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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066

EXCISE APPEAL BRANCH

Date 18/05/2010

Appeal No. E/09 /2010 - EX[DB]
E/S/06/2010-EX

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

To :
M/S. CADBURY INDIA LTD.
PLOT NO.25, MALANPUR INDUSTRIAL
AREA,VILLAGE GURIKHA, TEHSIL GOHAD,
DISTRICT BHIND (M.P.)
477117

M/S. CADBURY INDIA LTD. Appellant

Vs

C.C.E. INDORE STAY ORDER NO.377/2010-EX Respondent

I am directed to transmit herewith a certified copy of **Final order No.** 357/ **2010 EX[DB]** dated 14-5-10 passed by the Tribunal under Section 35-C(1)of Central Excises Act, 1944

Assistant Registrar
(Excise Appeal Branch)

Copy to :
1. Respondent
C.C.E. INDORE
MANIK BAGH PALACE, POST BOX NO. 10, INDORE 452001 (M.P.)
2. Adv. / Consult
MR.K.J.JHON &CO,ADV
SF 039,055,FORTUNE ARCADE, PLOT NO 69 K BLOCK,SECTOR-18, NOIDA 201301
3 C.D.R
~~4 J.C.D.R.~~
5 Bar association. CESTAT. New Delhi
6 Director Publications. Customs. Excise. I.P. Estate. New Delhi
7 M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi - 3
8 Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
9 M/s. Deeparchie Publications. M-93. Marg. 46. Saket. New Delhi 110017
10 Taxmann Allied Service Pvt Ltd.. 59/32. New Rohtak Road. New Delhi - 110005
11 Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road,Ahmedabad-15
12 LAWCRUX Advisors Pvt Ltd. LAW House,1-8,Sector - 10. Faridabad 121003 (Haryana)
13 Office Copy
14 Guard file
15. HON'BLE PRESIDENT.

Assistant Registrar
(Excise Appeal Branch)

16. Tax India Online.Com (P) Ltd.
Unit No.1, 2nd Floor, Vasant Aracade, Nelson Mandela Road,
Vasant Kunj, New Delhi-70

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. I

Excise Stay Application No. 06 of 2010 in Appeal No. 09 of 2010

[Arising out of the Order-in-Original No. 29/COMMR/CEX/IND/ 2009 dated 22/09/2009 passed by The Commissioner of Central Excise (Appeals), Central Excise, Indore.]

For Approval and signature :

Hon'ble Justice R.M.S. Khandeparkar, President
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 Cadbury India Limited — Appellant

Versus

CCE, Indore — Respondent

Appearance

Shri M.P. Bakshi, Advocate – for the appellant.

Shri Nitin Anand, Authorized Representative (DR) – for the Respondent.

CORAM : **Hon'ble Justice R.M.S. Khandeparkar, President**
Hon'ble Shri Rakesh Kumar, Member (Technical)

DATE OF HEARING : 09/04/2010.
DATE OF DECISION : 14/05/2010.

STAY Order No. 377/10-EX Dated : ___________
FINAL ORDER NO 357/10-EX

Per. Rakesh Kumar :-

This is an appeal against order-in-original No. 29/COMMR/CEX/IND/2009 dated 22/09/2009 passed by CCE, Indore by which Cenvat credit demand of Rs. 55,79,289/- was confirmed against the appellant under Rule 14 of Cenvat Credit Rules, 2004 (hereinafter referred to as CCR, 2004) readwith Section 11A (1) of Central Excise Act, 1944 (hereinafter referred to as Excise Act) alongwith interest on this credit at the applicable rate as per the provisions of Section 11AB of Excise Act and penalty of equal amount was imposed on the appellant under Rule 15 (2) CCR, 2004 readwith Section 11AC of the Excise Act. Though today only the stay application filed by the appellant for waiver from the requirement of pre-deposit of duty demand, interest and penalty and stay on recovery thereof, was listed, after hearing of this matter, we are of the view that there is no point in keeping this matter pending and accordingly the matter was heard for final disposal.

2. The facts leading to this appeal are, in brief, as under.

2.1 The appellant are engaged in the manufacture of Cocoa, Cocoa products and Wafer products chargeable to Central Excise Duty under Chapter 18 and 19 of Central Excise Tariff Act, 1985. Their factory premises are located in Industrial Area, Malanpur, District Bhind (M.P.) and their head office is located at Mumbai. The head office of the appellant is registered as an input service distributor. It was observed from ER-1 returns for April 2007 to December 2007 that the appellant had taken Cenvat credit of Service Tax. On further inquiry it appeared that during April 2007 – December 2007 period, the appellant had taken Cenvat credit of service tax amounting to Rs. 1,80,53,034/- without proper duty paying documents/invoices. It is on this basis that the show cause notice dated 2/5/08 was issued to the appellant for recovery of the above-mentioned allegedly wrongly taken service tax Cenvat credit under Rule 14 of CCR, 2004 readwith Section 11A of the Excise Act alongwith interest on it at the applicable rate as per the provisions of Section 11AB and for imposition of penalty on them under Rule 15 of CCR, 2004. The show cause notice was adjudicated by the Commissioner vide order-in-original No. 29/COMMR/CEX/IND/2009 dated 22/09/2009 by which out of the total Cenvat credit demand of Rs. 1,80,53,034/- raised in the show cause notice, the Cenvat credit demand of Rs. 55,79,289/- was confirmed alongwith interest and beside this, penalty of equal amount was imposed on the appellant. The remaining Cenvat credit demand of Rs. 1,24,73,745/- was dropped. The Cenvat credit demand of Rs. 55,79,289/- was confirmed on the ground that while this Cenvat credit, as per the records of the appellant, had been taken by them on the basis of an invoice No. 23 dated nil, there was no such invoice issued by their head office as input service distributor. It is against this order of the Commissioner that the present appeal and stay application have been filed.

3. Heard both the sides.

3.1 Shri M.P. Bakshi, Advocate, the learned Counsel for the appellant, pleaded that the appellant were taking Cenvat credit of service tax on the basis of the invoices issued by the head office as input service distributor, that the head office located at Mumbai had issued an invoice No. II/132 dated 31/8/07 passing on the Cenvat credit of Rs. 55,79,289/- as input service distributor, that it is on the basis of this invoice that their factory at Malanpur took the Cenvat credit of Rs. 55,79,289/- but by mistake, in the records, the invoice number was mentioned as 23, that this is a bonafide mistake, as the credit taken by the appellant unit on 20th September 2007 exactly tallies with the credit passed on by the head office as input service distributor under invoice No. II/132 dated 31/8/07, that the Jurisdictional Central Excise Superintendent alongwith the Inspector had visited the head office of the appellant company and verified their records, that they on this basis had submitted a report dated 13/3/09 to the Deputy Commissioner, wherein the Range Superintendent mentioned that the head office of the appellant company has passed on the service tax credit on the basis of genuine documents which are available with them, that the admissibility of the service tax credit on invoice No. II/132 dated 31/8/07 is unquestionable, that however, on perusal of the service tax credit register for April 2007 to December 2007 period of the appellant, it is noted that the invoice number shown in the credit register is 23 without date, which does not tally with invoice No. II/132 dated 31/8/07 issued by the head office, that when the Department accepts that the head office has passed on the service tax credit on the basis of genuine documents and service tax amounting to Rs. 55,79,289/- has been passed under invoice No. II/132 dated 31/8/07, it is clear that the number of this invoice was by mistake mentioned as 23 due to clerical mistake and that in view of this it is not correct to deny the Cenvat credit and hence the impugned order denying the Cenvat credit and confirming its demand alongwith interest and imposing penalty on the appellant is not correct.

3.2 Shri Nitin Anand, learned DR, defending the impugned order, reiterated the Commissioner's findings and pleaded that while the credit of Rs. 55,79,289/- had been taken on the basis of invoice No. 23 dated nil, supposed to have been issued by the head office, there is no such invoice, that in view of this, the credit has been correctly denied by the Department and that there is no infirmity in the impugned order.

4. We have carefully considered the submissions from both the sides and perused the records. The appellant unit located at Malanpur had taken the Cenvat credit, in question, on the basis of an invoice issued by their head office located at Mumbai as an input service distributor. There is no dispute about the fact that

the head office was registered as input service distributor.

4. From letter dated 13/3/09 of the Jurisdictional Range Superintendent to the Deputy Commissioner, Central Excise, we find that the Jurisdictional Range Superintendent had visited the head office and checked the records and had given a categorical report that the head office of the appellant company has passed on the credit of service tax on the basis of genuine documents which are available with them and that a credit of Rs. 55,79,289/- had been passed on to the appellant unit under invoice No. II/132 dated 31/8/07. Thus there is no dispute about the fact that the head office had passed on the service tax Cenvat credit of Rs. 55,79,289/- under invoice No. II/132 dated 31/8/07 on the basis of the genuine documents and the credit of this amount only had been taken by the appellant unit. If the department had any doubt that the credit of Rs. 55,79,289/- taken by the appellant unit was not on the basis of the invoice No. II/132 dated 31/8/07, a reconciliation exercise should have been conducted to ascertain as to whether the total credit passed on by the head office during 2007-2008 is not more than the credit taken and that the credit passed on had been taken by the head office on the basis of genuine documents. Without this exercise, it was not correct to hold that the Cenvat credit of Rs. 55,79,289/- had been taken without any invoice having been issued by the head office. In view of this, we are of the view that the impugned order is not correct. The same is set aside and the matter is remanded to the Commissioner for denovo adjudication after reconciliation exercise. Since the

after reconciliation exercise. Since the appeal has been finally disposed of, the stay application is dismissed as infructuous.

(Pronounced in the open court on 14/05/2010.)

(Justice R.M.S. Khandeparkar)
President

(Rakesh Kumar)
Member (Technical)

PK