

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/251 /2008 – SM[BR]

Date 12/01/2010

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

To :
C.C.E. DELHI I
C.R. BUILDING, I.P. ESTATE, NEW DELHI 110002
C.C.E. DELHI I

M/S BIRLA TEXTILE MILLS

Appellant

Vs

Respondent

I am directed to transmit herewith a certified copy of Final order No. 51 / 2010 –SM[BR] dated 23.12.2009
passed by the Tribunal under Section 35-C(1) of Central Excises Act, 1944


Assistant Registrar
(SM Appeal Branch)

Copy to :

1. Respondent

M/S BIRLA TEXTILE MILLS

P.O. BIRLA LINES, DELHI 110007.

2. Adv. / Consult SHRI ANAND SUKUMAR ADV.

306, LAWYERS CHAMBERS

SITALWAD BLOCK SUPREM COURT 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 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 Kuni, 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)

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17 Guard file


Assistant Registrar
(SM Appeal Branch)

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
West Block No.2, R. K. Puram, New Delhi
COURT-IV

Date of hearing/decision: 23.12.2009

Excise Appeal No. 251 of 2008-SM

[Arising out of order in Appeal No. 126-127/CE/DLH/2007 dated 16.11.2007 passed by the Commissioner (Appeals) Central Excise, Delhi-I].

For approval and signature:

Hon'ble Shri 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 should 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 Departmental authorities?	

CCE, Delhi-I

Appellants

Vs.

M/s Birla Textiles Mills

Respondents

Appearance:

Appeared for the Appellants -- Shri Sansar Chand, DR

Appeared for the Respondents -- Shri Anand Sukumar, Advocate

Coram: Hon'ble Shri Rakesh Kumar, Member (Technical)

In Order No. 51 / 2010 SM (BR)

Per: Rakesh Kumar:

This is Revenue's appeal against order-in-appeal No. 126-127/CE/DLH/2007 dated 16.11.2007. The facts leading to this appeal are, in brief, as under.

2. The appellant had paid amount of Rs. 1 lakh and Rs. 10 lakh as pre-deposit in pursuance of stay orders passed by the Tribunal. Both the pre-deposits made by debiting the RG-23A Pt.II account Rs. 10 lakh was debited on 30.10.95 and the

amount of Rs. 1 lakh was debited on 14.1.2003. Subsequently, when the matters were decided by the Tribunal and the decision was in favour of the respondent, these amounts of pre-deposit became refundable. The Assistant Commissioner vide orders-in-original No. 165/06/R dated 3.11.2006 and No. 02/07 dated 5.1.2007 sanctioned the refund of these amounts but ordered payment through recredit to the cenvat credit account. In other words both the refunds were sanctioned by recredit to the cenvat credit amount of the respondent, while the respondent had pleaded for refund in cash. The Assistant Commissioner had ordered the refunds through recredited in the cenvat account on the ground that both the amounts of pre-deposit have been paid by way of debit in the cenvat credit account and not through PLA. The respondent filed appeals before the Commissioner (Appeals) and in the appeals also prayed for interest on the refund amount for the period of delay. It was pleaded before CCE (Appeals) that when amounts have been paid through cenvat credit, the unit was functional, but by the time these amounts became refundable, the unit has closed down and had shifted to Baddi, where the unit avails of hill area exemption and cannot avail cenvat credit and that the unit, therefore, was not in a position to utilize to utilize any cenvat credit. The Commissioner (Appeals) vide order-in-appeal No.126-127/CE/DLH/07 dated 16.11.2007 allowed the cash refund, of these amounts and besides this, following the judgement of Hon'ble Supreme Court in the case of CCE, Hyderabad vs. ITC Limited reported in 2005 (179) ELT 15 (SC) also ordered interest on the refund amount for the period of delay from the date immediately following the date of expiry of three months from the date of final disposal of the dispute. It is against this order of the Commissioner (Appeals) that the present appeal has been filed by the Revenue challenging the allowing the cash refund and also permitting interest on refund of pre-deposit.

3. Heard both the sides.

3.1 Shri Sansar Chand, learned DR raised a preliminary objection that since total duty refund involved in this appeal is Rs. 11 lakhs, this matter must be heard by a Division Bench. To this, the respondent's Counsel pleaded that since there were two appeals disposed by CCE (Appeals) by a common order, and in each appeal the amount involved is within the jurisdiction of single Bench, single Bench is competent to hear this matter. ^{Tk 212} further pleaded that the amount of pre-deposit of Rs. 10 lakhs and Rs. 1 lakh as per the direction of the Tribunal has been paid by the respondent through the cenvat credit; that though subsequently the unit of the respondent located at Delhi had closed down, the unit has been shifted to Baddi where it is very much functioning; that on shifting of the unit to Baddi, the Assistant Commissioner vide letter dated 28.11.2006 addressed to the Assistant Commissioner, Central Excise Shimla had transferred cenvat/modvat credit for Rs. 4,00,000/- to the Baddi unit on the respondent's request, that since the respondent unit shifted to Baddi, they are still having the cenvat credit account, that the Assistant Commissioner has rightly credited the refund of pre-deposit to the cenvat credit account and that he relies upon the following judgement of the Tribunal and High Court wherein it was held that any amount, paid, through cenvat credit is to be refunded only through the recredit in the cenvat credit amount.

- i) Rollatainers Ltd. vs. CCE, Jaipur- [2005 (183) ELT 38 (Tri.Del.)];
- ii) CCE, Chennai vs. Rajashree Cements – [2001 (132) ELT 724 (Tri.Chennai)]
- iii) Gauri Plasticulture (P) Ltd., vs. CCE, Indore – [2006 (202) ELT 199 (Tri. Mumbai)]; and
- iv) Kandhari Beverages Ltd., vs. Union of India -- [2002 (144) ELT 15 (P&H)].

3.1.1 Sh. Sansar Chand, learned DR also submitted that in the abovementioned judgements, the Tribunal as well as the High Court has held that when any amount of duty is paid through cenvat credit it is to be refunded only by way of recrediting to the cenvat credit account. On the issue of interest for the period of delay

beyond three months from the date of filing of the refund application learned DR pleaded that the refund application for the amount of Rs. 10 lakhs had been made on 17.8.2005 and the second refund application for refund of amount of Rs. 1 lakh have been made on 6.7.2006 and in respect of first refund application for Rs. 10 lakhs, the order was passed by the Assistant Commissioner on 17.8.2005 and in respect of the second refund application the order was passed on 3.11.2006 and as such in respect of the first refund the interest is payable only from 16.11.2005 upto the date of the order of Assistant Commissioner and in respect of second refund application, the interest is payable from 5.10.2006 upto the date of the Assistant Commissioner's order sanctioning the refund. He also pleaded that once the Assistant Commissioner has passed the order crediting the refund amount to the respondent's, cenvat credit account, they should have taken the credit in their cenvat credit account on the basis of those orders.

3.2 Sh. Anand Sukumar, Advocate, the learned Counsel representing the respondent, pleaded that when the amount of pre-deposit had been paid in pursuance of the Tribunal's order by way of debit in the cenvat credit amount, the unit was still functioning in Delhi; that subsequently the unit was closed down in pursuance of the Hon'ble Supreme Court's order on environmental pollution, that unit subsequently was shifted to Baddi and opted for hill area exemption, that though an amount of Rs. 4 lakhs towards cenvat credit was transferred by the Jurisdictional Assistant Commissioner in Delhi to the Baddi unit, the Baddi unit of the respondent, being fully exempted availing hill area exemption, is not in a position to utilize the cenvat credit, that in view of these circumstances the recredit of the refund amount of pre-deposit to the cenvat credit account is meaningless, as they are not in a position to utilize these amounts; that in view of this, these amounts should have been refunded as cash, that he relies upon the judgements of the Tribunal in the cases of :

- i) Kundalia Industries vs. CCE, Delhi-I – [2006 (196) ELT 312 (Tri. Del.)];

- ii) CCE, Kanpur vs. Deepti Chemicals (P) Ltd., -[2006 (201) ELT 423 (Tri. Del.)];
- iii) Slovak India Trading Co. Pvt. Ltd., vs. CCE, Bangalore – [2006 (205) ELT 956 (Tri. Bang.)] and
- iv) Gauri Plasticulture (P) Ltd., vs. CCE, Indore- [2006 (202) ELT 199 (Tri. Mumbai)]

that in these judgements it has been held that when initially duty was paid through cenvat credit, if at the time of refund, the unit was closed or is not in a position to utilize the cenvat credit, the refund has to be given in cash, that as regards the interest, the same is payable in view of Hon'ble Supreme Court's decision in the case of CCE, Hyderabad vs. ITC Ltd., reported in 2005 (179) ELT 15 (SC) which has been rightly relied upon by the Commissioner (Appeals) and that the same view has been taken by this Tribunal in the case of Globe International Agencies vs. CC, Chennai -2006 (206) ELT 720 (Tri. Chennai), Continental Petroleum Ltd., vs. CC, Ahmedabad -2006 (200) ELT 429 (Tri. Del.) and King win Johnson (India) vs. CCE, Jaipur reported in 2006 (193) ELT 76 (Tri. Del.) wherein the Tribunal has held that in case of delay in refund of pre-deposit, the interest is payable for the period of delay beyond three months from the date of filing of the refund application. In view of the above, he pleaded that the impugned order passed by the Commissioner (Appeals) is correct and there is no merit in the Revenue's appeal.

4. I have carefully considered the submissions from both the sides and perused the records. As regards the plea of the learned DR that since the total amount involved in this appeal is Rs. 11 lakhs, single bench is not competent to hear the matter, there is not a correct plea as there are two orders-in-original of Assistant Commissioner involving refund of Rs. 10 lakhs and Rs. 1 lakh, the appeals against which were disposed off by the CCE (Appeals) by a common order-in-appeal No. 126-127/CE/DLH/07 dt. 16.11.07 and though Revenue has filed only one appeal against this common order-in-appeal, the same has to be

treated as two appeals against two separate orders involving amounts of Rs. 10 lakhs and Rs. 1 lakh.

5. The respondent had made pre-deposit in pursuance of two separate stay orders of the Tribunal directing them to make pre-deposit of Rs. 10 lakhs and Rs. 1 lakh. Subsequently, when those appeals were decided by the Tribunal, the amounts of pre-deposit made by them became refundable. The respondent had made pre-deposit through cenvat credit account. The respondent subsequently filed two refund applications on 17.8.2005 for refund of Rs. 10 lakhs and on 6.7.2006 for refund of Rs. 1 lakh. The Assistant Commissioner vide order-in-original dated 3.1.2006 and 3.11.2006 respectively sanctioned the refunds but ordered the same to be recredited to the cenvat credit account of the respondent on the ground that the amount of pre-deposit has been paid through cenvat credit account only. The Commissioner (Appeals) allowed the refund in cash and besides this, also ordered interest for the period of delay beyond three months from the date of filing of the refund application. The respondent's plea is that since when the refunds were sanctioned, the Delhi unit has closed down and had shifted to Baddi, where it is availing hill area exemption and is not in a position to utilize the cenvat credit, the refund should have been made in cash and not by way of recredit in the cenvat credit account. I find that in the judgement of the Tribunal in the case of CCE vs. Rajashree Cements (supra) and Rollatainers Ltd., vs. CCE, Jaipur (supra) cited by the learned DR, the Tribunal had upheld the grant of refund by way of recredit to the cenvat credit account on the ground that initially the duty had been paid through cenvat credit account and unit is still functional and it was not the plea of the assessee that their unit is closed and not in a position to utilize the cenvat credit. In the case of Kandhari Beverages Ltd., (supra) cited by the learned DR, Hon'ble Punjab & Haryana High Court had ordered the refund of pre-deposit alongwith interest to be credited to the cenvat credit account of the petitioner but in this case also I find that it was not the plea of the petitioner that

they are not in a position to utilize the cenvat credit account and that the refund should be made in cash. The order of the Hon'ble High Court passed in this case was on equitable considerations and issue as to whether the refund should be given in cash or through the cenvat credit account, had not been considered. However, the larger bench of the Tribunal in the case of Gauri Plastic Culture (P) Ltd., (supra), which has been cited by both the sides, has held that the refund in cash of the duty paid by debit made in modvat account is permissible as there is no express bar in cenvat credit Rules for this, but if denial of credit has compelled an assessee to pay duty out of PLA, refund of such credit would be admissible in cash only to the extent of payment of duty in cash during the period, but if no cash payments were made, towards duty through PLA and the credit would have remained unutilised in the account books, such credit can not be refunded in cash. But this is not a case of refund of credit but is a case of refund of duty paid through cenvat credit account. In this regard, the Tribunal in para 5 of this judgement has held that – "on success of their claim subsequently, if the assessee is maintaining modvat credit account and is in a position to use the same towards payment of duty on the further clearances, it should normally be credited ~~that~~ to the same account from which it was debited i.e. RG-23A Part.II account. However, if the assessee is not able to use the credit on account of any reason (which may be closure of the factory, final products being exempted etc.), the refund become~~s~~admissible in cash". In the case of Kundalia Industries (supra) cited by the respondent it has been held that even when initially the duty has been paid through cenvat credit account, its refund can be given it in cash ^{at} ₇ at the time of granting refund, the unit is closed or not in a position to utilize the cenvat credit and same view has been taken by the Tribunal in the case of Deepti Chemicals (P) Ltd., (supra) and also by the Slovak India Trading Co. Pvt. Ltd., On going through the judgements on this issue cited from both sides, I am of the view that when initially the duty has been paid through cenvat credit, refund can be given in cash, in a situation where at the time of grant of refund either totally closed or it is

not in a position to utilize the cenvat credit at all for any reason, like the final product being fully exempt from duty. In this case, when the amounts of pre-deposits were paid unit was located in Delhi and was functional. By the time the amounts of pre-deposit became refundable, the unit has closed down and shifted to Baddi, where from the very beginning it has started availing full duty exemption under the hill area exemption notification. Thus, since the respondent on shifting to Baddi are availing hill area exemption and are not in a position to avail cenvat credit, in my view the Commissioner (Appeals) has correctly ordered grant of refund through cash.

5. As regards the second issue regarding interest for the period of delay beyond three months from the date of filing of refund application I find that the Commissioner (Appeals) in this regard has relied upon the judgement of the Hon'ble Supreme Court in the case of ITC Limited (supra) wherein Hon'ble Supreme Court has in clear terms held that the interest of the refund of pre-deposit is available for the period of delay from the three months after the date of final disposal of the dispute. Though the learned DR pleads that the refund have been sanctioned by the Assistant Commissioner by recrediting the amount to the cenvat credit account, since as discussed above, the respondent is not in a position to utilize the cenvat credit, ordering the refund by way of recredit to the cenvat credit account was meaningless. The refund can be treated having sanctioned only when the same was been paid in cash. In view of this, I hold that the Commissioner (Appeals)'s decision on this issue is also correct.

6. In view of the above, I do not find any infirmity in the impugned order. Revenue's appeals are dismissed.

(Rakesh Kumar)
Member (Technical)

/Pant/