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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/2895/2009 – SM [BR]** Date **03/05/2011**

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

To :
M/S YEE KAY TECHNOCRAT (P) LTD
PLOT NO 1&4, BLOCK-H, N.H-2, NIT FARIDABAD.

M/S YEE KAY TECHNOCRAT (P) LTD Appellant
Vs
C.C.E. DELHI IV Respondent

I am directed to transmit herewith a certified copy of **Final order No. 240 / 2011-SM[BR]** dated 27.4.2011 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. DELHI IV
NEW CGO COMPLEX, NH-IV,
FARIDABAD, HARYANA 121001.

2. Adv. / Consult
MR.K.L. HANDA, CONSULTANT,
689, SECTOR-16, FARIDABAD-121002.

3. C.D.R
4. Bar association, CESTAT, New Delhi
5. Director Publications, Customs, Excise. I.P. Estate, New
6. M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -
7. Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
8. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi -
9. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road, Ahmedabad-15
10. LAWCRUX Advisors Pvt Ltd, LAW House,1-8,Sector - 10, Faridabad 121003 (Haryana)
11. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
12. Office Copy
13. Guard file

Assistant Registrar
(SM Appeal Branch)

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

COURT NO. III

Date of Hearing : 27.4.2011

Excise Appeal No. 2895 of 2009-SM

[Arising out of the Order-in-Appeal No. 105/CE/APPL/DLH-IV/2009 dated 4.8.2009 passed by the Commissioner of Central Excise (Appeals), Faridabad]

Coram:
Hon'ble Mr. Mathew John, Member (Technical)

1.	Whether Press Reporter may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	Yes
2.	Whether it would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	Yes
3.	Whether their Whether their Lordships wish to see the fair copy of the order?	Seen corrected.
4.	Whether order is to be circulated to the Department Authorities?	Yes

M/s Yee Kay Technocrat (P) Ltd. Appellant

Vs.

CCE, Delhi-IV Respondent

Appearance:

Appeared for Appellant : Shri K.L. Handa, Consultant
Appeared for Respondent : Ms. Rimjhim Prasad, SDR

CORAM : Hon'ble Mr. Mathew John, Member (Technical)

Final Order No. 240/2011 SM (Br) dated............

Per Mthew John:

The Appellant had a factory in Faridabad till May 2007. In May 2007 they shifted their factory from Ghaziabad to Roorkee-

Haridwar (Uttrakhand). All excisable goods manufactured in the new factory are exempted from payment of Excise duty.

2. In the process of shifting their factory they had transferred capital goods on which Cenvat credit of Rs.8,49,708/- was taken. The Appellant did not clear the capital goods under provisions of Rule 3(5) of Cenvat Credit Rules, 2004 by reversing applicable Cenvat credit. The Appellants have been contesting that they are entitled to transfer the capital goods from their factory at Faridabad to their factory at Roorkee under provisions of Rule 10(3) of Cenvat Credit Rules, 2004.

3. A Show Cause Notice issued demanding of amount as envisaged in Rule 3(5) was confirmed under the order-in-original along with interest and penalty under Section 11AC equal to the amount demanded. The Appellant filed an Appeal with the Commissioner (Appeals). The Commissioner (Appeals) upheld the demand and interest thereon. The penalty under Section 11AC was set aside on the ground that the Appellant had transferred the capital goods, under intimation to the department and, therefore, intention to evade payment of duty cannot be alleged.

4. Aggrieved by the order-in-appeal, the Appellant has filed this Appeal. The Counsel for the Appellant argues that his case falls squarely within Rule 10(3) of Cenvat Credit Rules. ~~Since~~ The Appellant is not selling the goods and the removal is from his factory at Faridabad to factory at Roorkee due to shifting of his

factory and such situation is dealt with under Rule 10(3) of Cenvat Credit Rules. He relies on the following case laws in support of his arguments :-

(1) **Sunpack Vs. CCE, Pondicherry** - 2008 (223) EKT 96

(2) **Pooja Forge Ltd. Vs. CCE, Faridabad** - 2006 (196) ELT 18

5. The ld. DR points out that Rule 10(3) is not a provision enabling removal of capital goods. The main provision under Rule 10 is in sub-rule (1) which deals, among other situations, with transfer of credit lying unutilised in one factory to another factory of the same manufacturer. The instant case there was no credit lying unutilised. Further if at all any credit was lying unutilised the Appellant could not have transferred the credit to the new factory because all products manufactured in the new factory were fully exempted from Excise duty and, therefore, there was no question of transferring any credit on inputs or capital goods to the new factory. Rule 10(3) is a condition to be satisfied for transferring credit under Rule 10(1). Since credit could not have been transferred under Rule 10(1) and since there was no such transfer there was no question of allowing transfer of capital goods under this Rule 10(3). She argues that this is a case where capital goods have been removed from the factory at Faridabad and squarely covered by Rule 3(5) of Cenvat Credit Rules. ~~will apply~~

6. Considered arguments on both the sides.

7. Rule 10 of Cenvat Credit Rules is reproduced below :-

Rule 10 Transfer of CENVAT credit. - (1) If a manufacturer of the final products shifts his factory to another site or the factory is transferred on account of change in ownership or on account of sale, merger, amalgamation, lease or transfer of the factory to a joint venture with the specific provision for transfer of liabilities of such factory, then, the manufacturer shall be allowed to transfer the CENVAT credit lying unutilized in his accounts to such transferred, sold, merged, leased or amalgamated factory.

(2) If a provider of output service shifts or transfers his business on account of change in ownership or on account of sale, merger, amalgamation, lease or transfer of the business to a joint venture with the specific provision for transfer of liabilities of such business, then, the provider of output service shall be allowed to transfer the CENVAT credit lying unutilized in his accounts to such transferred, sold, merged, leased or amalgamated business.

(3) The transfer of the CENVAT credit under sub-rules (1) and (2) shall be allowed only if the stock of inputs as such or in process, or the capital goods is also transferred along with the factory or business premises to the new site or ownership and the inputs, or capital goods, on which credit has been availed of are duly accounted for to the satisfaction of the Deputy Commissioner of Central Excise or, as the case may be, the Assistant Commissioner of Central Excise.

8. It can be clearly seen that the main enabling provision under this Rule is in sub-rule (1) which talks of transfer of credit. In this case, no transfer of credit ~~is~~ was possible at all because the factory at Roorkee was not operating under Cenvat Scheme. That being the case provisions of Rule 10(3) cannot be applied in this case. This Rule cannot be read as a provision enabling removal of capital goods from one factory of a manufacturer to another factory of the manufacturer. Therefore the correct rule applicable was Rule 3(5) as argued by the ld. DR.

9. I note that none of the case laws quoted by the Appellant dealt with the situation where machines were transferred to another factory manufacturing only exempted products. Therefore the case laws quoted do not apply. In view of the discussions above, the appeal is rejected.

(Pronounced in Court)

(Mathew John)
Member (Technical)

RM