

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
SINGLE MEMBER APPEAL BRANCH

Appeal No. ST/303 /2010 – SM[BR]

Date 24/12/2010

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

To :
C.C.E. JAIPUR I
N.C.R.BUILDING, STATUE CIRCLE, "C" SCHEME,
JAIPUR 302005.
C.C.E. JAIPUR I

Appellant
Vs
Respondent

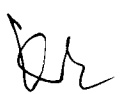
M/S PUSHP ENTERPRISES,

I am directed to transmit herewith a certified copy of Final order No. 1473 / 2010-SM[BR] dated 23.11.2010
passed by the Tribunal under Section 129, (B) of the Customs Act,1962 & Financial Act 1994 relating to Service Tax


Assistant Registrar
(SM Appeal Branch)

Copy to :

1. Respondent
M/S PUSHP ENTERPRISES,
H-780-A, ROAD NO. 13, V.K.I.
AREA, JAIPUR (RAJASTHAN)
2. Adv. / Consult **SHRI SAURABH YADAVA ADV.**
A-5, BASMENT LAJPAT NAGAR-III
NEW DELHI-24.
3. C.D.R
4. Bar association, CESTAT, New Delhi
5. Director Publications, Customs, Excise. I.P. Estate, New Delhi
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. M/s. Deeparchie Publications, M-93, Marg. 46, Saket, New Delhi 110017
9. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi - 110005
10. Easy Service Tax Online Dot Com Pvt.Ltd.407A, Iscon Mall, Above Star India Bazar, Satellite Road,
Ahmedabad-15
11. LAWCRUX Advisors Pvt Ltd, LAW House.1-8.Sector - 10, Faridabad 121003 (Harvana)
12. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor, Vasant Arcade, Nelson Mandela Road,
Vasant Kunj, New Delhi - 110070
13. Office Copy
14. 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: **23.11.2010**

Date of decision: **23.11.2010**

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 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?	

Service Tax Appeal No.ST/303/10-SM (BR)

[Arising out of common Order-in-Appeal No.41(DK)ST/JPR-I/2010 dated 29.01/02.2.2010 passed by the Commissioner of Central Excise (Appeals-I), Jaipur].

CCE, Jaipur-I

....Appellants

Vs.

M/s. Pushp enterprises

...Respondent

Appearance:

Rep. by Shri S.R. Meena, SDR on behalf of the appellant/Department.

Rep. by Shri Sourabh Yadav, Advocate for the respondent.

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

Final Order No. 1473/2010² SM (Br)/Dated: 23.11.2010

Per Rakesh Kumar:

The facts leading to filing of this appeal by the Department are, in brief, as under:-

1.1 The respondent are manufacturers of 'Bearing Components' chargeable to central excise duty under Chapter 84 of the First Schedule to the Central Excise tariff Act, 1985. They availed Cenvat credit of Central Excise duty paid on inputs and of service tax paid on input services as per the provisions of Cenvat Credit Rules, 2004. During the course of audit of central excise records of the respondent, it was observed that the respondents were clearing the goods to their trading unit at Bangalore having central excise registration as registered dealer. The goods cleared from Jaipur to their trading unit at Bangalore were warehoused there. It was found that the respondent had availed Cenvat credit of Service Tax paid on warehousing and cargo handling services availed at their dealer's premises at Bangalore to which they did not appear to be entitled. It is in view of this that a show cause notice dated 19.09.2010 was issued to the respondent for recovery of allegedly wrongly taken Service Tax Cenvat Credit amounting to Rs.2,34,220/- during the period from July, 2006 to June 2007. The show cause notice was issued by invoking extended period under proviso to Section 11 A(1)

of the Central Excise Act read with Rule 13 of the Cenvat Credit Rules, 2004. The show cause notice also demanded interest on allegedly wrongly taken Cenvat credit and penalty on them under Rule 15 (2) of the Cenvat Credit Rules, 2004. The show cause notice was adjudicated by the Asstt. Commissioner vide order-in-original dated 15.05.2009 by which the Asstt. Commissioner confirmed the entire Cenvat Credit demand of Rs.2,34,220/- along with interest and also imposed penalty of equal amount on the respondent under Rule 15(2) of the Cenvat Credit Rules, 2004 read with Section 11 AC of the Central Excise Act, 1944. On appeal to the Commissioner (Appeals), the Commissioner (Appeals) while upholding the Assistant Commissioner order on merits, held that show cause notice is time barred and set aside the Asstt. Commissioner's order confirming the Cenvat credit demand and imposing penalty, on the ground of limitation. The Commissioner (Appeals) was of the view that there is no evidence on record indicating that the respondent had suppressed the relevant information from the Department or that they have wrongly availed Cenvat credit with intent to evade payment of duty. It is against this order of the Commissioner (Appeals) that the Department has filed this appeal before the Tribunal.

2. Shri S.R. Meena, Id. SDR, pleaded that though the respondent in the ER-I Returns filed by them had disclosed the availment of Service Tax Credit, the nature of the input services received had not been

disclosed; that other than the ER-I Returns, there was no intimation from the respondent that they had been availing Service Tax Credit in respect of services of warehousing/cargo handling services availed by them at Bangalore, where the goods cleared by them to their Trading unit are stored and sold, that from the information disclosed in the ER-I Return, it was not possible for the Departmental Officers to ascertain as to whether they have wrongly availed Service Tax Credit in respect of the services, which are not covered by the definition of input services, that this wrong availment of Service Tax Credit came to the notice of the department only in the course of the audit by the Audit Officers, and that the respondent's act of non-disclosure of availment of Service Tax credit in respect of the services of warehousing and cargo handling services amounts to suppression of relevant facts with intent to evade payment of duty and hence the Asstt. Commissioner had rightly confirmed the demand by invoking the longer limitation period and rightly imposed penalty under Rule 15(2) of the Cenvat Credit Rules, 2004 read with Section 11 AC of the Central Excise Act, 1944. In support of his contention, he relied on the decision of the Tribunal in the case of **B.B. Shah (P) Ltd. Vs. CCE-II, Jaipur reported in 2008 (224) ELT 154 (Tribunal-Delhi)** and also the judgement of the Tribunal in the case of **M/s. Polycone Paper Ltd. Vs. CCE, Mumbai-III reported in 2008 (224) ELT 274 (Tribunall-Mumbai)**. He pleaded that in the case of

M/s. B.B. Shah (P) Ltd. (supra) while the appellants were required to file declaration of the value of the inputs in case of goods in process inclusive of processing charges and their declaration did not indicate that the value declared by them was inclusive of the processing charges and in these circumstances, the Tribunal held that the appellants are guilty of suppressing the relevant information from the Department with intent to evade the duty by taking higher Cenvat credit, that in the case of **Polycone Paper Ltd. (supra)**, the Tribunal observing that non-inclusion of cost of packing material came to light only after detection by preventive officers, held that the assessee had mis-declared the value of canisters and cleared them by suppressing supply of packing material and hence, longer limitation period under Section 11 AC is available to the Department, and that in view of the above, the impugned order setting aside the Asstt. Commissioner's order on the ground of non-applicability of the proviso to Section 11 A (1) and Section 11 AC of the Central Excise Act is not correct.

3. Shri Sourabh Yadav, Advocate, the learned Counsel for the respondent defended the impugned order reiterating the Commissioner (Appeals)'s findings and pleaded that in the impugned order, the appellants were required to disclose the quantum of Cevat Credit taken in respect of the inputs and input services and they were not required to enclose the invoices or disclose the details regarding the invoices for

input goods and input services and that the respondent availed Cenvat credit in respect of the input services in question, under bona fide belief that they are entitled for the same and there is no evidence that the respondent had deliberately mis-led the Department or suppressed some relevant information from the Department with intent to evade payment of duty by taking more Cenvat credit than the credit for which they were entitled, that he ^{and relies upon} the judgment of the Hon'ble Supreme Court in

the cases of **Padmini Products Vs. CCE reported in 1989 (43) ELT**

195 (SC) , Collector of Central Excise Vs. HMM Limited reported in

1995 (76) ELT 497 (SC) and Collector of Central Excise, Bangalore

Vs. Karnataka Agro Chemicals reported in 2008 (227) ELT 12 (SC),

wherein it has been held that for invoking the extended period under

proviso to Section 11 A (1) of the Central Excise Act, some positive

evidence showing deliberate suppression of relevant facts, wilful

misstatement or contravention of the provisions of the Central Excise

Act, 1944 or of the Rules made thereunder with intention to evade

payment of duty is required and mere failure or negligence of the

manufacturer to take out licence or pay duty where there was scope for

^{is not sufficient for invoking longer limitation period}
doubt that goods were not dutiable. He pleaded that the Commissioner

(Appeals) has given a clear finding that there is no evidence produced by

the Department to show that the respondent had deliberately suppressed

any relevant information with intent to avail wrong Cenvat credit, while

knowing that they were not entitled for the same and in view of this, the Commissioner (Appeals) has rightly held the demand to be time barred.

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

5. The point of dispute in this case is as to whether the extended period under proviso to Section 11 A(1) of Central Excise Act, 1944 is available to the Department for recovery of allegedly wrongly taken Cenvat credit and also whether the penalty is imposable on the respondent under Rule 15 (4) of the Cenvat Credit Rules, 2004 read with Section 11 AC of the Central Excise Act.

6. Proviso to Section 11 A(1) of the Central Excise Act, 1944 reads thus:-

“ Provided that where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of the Act or of the rules made thereunder with intent to evade payment of duty, by such person or his agent, the provisions of this sub-section shall have effect, as if the words “Central Excise Officer”, the words “Collector of Central Excise”, and for the words “Six months”, the words “five years” were substituted.”

7. As per the provisions of Rule 15 of the Cenvat Credit Rules, 2002 in a case where the Cenvat credit has been taken and utilised wrongly by the reason of fraud, collusion, wilful mis-statement, suppression of facts and contravention of any of the provisions of the Central Excise Act, 1994 and of the Rules made thereunder with intention to evade the payment of duty, the manufacturer shall be liable to pay penalty in terms of the provisions of Section 11 AC of the Excise Act.

8. Section 11AC of the Central Excise act provides that where any duty of excise has not been levied or short levied or short paid or erroneously refunded, by the reason of fraud, collusion or any wilful misstatement or suppression of facts or contravention of the provisions of this Act or of the rules made thereunder with intent to evade the payment of duty, the person liable to pay the duty, as determined under Section 11A(2) shall also be liable to pay a penalty equal to the duty so determined.

9. From perusal of the proviso to Section 11 A(1) and Section 11 AC, it is clear that the criteria for invoking extended period of limitation under proviso to Section 11 A(1) is identical to the criteria for imposition of penalty under Section 11 AC. The Hon'ble Supreme Court in the case of Padmini Products (supra) with regard to the proviso to Section 11 A(1) has held that mere failure or negligence on

the part of the manufacturer either to take out a licence or to pay duty in case where there was scope for doubt, does not attract the extended limitation period, unless there is evidence that the manufacturer knew that goods were liable to duty or he was required to take out a licence and

_____, therefore, mere failure to pay the duty or take out the licence is not enough to invoke these proviso. Same view has been taken by the Apex Court in the case of **Collector of Central Excise Vs. H.M.M. Limited** ^(Supra) and **Collector of Central Excise, Bangalore Vs. Karnataka Agro Chemicals** (supra).

10. In these cases, there is no dispute ^{about} the fact that the ER-I Return had disclosed the availment of Cenvat Credit but since there is no requirement for enclosing the invoices or giving the details of such credit or neither such details were given nor the invoices were enclosed. However, once ER-I Return is filed, even though it is filed under self-assessment system, the officers are supposed to scrutinize the same. Just because the respondent had taken Cenvat credit in respect of certain input services which according to the Department was not admissible to them, ~~it~~ cannot be concluded that that the credit had been taken knowing ^{very} well that the same was not admissible, unless there is some evidence in this regard. Moreover when the

quantum of service tax credit availed had been disclosed, the officers were always free to inquire from the respondent about details of the same and satisfy themselves about its correctness. In view of these circumstances, I am of the view that there is no infirmity in the impugned order. Revenue's appeal is dismissed.

(Rakesh Kumar)
Member (Technical)

Ckp.