1470 - 471/2010

TELEGRAM : CEGCANAL
Website : www.cestat.gov.in

REGISTERED / AD
Email : delhi@cestat.gov.in

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/859 - 860 /2010 – SM [BR] Date 05/10/2010

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

To :
M/S ATUL GENERATORS PVT. LTD.
NUNHAI , AGRA.

M/S ATUL GENERATORS PVT. LTD. Appellant
Vs
C.C.E. KANPUR Respondent

I am directed to transmit herewith a certified copy of **Final order** No.1102 – 1103 /2010-SM[BR] dated 27.9.2010 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. KANPUR
   117/7, SARVODAYA NAGAR, KANPUR 208005.
2. Adv. / Consult
   MR.BIPIN GARG
   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)

श्री· SH. RAM SARAN MITTAL, DIRECTOR OF
M/S ATUL GENERATORS PVT. LTD. NUNHAI , AGRA.

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH - COURT NO. 1

Excise Appeal Nos. 859-860 of 2010-SM

(Arising out of Order-in-Appeal No. 354/355-CE/APPL/KNP/2009 dated 15.12.2009 passed by the Commissioner (Appeals) Central Excise, Kanpur).

DATE OF HEARING : 27.09.2010
DATE OF DECISION : 27.09.2010

FOR APPROVAL AND SIGNATURE :

HON'BLE MR. 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 ?	No.
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 Atul Generators Pvt. Ltd. .... **Appellants**
Shri Ram Saran Mittal (Rep by Sh Bipin Garg, Adv.)

VERSUS

CCE, Kanpur .... **Respondent**
(Rep by Sh. R.K. Gupta, DR)

CORAM : **HON'BLE MR. JUSTICE RMS KHANDEPARKAR, PRESIDENT**

Final **ORAL ORDER.** 1102-1103/2010 SM(BR)

PER SHRI JUSTICE R.M.S. KHANDEPARKAR :

Heard the learned advocate for the appellants and the Departmental Representative for the respondent.

2. Both the appeals arise from order dated 15th December, 2009 passed by the Commissioner (Appeals), Kanpur. By the impugned order, the appeals filed by the appellants against the adjudicating order dated 22nd July, 2009 have been dismissed.

3. Though the impugned order is sought to be challenged on various grounds, it is not necessary to address to all those grounds. Suffice to refer to only one ground which, apparently, discloses total non-application of mind by the Commissioner (Appeals) while disposing of the appeals filed by the appellants.

4. The adjudicating authority by its order dated 22nd July, 2009 disallowed the Cenvat Credit upto Service Tax and ordered recovery of Rs. 5,07,564/- along with interest and equal amount of penalty, besides penalty of Rs. 1,50,000/- upon the Director of M/s Atul Generators (P) Ltd.

5. The contention of the Department was that, the appellants had wrongly availed the Cenvat Credit, whereas it was the defence of the appellants that whatever amount stated to have been wrongly availed as Cenvat Credit has already been reversed by the appellants. The adjudicating authority thereupon passed the said order dated 22nd July, 2009 which reads thus :

> **"I have carefully gone through the records, brief facts of the case, allegation contained in the show cause notice, defence reply and record of personal hearing held on 29.08.2008. And I find that the following issues in the case are to be decided on merits.**

1. Whether inadmissible Cenvat credit of service tax amounting to Rs. 5,07,564/- is liable to be recovered from the party under rule 14 of Cenvat credit Rules, 2004 read with Section 11A(1) of the Central Excise Act, 1944 by way of invoking the extended period.

2. Whether interest is liable to be recovered from the party under rule 14 of Cenvat Credit Rules, 2004 read with provisions of Section 11AB of the Central Excise Act, 1944.

3. Whether penalty equal to the amount of Service tax credit wrongly availed and utilized; is liable to be imposed under rule 15(2) of the Cenvat Credit Rules, 2004 read with Section 11AC of Central Excise Act, 1944.

At the outset, I find that the party had taken the credit of service tax paid on transportation of CNG up to unit through pipe line which was used by them for production of electricity which was not only used in the manufacture of final products but also was sold out to other units.

In this regard, the party has contended that in compliance of the letter issued by the Assistant Commissioner, Central Excise, Agra, pertaining to audit objection on input service of transportation of gas through pipeline, they debited the amount of Rs. 8,05,675/- of service tax and Rs. 16145/- Edu. Cess vide RG23A Pt. II entry No. 358 dated 18.12.2007. This contention of the party is not tenable in as much as the amount debited by the party relates to the audit objection in respect of M/s Atul Engg. Udyog to whom Electricity was sold and audit objected to availment of Cenvat credit as electricity generated is subjected to Nil rate of duty whereas the party has sold out electricity to their other units also i.e. M/s Atul Rail Equipments Co., Agra, M/s Atul Pumps Pvt. Ltd., Agra and M/s Atul Gases, Agra.

In the instant case the involved is that the party has availed and utilized Cenvat Credit of the service tax paid on transportation CNG which was used by them for the production of electricity which was not only used in the manufacture of final product but sold out to other units. Therefore, the party was not entitled to avail and utilize the credit of service tax paid on transportation of CNG which was used for production of Electricity sold out to other units. Therefore, I find that the amount of Rs. 5,07,564/- as demanded in the show cause notice is recoverable from the party under Rule 14 of Cenvat Credit Rules, 2004.

Further party's contention that allegation of suppression of facts is not correct as the noticee was availing of the benefit in good faith and under genuine belief to entitlement to Cenvat credit and audit authorities raised their objection based on records and there is nothing that department discovered or audit objected to beyond what was already recorded is also not tenable in as much the fact of sale of electricity to other unit was never disclosed to the department. As regard audit objection based on record, the same was pointed out in the unit of M/s Atul Engg. Udyog not in the unit of M/s Atul Generators (P) Ltd., Nunhai, Agra. Therefore, it is not correct to say that nothing has been suppressed.

I further observe that the party deliberately and knowingly suppressed the material fact from the department with a malafide intention to avail inadmissible credit and to mis-utilize the same to defraud the govt.'s legitimate revenue, hence to recover the inadmissible credit, extended period of limitation under Section 11A(1) of Central Excise Act has rightly been invoked.

Accordingly I hold that credit of Rs. 5,07,564/- wrongly availed and utilized by the party on account of service tax paid on transportation of CNG used in the manufacture of electricity which was sold out to other units is inadmissible and is liable to be recovered under Rule 14 of Cenvat Credit Rules, 2004 read with Section 11A(1) of Central Excise Act, 1944. The party is also liable to pay interest under Section 11AB of the Central Excise Act, 1944.

As far as imposition of penalty is concerned, I observe that the party have deliberately suppressed the material facts and intentionally taken the inadmissible credit of Rs. 5,07,564/- though they knew that they were not entitled to avail and utilize the credit of service tax paid on transportation of CNG used in the production of electricity sold out to other units. Therefore, I hold that they are liable to penal action under Rule 15*2) of Cenvat Credit Rules, 1994 read with Section 11AC of Central Excise Act, 1944.

As regards imposition of personal penalty upon Shri Ram Saran Mittal, Director of M/s Atul Generators (P) Ltd., Nunhai, Agra under rule 26 of Central Excise Rules, 2992, I observe that being Director of the firm, Shri Ram Saran Mittal suppressed the facts from the Department with an intent to wrong availment of service tax credit. This, I hold that he has rendered himself liable to penal action under rule 26 of Central Excise Rules, 2002.

I also find that the cases referred to by the party in their defence reply are not applicable in the present case in as much he facts and circumstances of the instant case are different than that of the cases referred to by them.

Accordingly, I pass the following order –

i) I order to recover the Cenvat Credit of service tax of Rs. 5,07,564/- under rule 14 of Cenvat Credit Rules, 2004 read with Section 11A(1) of Central Excise Act, 1944.

ii) I order for recovery of interest from the party under rule 14 of Cenvat Credit Rules, 2004 read with Section 11AB of Central Excise Act, 1944.

iii) I impose a penalty of Rs. 5,07,564/- upon M/s Atul Generators (P) Ltd., Nunbai, Agra, under rule 15(2) of Cenvat Credit Rules, 2004 read with Section 11AC of Central Excise Act, 1944.

iv) I impose personal penalty of Rs. 1,50,000/- upon Shri Ram Saran Mittal, Director of M/s Atul Generators (P) Ltd., Nunbai, Agra, under Rule 26 of Central Excise Rules, 2002."

6. Being aggrieved, the appellants carried the matter in appeal raising various issues including the absence of material to invoke the extended period of limitation, non-consideration of the fact that the appellants had, in fact, reversed the credit of an amount more that what was demanded under the impugned order etc. The Commissioner (Appeals), however, disposed of the matter holding thus :

"For speedy disposal of appeal, I take up the stay application/delay condonation along with appeal together. I have carefully gone through the records, brief facts of the case, allegation contained in the show cause notice, defence reply and I find that the following issues in the case are to be decided on merits :

1. Whether inadmissible Cenvat credit of service tax amounting to Rs. 507564/- is liable to be recovered from the appellant under rule 14 of Cenvat credit Rules, 2004 read with Section 11A(1) of the Central Excise Act, 1944 by way of invoking the extended period.

2. Whether interest is liable to be recovered from the appellant under rule 14 of the Cenvat Credit Rules, 2004 read with Section 11AB of the Central Excise Act, 1944.

3. Whether penalty equal to the amount of Service tax credit wrongly availed and utilized; is liable to be imposed under rule 15(2) Cenvat Credit Rules, 2004 read with Section 11AC of the Central Excise Act, 1944.

As regards point no. (1), I find that the party had taken the credit of service tax paid on transportation of CNG up to unit through pipe line which was used by them for production of electricity which was not only used in the manufacture of final products but also was sold out to other units.

In this regard, the party has contended that in compliance of the letter issued by the Assistant Commissioner, Central Excise, Agra, pertaining to audit objection on input service of transportation of gas through pipeline, they debited the amount of Rs. 8,05,675/- of service tax and Rs. 16145/- (Ed. Cess) vide RG23A Pt. II entry No. 358 dated 18.12.2007. This contention of the party is not tenable in as much as the amount debited by the party relates to the audit objection in respect of M/s Atul Engg. Udyog to whom Electricity was sold and audit objected to availment of Cenvat credit as electricity generated is subjected to Nil rate of duty whereas the appellant has sold out electricity to their other units also i.e. M/s Atul Rail Equipments Co., Agra, M/s Atul Pumps Pvt. Ltd., Agra and M/s Atul Gases, Agra.

In the instant case the issue is that the party has availed and utilized Cenvat Credit of the service tax paid on transportation CNG which was used by them for the production of electricity which was not only used in the manufacture of final product but sold out to other units. Therefore, the appellant was not entitled to avail and utilize the credit of service tax paid on transportation of CNG which was used for production of Electricity sold out to other units. Therefore, I find that the amount of Rs. 507564/- as demanded in the show cause notice is recoverable from the party under Rule 14 of Cenvat Credit Rules, 2004.

Further appellant's contention that allegation of suppression of facts does not appear to be correct as the appellant was availing of the benefit in good faith and under genuine belief to entitlement of Cenvat credit.. As regard audit objection based on record, the same was pointed out in the unit of M/s Atul Engg. Udyog not in the unit of M/s Atul Generators (P) Ltd., Nunhai, Agra. Therefore, it is not correct to say that nothing has been suppressed.

I further observe that the appellant has deliberately and knowingly suppressed the material fact from the department with a malafide intention to avail inadmissible credit and to mis-utilize the same to defraud the govt.'s legitimate revenue, hence to recover the inadmissible credit, extended period of limitation under Section 11A(1) of Central Excise Act has rightly been invoked.

Accordingly I hold that credit of Rs. 5,07,564/- wrongly availed and utilized by the appellant on account of service tax paid on transportation of CNG used in the manufacture of electricity which was sold out to other units is inadmissible and is liable to be recovered under Rule 14 of Cenvat Credit Rules, 2004 read with Section 11A(1) of Central Excise Act, 1944. The party is also liable to pay interest under Section 11AB of the Central Excise Act, 1944.

As far as imposition of penalty is concerned, I observe that the appellant has deliberately suppressed the material facts and intentionally taken the inadmissible credit of Rs. 5,07,564/- though they knew that they were not entitled to avail and utilize the credit of service tax paid on transportation of CNG used in the production of electricity sold out to other units. Therefore, I hold that they are liable to penal action under Rule 15(2) Cenvat Credit Rules, 1994 read with Section 11AC of Central Excise Act, 1944.

As regards imposition of personal penalty upon Shri Ram Saran Mittal, Director of M/s Atul Generators (P) Ltd., Nunhai, Agra under rule 26 of Central Excise Rules, 2002, I observe that being Director of the firm, Shri Ram Saran Mittal suppressed the facts from the Department with an intent to wrong availment of service tax credit. Thus, I hold that he has rendered himself liable to penal action under rule 26 of Central Excise Rules, 2002.

I also find that the cases referred to by the party in their defence reply were not applicable in the present case in as much the facts and circumstances of the instant case are different than that of the cases referred to by them.

Accordingly, I uphold the order-in-original and reject the appeal in toto."

7. Bare perusal of the discussion and findings by the Commissioner (Appeals), quoted above, and comparing the same with the discussion and findings of the adjudicating authority, quoted above, would, apparently, disclose that the Commissioner (Appeals) has merely verbatim copied the discussion and findings of the adjudicating authority. There is no independent discussion of the issues involved with reference to the facts of the case. The appellate authority is expected to go through the records and consider the points canvassed with reference to the facts of the case and the law applicable thereto. Such an exercise should be reflected in the discussion and findings of the order passed by the appellate authority. The impugned order nowhere discloses any such exercise by the lower appellate authority. On this ground alone, which, apparently, discloses total non-application of mind by the lower appellate authority to the matter in hand, the impugned order is unsustainable and, therefore, the appeals are hereby allowed. The impugned order is hereby quashed and the matters remanded to the lower appellate authority to consider the appeals filed by the appellants

afresh in accordance with the provisions of law and bearing in mind the observations made hereinabove.

(JUSTICE R.M.S. KHANDEPARKAR)
PRESIDENT

Golay