

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

Date 29/01/2010

Appeal No. E/770 /2007 – SM[BR]

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

To :
OSWAL OVERSEAS LTD.
NAWABGANJ, DISTT. BAREILLY.
OSWAL OVERSEAS LTD.

Appellant
Vs
Respondent

C.C.E, MEERUT-II

I am directed to transmit herewith a certified copy of **Final order No. 169 / 2010-SM[BR]** dated 5.1.2010 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

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~~4 J.C.D.R.~~

5 Bar association, CESTAT, New Delhi

6 Director Publications, Customs, Excise. I.P. Estate, New Delhi

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Assistant Registrar
(SM Appeal Branch)

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
West Block No.2, R. K. Puram, New Delhi
COURT-I

Date of hearing/decision: 05.01.2010

Excise Appeal No. 770 of 2007-SM

[Arising out of order in appeal No. 12-CE/MRT-II/2007 dated 25.1.2007 passed by the Commissioner (Appeals) Customs & Central Excise, Meerut].

For approval and signature:

Hon'ble Shri Justice R.M.S. Khandeparkar, President

1.	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982.	Yes
2.	Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	Yes
3.	Whether Their Lordships wish to see the fair copy of the Order?	See
4.	Whether Order is to be circulated to the Departmental authorities?	Yes

M/s Oswal Overseas Limited

Appellants

Vs.

CCE, Meerut-II

Respondent

Appearance:

Appeared for the Appellant – Shri Kapil Vaish C.A.

Appeared for the Respondent – Shri V.K. Saxsena, Jt. CDR

Coram: Hon'ble Shri Justice R.M.S. Khandeparkar, President

Oral Order

169 / 2010 SM (Br)

Per Shri Justice R.M.S. Khandeparkar:

This appeal arises from order dated 25.02.2007 passed by the Commissioner (Appeals) Meerut-II. Under the impugned order, the appeal filed by the appellants against the order of the adjudicating authority has been dismissed. The Assistant Commissioner, Bareilly by his order dated 18.10.2006 had confirmed the demand of Rs. 22075/- under Rule 14 of the

Cenvat Credit Rules, 2004 read with Section 11A of the Central Excise Act, 1944 against the appellants which was raised vide show cause notice dated 28.10.2005 and had imposed penalty of equal amount under Rule 15 of the said rules and also had directed the appellant to pay interest on the amount due and payable under the said order.

2. Few facts relevant for the decision are that the appellants are engaged in manufacture of sugar and molasses classifiable under Chapter heading No. 1701 and 1703 of the Central Excise Tariff Act, 1985. The appellants availed cenvat credit to the tune of Rs. 22075/- during the period May 2005 to August 2005 on the items namely welding electrodes classifiable under heading 83.11, asbestos jointing sheets classifiable under sub-heading 68.05 and M.S. Plates as the capital goods. Disputing the claim of the appellants about entitlement to avail the cenvat credit in relation to the welding electrodes and asbestos jointing sheets, a show cause notice dated 28.10.2005 came to be issued to the appellants requiring the appellants to show cause as to why the credit to the tune of Rs. 22075/- in relation to the said items should not be disallowed and as to why the amount should not be recovered. The proceedings were contested by the appellants contending that the welding electrodes were the components and accessories of the capital goods as defined under Section 2(a)(A)(i) of the Cenvat Credit Rules, 2004 and were used for welding of various pipelines, equipments and machinery in the appellant's factory and were used in the process of replacing the worn out parts of the plant and machinery. As regards the asbestos jointing sheets it was contended that they were used for welding of various pipelines installed inside the factory and allowing flow of liquid during the process of manufacture from one equipment to another and further that without the use of this item it would not be feasible to carry on manufacturing smoothly inasmuch as that there would be leakage from the pipes and the

manufacturing process would be badly affected. The contention of the appellants were rejected and the assessing authority confirmed the demand as stated above. The appeal carried against the same did not yield fruitful results. Hence, the present appeal.

3. While assailing the impugned order, learned Chartered Accountant appearing for the appellants contended that the authorities below erred in ignoring the fact that the appellants had clearly established that welding electrodes were being used in the process of replacement of worn out parts of the plant and machinery in the factory of the appellants and consequently they become components or the parts of the machinery used for manufacturing process. He further submitted that the electrodes are used alongwith the welding machine for the process of fixing the parts of the machinery in the factory and in that sense they are the accessories of the welding machine. While the machinery is classifiable under Chapter sub-heading 84.38 the welding machines are classifiable under sub-heading 84.68. He placed reliance in the decision of the Rajasthan High Court in the matter of **Hindustan Zinc Limited vs. Union of India** reported in 2008 (228) ELT 517, unreported decision of the Tribunal in the matter of **Kissan Sahkari Chinni Mills Limited vs. CCE, Meerut-II** in Excise Appeal No. E/625/05 delivered on 3.11.2009 and **General Manager, Oswal Overseas Ltd., vs. CCE, Meerut** in Appeal No. E/1614/07-SM delivered on 19.01.2009, in support of his contention. As regards the asbestos jointing sheets, the learned C.A. submitted that they are the components and accessories of sugar mills machinery classifiable under sub-heading 84.38 and drawing my attention to the decision of the Tribunal in the matter of **KCP Sugar & Indus. Ltd., vs. CCE, Guntur** reported in 2004 (178) ELT 275 (Tri. Bang.) submitted that the point is well settled by the said decision and it is in favour of the assessee and the same was

totally ignored by the authorities below. For the above reasons, according to the learned C.A. the authorities below erred in disallowing the cenvat credit availed by the appellants in relation to the said items. He further submitted that since there were divergent views expressed by the Tribunal on the entitlement of the assessee to avail the cenvat credit in relation to the above items, the authorities below clearly erred in imposing penalty. Drawing my attention to the show cause notice, he further submitted that the same related to two items namely, welding electrodes and asbestos jointing sheets, however, the amount of credit which has been disallowed includes sum of Rs. 3350/- in relation to M.S. Plates. There was specific ground raised by the appellants in the appeal before the Commissioner (Appeals) in that regard and that is clearly reflected from the impugned order itself and the Commissioner (Appeals) failed to give any finding in that regard. According to learned C.A. there was therefore, no justification to deny the credit to the tune of Rs.3350/-, which was availed by the appellants in relation to the M.S. Plats, that was not the subject matter at all. For all reasons stated above, the impugned order needs to be set aside and credit availed by the appellants should be granted.

4. Learned Jt. CDR on the other hand, submitted that the authorities below after taking into consideration the materials on record have arrived at correct findings and the same do not warrant any interference by the Tribunal.

5. As regards the welding electrodes are concerned, it cannot be disputed that the appellants in their reply to the show cause notice had specifically claimed the same to be the capital goods falling under sub-clause (iii) of Rule 2(a)(A) of the Cenvat Credit Rules 2004 and it was specifically pleaded that the welding electrodes were being used for welding of various pipelines, equipments and machinery in the appellant's

factory and they were being used in the process of replacing worn out parts of the plant and machinery and in that sense they were used for repair and maintenance of plant and machinery. The use of welding electrodes for repairs and maintenance for the plant and machinery in the factory of the appellants evidently stands established and in fact there is no dispute on this aspect between the parties as is evident from the records. However, at the same time, the Commissioner (Appeals) on consideration of the materials on record has clearly arrived at finding of fact to the effect that the welding electrodes are used for the purpose of welding only and they are consumable items and lose their identity and existence on their use. I do not find any challenge to the said finding by the appellants. Indeed, neither it was argued that the finding being either contrary to the materials on record or being perverse, nor the memo of appeal discloses any challenge to the said finding. Once it is established that the item is a consumable item and it loses its, not only the identity but also the existence on its use, one fails to understand how can it still remain to be the item which could satisfy the ingredients of the definition of the term "capital goods".

6. The expression "capital goods" has been defined in Rule 2(a)(A) as the goods enumerated under item No. (i) to (vii). Under item No. (i) the same enlists of the goods falling under Chapter 82, Chapter 84, Chapter 85, Chapter 90, heading 6805, grinding wheels and the like and parts thereof falling under heading 6804 of the First Schedule to the Excise Tariff Act. Under item No. (iii) refers to components, spares and accessories of the goods specified at item No. (i) and (ii) of the said definition. It is with reference to this clause of the definition of the capital goods that the appellants claim welding electrodes to be the components and accessories of the goods specified at item No. (i) of the definition clause of the term

“capital good” under the said Rules. The Rules do not define the term components or accessories. In the absence of any definition of the said terms, it is permissible to refer to the dictionary meaning of the same. (Vide **Commissioner of Customs, Excise, Delhi vs. Allied Air-Conditioning Corpn. (Regd.)** reported in 2006 (202) ELT 209 (SC). The Webster Comprehensive Dictionary, International Edition defines the term components as “a constituent part” and as an adjective “serving or helping to constitute”. It is defined in Concise Oxford Dictionary Ninth Edition, as a noun as “a part of a larger whole”, and as an adjective as “being part of a larger whole”.

7. The term “accessory” has been defined in Concise Oxford Dictionary Ninth Edition, as a noun as “an additional or extra thing, a small attachment or fitting, a small item of dress”, and as an adjective as “additional, contributing or aiding in a minor way, dispensable”. The same term has been defined in Webster’s Dictionary as a noun as “a thing of secondary or subordinate importance, an object or device not essential in itself but adding to the beauty, convenience, or effectiveness of something else” and as an adjective it has been defined as “assisting as a subordinate, adding or contributing in consequential way, present in a minor amount and not essential as a constituent”. The Apex Court in **Commissioner of Central Excise, Delhi vs. Insulation Electrical (P) Ltd.**, reported in 2008 (224) ELT 512 (S.C.) held that ‘accessory’ is something supplementary or subordinate in nature and need not be essential for the actual functioning of the product. In **Allied Air-Conditioning Corpn. (Regd.)**, supra, it was held by the Apex Court that “aiding or contributing in secondary way of assisting in or contributing to as a subordinate is the essence on the basis of which it can be decided whether an article is an accessory or not”.

8. If one peruses the definition of the term "capital goods" as is found in the said rules under item No. 1, it refers to various goods and then it refers to pollution control equipment, moulds and dies, jigs and fixtures, refractories and refractory materials, tubes and pipes and fittings thereof and storage tank. The later portion of the definition clause which relates to the uses of such items, it provides that such items must be those which are used in the factory of the manufacturer of the final product but does not include any equipment or appliances used in a office or for providing output service.

9. In the case in hand, as already seen above, the authority below on analyses of all the materials on record in relation to the function and utility and use of the welding electrodes has come to a clear finding of fact that such product is a consumable product and the same loses its identity and existence on its use and indeed even in the course of the arguments on behalf of the appellants the learned Advocate fairly submitted that the welding electrodes are essentially used for fixing various parts of the machinery while replacing the worn out parts. In other words, the function or utility of the welding electrodes is restricted to fixing or the new components of the machinery, once the old components are found to be worn out or are found not fit for use. Obviously, in the process, the welding electrodes lose their identity as well as existence and they can neither be components nor the accessories, bearing in mind, the context in which the items are understood as the capital goods within the meaning of the said expression under the said Rules.

10. In Hindustan Zinc Limited case, the Hon'ble Rajasthan High Court undoubtedly was dealing with the issue as to whether welding electrodes used for repairs and maintenance of the plant and machinery were eligible

for cenvat credit both as capital goods as well as inputs. The High Court referred to the decision of the Apex Court in **Commissioner vs. Jawahar Mills Ltd.**, - 2001 (132) ELT 3 (SC), **J.K. Cotton Spinning and Weaving Mills Co. Ltd., vs. Sales Tax Officer** -1997 (91) ELT 34 (SC) as also to the decision of the Tribunal in the matter of **Jaypee Rewa Plant vs. Commissioner** -2003 (159) ELT 553 (Tribunal LB) while answering the issue in favour of the assessee.

11. Referring to the decision of the Apex Court in Jawahar Mills case, it was held in **Hindustan Zinc Limited** case that the Apex Court has held that the capital goods can be machines, machinery, plant, equipment, apparatus, tools or appliances and any of those goods if used for producing, or processing of any goods or for bringing about any change in any substance, for the manufacture of the final product, the same would be capital goods and would qualify for modvat credit. It is pertinent to note that the Rajasthan High Court was not dealing with a matter with reference to the definition of the term capital goods as is found in the Cenvat Credit Rules, 2004, but with reference to the point as to whether the products used for repairs and maintenance of plant and machinery were capital goods as well as inputs because they were used "in the manufacture of final goods". This is apparent from para 11 to 13 of the judgement in that case. The point in the case in hand is whether the welding electrodes can be said to be the capital goods within the meaning of the said expression under Cenvat Credit Rules, 2004. In Hindustan Zinc case the issue as to whether welding electrode used for repair of plant and machinery would be the capital goods or inputs was considered from the point of view as to whether the same is used in the process of manufacture of the final products based on the decision in **J.K. Cotton Spinning and Weaving Mills Co. Ltd., vs. Sales Tax Officer** reported as 1997 (91) ELT 34 (S.C.) which was a decision on the basis of the definition of the terms as was

found in the provisions of law in force at the time relevant for the said decision and which was not same or similar to the one found in the Cenvat Credit Rules 2004. In terms of the definition of the term "the capital goods" in the Cenvat Credit Rules, 2004, it is not necessary that the capital goods should be used for producing or processing of final goods or for bringing about any change in any substance for the manufacture of final product. Under the definition in the said Rules, what is required is that the capital goods must be those used in the factory of the manufacturer of the final product. Being so, the decision of the Rajasthan High Court in relation to the issue of capital goods is of no help to the appellants in the case in hand.

12. With reference to the issue relating to the inputs after referring to the J.K. Cotton Spg. & Wvg. Mills case and quoting a sentence from the decision of J.K. Cotton case to the effect that "there need not be ingredients or commodities used in the processes, nor must they be directly and actually needed for "turning out or the creation of goods", it was observed that "the expression 'in manufacture of goods' should normally encompass the entire process carried on by the dealer, of converting raw materials into finished goods, where any particular process, or activity, is so integrally connected with the ultimate production of the goods, but for that process, manufacturing or processing of the goods would be commercially inexpedient, goods required in that process would, fall within expression "in the manufacture of goods". Obviously, it was on the aspect as to whether the product was used in or in relation to the manufacture of final goods. That is not the point in issue in the case in hand. Undisputedly, the welding electrodes are claimed to be the accessories of the welding machine. Welding machine does not form part of the manufacturing machinery. It may be used in the process of repairs of that machinery. It

is not necessary to elaborately discuss this aspect. In this regard, suffice to refer to the decision of the Division Bench in the matter of **M/s Vikram Cement vs. CCE, Indore** in Excise Appeal No. 1466 of 2009 delivered on 23rd and 24th July 2009 by this Tribunal. The said decision gives complete answer to the point canvassed on behalf of the appellants in relation to the welding electrodes as to whether the same are the capital goods or not, within the meaning of the said expression in the said Rules and also as to why it cannot form part of the process of manufacturing of the final product. Being so, on both the aspects, the decision of the Rajasthan High Court in Hindustan Zinc case is of no help to the appellants.

13. The decision in Kisan Sahkari Chini Mills Ltd., case is also of no help in this regard. Para 9 of the said decision to which attention was drawn stated that "Plain reading of the relevant portion of the definition of the expression "capital goods" under rule 2(b) would disclose that it essentially refers to the items used in the factory of the manufacturer of the final product. Obviously, therefore, whenever a dispute arises as to whether particular items satisfies the criteria of being capital goods within the meaning of the said expression under the said provisions of law or not, it is necessary for the adjudicating authority to ascertain whether the item falls under the specified chapter heading and whether the same is used in the factory of the manufacturer". It was totally in a different context that the above observations were made. It was on a limited point as to whether the item was used in the factory or not. Being so, this decision and above observation can lend no assistance to the appellants in the matter in hand.

14. As regards the claim pertaining to the asbestos jointing sheets, undoubtedly, the appellants are justified in making grievance about the same. As rightly pointed out by the learned C.A. for the appellants, the issue in that regard is no longer res-integra and stands concluded pursuant to the decision of the Tribunal in KCP Sugar & Inds. Ltd., (supra). It was

clearly ruled therein that the asbestos packing/ compressed asbestos fibres used for preventing leakage in pipes and are to be considered as the components or integral parts of sugar machinery which falls under Chapter 84. Being so, the authorities below clearly erred in disallowing the cenvat credit availed by the appellants in relation to the asbestos jointing sheets. To that extent the impugned order need to be interfered with.

15. Learned C.A. for the appellants is also justified in contending that the authorities below totally ignored the fact that the amount of Rs. 22,075/- also included an amount of Rs. 3350/- in relation to the credit availed by the appellants pertaining to M.S. Plates and that was not the subject matter of proceedings before the adjudicating authority. Show cause notice nowhere referred to M.S. Plates and it was never disputed before the lower authority that the appellants were entitled to avail cenvat credit in relation to the said product. Obviously, the amount of Rs. 3350/- is liable to be deducted from the amount demanded under the impugned order.

16. Learned C.A. is also justified in contending that in the facts and circumstances of the case and more particularly in view of divergent views taken by the Tribunal during the relevant period on the issue as to whether the assessee would be entitled to avail the credit on the product in question or not, the adjudicating authority was not justified in imposing penalty. The penalty imposed therefore, needs to be quashed.

17. In the result, the appeal partly succeeds. The impugned order as far as the same disallows the credit in relation to asbestos jointing sheets cannot be sustained and to that extent is liable to be set aside, apart from deducting sum of Rs. 3350/- pertaining to the credit availed by the appellants on M.S. Plates from the total amount demanded under the

impugned order and quashing of the penalty. As regards the disallowance of credit in relation to the welding electrodes, no interference is called for. The impugned order, therefore, needs to be modified accordingly and do hereby stand modified in above terms.

18. The appeal accordingly is partly allowed in the above terms and stands disposed of.

(Justice R.M.S. Khandeparkar)
President

/Pant/