

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/2977/2007 – SM[BR]

Date 30/11/2011

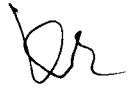
Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
C.C.E. RAIPUR
CENTRAL EXCISE BUILDING, DHAMTARI ROAD,
TIKRAPARA, RAIPUR 492001.
C.C.E. RAIPUR

Appellant
Vs
Respondent

M/S BALDEV ALLOYS (P) LTD

I am directed to transmit herewith a certified copy of **Final order No. 847 / 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
M/S BALDEV ALLOYS (P) LTD
SILTARA INDUSTRIAL AREA,
DISTT-RAIPUR(CG)
2. Adv. / Consult **SHRI BIPIN GARG ADV.**
B-1/1289-A, VASANT KUNJ NEW DIKHI
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)

**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. 2977 of 2007 (SM)**

[Arising out of the Order-in-Appeal No. 173/RPR-I/2007 dated 24/08/2007 passed by The Commissioner (Appeals-I), Central Excise, Raipur.]

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?

CCE, Raipur

Appellant

Versus

M/s Baldev Alloys (P) Ltd.

Respondent

Appearance

Mrs. R. Jagdav, Authorized Representative (DR) – for the
appellant.

Shri Mayank Garg, Advocate – for the respondent.

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

DATE OF HEARING : 17/11/2011.

final Order No. 847/2011 *sm (R)* Dated : _____

Per. Rakesh Kumar :-

The respondent are manufacturers of Sponge Iron chargeable to Central Excise Duty. They take Cenvat credit of duty paid on inputs and capital goods used in or in relation to manufacture of their final products. The dispute in this case is as to whether during the period from April 2004 to June 2005, they were eligible for Cenvat credit in respect of MS Angles, Channels, Beams, Joists etc. which according to them, had been used in assembly, erection and installation of main platform for Kiln. The department's being of the view that these items are neither covered by the definition of 'input' not covered by the definition of 'capital goods', are not eligible for Cenvat credit, issued a show cause notice dated 15/3/07 seeking denial of Cenvat credit of Rs. 1,35,853/- in respect of these items, its recovery alongwith interest and also

imposition of penalty under Rule 15 of Cenvat Credit Rules, 2004. Though the show cause notice dated 15/3/07 sought recovery allegedly of wrongly taken Cenvat credit during the period from April 2004 to June 2005, it does not invoke proviso to Section 11A (1) of Central Excise Act, 1944 and as such, there is no allegation that wrong availment of Cenvat credit took place on account of wilful misstatement, suppression of fact etc., on the part of the assessee. The show cause notice was adjudicated by the Assistant Commissioner vide order-in-original dated 24/5/07 by which the Cenvat credit demand, as made in the show cause notice, was upheld alongwith interest and beside this, penalty of Rs. 25,000/- was imposed on the respondent under Rule 15 of the Cenvat Credit Rules, The Assistant Commissioner in the order-in-original held that the items, in question – MS Angles, Channels, Beams, Joists etc. has been used for erection of supporting system for Kiln and, hence, the same not be considered as capital goods nor inputs.

1.1 On appeal to Commissioner (Appeals), the Commissioner (Appeals) by order-in-appeal dated 24/8/07 set aside the Assistant Commissioner's order. The Commissioner

(Appeals) set aside the order on merits as well as on time bar holding that the extended period under proviso to Section 11 A (1) is not available to the department.

1.2 Against this order of the Commissioner (Appeals), this appeal has been filed by the Revenue.

2. Heard both the sides.

2.1 Ms. R. Jagdav, the learned Departmental Representative, assailed the impugned order by reiterating the grounds of appeal in the Revenue's appeal and pleaded that the items, in question, have been used for fabrication and erection of platform for the Kiln, that platform is structure fixed to the earth and, hence, the same cannot be treated as capital goods, that in this regard, she relies upon the judgment of Larger Bench of the Tribunal in the case of **Vandana Global Ltd. vs. CCE, Raipur** reported in **2010 (253) E.L.T. 440 (Tri. - LB)** and also the judgment of the Apex Court in the case of **Saraswati Sugar Mills vs. CCE, Delhi - III** reported in **2011 (270) E.L.T. 465 (S.C.)**, that the items, in question, are not covered by the definition of input, that in

view of this, the Cenvat credit was not available in respect of these items and the Commissioner (Appeals)'s order allowing the Cenvat credit in respect of these items is not correct, and that the Commissioner (Appeals)'s finding that the demand is time barred is also incorrect in view of judgment of Larger Bench of the Tribunal in the case of **Nizam Sugar Factory vs. CCE, Hyderabad** reported in **1999 (114) E.L.T. 429 (Tri. – LB)**, wherein the Larger Bench of the Tribunal has held that limitation of 5 years is applicable even when the department had knowledge about suppression, fraud etc. and the period of 5 years would be counted from the relevant date as defined in Section 11A. She, therefore, pleaded that the impugned order is not correct.

2.2 Shri Mayang Garg, Advocate, the learned Counsel for the respondent, defended the impugned order and pleaded that the items, in question, had been used for fabricating and erecting platform for Kiln, that platform for Kiln is a structure specifically designed for Kiln, that Kiln cannot function without the platform, and in view of this, the Kiln is to be treated as accessory of Kiln accessory, and the same would be covered by the definition of capital goods, that the MS

Angles, Channels, Beams, Joists. Used for fabrication of Kiln would be eligible for Cenvat credit, that Hon'ble Supreme Court in the case of **CCE, Jaipur vs. Rajasthan Spinning & Weaving Mills Ltd.** reported in **2010 (255) E.L.T. 481 (S.C.)**, has held that the steel plates and MS Channels used for fabrication of chimney for diesel generating set are eligible for Cenvat credit, that relying upon this judgment of the Apex Court, the Tribunal in a recent judgment in the case of **CCE, Visakhapatnam – II vs. M/s APP Mills Ltd.** reported in **2011 – TIOL – 1378 – CESTAT – BANG.** Has held that the view of Larger Bench of the Tribunal in the case of **Vandana Global Ltd.** taken much before the judgment of the Apex Court in the case of **CCE, Jaipur vs. Rajasthan Spinning & Weaving Mills Ltd.** (supra) is not the correct view, as it runs contrary to the judgment of the Apex Court, that in view of this, there is no infirmity in the impugned order permitting Cenvat credit in respect of MS Angles, Channels, Beams, Joists etc. used for fabrication and erection of platform for Kiln, that the Cenvat credit demand for the period from April 2004 to June 2005 has been raised by show cause notice dated 15/3/07, that in the show cause notice

neither there is any allegation of wilful suppression etc. on the part of the respondent nor proviso to Section 11A (1) has been invoked, and that in view of this, the longer limitation period of 5 years under proviso to Section 11A (1) is not available to the department and, hence, the Cenvat credit demand is time barred. He, therefore, pleaded that there is no infirmity in the impugned order.

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

4. I find that in this case, while the Cenvat credit demand for the period from April 2004 to June 2005 had been raised by the show cause notice dated 15/3/07, the show cause notice does not make any allegation of misstatement or deliberate contravention of the provisions of the Central Excise Act, 1944 or of the Rules made thereunder with intent to payment of duty and, as such, the proviso to Section 11A (1) has not been invoked. In the order-in-original passed by the Assistant Commissioner simply confirms the demand without considering the aspect of limitation, though in course of hearing, this point had been raised. Even the para 2 of the

show cause notice mentions that the alleged wrong availment of Cenvat credit had been detected by the audit on the basis of the records produced by the respondent. In view of these circumstances, I agree with the Commissioner (Appeals)'s finding that the demand is barred by limitation. Moreover, during the period of dispute, there were conflicting judgments of the Tribunal on the issue as to whether MS Plates, Angles, Channels etc. used for fabrication of supporting structures would be eligible for Cenvat credit or not, and this issue was ultimately decided by Larger Bench of the Tribunal in 2009. The Apex Court in the case of **Jaiprakash Industries Ltd. vs. CCE, Chandigarh** reported in 2002 (146) E.L.T. 481 (S.C.) has held that when there was bonafide doubt about excisability of the goods due to divergent views of the High Courts, extended period of 5 years could not invoked. Same view has been taken by the Apex Court in the case of **Continental Foundation Jt. Venture vs. CCE, Chandigarh** – I reported in 2007 (216) E.L.T. 177 (S.C.).

Keeping in view of these judgments, the Tribunal also in the case of **CCE, Raipur vs. Orion Ferro Alloys Pvt. Ltd.** reported in 2010 (259) E.L.T. 84 (Tri. – Del.) has held that in

view of conflicting decisions on the point of dispute, the longer limitation period cannot be invoked. In view of the above discussion, I hold that the Cenvat credit demand is hit by limitation and, as such, there is no infirmity in the Commissioner (Appeals)'s order on this point and, hence, the duty demand itself is not maintainable. Since, the demand is not maintainable on limitation there is no need to go into the question of merit.

5. The Revenue has cited the judgment of Larger Bench of the Tribunal in the case of **Nizam Sugar Factory vs. CCE, Hyderabad** (supra). This judgment does not help the Revenue as the ratio of the judgment is that the limitation of 5 years is available even when the Department had knowledge about the suppression, misstatement etc. and that period of 5 years would be counted from the relevant date as defined in Section 11A. This judgment would be applicable, if there is existence of wilful suppression of fact, fraud etc. which is not there in this case as there is not even allegation in this regard in the show cause notice. Therefore, the judgment of the Larger Bench in the case of **Nizam Sugar Factory vs. CCE,**

Hyderabad (supra) relied upon by the Department does not support the Department's case.

6. In view of the above discussion, I do not find the merit in the Revenue's appeal. The same is dismissed.

(Dictated and pronounced in open court.)

(Rakesh Kumar)
Member (Technical)

PK