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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/2772/2007 – SM[BR]   Date 15/02/2010

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

To :
M/S BIRLA PLUS CEMENT
BEHIND- GHTP VILLAGE- LEHRA MOHABAT,
TEHSIL- RAMPURA PHUL DISTRICT- BATHINDA(PB)
151111

M/S BIRLA PLUS CEMENT   Appellant

Vs

C.C.E. LUDHIANA   Respondent

I am directed to transmit herewith a certified copy of **Final order No**. 213 / 2010 –SM[BR] dated 3.2.2010 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. LUDHIANA
CENTRAL EXCISE HOUSE, 'F' BLOCK, RISHI NAGAR, LUDHIANA 141001 (PUNJAB)
2. Adv. / Consult SHRI RAJEEV ARORA AUTHORISED SIN.
M/S APPELLANT;---------------------------

3 S.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 Commercial Laws of India Pvt Ltd. Post Bag No. 1033, No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
9 Raghuraman's 44-B. Regal Flat.Shipra Suncity. Indirapuram - 201010.Ghaziabad. DT. U.P.
10 M/s Manupatra Information Solutions Pvt Ltd. Excise & Customs Cases B-37, Sector - 1, Noida - 201301, Gautam Budh Nagar, (UP)
11 M/s. Deeparchie Publications. M-93. Marg. 46. Saket. New Delhi 110017
12 Taxindiaonline.com Pvt.Ltd. B-XI/8183.Vasant Kunj. New Delhi - 110070
13 Taxmann Allied Service Pvt Ltd., 21/35. West Punjabi Bagh. New Delhi - 110026
14 Easy Service Tax Online Dot Com Pvt.Ltd.407A.Iscon Mall.Above Star India Bazar.Satellite Road.Ahmedabad-15
15 LAWCRUX Advisors Pvt Ltd. LAW House.1-8.Sector - 10. Faridabad 121003 (Haryana)
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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-III

Date of hearing/decision: 3.2.2010

Central Excise Appeal No.2772 of 2007-SM

Arising out of the order in appeal No.128/CE/APPL/LDH/2007 dated 29.5.2007 passed by the Commissioner (Appeals), Central Excise, Jalandhar.

For Approval and Signature:

Hon'ble Mr. M. Veeraiyan, Member (Technical)

1	Whether Press Reporter 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 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?	Seen
4	Whether Order is to be circulated to the Departmental authorities?	Yes

M/s Birla Plus Cement ... Appellant

Vs.

C.C.E., Ludhiana ... Respondent

Appearance:

Shri Rajeev Arora, Authorised signatory for the appellant
Shri S.K. Bhaskar, Authorized Departmental Representative (JDR) for the Revenue

Coram: Hon'ble Shri M. Veeraiyan, Member (Technical)

Final Oral Order No. 213/2010, SM-(BR)

Per M. Veeraiyan:

This is an appeal against the order of the Commissioner (Appeals) No. 128/CE/APPL/LDH/2007 dated 29.5.2007.

2. Heard both sides.

3. The appellant had a closing stock of 5765.421 MTs. of cement lying in Silo on Budget day on 8.7.04. The education cess @ 2% of excise duty

became payable with effect from 9.7.04. The appellant paid excise duty including education cess in respect of the said closing stock as and when it was cleared and preferred a refund claim on 11.10.04 for a sum of Rs.46,123/- being education cess paid on pre-budget stock. The original authority vide order dated 30.3.2005 allowed the refund by way of credit in cenvat account. The Commissioner took up the matter on review and directed the Department to file appeal before Commissioner (Appeals). The Commissioner (Appeals) ordered that the refund amount be deposited into the Consumer Welfare Fund on the ground that the appellant has not proved that the burden was not passed on to the consumers.

4. Shri Rajeev Arora, authorised signatory of the appellant company submits that it is not in dispute that they are not liable to pay education cess for the pre-budget stock; they have maintained the same prices for the cement sold whey they were not paying education cess and when they were paying education cess. In view of the same, it should be held that the education cess component was borne by them out of their own profit and was not passed on to the consumers. He also relies on the Chartered Accountant Certificate which according to him, has not been challenged by the Commissioner (Appeals).

5. Learned DR reiterates the finding of the Commissioner (Appeals).

6. I have carefully considered the submissions from both sides and perused the records. On perusal of the invoices raised relating to the impugned goods, it is noticed that the invoices clearly indicate the education cess payable at 2% of excise duty. They also mention the basic value as inclusive of all excise duties. Merely because the prices prior to levy of education cess and those after levy of education cess remained the same, no presumption can be made that the duty burden has not been passed on to the consumers. Therefore, the Commissioner (Appeals) was right in applying the ratio of the decision of the Apex Court in the case of C.C.E., Mumbai II vs. Allied Photographic - 2004 (166) ELT 3 (SC) and coming to the

conclusion that in spite of uniformity of prices before and after the levy of education cess inasmuch as the appellants have indicated the education cess components, they are held to have passed on the duty burden. In view of clear evidence on the face of record, non-reliance on the Chartered Accountant's certificate by the Commissioner (Appeals) cannot be faulted.

7. Further, the disputed duty amount is only Rs.46,123/- which is less than the limit prescribed under proviso to Section 35B(1) of Central Excise Act, 1944.

8. In view of the above, I do not find any valid ground to interfere with the order of the Commissioner (Appeals). The appeal is therefore, rejected.

(M. Veeraiyan)
Member (Technical)

scd/