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

Date 12/04/2010

Appeal No. E/915 /2005 - EX[DB]

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

To :
ALBERT DAVID LTD.
207, NEW INDUSTRIAL AREA,
MANDIDEEP

ALBERT DAVID LTD. — Appellant
Vs
C.C.E BHOPAL — Respondent

I am directed to transmit herewith a certified copy of **Final order No. 174/ 2010 EX[DB]** dated 09-4-10 passed by the Tribunal under Section 35-C(1)of Central Excises Act, 1944

Assistant Registrar
(Excise Appeal Branch)

Copy to :
1. Respondent
   C.C.E BHOPAL
   HOSHANGABAD ROAD, 48, ADMINISTRATIVE AREA, AREA HILLS, BHOPAL (M.P.) 462011
2. Adv. / Consult SH. A.R. MADHAV RAO, ADV.,
   B-6/10, S.J.ENCLAVE,
   N. DELHI-29
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
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
(Excise Appeal Branch)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
COURT NO.II

E/Appeal No. 915/2005-Ex(Br)

(Arising out of order in appeal No.804/CE/BPL/2004 dated 17.12.20004 passed by the Commissioner of Central Excise (Appeals), Bhopal)

M/s Albert David Ltd — Appellant

Vs

CCE, Bhopal — Respondent

Appeared for the Appellant : Shri A.R.Madhav Rao, Advocate

Appeared for the Respondent : Shri Vijai Kumar, DR

Coram: **Hon'ble Mr. D.N. Panda, Judicial Member**
Hon'ble Rakesh Kumar, Technical Member

Date of Hearing: 25.2.2010

FINAL Order No. 174/2010 EX /2010

Per D.N. Panda:

The short point in this appeal is whether the un-utilized Cenvat credit of Rs. 22,97,581/-standing to the account of this appellant as on 1.3.2000 in terms of Notification No.10/2002 dated 1.3.2002 is to be carried forward to meet its consequence in accordance with law subsequently. Show Cause Notice was issued to forfeit the Cenvat credit above lying in the Account of Assessee on the ground that when the credit was unutilised, there is no further right to be carried forward to avail benefit of the same. Revenue's plea is that the assessee was operating under a scheme of exemption from duty prior to 3.1.2002 and credit was earned as that was standing to its credit as above stands lapsed.

2. Learned Counsel Shri Madhav Rao submits that when right to carry forward the unutilized cenvat credit was not denied by Notification No.10/2002 dated 1.3.2002, such a right cannot be denied by show cause notice or adjudication proceedings. Hon'ble High Court of Calcutta has the occasion to deal with such a matter in the case of Rasoi Ltd Vs UOI reported in 2004 (176) ELT 101 (Cal.) which was affirmed by the Hon'ble Supreme Court and the matter went in favour of the assessee. In that case, Revenue had also disputed that unutilized Cenvat credit not permissible to be used in future. His argument is that when an assessee uses Cenvat credit is immaterial when right to use such credit accrues or arises to make use thereof.

3. Learned DR Shri Vijay Kumar opposes submissions of the appellant on the ground that when the appellant was operated during the period 1.3.2002 till 20.2.2003 on a different scheme in terms of Notification No. 10/2002 dated 1.3.2002 they have lost their right for availing the unutilized Cenvat credit since they were earlier denied in terms of finding by the learned Commissioner as per the order of adjudication in para 15 at page 6 thereof. His further submission is that Rule 3(2) of Cenvat Credit Rules 2002 prohibits the benefit of Cenvat credit which was not utilized when a new scheme comes into operation. Also his further argument is that when the appellant did not inform the department as to the existence of the credit to the aforesaid extent, they have lost their right for set off in future.

4. Heard both sides and perused the record.

5. We are unable to find how a right accrued extinguishes without mandate of law. If a right accrued is deniable subsequently, that shall be only permissible by specific statutory provision without being done by mere construction of the scheme. We have examined the order of adjudication as to unutilised credit of Rs 22.97 lakhs claimed by Appellant for carry forward for further utilisation. But we are unable to find specific mandate in the impugned Notification to approve the order of adjudication which abrogates right of the Appellant in respect of its claim. When we go through the judgement of Hon'ble Calcutta High Court, in para 7 of the judgment, the Hon'ble Court has dealt with the right to credit and held that the right does not extinguish on its own volition. That judgment has been upheld by the Apex Court in the case or Rasoi Limited Vs Union of India reported in 2005 (182) ELT A-91 (SC). Also we have gone through the Notification No. 10/2002-CE dated 1.3.2002. No where the Notification says that the past right has been diminished by mandate of Statute specifically. When we look into the condition imposed by Notification, we are unable to find as to whether unutilized credit was prohibited to be carried forward.

6. Learned Counsel submits that the inputs were dutiable @ 10% while the output was dutiable @ 8%. By mere common sense one can construe that difference in rate of duty may be possible cause of arise of unutilised credit in absence of any finding to the contrary by the learned Adjudicating Authority as to value addition aspect of the goods manufactured using the input dutiable

@ 10%. Quantum of credit is undisputed by Revenue. When the learned DR relies on Rule 3(4) of Cenvat Credit Rules, 2002, there is also no whisper from him as to the specific provision which forfeits the right of Appellant. In view of the aforesaid observation, we allow the appeal to the extent that was before us and as stated above.

(Order dictated in the open Court.)

(D.N. Panda)
Judicial Member

(Rakesh Kumar)
Technical Member

MPS*