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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

Date 18/08/2011

Appeal No. E/105 /2009 – SM[BR]

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 KANORIA SUGAR & GENERAL MANUFACTURING CO. LTD., Respondent

I am directed to transmit herewith a certified copy of **Final order No. 466 / 2011-SM[BR]** dated 3.8.2011 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 KANORIA SUGAR & GENERAL MANUFACTURING CO. LTD.,
CAPTAINGANJ, DISTT.,
KUSHINAGAR, (U.P.)

2. Adv. / Consult
NONE:-------------------

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 (Harvana)
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 AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI, PRINCIPAL BENCH NEW DELHI

Date of Hearing:03.08.11
Date of decision:03.08.11

Excise Appeal No.105 of 2009-SM(BR)

[Arising out of Order-in-Appeal No.108 & 109-CE/ALLD/2008 dated 19.11.2008 passed by the Commissioner of Central Excise (Appeals), Allahabad].

CCE, Allahabad Appellant

Vs.

M/s. Kanoria Sugar & General Manufacturing Co. Ltd. Respondent

For approval and signature:

Hon'ble Shri Rakesh Kumar, Member (Technical)

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1. Whether Press Reporters may be allowed to see 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?

Appearance: Rep. by Shri S.K. Bhaskar, DR for the appellants.
Rep. by None for the respondent.

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

Final Order No. 466/2011-SM(BR) Dated:3.8.2011

Per Rakesh Kumar

The respondents are manufacturers of V.P. Sugar and Molasses. During the period from 16.06.2005 to March, 2006, they sold some used capital goods as scrap without payment of duty. While during this period, in terms of the provisions of Rule 3(5A) of the Cenvat Credit Rules, 2004, when the modvat credit availed capital goods are sold as scrap, an amount equal to the duty on their sale price is required to be paid. The department was of the view that since the capital goods, in question sold as scrap, were Modvat credit availed goods, the provisions of Rule 3(5A) would be applicable and the amount equal to the duty on the goods sold as scrap was payable. On this basis, the original adjudicating authority vide Order-in-Original dated 28.02.2008 confirmed the Cenvat credit demand of Rs.50,402/- along with interest and besides this, imposed penalty of equal amount under Rule 15(2) of the Cenvat Credit Rules, 2004 read with Section 11 AC of the Central Excise Act. Though in the course of adjudication proceedings before the original adjudicating authority, it was pleaded that the capital goods, in question, sold as scrap was not cenvat credit availed goods, it was not accepted. On appeal to the Commissioner (Appeals), the Commissioner (Appeals) vide impugned order-in-appeal dated 19.11.2008 set aside the Asstt. Commissioner's order on the ground that the burden of proving that the capital goods in question, sold as scrap were Cenvat credit availed is on the department and since the Asstt. Commissioner's findings on this point is without any basis, the demand is not sustainable. The Commissioner (Appeals) in this regard relied upon the judgements of the Tribunal in the case of K.M. Sugar Mills Ltd. Vs. CCE, Allahabad reported in 2004 (164) ELT 40 (Tribunal)] and of Banswara Textile Mills Ltd. reported in 2005 (183) ELT 318 (Tribunal)]. Against this order of the Commissioner (Appeals), the present appeal has been filed.

2. Though a notice of hearing had been sent to the respondent well in time, when this matter was called, none appeared on behalf of the respondent. I find that in the earlier occasion also, when this matter was fixed for hearing, nobody appeared on behalf of the respondent. In view of this, in accordance with Rule 21 of CESTAT (Procedure) Rules, sofar as the respondent are concerned, the matter is decided ex parte.

3. Heard Shri S.K. Bhaskar, ld. Departmental Representative, assailed the impugned order by reiterating the grounds of appeal in revenue's appeal and emphasised that it is the respondent who were maintaining the records regarding availment of cenvat credit in respect of capital goods and that when the respondent claims that the goods, in question were not cenvat credit availed, it is they who should produce the evidence in this regard, that since the respondent have not produced any

evidence in support of their contentions regarding non-availment of cenvat credit, the department can presume that cenvat credit had been availed and the impugned order is, therefore, not correct. Shri S.K. Bhaskar, Departmental Representative also cited the judgements of the Tribunal in the case of Gujarat Narmada Fertilizers Co. Ltd. Vs. CCE, Surat reported in 2007 (209) ELT 452 (Tribunal-Mumbai), wherein it was held that waste and scrap generated out of modvat credit availed capital goods is chargeable to duty under Rule 57 S (2) (C) of Central Excise Rules and also the judgement of Hon'ble Gujarat High Court in the case of GNFC Vs. Union of India reported in 2007 (214) ELT 18 (Gujarat), wherein the same view has been taken. He also cited the judgement of the Tribunal in the case of R.B.M.P. Mills Ltd. Vs. CCE, Aurangabad reported in 1998 (98) ELT 246 (Tribunal), wherein it was held that in absence of any records produced by the appellant, their claim that waste and scrap cleared by them was of stock prior to 1986 cannot be accepted. He, therefore, pleaded that in view of this, the impugned order is not correct.

4. None present on behalf of the respondent.

5. I have carefully considered the submissions of the ld. DR. There is no dispute about the fact that the duty on capital goods cleared as scrap during the period of dispute would be payable in terms of provisions of Rule 3(5A) of the Cenvat Credit Rules, 2001 only in respect of the capital

goods in respect of which Cenvat Credit had been availed. The respondents in course of proceedings before the Asst. Commissioner had claimed that the capital goods were not cenvat credit availed goods but the Asstt. Commissioner did not accept this plea and held that the goods were cenvat credit availed. On going through the records, I find that this finding is without any reference to the records. If the cenvat credit had been availed in respect of the capital goods in question, the records in respect of the same would be available while the order-in-original passed by the Asstt. Commissioner does not refer to any such records. Since whether or not the capital goods, in question, were cenvat credit availed is verifiable fact, the impugned order is set aside and the matter is remanded back to the original adjudicating authority for de novo adjudication after verification as to whether in respect of the capital goods, in question, cenvat credit had been availed or not after hearing the respondents. The revenue's appeal is allowed by way of remand.

(Rakesh Kumar)
Member (Technical)

Ckp.