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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

Appeal No. E/543 /2010 - EX[DB] WITH E/S/558/2010-EX

Date 21/09/2010

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

To :
M/S CAPITAL TRANSFORMERS PVT. LTD.
56-B, DILSHAD GARDEN, G.T.ROAD, SHAHDARA,
DELHI-110095

M/S CAPITAL TRANSFORMERS PVT. LTD. — Appellant

Vs

C.E. DELHI II — Respondent

STAY ORDER NO.646/2010-EX

I am directed to transmit herewith a certified copy of **Final order No. 645/ 2010 EX[DB]** dated 20-8-10 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. DELHI II
   C.R. BUILDING, I.P. ESTATE, NEW DELHI 110002
2. Adv. / Consult SH. PRABHAT KUMAR, C/O
   MR.RAJESH KUMAR & ASSOCIATES
   323, FIE, PATPARGANJ INDUSTRIAL AREA, DELHI-110092.
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
16. HON'BLE PRESIDENT.

Assistant Registrar
(Excise Appeal Branch)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH - COURT NO. 1

DATE OF HEARING : 20.08.2010
DATE OF DECISION : 20.08.2010

Excise Stay Application No. 558 of 2010 in
Excise Appeal No. 543 of 2010

M/s Capital Transformers Pvt. Ltd. ..... **Applicants**
(Rep by Sh. Prabhat Kumar, Adv.)

VERSUS

CCE, Delhi-II ..... **Respondent**
(Rep. by Sh. Nitin Anand, DR)

CORAM : **HON'BLE MR. JUSTICE RMS KHANDEPARKAR, PRESIDENT**
HON'BLE MR. RAKESH KUMAR, MEMBER (TECHNICAL)

STAY **ORAL ORDER NO.** 664/10-EX

PER SHRI JUSTICE R.M.S. KHANDEPARKAR :

Heard. As we propose to dispose of the appeal itself and hence the application is disposed of without insisting for deposit of the amount, with direction to the Registry to place the appeal itself for final hearing forthwith. Application stands disposed of accordingly.

(JUSTICE R.M.S. KHANDEPARKAR)
PRESIDENT

(RAKESH KUMAR)
MEMBER (TECHNICAL)

Golay

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH - COURT NO. 1

DATE OF HEARING : 20.08.2010
DATE OF DECISION : 20.08.2010

Excise Appeal No. 543 of 2010

(Arising out of Order-in-Appeal No. 320/CE/DLH/2009 dated 31.12.2009 passed by the Commissioner of Central Excise (Appeals), New Delhi)

FOR APPROVAL AND SIGNATURE :

HON'BLE MR. JUSTICE R.M.S. KHANDEPARKAR, PRESIDENT
HON'BLE MR. 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 ?	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 Capital Transformers Pvt. Ltd. ..... **Applicants**
(Rep by Sh. Prabhat Kumar, Adv.)

VERSUS

CCE, Delhi-II ..... **Respondent**
(Rep. by Sh. Nitin Anand, DR)

CORAM : HON'BLE MR. JUSTICE RMS KHANDEPARKAR, PRESIDENT
HON'BLE MR. RAKESH KUMAR, MEMBER (TECHNICAL)

FINAL ORAL ORDER NO. 645/10-EX.

PER SHRI JUSTICE R.M.S. KHANDEPARKAR :

Heard the learned advocate for the appellants and the DR for the respondent.

2. The present appeal arises from order dated 31st December, 2009 passed by the Commissioner (Appeals), Delhi. By the impugned order, the Commissioner while allowing the appeal filed by the appellants against the order of the adjudicating authority reduced the penalty from equal amount of duty to Rs. 5,000/-. However, refused to interfere in the rest of the part of the order except setting aside the penalty against the Managing Director.

3. The appellants are engaged in the manufacture of excisable goods, namely, power and distribution transformer and availed Cenvat Credit on the inputs and capital goods procured by them. In the course of scrutiny of ER-1 Return for the month of October, 2008 to December, 2008, it was revealed that the appellants had availed credit of Service Tax amounting to Rs. 15,63,840/- without disclosing details of the input service and copies of invoices of input along with ER-1 return. Consequent to the investigation, show cause notice dated 11.02.2009 came to be issued to the appellants which was contested by the appellants and the Additional Commissioner, Delhi, by his order dated 31st August, 2009 confirmed the demand of Service Tax amounting to Rs. 15,63,840/- along with interest thereon and equal amount of penalty, besides penalty of Rs. 2 lacs against the Managing Director. On appeal to the Commissioner (Appeals), the penalty against the Managing Director was quashed and penalty

against the Company was reduced to Rs. 5,000/-, as stated above. Being aggrieved by the said order, the appellants have approached the Tribunal.

4. While assailing the impugned order, the learned advocate for the appellants submitted that, bare reading of the impugned order discloses that the lower appellate authority had travelled beyond the allegations in the show cause notice inasmuch as that the invoices were sought to be treated as bills of exchange inspite of the fact that there was no limitation prescribed for availing the Cenvat Credit merely because the credit was utilized by the appellants in the year 2008-09 in relation to the credit availed during the period from 2005 onwards, the same is sought to be denied to the appellants. Drawing our attention to the decision of the Tribunal in the matter of **Coromandel Fertilizers Ltd. vs CCE (A), Visakhapatnam-IV,** reported in 2009 (239) ELT 99 and **Commissioner of Central Excise & Customs, Ahmedabad vs Dishman Pharma & Chem. Ltd.,** reported in 2007 (210) ELT 124, the learned advocate submitted that, in the absence of any limitation being prescribed under the statute, it is not permissible for the authority to impose such limitation for utilization of the Cenvat Credit. He further drew our attention to the observations made by the Commissioner (Appeals) to the effect that the judgment in **Coromandel Fertilizers Ltd.**'s case (supra) was *per incuriam* and submitted that without arriving at the exact mistake committed by the Tribunal while delivering the said order, the lower authority could not have declared the said order to be *per incuriam*.

5. On the other hand, the DR submitted that, apart from the time limit as such the very fact whether the appellants had at all received the input service or not was itself in dispute and doubt and there was no sufficient material in that regard and hence no fault can be found for denying the Cenvat Credit to the appellants. Drawing our attention to the decision of the Tribunal in **Ranbaxy vs CCE,** reported in 2010 (253) ELT 578, he submitted that, though there is no limitation prescribed specifically for utilization of the credit availed, the assessee has to establish that the utilization has to be with reference to the input service and for that purpose necessary documentation has to be maintained. In the matter in hand, it was pointed out to the assessee in the show cause notice itself that the credit was sought to be availed without even disclosing necessary details in the statutory record and yet there was no sufficient documentary evidence produced about the availment of the credit which was sought to be utilized in the year 2008-09.

6. On hearing the learned advocate for the appellants and the DR for the respondent and on perusal of the order passed by the authorities below, it is apparent that there was a dispute about actual receipt of the input service and the availability of credit to avail the same and in that regard a specific mention was made in the show cause notice. It is equally true that the said allegation was denied by the appellants in the show cause notice and had stated that they could produce necessary documentary evidence in support of their contention. The learned advocate, in the course of the arguments, submitted that, neither the adjudicating authority nor the lower

appellate authority called for such documentary evidence. It is settled law that it is not for the authorities to call for the evidence, but once the show cause notice is issued, it is for the assessee to produce such documents if he or she desires to contest the allegations in the show cause notice. At the same time, in the case in hand, it is not in dispute that the appellants did maintain certain accounts in relation to the availament and utilization of the credit, besides it related to the period of about five years.

7. It is further clear from the reply to the show cause notice that it was the contention of the appellants that they did not avail the Cenvat Credit immediately after procurement of the input service as they had no knowledge about the availability of the credit and the utilization thereof. There is a specific statement in that regard in the reply. It is true that ignorance of law is no excuse. But, at the same time, the party having come to know about his or her right had immediately tried to exercise the same. This, *prima facie,* discloses that the action on the part of such party to be bonafide. In such circumstances, undoubtedly, it would be appropriate to give proper opportunity to the party to establish their claim. Since the appellants have stated that they have sufficient documentary evidence to establish procurement of input service in respect of which the credit was sought to be availed, it would be in the fitness of case to set aside the impugned order and remand the matter to the adjudicating authority to give an opportunity to the appellants in this regard and to pass an order afresh in accordance with the provisions of law after

taking into consideration all such materials which may be produced by the parties in this regard.

8. The learned advocate for the appellants is also justified in contending that the Commissioner (Appeals) should not have ignored the order passed by the Tribunal by merely observing the same to be *per incuriam*. Before arriving at any such declaration, it is necessary for the competent authority to analyse the order or judgment and to ascertain as to whether it is either against the provisions of law or against any judicial pronouncement already made on the point in issue and only thereafter to make such declaration. We do not find any such exercise having been done by the Commissioner (Appeals). In the circumstances, the said finding also cannot be sustained.

9. In the circumstances, without expressing any opinion on any of the other points sought to be raised in the matter, we set aside the impugned order and remand the matter to the adjudicating authority to decide the same afresh after giving opportunity to the appellants to produce evidence, if any, if so desired. Needless to say that, once the appellants produces the documents, the Department would also be entitled to produce the evidence, if any, if so desired. The appeal is accordingly allowed in the above terms and stands disposed of.

(JUSTICE R.M.S. KHANDEPARKAR)
PRESIDENT

(RAKESH KUMAR)
MEMBER (TECHNICAL)

Golay