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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 / 2612 / 2007 –SM[BR] **Date 30/11/2011**

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

To :
M/S U.PSTATE SUGAR CORPORATION LTD.
AMROHA, DISTT. J.P.NAGAR -244245.

M/S U.PSTATE SUGAR CORPORATION LTD. Appellant
Vs
C.C.E. MEERUT II Respondent

I am directed to transmit herewith a certified copy of **Final order No. 846 /2011-SM[BR]** dated 17.11.2011 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. MEERUT II
OPP. SAHEED PARK (NEAR
ASHOK KI LAT) DELHI ROAD,
MEERUT (UP)

2. Adv. / Consult
MR.BIPIN GARG
B-1/1289,A-VASANT KUNJ, NEW DELHI

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

COURT NO. IV
Excise Appeal No. 2612 of 2007 (SM)

[Arising out of the Order-in-Appeal No. 45-46/CE/MRT-II/2007 dated 28/03/2007 passed by The Commissioner (Appeals), Central Excise, Meerut – II.]

For Approval and signature :
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 U.P. State Sugar Corporation Ltd. Appellant

Versus

CCE, Meerut – II Respondent

Appearance

Ms. Sukriti Das, Advocate – for the appellant.

Mrs. R. Jagdav, Authorized Representative (SDR) – for the respondent.

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

DATE OF HEARING : 17/11/2011.

Final Order No. 846/2011 SM (BR) Dated : ____________

Per. Rakesh Kumar :-

The point of dispute in this case is as to whether welding electrodes, D.A. Gas, St. stable (a sort of special purpose welding electrodes) used in the factory are eligible for Cenvat credit or not. The period of dispute in this case is January 2002 to September 2002. The original Adjudicating Authority disallowed the Cenvat credit in respect of these items and confirmed the Cenvat credit demand of Rs. 14,744/- alongwith interest. The order of the original Adjudicating Authority's order was upheld by the Commissioner (Appeals). Against the order of the Commissioner (Appeals), the appellant filed an appeal before the Tribunal, which was disposed of by Final order No. 259-261/06 – SM (BR) dated 20th February 2006 by which the Tribunal remanded the matter to the original Adjudicating Authority for fresh decision after ascertaining the use of these items. In this order of the Tribunal, there was no decision on any legal point regarding eligibility of the items use for repair and maintenance for Cenvat credit. In denovo proceedings in pursuance of the Tribunal's order, the Assistant Commissioner vide order-in-original dated 31/10/06, again confirmed the Cenvat credit demand of Rs. 14,744/- alongwith interest and imposed penalty of equal amount on the appellant. The order of the Assistant Commissioner was upheld by the Commissioner (Appeals) vide order-in-appeal dated 28/3/07. Against this order of the Commissioner (Appeals), the present appeal has been filed.

2. Heard both the sides.

2.1 Ms. Sukriti Das, Advocate, the learned Counsel for the appellant pleaded that even if the items, in question – welding electrodes, D.A. Gas, St. stable (a sort of special purpose welding electrodes) were used for repair and maintenance of plant and machinery, the same would still be eligible for Cenvat credit in terms of the judgment of Hon'ble Rajasthan High Court in the case of **Hindustan Zinc Ltd. vs. Union of**

India reported in **2008 (228) E.L.T. 517 (Raj.)**, the judgment of Hon'ble High Court of Chhattisgarh in the case of **Ambuja Cements Eastern Ltd. vs. CCE, Raipur** reported in **2010 (256) E.L.T. 690 (Chhattisgarh)** and judgment of Hon'ble High Court of Karnataka in the case of **CCE, Bangalore – I vs. Alfred Herbert (India) Ltd.** reported in **2010 (257) E.L.T. 29 (Kar.)**, and that in view of settled legal position on this issue, the impugned order denying Cenvat credit is not correct.

2.2 Mrs. R. Jagdev, the learned Senior Departmental Representative, defended the impugned order by relying upon the judgment of Division Bench of the Tribunal in the case of **Vikram Cement vs. CCE, Indore** reported in **2009 (242) E.L.T. 545 (Tri. – Del.)** and also the judgment of the Tribunal in the case of **SAIL vs. Commissioner** reported in **2009 (222) E.L.T. 233 (Tribunal)**, the SLP to Hon'ble Supreme Court against which has been dismissed vide judgment reported in **2008 (229) E.L.T. A127 (S.C.)**. She also pleaded that the appellant have not produced any evidence that the items, in question, had been used for fabrication of capital goods, that from the records it is clear that the items had been used for repair and maintenance and in that case, in view of the above-mentioned judgment of the Tribunal and also of the Apex Court, the Cenvat credit would not be admissible.

3. I have carefully considered the submissions from both the sides and perused the records.

4. Even if the items, in question, have been used for repair and maintenance, the same would be eligible for Cenvat credit, in view of the judgment of Hon'ble Chhattisgarh High Court in the case of **Ambuja Cements Eastern Ltd. vs. CCE, Raipur** (supra). In the latter judgment, with regard to dismissal by the Apex Court of SLP against the Tribunal's order in the case of **SAIL vs. Commissioner** (supra), the Hon'ble High Court in para 22 of the order has observed as under :-

> "**22.** Thus, decision in the matter of *Jaypee Rewa Plant* is not a good law in view of above judgment of the Rajasthan High Court. That apart, the Madras High Court in *India Cements Ltd.* has held that the welding electrodes used for repairs and maintenance are covered under the

definition of capital goods in terms of Rule 57Q. Similarly, in *Birla Jute & Industries Ltd.*, also, the Delhi Tribunal held that Modvat credit is admissible for Electrodes and Calibration Gas Mixture (Welding equipments), but not admissible for explosives under Rule 57A of the Central Excise Rules, 1944, Civil appeals preferred by the revenue have been further dismissed by the Supreme Court.

It is settled law that refusing of special leave to file appeal by a non-speaking or speaking order does not attract the doctrine of merger, whereas where an award, appeal or revision is provided against the order passed by the Court, Tribunal or any other authority before a superior forum and such superior forum modifies, reverses or affirms the decision put in issue before it, the decision by the subordinate forum merges in the decision by the superior forum and it is the latter which subsists, remains operative and is capable of enforcement in the eye of law, as held by the Supreme Court in *Kunha Yammed*."

5. In view of this, the impugned order is not sustainable. The appeal is allowed.

(Dictated and pronounced in open court.)

(Rakesh Kumar)
Member (Technical)

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