. In view of the above discussion, the impugned order upholding the demand of Rs.5,36,800/- and Rs.3684/- alongwith interest and imposing penalty of equal amount is not sustainable. The same is set aside and the appeal is allowed.

Order dictated in the open Court.

(Rakesh Kumar)
Member (Technical)

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