

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/4126/2010 – SM[BR] E / STAY / 4021 / 2010-SM[BR]

Date 02/11/2011

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

To :
M/S HOT SPOT COLOR LAB
37-40 HOUSE, CENTRE POINT COMPLEX, GWALIOR.
M/S HOT SPOT COLOR LAB

Appellant

Vs
Respondent

C.C.E. INDORE

I am directed to transmit herewith a certified copy of **Final order No. 740/2011-SM[BR]&S/680/2011** dated 14.10.2011
passed by the Tribunal under **Section 35-C(1) of Central Excises Act, 1944**



Assistant Registrar
(SM Appeal Branch)

Copy to :

1. Respondent
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2. Adv. / Consult
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3. C.D.R
4. Bar association, CESTAT, New Delhi
5. Director Publications, Customs, Excise. I.P. Estate, New
6. M/s Centax Publications 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)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST BLOCK NO.II, R.K. PURAM, NEW DELHI-110066.
SINGLE MEMBER BENCH
COURT NO.3

E/Stay/4021/10-SM in Appeal No.E/4126/10-SM

(Arising out of Order-in-Appeal No.ind/321/2010 dt.13.10.10
passed by the Commissioner of Central Excise & Service Tax
(Appeals), Indore)

Date of Hearing/Decision: 14.10.2011

For approval and signature:

Hon'ble Mrs.Archana Wadhwa, Member (Judicial)

1	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	No
2	Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	No
3	Whether Their Lordships wish to see the fair copy of the Order?	Seen
4	Whether Order is to be circulated to the Departmental authorities?	Yes

M/s.Hot Sport Colour Lab

Appellant

Vs.

CCE, Indore

Respondent

Present for the Appellant: Shri Vaibhav Jain, Advocate
Present for the Respondent: Shri S.K.Panda, JCDR

Coram: Hon'ble Mrs.Archana Wadhwa, Member (Judicial)

Final ORDER NO. 740/2011 SM (Br) &
S-680/2011 SM (Br)
PER: ARCHANA WADHWA

After dispensing with the conditions of pre-deposit of duty and
penalty, I proceed to decide the appeal itself with the consent of both
sides.

2. The dispute relates to availability of cenvat credit on capital goods purchased by the appellants in the month of December, 2005. It is seen that that the appellants purchased the said capital goods from the buyers under invoice dated 5.12.05 and the said capital goods were received in the factory on 22.12.05 whereas they had taken the credit of duty paid on capital goods in November, 2005 itself. The Revenue's case is that in terms of the provisions of Cenvat Credit Rules, an assessee is entitled to take credit only after ~~the~~ receipt of capital goods. Inasmuch as the appellants availed cenvat credit before the receipt of the capital goods, the said credit is not admissible to them. Accordingly, the proceedings were initiated against them by way of issuance of show cause notice resulting in confirmation of demand of duty by denying cenvat credit and imposition of penalty under Rule 15(1) and Rule 15(2) of Cenvat Credit Rules, 2004. On appeal against the above order, the Commissioner (Appeals) observed as under:-

"The sole ground on which capital goods credit was denied to the Appellant is that, the Appellant had taken the credit in the month of November 2005 before receipt of capital goods in the premises of the Appellant which was not available to them on that date. I find that, Rule 3(1) of CENVAT Credit Rules, 2004 permits provider of an output service to take credit of Central excise duties and Education Cess paid on input or capital goods after receipt of the input or capital goods in their premises. It is evident from the records that the Appellant had taken the cenvat ccredit on the capital goods, before it received in the premises of the Appellant. The disputed credit was taken in the month of November 2005 whereas the capital goods was received in the Appellant's premises on 22/12/2005. Therefore, the Appellant had wrongly taken the credit on the capital

goods before it receipt. The Adjudicating Authority has rightly disallowed the credit taken in the month of November. I held accordingly. Further I find that, it has not been disputed that the receipt of the capital goods in the premises of the Appellant and the capital goods was being used in the providing taxable output service. Also this capital goods was received alongwith invoice which is a prescribed document for taking credit. Thus the credit is available to the Appellant after 22/12/2005 and the substantial benefit cannot be denied.

Further, I find that the appellant are partnership firm, and as per the proviso to Rule 6 (1) of Service Tax Rules, 1994, they were liable to pay the Service Tax for the quarter in dispute by the 5th of January, 2006, therefore they have not earned any extra credit for payment of service tax. But it is also a fact that the appellant had taken the Cenvat Credit before receipt of the Capital goods. When the date of payment was 5th January, 2006, on this count, it does not make any difference that the credit was shown to have taken in the month of November or December 2005. Credit available upto 31/12/2005, could have been utilized towards payment of Service Tax for the quarter ending on 31/12/2005 and if the credit would have been taken on or after receipt of the capital goods, the credit was available before this date. The capital goods was received by them under invoice and they are using it in providing output service, therefore, I do not find nay malafide on the part of the appellant. Therefore penalty under Rule 15(2) of Cenvat Credit Rules, 2004, imposed by the adjudicating authority is not justified. I wave the penalty imposed under Rule 15(2) of Cenvat Credit Rules 2004 but penalty under Rule 15(1) of above stated rules is justified and I reduce the penalty of Rs.2,00,000/- (Rupees Two Lakhs) under Rule 15 (1) of Cenvat Credit Rules, *ibid.*"

3. Accordingly, the Commissioner (Appeals) confirmed the denial of cenvat credit, waived the penalty imposed under Rule 15(2) and reduced the penalty to Rs.2 lakhs under Rule 15(1) *ibid*.

The said order is impugned before the Tribunal.

4. ~~At~~ ^{AD} reading of the above portion of order of the Commissioner (Appeals), shows that the said order is self contradictory. On one hand, the Commissioner (Appeals) has observed that the appellants were entitled to credit after 22.12.05 i.e. after the date of receipt of the capital goods in the factory premises and on the other hand he has dismissed the entire credit. He has also observed that the appellants have not earned any benefit by availing of credit in the month of November of itself, [.] inasmuch as they were liable to pay service tax by 5th January, 2006. As such, if the credit would have been taken in the month of December, the same would have been availed for payment of duty in January, 2006.

5. I find that there is no dispute about receipt of the ~~goods of~~ ^{AD} capital goods in the factory of appellants on 22.12.2005 and availability of credit of duty after the said date. Merely because, the appellants have made credit entry in their record in the month of November, 2005, instead of making the same in December, 2005, by itself cannot be made a ground for denial of credit on such technical ground, which is otherwise available to the appellants. Inasmuch as the appellants were admittedly entitled to credit after 22.12.2005, I find no reason for denial of the same.

6. Further, it is ^{not available on} ~~also seen on~~ record that by availing the credit in November, 2005, whether the appellants have utilized the same during the period November, 2005 to 22.12.2005, in which case the interest liability would arise against them. Inasmuch as the above information is not available from the record and the learned Advocate is not in a position to throw light about above issue, I set aside the impugned order and remand the matter to the original adjudicating authority for verification of the above factual position and to confirm interest accordingly ^{if any.} Inasmuch as the matter is being remanded to the adjudicating authority he would also decide imposition of penalty amount depending upon the utilization of credit during the intervening period. The stay petition as also appeal gets disposed of in the above manners.

(Pronounced in the open court`

(ARCHANA WADHWA)
MEMBER (JUDICIAL)

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