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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/2310/2007 – SM[BR] Date 06/09/2010

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

To :
M/S THE DHAMPUR SUGAR MILLS LTD
DHAMPUR(NR) DISTT- BIJNOR(UP)
246761

M/S THE DHAMPUR SUGAR MILLS LTD Appellant

Vs

C.C.E. MEERUT II Respondent

I am directed to transmit herewith a certified copy of **Final order No.** 951 /2010-SM[BR] dated 27.8.2010 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
   OPP. SAHEED PARK (NEAR ASHOK KI LAT) DELHI ROAD, MEERUT (UP)
2. Adv. / Consult
   SHRI BIPIN GARG ADV.
   B-1/1289-A, VASANT KUNJ NEW DELHI
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. 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. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
14. Office Copy
15. Guard file

Assistant Registrar
(SM Appeal Branch)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST BLOCK NO.II, R.K. PURAM, NEW DELHI-110066.
BENCH-SM

Date of Hearing/Decision:11.08.2010

Excise Appeal No.E/2310/07-SM

[Arising out of Order-in-Appeal No.65-CE/MRT-II/2007 dated 29.03.2007 passed by the Commissioner(Appeals0, Meerut-II].

M/s. The Dhampur Sugar Mills Ltd. ...Appellant

Vs.

CCE, Meerut-II ... Respondent

Present for the Appellant :Shri.Bipin Garg, Advocate
Present for the Respondent:Shri.Anil Khanna, SDR

Coram: HON'BLE MR. D.N. PANDA, JUDICIAL MEMBER

Final **ORDER NO.** 951/2010 SM(BR) **DATED:11.08.2010**

PER: D.N.PANDA

This appeal has been preferred by the appellant in view of the disallowance of Cenvat Credit by both the authorities below. According to the show cause notice, for the period from February 2005 to September, 2005, the appellant availed cenvat credit of Rs.2,49,772/- on two goods. One of the kind was H.R.Coil Plate & Section/Plate, Angle (falling under Sub-Heading No. 7208.31/ 7209.11) and the second category of goods was graphite Packing (falling under Sub-Heading No.6805.90. The show cause notice, no where stated as to how those two goods are not of the kind of capital goods. The conclusion in the show cause notice was that these two goods do not qualify to the definition of capital goods and without any reason stated in the show cause notice. When such is the fact to initiate the proceeding against the appellant, the appellant explained on various items which were appearing in Annexure to show cause notice.

2. The show cause notice failed to speak anything about the nature of goods, its uses and its classification on the body of it. But the appellant explained on each and every item of the Annexure to show cause notice submitting that when those goods are either components, spares or accessories supporting the capital goods of the class as defined by Rule 2 (a) (i) of the Cenvat Credit Rules, 2004, cenvat credit is undeniable. Ld. Adjudicating Authority dealt the items in para 6 of order of Adjudication.

3. It appears that H.R. Coil was not subject matter of show cause notice except the figure appearing in show cause notice as 7208.11. Learned Adjudicating Authority examined angles which according to him fall in the family of Chapter 72. He further went on to examine the graphic packing which was subject matter of show cause notice. He also examined packing AMP 031, 032 and Smart PTFE/Graphite Fibre in para 7 and was of the opinion that cenvat credit is not admissible to the assessee under the class of capital goods. No where in para 7, he could demonstrate that he has considered pleadings of the assessee made in the reply to show cause notice. He

examined the packing item in para 8. It was recorded that the appellant did not produce any document to prove that duty on these products was paid. He went through the definition of capital goods and came to the conclusion that disallowance is justified. So far as the graphite packing is concerned, appellant submitted in its reply to show cause notice that the use of said goods as part of the fermenter, Yeast Propagation Vessels, Pre Fermenter main Hole flange connection and connecting pipe line network of yeast propagation vessels to pre-Fermenter. So many technicalities were raised by the appellant. But none of them were put into test by Technical experts.

4. When the fate of the adjudication order was as above, the appellant went before the learned Appellate Authority, who examined the items in para 6 of the order. He proceeded to find out the meaning of component, spare, and accessories in page 4 of the appellate order. But he has also failed to examine the pleading of the appellant. Unless pleading of the appellant are tested on the touch stone of law, the appellant is said to have been denied justice. When the show cause notice did not speak anything about the nature how the alleged goods shall not be called as capital goods, the ld. Appellate Authority cannot travel beyond the scope of show cause notice to concur with the ld. Adjudicating Authority.

5. When the factual matrix was as above, ld. Counsel appearing today submitted that his pleading is supported by

the decision of the Tribunal in the case of L.H. Sugar Factories Ltd. vs. CCE, Meerut reported in 2010 (251) ELT 135 (Tri.-Del.) & Sarjoo Sahkari Chini Mills Ltd. vs. CCE, Lucknow reported in 2009 (248) ELT 559 (Tri.- Del.)

6. He also relies on the judgement of the Hon'ble High Court of Rajasthan in the case of Union of India vs. Hindustan Zinc Ltd. reported in 2007 (214) ELT 510 (Raj.) which was affirmed by Hon'ble Supreme Court dismissing the appeal filed by Union of India in CU 8147/06. Hon'ble High Court in para 3 & 4 of the judgement held as under:-

> ***3.*** *This Court concluded that goods once brought in factory for use in up-keep and maintenance of plant and machinery, which are directly used in manufacture of excisable articles, are the capital goods, and were certainly of subordinate necessity to such plant and machinery for the running of plant and is otherwise essential for its smooth and regular operations. Without proper up-keep and maintenance, the principal plant and machinery cannot function properly. Use of such capital goods is essential for smooth running of plant with greater efficiency. In other words, the goods in question are essential supplement to the plant and machinery for use in manufacturing goods, for its greater efficiency and better results and thus, it is an integral part of the process with which the primary machines are engaged. Looked from these aspects, there is no impediment for the goods in question qualifying as capital goods eligible for Modvat credit.*
>
> ***4.*** *Consequently, such goods which are necessary for running of plant and up-keeping of the*

machinery directly involved in the manufacturing and products were held to be eligible to avail Modvat credit.

7. Ld. Counsel, therefore, prays that the appeal may be allowed, since the decision of the Hon'ble High Court of Rajasthan has dealt the matter in great length with the conclusion that the goods once brought to factory for use in up-keep and maintenance of plant and machinery which are directly used in manufacture of excisable articles, are the capital goods. Accordingly, prayer of the appellant is that the impugned order be set aside and necessary relief allowing cenvat credit may be made admissible.

8. Ld. DR opposes entire contention of the appellant on the ground that thread-bare examination of every item was done by the adjudicating authority and what that was done at the adjudication stage was also tested in the appellate stage. According to Revenue, ld. Appellate Authority came to conclusion that goods in question do not qualify the capital goods, since those were neither components nor spares or accessories of capital goods.

9. Heard both sides and perused the records.

10. The factual matrix that comes out from record is depicted here in before. It appears that a casual show cause notice was issued without depicting the cause against the proposed action. When the show cause notice looses its

foundation to bring the appellant to the proper charge under the law, the proceeding shall be ill-founded. When the show cause notice did not assign the reason as to why the proposed proceeding has been initiated, a bald statement therein does not meet the end of justice. No doubt, the authorities have examined various items but they have travelled beyond the scope of show cause notice. If the noticee is not brought to charges, he should never face charges by any order passed beyond show cause notice. What that was not a cause cannot be converted into a cause in adjudication order or an appellate order.

11. Ld. Counsel's reliance on the ratio of the decision in Hindustan Zinc Ltd. reported in 2007 (214) ELT 510 (Raj) deserves consideration when decision of the Hon'ble High Court of Rajasthan has been affirmed in Civil Appeal No.CC8147/06 and became law under Article 141 of the Constitution. Accordingly, the ratio laid down in para 3 & 4 of the judgement in so far as that may be applicable to the present case cannot be lost sight of.

12. In view of peculiar circumstances cited above, it is made clear to both sides that on the basis of governing facts and attending circumstances; this order has been passed against an ill-founded proceeding. With these words, appeal is allowed.

[Dictated & Pronounced in the open Court].

(D.N.PANDA)
JUDICIAL MEMBER

Anita