

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

Appeal No. E/1809/2005 - EX[DB], E/567/2007-EX
E/2459/2007 & E/1734/2009-EX

Date 31/03/2010

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

To :
M/S ABC PAPER
SCO 18-19 FIRST FLOOR SECTOR 8-C, MADHYA
MARG CHANDIGARH
160009

M/S ABC PAPER

C.C.E. JALLANDHAR(HQ. AT CHANDIGARH)

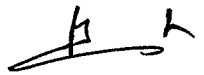
Appellant

Vs

Respondent

I am directed to transmit herewith a certified copy of Final order No. 126-129/
passed by the Tribunal under Section 35-C(1) of Central Excises Act, 1944

2010 EX[DB] dated 02-2-10


Assistant Registrar
(Excise Appeal Branch)

Copy to :

1. Respondent

C.C.E. JALLANDHAR(HQ. AT CHANDIGARH)

C.R.BUILDING, PLOT NO. 19, SECTOR 17-C, CHANDIGARH.

2. Adv. / Consult

MR.C.HARISHANKAR

46, BANK ENCLAVE, DELHI-110092

3 C.D.R

~~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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18. HON'BLE PRESIDENT


Assistant Registrar
(Excise Appeal Branch)

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

Date of hearing: 02.02.2010
Date of decision: 03.02.2010

For approval and signature:

Hon'ble Shri Justice R.M.S. Khandeparkar, President
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.	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?	Seen
4	Whether Order is to be circulated to the Departmental authorities?	Yes

1. Excise Appeal No. 1809 of 2005

[Arising out of Order-in-original No. 06/CE/JAL/2005 dated 31.01.2005 passed by the Commissioner of Central Excise, Jalandhar]

2. Excise Appeal No. 567 of 2007

[Arising out of Order-in-original No. 90/CE/JAL/2005 dated 30.11.2006 passed by the Commissioner of Central Excise, Jalandhar]

3. Excise Appeal No. 2459 of 2007

[Arising out of Order-in-original No. 36/CE/JAL/2005 dated 29.05.2007 passed by the Commissioner of Central Excise, Jalandhar]

4. Excise Appeal No. 1734 of 2009

[Arising out of Order-in-original No. 72/CE/JAL/2008 dated 22.12.2008 passed by the Commissioner of Central Excise, Chandigarh]

M/s ABC Paper

Appellants

Vs.

CCE, Jalandhar

Respondent

Rep. by Sh. C. Hari Shankar, Sh. S. Sunil & Sh. Pushkar K. Singh, Advocates for the appellants.

Rep. by Shri Sunil Kumar, SDR for the respondent.

Coram: Hon'ble Shri Justice R.M.S. Khandeparkar, President
Hon'ble Shri Rakesh Kumar, Member (Technical)

FINAL Oral Order 126-129/10-ER

Per Shri Justice R.M.S. Khandeparkar:

Since common questions of law and facts arise in all these four appeals, they were heard together and are being disposed of by this common order.

2. Heard the learned Advocate for the appellants and learned DR for the respondent.

3. In all these matters the cenvat credit in relation to the inputs utilized in the final goods having been disallowed, the appellants have been directed to pay 8% of the price of the exempted goods. In Excise Appeal No. 1809 of 2005, on adjudication of the show cause notice dated 31.05.2004 for the period May 2003 to March 2004, the appellants have been directed to pay the amount of Rs. 1,26,59,970/- in addition to penalty of Rs. 1 lakh. In Excise Appeal No. 567 of 2007, on adjudication of the show cause notices dated 17.05.2005 and 24.02.2006 for the period February 2001 to March 2005, the appellants have been directed to pay sum of Rs. 2,07,68,019/-. In Excise Appeal No. 2459 of 2007, on adjudication of show cause notice dated 6.10.2006 for the period September 2005 to March 2006, the appellants have been directed to pay sum of Rs. 1,26,38,651/- besides imposition of the penalty amount of Rs. 25 lacs. In Excise Appeal No. 1734 of 2009, on adjudication of the show cause notice dated 6.12.2007 for the period from November 2006 to August 2007, the appellants have been directed to pay sum of Rs. 1,52,59,729/- besides the penalty of Rs. 30 lacs.

4. The appellants herein are the manufacturers of News Print and Writing & Printing Paper classifiable under Chapter 48 of the First Schedule to the Central Excise Tariff Act, 1985. They were engaged in manufacture of writing & printing paper classifiable under Chapter sub-heading No. 4802.10 attracting nil rate of duty as well as writing & printing paper classifiable under Chapter sub-heading

4802.90 being subject to payment of duty. The show cause notices came to be issued to the appellants on the ground that the appellants were not maintaining separate accounts of the inputs which were used in the manufacture of the two varieties of the papers, and on adjudication thereof, the said orders came to be passed as stated above.

5. It is the case of the Department that the accounts maintained by the appellants were neither verifiable nor co-relatable and, therefore, there was no compliance of the requirements of provision of law comprised under Cenvat Credit Rules. On the other hand, it is the case of the appellants that apart from storing separately the inputs to be used in the manufacture of dutiable and non-dutiable final products, except for four items, separate accounts were maintained and in relation to those four items, the credit taken thereon was only for Rs.10,603/- for the relevant period. In Appeal No. 1809 of 2006, it is the case of the appellants that the account maintained was clearly verifiable and co-relatable.

6. The Commissioner after analyzing the facts of the case and applying the law comprised under the Cenvat Credit Rules held that once the appellants had opted to avail cenvat credit on inputs used in dutiable goods and to keep separate accounts for cenvated and non-cenvated inputs showing receipts, consumption and inventory of inputs but undisputedly having reversed the credit on proportionate basis when the product manufactured was not satisfying the requirement of Rule 6, there was clear infraction of the provision of law which disentitled the appellants to avail cenvat credit and, therefore, they were liable to pay the amount as determined under the impugned orders. It was also observed that the appellants failed to produce documentary evidence of maintenance of separate accounts in relation to wire & felts, oil, greases and lubricants inspite of the fact that undisputedly they were common inputs for dutiable as well as non-dutiable final products. The Commissioner also held that it is not in dispute that at any given point of time only one variety of paper could be manufactured, and it cannot be

ascertained whether cenvated or non-cenvated inputs have been used for the dutiable or exempted final product since the process of manufacturing both type of products is a continuous and integrated one. Further, undisputedly reversal of the credit in relation to the inputs consumed in the manufacture of exempted goods clearly disclose knowledge to the appellants about inability to maintain separate accounts in respect of receipt, consumption and inventory of cenvated and non-cenvated inputs and it further discloses that the so-called separate accounts were prepared merely on assumptions and not on the basis of any factual data.

7. Learned Advocate appearing on behalf of the appellants submitted that the case of the appellants is fully covered by the decision of the Bombay High Court in the matter of **CCE&C, Aurangabad vs. Concept Pharmaceuticals Limited** reported in 2008 (225) ELT 181 (Bom.) and clearly distinguishable from the decision of the Bombay High Court in the matter of **CCE, Thane-I vs. Nicholas Piramal (India) Limited** reported in 2009 (244) ELT 321 (Bom.). He also placed reliance in the decision of the Gujarat High Court in the matter of **CCE, Ahmedabad-II vs. Maize Products** reported in 2009 (234) ELT 431 (Guj.), while contending that the Gujarat High Court has approved the decision of the Tribunal in the matter of **Maize Products vs. CCE-II, Ahmedabad** reported in 2007 (79) RLT 662. While contending that in Nicholas Piramel case, there was a clear infraction of Rule 6(2)(i) of the Cenvat Credit Rules as there was no separate accounts maintained therein in relation to the inputs used in the manufacture of dutiable and non-dutiable final products, which is not the case in the matter in hand, he submitted that the appellants have fulfilled both the conditions of Rule 6(2) inasmuch as that the appellants had maintained separate accounts in respect of the inputs used for two different types of final products and had also reversed the credit attributable to the transferred category of the cenvated inputs for manufacture of final product even before being put into such use which clearly disclose that the appellants had not availed any cenvat credit in respect of the inputs used in manufacture of non dutiable products. As far as wire & felts, oil,

greases and lubricants are concerned, referring to the decision of the Punjab and Haryana High Court in **CCE, Chandigarh vs. Zenith Papers** reported 2002 (146) ELT 518 (P&H), it was sought to be argued that they are not inputs but the capital goods and a total credit relatable to those items was merely Rs.10,503/- besides being entirely reversed by the appellants. Attention was also sought to be drawn to the decision of the Tribunal in the matter of **CCE, Mumbai-VI vs. Philips India Ltd.**, reported in 2006 (200) ELT 106 (Tri. Mumbai). Learned Advocate also submitted written submissions under the caption "a broad overview".

8. Learned Advocate referring to the appeal No. 567 of 2007 submitted that the Department had issued show cause notice dated 31.05.2004 for a period from May 2003 to March 2004 which was already sought to be adjudicated upon and it was thereafter that the show cause notice dated 24.02.2006 was issued in relation to the preceding period namely February 2001 to April 2003 which was clearly not permissible in view of the decision of the Apex Court in the matter of **Nizam Sugar Factory vs. CCE, A.P.** reported in 2006 (197) ELT 465 (S.C), **ECE Industries Limited vs. CCE, New Delhi** reported in 2004 (164) ELT 236. It is the contention of the learned Advocate that the factual basis on which the show cause notice dated 24.02.2006 was issued were within the knowledge of the Department as long back as in May 2004 and, therefore, there was no case for invocation of extended period of limitation nor for issuing separate show cause notice after issuance of show cause notice dated 31.05.2004.

9. Learned DR on the other hand, drawing our attention to the impugned orders and the statement of Shri Ashok Kumar, Deputy General Manager (Finance) of the appellants company, submitted that the factual basis on which the show cause notices were issued in the matter were clearly corroborated by clear admission of the authorised signatory of the appellants company itself inasmuch as that the failure on the part of the appellants to maintain separate account in relation to the cenvated and non-cenvated inputs according to their consumption in the

final products was not only clearly admitted but was established by documentary proof. Drawing our attention to the said statement and analysis thereof in the impugned order and further findings arrived at by the Commissioner, the learned DR submitted that the analysis and the findings clearly reveal that different varieties of papers when they are manufactured in the appellants factory, the inputs used in the process cannot be differentiated exactly as to which part thereof is utilised for manufacture of dutiable and which part thereof is used for non-dutiable final products. Indeed some of questions and answers of the authorised signatory of the appellants company clearly reveal absence of substance in the case of the appellants. The relevant questions and answers are as under:-

"Question-18. There are four tanks for storage of caustic soda lye which are interconnected to each other. It has been observed that there is no such marking on the said tanks as to which contains cenvated caustic soda lye and which contains non-cenvated caustic soda lye. Do you agree?

Answer. It is correct that we have four storage tanks for storage of caustic lye which are interconnected by valves. We have internally earmarked the said tanks for storage of cenvated and non-cenvated caustic soda lye. However, there is no such marking on the said tanks displaying cenvated caustic soda lye. However, there is no such marking on the said tanks displaying cenvated caustic soda lye and that showing non-cenvated caustic soda lye.

Question -19. Suppose only one variety of paper is being manufacture for a continuous period, whether the tank earmarked for other variety will remain empty?

Answer. I state that our production of exempted variety of paper is not regular. As such the tank, meant for non-cenvated inputs can be used for cenvated inputs depending upon the required product.

Question-20. It is practically possible at any given time to determine as to whether cenvated caustic soda lye is being used for non-cenvated caustic soda lye is being consumed?

Answer. As already stated whenever different varieties are to be manufactured, since the process time is known, the inputs are put to process accordingly. However, it may not be differentiated exactly as there may be

over looping of cenvated and non-cenvated inputs which all be very negligible. The same situation all cenvat again when there is change in the variety of paper.

Question-21. It is observed that writing and printing paper meant for use in the printing of educational text books is not different from the writing and printing paper being cleared on payment of duty. At what stage differentiation is made?

Answer- Though the paper is same but the paper meant for education text books has water mark inscribed on it at the paper machine which is not marked on the other paper.

Question -22. Is not it a fact that your claim for maintenance of accounts of receipt, consumption and inventory of inputs is not actual but based on assumptions?

Answer- It is a fact that we maintain separate accounts of receipt, consumption and inventory of inputs. On receiving order for manufacture and supply of exempted variety of paper, we plan and procure the inputs on which we do not avail credit and mark the input invoices on receipt of the material with the remark. "For Exempted Variety of Paper". However, during process, in case of any shortage of material which is not available in the account of non-cenvated inputs, the required quantity of inputs is taken from the cenvated account and proportionate credit is reversed".

10. The above statements of the appellants' representative clearly disclose that some of the inputs used for manufacture of non dutiable final product were not stored separately. Even as the process of manufacturing goes on, it is a continuous process of manufacturing of exempted as well as dutiable final products and in such a process, it is the case of the appellants representative himself that they face difficulty in maintaining separate account as regards the consumption of inputs in dutiable and non-dutiable final products. This clearly lends support to the case putforth by the Department that the so-called separate account of cenvated and non-cenvated inputs had been prepared merely on assumptions and not on the basis of factual data. If we peruse the Cenvat Credit Rules, particularly sub-rule

(2) and (3) of Rule 6, the manufacturer is required to maintain a proper account of the inputs to be utilized in dutiable and non-dutiable final product. It is true, that there is no format prescribed for the same. However, the provisions of law apparently disclose that a proper account of the inputs to be utilized in the manufacture of exempted and non-exempted final products is required to be maintained for the purpose of verification thereof by the Department so that Department is able to co-relate the inputs received with the claim of cenvat credit to the final product which is not exempted from payment of duty and in the same manner, the inputs utilised in relation to the exempted final product. Neither in the reply filed by the appellants to the show cause notice nor in the process of adjudication, there was even an attempt by the appellants in that regard to establish such co-relation on the basis of the accounts stated to have been maintained by the appellants. On the contrary, the factum of reversal of the credit in relation to some of the inputs utilised in the manufacture of exempted goods and corresponding entries in that regard in account clearly disclose that the appellants were not able to maintain separate account in relation to the inputs utilized for manufacture of dutiable final products from that of exempted final products. The Commissioner on analysis of the provisions of law has rightly observed that the Cenvat Credit Rules give three options to the manufacturer engaged in simultaneous manufacture and clearance of exempted and dutiable goods out of common inputs and they are:-

“21. In fact, Cenvat Credit Rules gives following options to the manufacturer engaged in simultaneous manufacture and clearance of exempted and dutiable goods out of common inputs:-

- a) Take Cenvat Credit on the entire inputs received (both cenvated and non-cenvated) and reverse credit if the inputs are used in the manufacture of exempted goods at the time of clearance of exempted goods. For this purpose, instead of reversing proportionate credit, a flat rate of 8% (now 10%) of the price of exempt products (exclusive of Sales tax and other taxes) will

have to be paid or reversed in terms of Rule 6(3)(b) of Cenvat Credit Rules.

- b) In respect of certain specified exempted products manufacturer shall reverse credit attributable to inputs used in exempted products (i.e. on proportionate basis) at the time of their clearance from the factory in terms of Rule 6(3)(a).
- c) The manufacturer may opt not to avail Cenvat Credit on inputs used in exempt product at purchase stage itself. Hence he would be required to keep separate accounts showing receipt, consumption and inventory of inputs used in the exempted goods in terms of Rule 6(2)".

11. The Commissioner after detailed analysis of the materials on record has rightly applied the law to the facts of the case and has held that the appellants after opting for maintenance of the accounts in terms of Rule 6(2) & (3), could avail cenvat credit in relation to the duty paid on the inputs used in manufacture of dutiable product and not to claim cenvat credit in relation to the inputs used in manufacture of the exempted final product, however, did not in fact maintained the proper account in respect of such inputs. Besides, admittedly the appellants reversed the credit which was sought to be availed in relation to the inputs which were actually utilized for manufacture of exempted products. The records disclose that the reversal was not necessarily prior to utilization thereof. On most of the occasions the reversal was much after utilization of the credit, with one or two exceptions.

12. The Commissioner after taking into consideration of the materials on record while summarizing the assessment thereof held thus:-

"24. I find that it has been admitted by the noticee that at any given point of time only are variety of paper can be manufactured and it cannot be differentiated whether cenvated at non-cenvated inputs have been used – the process being continuous and integrated one. This itself shows that noticee knowingly maintained separate accounts of receipt, consumption & inventory of cenvated & non-cenvated inputs on the basis of assumptions only and intentionally reversed the credit on proportionate basis when it is in full knowledge of the noticee that their exempted product i.e. Writing &

Printing Paper [Sub-heading 480.10] is not a specified product in terms of Rule 6(3)(a) of the Cenvat Credit Rules. By not paying duty @ 8% /10% of the total value of exempted final product the noticee has contravened the provisions of Rule 57AD(b) read with Rules 6(3)(b) of the Cenvat Credit Rules and thus noticee is liable to Penal Action under Rule 13 of the Cenvat Credit Rules read with rule 173Q of the Central Excise Rules, 1944 read with Section 11AC of the Act”.

13. The Bombay High Court in **Nicholas Piramal (India) Limited** case while dealing with the issue as to whether the Tribunal was right in allowing the assessee to reversal of credit taken instead of directly payment of an amount equal to 8% or 10% of the total price of the exempted goods as per Rule 6(3)(b) of the Cenvat Credit Rules, 2002 held as under:-

“24. Rule 6 it is submitted is a part of delegated legislation enacted under section 37(2)(xvii). This section enables of Central Government to make rules providing for credit of duty paid on the goods used in or in relation to the manufacture of excisable goods. Rule 6 cannot be employed as a charging section thus going much beyond the mandate of giving credit.

A power to give benefit, encompasses within itself, the power to put conditions and restrictions under which credit is available. Power to give benefit also carries with it power to take it back or withdraw it. The rules however and which are not in challenge before us, permit availing of credit in terms set out therein. The rule if properly read starts with the words “Cenvat Credit shall not be allowed”. Therefore, Rule 6 makes it clear that in so far as inputs used in the manufacture of exempted goods, no cenvat credit is allowed. The rule making authority however noting that inputs may be used both for manufacturing final products which may be dutiable and other final products which are exempt, has provided that such manufacturer will be given credit in so far as inputs used for manufacturing of dutiable goods, if accounts are maintained in terms of the rules. Therefore merely because the assessee contends that he is willing to forego credit on inputs used in the manufacture of exempted final product does not warrant a departure from the requirements of Rule 6 (2) and 6(3). The rules contemplate that on failure to maintain accounts in terms of Rule 6(2) the consequences would be in terms of Rule 6(3)(a) or (b). Nor is possible to read down the rule as “amount not exceeding” as is sought to be contended on behalf of the assessee”.

14. It would be appropriate to scan through the following paras of the High Court decision:-

"The assessee's submission has been that he gives up the credit which he had taken before the goods leave the factory premises. That amounts to compliance with Rule 6(1). The language of Rule 6(1) is not to grant credit to an assessee except in circumstances mentioned in sub-rule (2). We have therefore no hesitation in rejecting the said contention. It will not be possible in that context to read the rule as directory as sought to be contended on behalf of the assessee. The rule would have to be followed. In other words, it is mandatory, if an assessee seeks to avail of Cenvat Credit as set out in the rule.....

.....

In our opinion, the taxing machinery has to follow the method provided more so by the Assessing Officer. He cannot disregard a rule. It is not open to an assessee to contend that because they have chosen not to maintain the records as required, revenue authorities even against the grain of the language of the rule, must estimate the inputs used in the manufacture of final dutiable products and accordingly, pass necessary orders. It is also not possible to accept the contention that because they are familiar with the procedure of ascertaining the amount of credit, that by itself makes rule 6(3)(b) directory.

.....

It was then submitted that a co-ordinate Bench of this Court in CCE v. Concept Pharmaceuticals -2008 (225) ELT 181 (Bom.), has accepted a similar contention that the credit of duty paid on common input is taken initially and thereafter reversed, to the extent used in the manufacture of exempted final product, demanding an amount equal to 8%/10% under Rule 57CC is not maintainable. We must firstly note that the learned Division Bench was considering the order of the Tribunal. From the facts it would be clear that the assessee company was reversing credits upon which the Modvat credit was claimed before the inputs were put into process for production of exempted goods. Rule 6(1), 6(2) and 6(3) have not been considered, though in the head note of the citation some reference is made thereto. In our opinion, therefore, that judgment is not an authority on interpretation of Rule 6. On facts also, the assessee there was reversing the

credit on inputs used in the manufacture of final product.

.....

.....

✶ Lastly, it is submitted that the availing credit is not irrecoverable act and the assessee had the option to surrender the credit availed. An assessee it is submitted can surrender the benefits availed under a particular provision and avail benefit conferred by some other provision. Reliance is placed in the judgment in *Share Medical Care v. UOI* -2007 (209) ELT 321 (S.C.) = 2007 (4) SCC 573. In our opinion, the argument is misplaced. Once the law itself has laid down, the circumstances under which credit can be availed, it is that method by which the credit can alone be availed. It is not open to an assessee has the choice of claiming credit or reversing the same. Such an argument in our opinion is devoid of merits considering the clear language of Rule 6(1) and is consequently rejected”.

15. The decision of the Bombay High court in **Concept Pharmaceuticals Limited** case, taking into consideration the facts of the case, the Hon’ble High Court held that the Tribunal was justified in observing that the appellant’s case was fully covered by the Board’s circular. As rightly submitted by the learned DR it is apparent that the Circular No. 654/45/2002-CX dated 19.08.2002 was not brought to the notice of the High Court while deciding the matter in the said Concept Pharmaceutical case. Besides the decision in **Nicholas Piramal (India) Limited** case deals in detail with the provision of law and various points sought to be canvassed in relation to interpretation of those provisions. That is not a case in the matter of Concept Pharmaceutical case. Being so, considering the law laid down by the Apex Court in the matter of *Union of India & Others vs. Dhanwanti Devi and Others* reported in (1996) 6 SCC 44, read with the decision of the Andhra Pradesh High Court in *S.K. Mahaboob Ali vs. Director General of Police C.R.P.F., New Delhi* reported in 2005 (192) ELT 143 the decision in the matter of *Nicholas Piramal (India) Ltd.*, is binding upon the Tribunal. Besides both the decisions being delivered by the Bench of two Hon’ble Judges, the decision in *Nicholas Piramal* having been delivered in later point of time, will be binding upon the Tribunal. Besides as rightly pointed out by the learned DR, the Hon’ble

Judges in Nicholas Piramal had occasion to consider the decision in the matter of Concept Pharmaceuticals case and that is apparent from the contents of para 29 of the decision quoted herein above.

16. The decision of Gujarat High Court in **Maize Products** was also delivered in the peculiar facts of the case without laying down any law as such. Therein the Hon'ble Gujarat High Court had clearly noted that the Tribunal without going into merits of the decision of the Commissioner had accepted offer made by the assessee company and had issued certain directions. The Hon'ble High Court has clearly observed that "the respondent-assessee having accepted before the Tribunal to reverse the cenvat credit as recorded by the Tribunal in paragraph 4 of the impugned order as regards reversal of the amount involved and any more amount that may be reversible, the Tribunal had issued the directions accordingly". It is further observed that "in the facts and circumstances of the case, it is apparent that the entire controversy has been decided by the Tribunal by merely remitting the matter back to the Adjudicating Authority to re-determine the credit in accordance with law". Obviously, the High Court has not decided any point of law and has merely confirmed the decision of the Tribunal regarding the remand of the matter for the purpose of appropriate decision of the adjudicating authority in accordance with provisions of law.

17. The decision in **Zenith Papers** case was on the point that if two products namely wire mesh and felt were treated as inputs, the assessee could avail modvat credit under Rule 57A, in case they are considered as capital goods the credit can be claimed under Rule 57Q. One fails to understand the relevancy of this decision for deciding the points in issue in the case in hand.

18. For the reasons stated above, therefore, as far as the finding on the point about failure to comply with the Rule 6 in relation to maintenance of separate

accounts of cenvated and non-cenvated inputs is concerned, no fault can be found with the same.

19. Coming to second point with regard to show cause notice dated 24.02.2006 which relates to the period February 2001 to April 2003 is concerned, indeed the Apex Court in **Nizam Sugar Factory** (supra) had clearly held that when the first show cause notice was issued all the relevant facts were within the knowledge of the authorities and later on while issuing second and third show cause notices the same facts could not have been taken as suppression of facts on the part of the assessee as those facts were already within the knowledge of the authorities and, therefore, there was no suppression of facts as such to enable the Department to invoke extended period of limitation for issuance of second and third show cause notice.

20. In the case in hand, undisputedly, show cause notice dated 24.02.2006 was issued in relation to the period from February 2001 to April 2003. Apparently, it was issued beyond the period of one year. At the same time, it is not in dispute that the show cause notice dated 31.05.2004 which was for the period May 2003 to March 2004 was already adjudicated upon and the final order was passed by the adjudicating authority on 31.01.2005. Obviously, therefore, there was no justification for issuance of show cause notice for the earlier period after adjudication of the later period. Mere allegation that the facts came to the knowledge of the Department subsequently cannot be accepted particularly when the first adjudication proceedings were concluded by the order dated 31.01.2005 which apparently disclose that the relevant facts for initiating necessary action in relation to the earlier period were within the knowledge of the Department. Being so, the appellants are justified in contending that the show cause notice dated 24.02.2006 and the proceedings on the basis of the said show cause notice were not sustainable and hence need to be quashed.

21. As regards the issue of penalty, learned Advocate for the appellants is justified in contending that no rational has been applied while imposing different amount of penalties, the quantification thereof apparently appears to have been done arbitrarily. While in the case of show cause notice dated 31.05.2004 penalty of Rs. 1 lakh was imposed. As regards show cause notice dated 17.05.2005 read with show cause notice dated 24.02.2006, the penalty of equal amount due was imposed while in relation to later show cause notice dated 06.10.2006 and 06.12.2007 penalty of Rs. 25 lacs and Rs. 30 lacs respectively has been imposed. In the facts and circumstances of the case, considering the fact that in some matters, the Tribunal had sought to express the divergent views on the matter in issue, we find that there was no justification for imposition of the penalty at all. Being so, the appellants are justified in contending that the penalty is liable to be quashed.

22. In the result, the appeals partly succeed as far as penalty imposed in each of the matter is concerned, and the same is quashed. As far as Appeal No. 567 of 2007 is concerned, the demand under the impugned order with reference to the show cause notice dated 24.02.2006 is concerned, is hereby quashed and the appeal is allowed to that extent. As regards other claims are concerned, no interference in respect thereof is called for in any of the appeals.

23. All the appeals are disposed of in the above terms.

[Justice R.M.S. Khandeparkar]
President

[Rakesh Kumar]
Member [Technical]

/Pant/