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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/3969/2004 - EX[DB] Date 25/02/2010

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

To :

M/S.OSWAL PAPER & ALLIED INDUSTRIES, G.T. ROAD, MUKERIAN (PB)

M/S OSWAL PAPER & ALLIED INDUSTRIES Appellant

Vs

C.C.E. JALANDHAR Respondent

I am directed to transmit herewith a certified copy of **Final order No. 90/ 2010 EX[DB]** dated 19-2-2010 passed by the Tribunal under Section 35-C(1)of Central Excises Act, 1944

Assistant Registrar
(Excise Appeal Branch)

Copy to :

1. Respondent

C.C.E. JALANDHAR
THE COMMISSIONER OF CENTRAL EXCISE, JALANDHAR
(HQ AT CHANDIGARH), PLOT NO 19, SECTOR 17-C, CHANDIGARH

2. Adv. / Consult SH. ATUL GUPTA, C.S.
B-1/1289-A, VASANT KUNJ,
N. DELHI - 70

3 C.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
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Assistant Registrar
(Excise Appeal Branch)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.
Principal Bench, New Delhi

COURT NO. I

Excise Appeal No. 3969 of 2004

[Arising out of the Order-in-Appeal No. 204-CE/Jal/2004 dated 29/04/2004 passed by The Commissioner (Appeals), Customs & Central Excise, Jalandhar (Chandigarh).]

For Approval and signature :

Hon'ble Justice R.M.S. Khandeparkar, President
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 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 Oswal Paper & Allied Industries — Appellant

Versus

CCE, Jalandhar (Chandigarh) — Respondent

Appearance

Shri Atul Gupta, C.S. – for the appellant.

Shri B.L. Soni, Authorized Representative (SDR) – for the Respondent.

CORAM : **Hon'ble Justice R.M.S. Khandeparkar, President**
Hon'ble Shri Rakesh Kumar, Member (Technical)

DATE OF HEARING : 27/10/2009.
DATE OF DECISION : 19/2/2010

FINAL Oral Order No. 90/2010-EX Dated : ________

Per. Rakesh Kumar :-

The appellant (earlier known as M/s Mukerian Paper Mills), manufacture paper and paper board chargeable to Central Excise duty under heading 48.02 of the tariff. They had been availing Modvat facility in respect of capital goods under Rule 57Q of the Central Excise Rules, 1944. A show cause notice dated 23/5/95 was issued to the Appellant proposing denial of Modvat credit amounting to Rs. 60,95,279/-. The original adjudicating authority, vide order-in-original No. 166/AC/98 dated 10/12/98 allowed the credit of only Rs. 1,07,404/- and disallowed the balance amount of Rs. 59,87,875/-. On appeal by the Appellant to CCE (Appeals), the CCE (Appeals) vide order dated 29/6/01 allowed Modvat credit of Rs. 3,83,990/- and disallowed the Modvat credit of Rs. 56,03,885/-. Both, the Department as well as the Appellant filed appeals to Tribunal against the CCE (Appeals)'s order. While the Department's appeal was rejected vide Tribunal's final order No. A/188/2002-NB (DB) dated 4/2/02, in respect of the appellant's appeal, the Tribunal vide order No. A/338/2002-NB (DB) dated 25/2/02 remanded the case to original adjudicating authority for denovo consideration in the light of Hon'ble Supreme Court's judgment in case of **CCE, Coimbatore vs. Jawahar Mills Ltd.** reported in **2001 (132)**

E.L.T. 3 (S.C.) and Tribunal's judgment in case of **CCE, Indore vs. Surya Roshni Ltd.** reported in **2001 (128) E.L.T. 293 (Tri. – LB)**. Assistant Commissioner vide order-in-original No. 49/AC/Denovo/03 dated 30/4/03 disallowed the credit amounting to Rs. 23,80,856/-, but allowed the credit amounting to Rs. 32,23,028/- and beside this, he also demanded interest under Section 11AB on allegedly wrongly taken Modvat credit and imposed penalty of Rs. 1,00,000/- on the Appellant. On appeal to CCE (Appeals) against the Assistant Commissioner's order dated 30/4/03, the CCE (Appeals), vide order-in-appeal No. 204/CE/Jal/04 dated 29/4/04, upheld the Assistant Commissioner's order except for allowing the credit of Rs. 53,026/-. It is against this order that the present appeal has been filed.

2. Heard both the sides.

2.1 Shri Atul Gupta, the learned Counsel for the appellant, made the following submissions.

(1) Modvat credit amounting to Rs. 10,88,206/- has been denied in respect of imported capital goods received under B/E No. 341447 dated 20/12/93 on the ground that the original Triplicate copy of the B/E has not been produced, ignoring the certificate issued by the supplier and verified by the jurisdictional Range Superintendent. The CCE (Appeals) has just reiterated the findings in the earlier order of CCE (Appeals). Moreover on this issue, the order

has been passed going beyond the show cause notice as in the show cause notice, this credit was sought to be denied on the ground that the B/E was not in the name of the Appellant and there was no issue of non-production of original Triplicate copy of the B/E. The machinery received under the B/E is a big machinery and there is no dispute about its receipt.

(2) The machinery in respect of which Modvat credit amounting to Rs. 10,88,206/- had been taken, had been imported by M/s Mechano, who in this regard have given a certificate of sale, which has been verified by the Range Superintendent. There was no allegation in the show cause notice that original Triplicate copy of the B/E has not been produced. Therefore, denial of Modvat credit amounting to Rs. 10,88,206/- is not correct. In this regard, reliance is placed on Hon'ble Supreme Court's judgment in case of –

(i) CC, Mumbai vs. Toyo Engineering India Limited reported in 2006 (201) E.L.T. 513 (S.C.)

(ii) CCE vs. Gas Authority of India Ltd. reported in 2008 (232) E.L.T. 7 (S.C.)

(3) In fact, the original Triplicate copy of the B/E on the basis of which Modvat credit amounting to Rs. 10,88,206/- had been taken, is with the Department, as the same had been submitted with the RT-12 return.

(4) Credit amounting to Rs. 4,03,351/- has been denied on the grounds that either the Appellants could not produce the Transporter's copy of the invoice or the credit has been taken on original copies of invoices merely rubber - stamped as - "Duplicate for Transporter", but not the actual duplicate copies of invoices meant for transporters. This denial of Modvat credit is wrong, as in all the cases the credit has been taken on the basis of the Duplicate copies except for a few cases where the duplicate copy was lost in transit. In any case, during the period of dispute, duplicate copy of invoice was not required for taking Modvat credit - this requirement came w.e.f. 19/1/95 by Notification No. 2/95-CE (NT) dated 19/1/95.

(5) Credit amounting to Rs. 6,61,022/- has been denied on the ground that the invoices are computer generated, not pre-authenticated and original copies have been marked as 'Duplicate for Transporters'. Here also, the credit has been wrongly denied, as during the period of dispute, the requirement of taking credit only on the basis of Duplicate copy of invoice was not there. In this regard reliance is placed on Tribunal's judgment in case of **Bajaj Auto Ltd. vs. CCE & C, Pune** reported in **2000 (121) E.L.T. - 726 (Tri. - Bom.)**.

2.2 Shri B.L. Soni, the learned Departmental Representative, reiterating the findings of CCE (Appeals) in the impugned order made the following submissions -

(1) As regards the Modvat credit of Rs. 10,88,206/- taken on the basis of B/E, the same has been wrongly taken, as neither this credit has been taken on the basis of original Triplicate copy of the B/E i.e. the original of the 3rd copy of the B/E which is given by the custom house to the importer, retaining the original and duplicate in the custom house, nor the B/E copy bears any endorsement by the importer in favour of the Appellant. Citing Hon'ble Supreme Court's judgment in case of **Union of India vs. Marmagoa Steel Ltd.** reported in **2008 (229) E.L.T. 481 (S.C.)**, it was pleaded that for taking Modvat credit of additional customs duty on imported inputs or capital goods "Triplicate copy of the B/E" is the only valid document.

(2) As regards the denial of Modvat credit on the ground that the same has been taken only on the basis of original invoices, not on the basis of "duplicate copy meant for Transporter", The case records show that the documents on the basis of which Modvat credit has been taken are not even original invoices but photocopies of original invoices, which, in any case, are not the valid documents for Modvat credit. In this regard, reliance is placed on Tribunal (Larger Bench)'s judgment in case of **CCE, New Delhi vs. Avis**

Electronics Pvt. Ltd. reported in **2000 (117) E.L.T. 571 (Tri. – LB.)**.

(3) Credit of Rs. 55,250/- and Rs. 32,000/- taken on the strength of photocopies of invoices has been rightly denied by the CCE (Appeals). Similarly credit of Rs. 88,000/- taken on the basis of invoices which are not in the name of the Appellant, has been rightly denied.

2.3 In rejoinder, Shri Atul Gupta, with regard to Modvat credit of Rs. 10,88,206/- taken in respect of imported machinery on the basis of Bill of entry (B/E), emphasised that in the show cause notice issued for denial of this Modvat credit, the only ground mentioned is that the B/E is not in the name of Appellant and there was no allegation that the B/E was not the original of the Triplicate copy and in raising this point, the CCE (Appeals) has travelled beyond the show cause notice, which is not permissible.

2.4 On conclusion of hearing on 27/10/09, the bench directed the Appellant to produce the Modvat documents in original, if they so desire, within seven days. The Appellant's counsel, vide letter dated 4/11/09 reported that the matter pertains to 1994 period and the factory is also closed since long and that the Appellant tried to trace out the documents, but in vain. They, therefore, prayed that in the interest of justice, the Department be directed to provide the documents, as the same should be lying with them, because the Commissioner (Appeals) has given his findings after seeing the invoices.

3. We have carefully considered the submissions from both the sides and have pursued the records.

3.1 The appellant had taken capital goods Modvat credit out of which credit of Rs. 60,95,279/- was sought to be denied as under by issuing a show cause notice dated 23/5/95.

(a) Credit of Rs. 33,81,991/- was sought to be denied on the ground that the same has been taken in respect of items which are not covered by the definition of capital goods.

(b) Credit of Rs. 10,88,207/- was sought to be denied on the ground it had been taken on the basis of B/E No. 341447 dated 20/12/93 which is in the name of the importer - M/s Mechno Paper Machines Ltd., not in the name of the Appellant.

(c) Credit of Rs. 11,92,049/- was sought to be denied on the ground that the same had been taken on the basis of original copies of invoices which were merely rubber stamped as "duplicate for carrier", while it is only the duplicate i.e. 2nd copy of invoice, which is valid document for Modvat credit.

(d) Credit amounting to Rs. 2,00,706/- was sought to be denied on the ground that the same had been taken on the basis of invoices which did not contain the required information.

(e) Credit of Rs. 32,648/- was sought to be denied on the ground that the same had been taken before filing declaration of capital goods under Rule 57T.

(f) Credit of Rs. 1,55,827/- was sought to be denied on the ground that the same had been taken on the basis of invoices, issued in the name of M/s Mukerian Paper Mills, Unit II not in the name of the Appellant.

(g) Credit of Rs. 43,850/- was sought to be denied on the ground that the same had been taken on the basis of photocopies of duplicate invoices.

Thus, in the show cause notice, credit of only Rs. 43,850/- was sought to be denied on the ground that the same had been taken on the basis of photocopies of the prescribed documents and remaining credit was sought to be denied on various other grounds.

3.2 After two rounds of original adjudication and two rounds of appeal before CCE (Appeals), the disputed amount is now reduced to Rs. 23,27,830/- which is the subject matter of dispute in this appeal. Out of the total disputed amount of Rs. 23,27,830/- -

(a) credit of Rs. 10,88,207/- is sought to be denied on the ground that it was not taken on the basis of original of the Triplicate of B/E No. 341447 dated 20/12/93 of M/s Techno Paper Machines Ltd. ;

(b) credit of Rs. 4,03,351/- and Rs. 6,61,022/- is sought to be denied on the ground that the same has been taken on the basis of original copies of invoices not on the basis of duplicate copies, and

(c) remaining amount of credit of Rs. 88,000/- + Rs. 55,250/- + Rs. 32,000/- - is sought to be denied on the ground that the same has been taken either on the basis of photocopies of the prescribed documents (invoice) or on the basis of invoices not being in the name of the Appellant.

3.3 As regards the Modvat credit of Rs. 1,75,250/- (Rs. 88,000/- + Rs. 55,250/- + Rs. 32,000/-) taken on the basis of photocopies of invoices or on the basis of invoices neither in the name of Appellant nor endorsed in their favour is concerned, this credit is not admissible and hence the impugned order with regard to this amount is upheld.

3.4 As regards the Modvat credit amounting to Rs. 10,88,207/- taken on the basis of B/E No. 341447 dated 20/12/93, we find that while in the show cause notice, this credit is sought to be denied only on the ground that the B/E is not in the name of the Appellant, at the adjudication and 1st appeal stage, the credit is also sought to be denied on the ground that the same had not been taken on the basis of original 3rd copy (Triplicate copy) of the Bill of entry. On the other hand the Appellant plead that the credit had been taken on the basis of original Triplicate copy and the same had been submitted to the Department alongwith the RT-12 return.

3.4.1 Hon'ble Supreme Court in cases of –

(a) CC, Mumbai vs. Toyo Engineering India Ltd. reported in 2006 (201) E.L.T. – 513 (S.C.)

(b) CCE Nagpur vs. Ballarpur Industries Ltd. reported in 2007 (215) E.L.T. – 489 – (S.C.)

has held that show cause notice is the foundation in the matter of levy and recovery of duty, penalty and interest and the grounds which did not find mention in the show cause notice, cannot be taken up in adjudication or appeal.

3.4.2 The show cause notice seeks to deny Modvat credit amounting to Rs. 10,88,206/- taken on the basis of B/E No. 341447 dated 20/12/93 only on the ground that it is not in the name of the Appellant. Since in this case –

(a) there is no dispute about the duty paid nature of the capital goods received under the B/E No. 341447 dated 20/12/93, and there is also no dispute about the receipt of the capital goods in the Appellant's factory ;

(b) the capital goods, in question, imported by M/s Mechano Paper Machinery had been sold by them to the Appellant and about this also, there is no dispute ;

(c) the jurisdictional central excise superintendent has given a certificate that M/s Mechano Paper Machines have not availed Modvat credit in respect of the capital goods imported under B/E No. 341447 and

(d) the copy of the B/E available in the records does contain a declaration of M/s Mechano Paper Machines – "endorsed in favour of M/s Mukerian Paper Unit II (old name of the Appellant company). Further we have certified that we have not availed any Modvat credit",

and it is not the allegation in the show cause notice that the B/E is not endorsed in favour of the Appellant,

We hold that Modvat credit amounting to Rs. 10,88,206/- on the basis of B/E No. 341447 is admissible to the Appellant and the same cannot be denied by raising a new ground regarding non production of original Triplicate copy of the B/E at adjudication/appeal stage when that ground was not there in the show cause notice.

3.5 As regard the credit of Rs. 4,03,351/- and Rs. 6,61,022/- it is sought to be denied in the show cause notice on the ground that the credit had been taken on the basis of original copies of invoices merely rubber stamped – 'duplicate for transporter', or not on the basis of the duplicate copies of invoices i.e. the invoices with "duplicate for transporter' printed on them. Since the show cause notice does not allege that the credit had been taken on the basis of photocopies of invoices and this plea is not mentioned even in the impugned order-in-appeal, the same cannot be raised in appeal before the Tribunal.

3.5.1 Coming to the objection that the credit had been taken on the basis of – "original copies" of invoices merely rubber stamped "duplicate for carriers", we find that there is no dispute about the facts that –

(a) the goods had been received in the Appellant's factory under the invoices in question ; and

(b) the Modvat credit on the basis of these invoices had been taken during the period prior to 19/1/95.

3.5.2 During the period prior to 19/1/95, Rule 57T (3), Rule 57 G (2) and Rule 57 GG (4), with which we are concerned, were as under :-

"57 G(2) – A manufacture who has filed a declaration under sub-rule (1) may, after obtaining the acknowledgement aforesaid, take credit of the duty paid on the inputs received by him :

Provided that no credit shall be taken unless the inputs are received in the factory under the cover of an invoice, issued under Rule 52A or an AR-1 or Bill of entry or any other document, as may be prescribed by the Central Government by notification in the official Gazette in this behalf evidencing the payment of duty on such inputs"

X X X X X X

"Rule 57 GG (4) - Accounting Procedure for the person issuing invoices under Rule 57G or 57T -

X X X X X X

(4) The registered person shall issue an invoice containing the details, as prescribed by the Central Board of Excise & Customs, or as the case may be, Collector of Central Excise"

"Rule 57T (3) - No credit of specified duty shall be taken unless such capital goods are received in the factory premises of the manufacture under the cover of invoice or a bill of entry or any other document as may be specified under Rule 57G evidencing the payment of duty"

3.5.3 By Notification No. 2/95-CE dated 19/1/95 Rule 57G (2) and 57GG (4) were amended. The amended Rule 57G (2), in addition to bill of entry, notified "a certificate issued by an Appraiser of Custom posted in Foreign Post Office" also as a valid document for Modvat credit. A further amendment to Rule 57G (2) by Notification No. 6/95-CE (NT) dated 10/3/95, replaced the words "Bill of entry" by "Triplicate copy of Bill of entry". The amending Notification No. 2/95-CE (NT) dated 19/1/95 also added the following to sub-rule (4) of Rule 57GG.

"4(a) The invoice shall be made out in quadruplicate. The original copy shall be for the buyer, the duplicate for the transporter, the triplicate shall be sent to the proper officer and the quadruplicate shall be retained by the registered person.

(b) The copies of the invoice shall be marked at the top in bold letters in the following manner, namely –

(i) the original copy shall be marked as original for Buyer

(ii) the duplicate copy shall be marked as Duplicate for Transporter (to be used for taking credit under Rule 57G or for making receipt entries in the register maintained under this rule.

(iii) Triplicate copy shall be marked as Triplicate for Central Excise and

(iv) the quadruplicate copy shall be marked as Quadruplicate for Registered person."

3.5.4 From reading of Rule 57G (2) and 57GG (4), as they existed during the period prior to 19/1/95 and as they exists w.e.f. 19/1/95, it will be seen that during the period of dispute i.e. the period prior to 19/1/95, there was no requirement of issuing invoices by an assessee ~~is~~ in four copies, each marked original, duplicate, triplicate and quadruplicate and taking of Modvat credit by the input/capital goods receiver only under invoice marked – "Duplicate for Transporter". The Tribunal's judgments in the cases of **CCE, Chennai vs. Dunlop India Limited** reported in **2002 (147) E.L.T. – 513 (Tri. – Chennai)** and **CCE, New Delhi vs. Avis Electronics Pvt. Ltd.** reported in **2000 (117) E.L.T. – 571 (Tri. – LB)**, cited by the learned DR wherein it was held that Modvat credit as per the provisions of Rule 57G could be taken only on the basis of Duplicate copies of invoices, being with regard to the provisions of Rule 57G and 57GG during period w.e.f. 19/1/95 – are not relevant to this case.

3.5.5 In view of the above discussion, we hold that the impugned order disallowing the credit of Rs. 4,03,351/- and Rs. 6,61,022/- is not correct.

4. Accordingly, while the portion of the impugned order disallowing the credit of Rs. 1,75,250/- taken on the basis of photocopies of invoices or invoices not in the name of the Appellant and not endorsed in their favour, is upheld, the portion of the order disallowing the Modvat credit of Rs. 10,88,206/-, Rs. 4,03,351/- and Rs. 6,61,022/- as discussed above, is set aside. The appeal is thus partially allowed.

(Pronounced in open court on 19/2/2010

(Justice R.M.S. Khandeparkar)
President

(Rakesh Kumar)
Member (Technical)

PK