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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/2744/2007 – SM[BR] Date 14/12/2009

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

To :
C.C.E ALLAHABAD
38,M.G.MARG, CIVIL LINES, ALLAHABAD

C.C.E ALLAHABAD Appellant
Vs
M/S KESARWANI ZARDA BHANDAR Respondent

I am directed to transmit herewith a certified copy of **Final order No.** 1518 / 2009 –SM[BR] dated 8.12.2009 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 KESARWANI ZARDA BHANDAR
   SAHSON, ALLAHABAD(U.P)
2. Adv. / Consult SHRI S.P.OJHA CON.
   299, BAGHAMBARI HOUSING SCHEME
   ALLAHPUR, ALLAHABAD

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
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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.

Excise Appeal No.2744/07-SM

[Arising out of Order-in-Appeal No.147-CE/Alld/07 dated 24.7.07 passed by the Commissioner,Allahabad)

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:	:

CCE, Allahabad Appellant

Versus

M/s. Kesarwani Zarda Bhandar Respondent

Appearance

Sh. V.K.Saxena, Authorised Departmental Representative(JCDR) For Appellant

Shri S.P.Ojha, Consltant For Respondent

Date of decision: 8.12.09
Final Order No. 1518/2009 SM (BR)

Per Rakesh Kumar

This is Revenue's appeal against order-in-appeal No.147-CE/Alld/07 dt.24.7.07 passed by Commissioner(Appeals), Allahabad by which the Commissioner(Appeals) while upholding the Cenvat credit demand of Rs.1,23.923/- reduced the penalty under Rule 15 of Cenvat Credit Rules,2004 from Rs.1,23,923/- to Rs.40,000/-. The Department has filed this appeal for enhancement of penalty on the Respondent to an amount equal to wrongly taken Cenvat credit, on the ground that in this case, the provisions of sub-rule (2) of Rule 15 of Cenvat Credit Rules,2004 read with section 11AC of Central Excise Act,44 are attracted as suppression of fact and willful mis-statement is involved.

2. The respondent manufacturing excisable goods, namely branded chewing tobacco chargeable to Central Excise Duty, had, during the period from March'05 to March'06, availed the GTA service from various GTAservice providers and had taken Cenvat credit amounting to Rs.1,23,923/- on the basis of GRs issued by them under which the GTA service providers in relation to the transport charges has also charged service tax, while during that period as per the provisions of Notification No.35/04-ST dt.3.12.04 issued under Section 68(2) of Finance Act,1994 read with Rule 2(1)(d)(v) of Service Tax Rules,1994, it is the Respondent as

receiver of the GTA service were liable to pay the service tax and GTA providers were neither liable to pay any service tax nor the respondent on the basis of the GRs/invoices issued by them could take Cenvat credit of any such service tax paid by the GTA service providers. It is on this basis that after issue of show cause notice, the Dy. Commissioner vide order-in-original dt.9.3.07 confirmed Cenvat credit demand of Rs.1,23,923/- alongwith interest under Rule 14 of the Cenvat Credit Rules,2004 and besides this, imposed penalty of equal amount under Rule 15 of Cenvat Credit Rules,2004. On appeal to the Commissioner(Appeals), the Commissioner(Appeals) vide order-in-appeal No.147/CE/Alld/04 dt.24.7.07, while upholding the Cenvat credit demand alongwith interest, reduced the penalty to Rs.40,000/- on the ground that the appellant had paid the service tax alongwith interest on 8.5.06 i.e. before adjudication.

3. Against upholding the penalty of Rs.40,000/-, the respondent filed an appeal No.E/2760/07-SM before the Tribunal for setting aside of the same and the Department also filed the present appeal against the same order for enhancing the penalty amount to an amount equal to the wrongly taken Cenvat credit.

4. Heard both the sides.

4.1 Shri V.K.Saxena, the learned JCDR pleaded for enhancement of penalty reiterating the grounds of appeal in the revenue's appeal. He pleaded that the credit had been taken during the period from March'05 to March'06 when the provisions regarding liability of various persons for payment of service tax on the GTA service were known very well and there could not have been any doubt in this regard.

4.2 Shri S.P.Ojha, Consultant, learned Counsel for the respondent, pleaded that the respondent's appeal against the same order, of the Commissioner(Appeals) has been decided by the Tribunal vide Final Order No.1243/09-SM dt.29.9.09 by which the impugned order has been set aside and the matter has been remanded to the original adjudicating authority to decide afresh after considering the Chartered Accountant's certificate certifying that though the credit amounting to Rs.1,23,923/- had been taken by the respondent on the basis of GTA service providers invoices, but the same was not utilized in payment of duty and that the entire credit was reversed. He, therefore, pleaded that since the impugned order has already been set aside and the matter has been remanded to the original adjudicating authority, the department's appeal does not survive.

5. I have carefully considered the submissions from both the sides and perused the records. Against the same order-in-appeal reducing the penalty to Rs.40,000/- while the appellant filed an appeal No.2760/07-SM to the Tribunal for setting aside the same pleading that the credit, though wrongly taken, had not been utilized by them and hence they were not liable for any penalty, the Department filed an appeal against the same order for enhancement of penalty. I find that the respondent's appeal has

already been disposed of by the Tribunal vide final order No.1243/09-SM dt.29.9.09 by which the impugned order has been set aside and the matter has been remanded to the original adjudicating authority for denovo decision after considering the claim of the respondent based on the Chartered Accountant's certificate that the credit though wrongly taken by them had not been utilized and that for this reason, they are not liable for penalty. In view of the Tribunal's order dt.29.9.09 setting aside the impugned order-in-appeal and remanding the matter to original adjudicating authority, the Department's appeal does not survive. The Revenue's appeal is, therefore, dismissed.

Order dictated in the open Court.

(Rakesh Kumar)
Member Technical

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