

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

Appeal No. E/149 /2010-150 /2010 - EX[DB] WITH
E/S/139 & 141/2010-EX

Date 20/12/2010

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

To :
M/S. HARSH INTERNATIONAL PVT. LTD.
C-172, MAYAPURI INDL. AREA, PHASE-II, NEW
DELHI
M/S. HARSH INTERNATIONAL PVT. LTD.

Appellant

Vs

Respondent

C.C.E. DELHI II

STAY ORDER NO.1019-1020/2010-EX

2010 EX[DB] dated 16-12-10

I am directed to transmit herewith a certified copy of Final order No. 861-862/
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
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2. Adv. / Consult
MR.S.JAINA & ASSOCIATES
84,DARYAGANJ,N.DELHI
3. C.D.R
4. Bar association. CESTAT. New Delhi
5. Director Publications. Customs. Excise. I.P. Estate. New Delhi
6. M/s Centax Publications Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -
7. Company Law Institute of India Pvt Ltd., No.2(Old No. 36), Vaithyaram Street, T. Nagar, Chennai -17
8. M/s. Deeparchie Publications. M-93, Marg. 46, Saket, New Delhi 110017
9. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi - 110005
10. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road,
Ahmedabad-15
11. LAWCRUX Advisors Pvt Ltd, LAW House,1-8,Sector - 10, Faridabad 121003 (Harvana)
12. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road,
Vasant Kunj, New Delhi - 110070
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16. M/S. HARSH INTERNATIONAL (KHAINI) PVT. LTD.
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Assistant Registrar
(Excise Appeal Branch)

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

Date of hearing: 06.07.2010
Date of decision: 16.12.2010

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.	
2	Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	
3	Whether Their Lordships wish to see the fair copy of the Order?	
4	Whether Order is to be circulated to the Departmental authorities?	

Excise Appeal No. 149 of 2010 with Excise Stay No. 139 of 2010

[Arising out of Order-in-Original No. 07/2009 dated 30.09.2009 passed by the Commissioner of Central Excise, Delhi-II, New Delhi].

M/s Harsh International Pvt. Limited

Appellants

Vs.

CCE, Delhi-II

Respondent

AND

Excise Appeal No. 150 of 2010 with Excise Stay No. 141 of 2010

[Arising out of Order-in-Original No. 07/2009 dated 30.09.2009 passed by the Commissioner of Central Excise, New Delhi].

M/s Harsh International (Khaini) Pvt. Limited

Appellants

Vs.

CCE, Delhi-II

Respondent

Appearance: Ms. Seema Jain, Advocate for the appellants.
Rep. by Sh. Sunil Kumar, DR for the respondent.

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

FINAL Oral Order No. 861-862/10-EX.
STAY Oral Order No. 1019, 1020/10-EX.

Per: Shri Justice R.M.S. Khandeparkar:

By consent appeals and applications are taken up for final disposal without insisting for pre-deposit of the amount demanded under the impugned order.

2. We have heard at length the learned Advocate for the appellants and learned DR for the respondent and we have also perused the written submissions filed by both the parties.

3. The appellants are engaged in manufacture of chewing tobacco. They have availed cenvat credit to the tune of Rs. 58,74,364/- being the amount equivalent to the basic excise duty and Rs. 13,674/- paid towards cess on the capital goods stated to be purchased during the period from 2003 to 2005. The manufacturing activity of the appellants' company came to standstill by the end of June 2007 and under letter dated 18.07.2007, the appellants surrendered Central Excise registration. The capital goods purchased during the period from 2003 to 2005 stated to have been used by the appellants were removed in the month of June & July 2007 without payment of any duty and were sold to M/s Harsh International Khaini Pvt. Ltd. Sonipat on retail invoices in the month of June and July 2007. The capital goods purchased in the years 2003-2005 were removed as such without reversal of

the benefit of cenvat credit availed by the appellants at the time of their purchase.

4. The department contending that the removal of the capital goods in the month of June and July 2007 should have been after reversing the cenvat credit availed on those capital goods at the time of their receipt in the factory in terms of Rule 3(5) of the Cenvat Credit Rules, 2004, seized those capital goods; however, the same goods were provisionally released on execution of the bond for the full value and a bank guarantee of Rs. 10 lakh. An amount of Rs. 1,20,690/- was also deposited by the appellants under protest. A show cause notice dated 18.06.2008 therefore, came to be issued to the appellants for reversal of the cenvat credit availed by the appellants alongwith recovery of interest and imposition of penalty. The same was contested by the appellants contending that they were not required to reverse the cenvat credit on used capital goods cleared by them as per law prevailing at the relevant time. The adjudicating authority, however, by order dated 30.09.2009 confirmed the demand for reversal of the cenvat credit as proposed in the show cause notice alongwith interest and also imposed penalty of equal amount. Hence, the present appeal.

5. Undisputedly, the period involved in the matter is June and July 2007. The capital goods stated to have been used pursuant to their purchase during the period from 2003 to 2005 were sold to M/s Harsh International Khaini Pvt. Limited in June and July 2007. The adjudicating authority has confirmed the demand on the ground that at the relevant time the removal of the goods ought to have been on reversing the cenvat credit availed by the appellants at the time of receipt of those capital goods in their factory in terms of Rule 3(5) of the Cenvat Credit Rules, 2004. The issue, therefore, which arises for consideration is whether used capital goods could have been

removed as such in June and July 2007 only upon reversal of cenvat credit that was availed by the appellants on purchase of the said capital goods.

6. Learned Advocate for the appellants while drawing our attention to the various changes which were incorporated in Rule 3 of the Cenvat Credit Rules submitted that the legal provisions prevalent at the relevant time did not provide for reversal of the cenvat credit on removal of used capital goods. According to the learned Advocate, this was also recognized by the judicial pronouncement of the Tribunal and in that regard drew our attention to the decision of the Tribunal in the matter of **Madura Coats Pvt. Ltd. vs. Commissioner of Central Excise, Tirunelveli** reported in 2005 (190) ELT 450 (Tri. Bang.), **Cummins India Ltd. vs. Commissioner of C. Ex. Raigad** reported in 2008 (219) ELT 911 (Tribunal), **Commissioner vs. Cummins India Ltd.** reported in 2009 (234) ELT A120 of the Bombay High Court, **CCE, Coimbatore vs. L.G. Balakrishnan & Bros.** reported in 2009 (238) ELT 659 (Tri. Chennai) and **Commissioner of C. Ex. Chandigarh vs. Raghav Alloys (P) Ltd.** reported in 2009 (242) ELT 124 (Tri. Del.). It was further sought to be contended on behalf of the appellants that the decision of the Tribunal as above was accepted by the Department and, therefore, the Department is not entitled to take a contrary view in identical cases which include the appellants case. Further, referring to the decision of the Supreme Court in the matter of **Maruti Suzuki Ltd. vs. Commissioner of Central Excise, Delhi-III** reported in 2009 (240) ELT 641 (SC) and in the matter of **CCE vs. Gujarat Narmada Fertilizers Co. Ltd.** reported in 2009 (240) ELT 661 (SC), it is sought to be contended that it is not a case of clandestine removal of goods and there was no intention to evade payment of duty as such and, therefore, there was no justification for imposition of penalty.

7. On the other hand, learned DR has submitted that the law being abundantly clear on the point in issue, the contention about absence of provision of law for reversal of the credit at the relevant time cannot be accepted. Drawing attention to Rule 3(5A) of the Cenvat Credit Rules as was in force since 16.05.2005 the learned DR submitted that the same clearly required that the removal as such of the capital goods from the factory should have been on payment of an amount equal to the credit availed in respect of such capital goods. The expression as such was clearly explained by the Larger Bench in the matter of **Modernova Plastyles Pvt. Ltd. vs. Commissioner of C. Ex. Raigad** reported in 2008 (232) ELT 29 (Tri. LB). It was further contention on behalf of the Department that the appellants had removed the capital goods without intimation to the Department, without cover of invoice and without payment of duty, which not only disclose that the goods were clandestinely removed but the action on the part of the appellants in that regard lacked bonafide and, therefore, the provisions regarding the penalty were clearly attracted. As regards the decision of the Apex Court in **Maruti Suzuki Ltd.**, it is submitted that the same pertains to the issue regarding the consumption of inputs and not on the issue of removal of capital goods and, therefore, is not of no help to the appellants in the case in hand.

8. It cannot be disputed that from March 2001 till November 2007 there were some amendment to the provisions relating to the effect of removal of capital goods on which cenvat credit was availed. However, the basic requirement to warrant either payment of duty or reversal of the credit during this entire period remained constant in the sense that the obligation either to pay the duty or to reverse the credit equivalent to the one availed related to the capital goods which were 'removed as such' from the factory.

In any case, admittedly, w.e.f. 06.05.2005 the provision of law in this regard which was in force read thus:-

“When inputs or capital goods, on which cenvat credit has been taken, are removed as such from the factory, or premises of the provider of output service, the manufacturer of the final products or provider of output service, as the case may be, shall pay an amount equal to the credit availed in respect of such inputs or capital goods and such removal shall be made under the cover of an invoice referred to in rule 9”.

9. The said Rule was changed w.e.f. 13.11.2007 and read thus:-

“When inputs or capital goods, on which cenvat credit has been taken, are removed as such from the factory, or premises of the provider of output service, the manufacturer of the final products or provider of the output service, as the case may be, shall pay an amount of equal to the credit availed in respect of such inputs or capital goods and such removal shall be made under the cover of an invoice referred to in rule 9”.

Provided also that if the capital goods, on which cenvat credit has been taken, are removed after being used, the manufacturer or provider of output service shall pay an amount equal to the cenvat credit taken on the said capital goods reduced by 2.5% for each quarter of a year or part thereof from the date of taking the cenvat credit”.

10. Plain reading of above provisions of law discloses that at the relevant time, that is, when the capital goods were removed as such from the factory by the appellants, they were required to pay an amount equal to the credit availed by them in respect of such capital goods. Once it is apparent that the appellants had not paid such amount, there was clear violation of the Rule in force at the relevant time.

11. It is, however, the contention on behalf of the appellants that the said provision did not apply to the capital goods which were “used”. Plain reading of the provision of law as was in force at the relevant time nowhere discloses that the same would apply only to those capital goods which were “unused” or that the provision would not apply to the “used” capital goods. The provision of law does not make any such differentiation. Besides, the Larger Bench of the Tribunal in **Modernova Plastyles Pvt. Ltd.** case had clearly held that “If the expression ‘as such’ is held to cover only unused or new capital goods, manufacturers who wish to remove used capital goods to job workers’ premises for testing, repairing, reconditioning etc. would not be able to avail of the facility under Rule 4(5)(a). Further, if the expression ‘as such’ is interpreted to mean new or unused capital goods, then the question of testing, repairing, reconditioning them does not arise and the terms testing, repairing, reconditioning would become redundant, and any interpretation which results in rendering any portion of rule or legislation redundant, should be avoided, as held by the apex court in **Amrit Paper vs. CCE, Ludhiana** – 2006 (200) ELT 365 (S.C.) and **Rajesh Kumar Shama vs. Union of India** -2007 (209) ELT 3 (S.C.)”.

12. With the elaborate discussion and clear finding by the Larger Bench on the relevant aspect of the matter which is also otherwise binding on this Bench, it is not possible to accede to the contentions sought to be raised on behalf of the appellants regarding the meaning and the scope of the expression ‘as such’ with reference to the removal of the capital goods.

13. The learned Advocate for the appellants however has relied upon the decisions in the matter of **Madura Coats Pvt. Ltd., Cummins India Ltd., L.G. Balakrishnan & Bros.** and **Raghav Alloys (P) Ltd.** in support of the said contention.

14. Once the Larger Bench has decided the point in relation to the scope of the expression 'as such', any decision of the Division Bench or of the Single Member cannot be binding on this Tribunal. That apart, the decision in **Cummins India** case related to the period prior to 16.05.2005. As regards the decision in **Raghav Alloys (P) Ltd.** is concerned the same related to the removal of the goods in May 2003. Besides single Member decision cannot override the Larger Bench decision.

15. As regards the decision in **L.G. Balakrishnan & Bros.** case that was entirely on the basis of the decision in **Madura Coats** case.

16. As far as the decision in **Madura Coats** is concerned, it is pertinent to note that the same was delivered in a matter where the appeal itself was not maintainable in law as the same was not filed by any aggrieved person or party. That was a case where appeal was filed by the assessee against an order passed by the Commissioner (Appeals) which was in favour of the assessee. This is apparent from the said decision itself, wherein Sh. T. Jayaraman speaking for the Bench has recorded that "Even though the order of the Commissioner (Appeals)'s is in favour of the appellants, they have filed this appeal". Indeed in that case the adjudicating authority had confirmed the demand of Rs. 1,35,260/- in relation to the period from 1st March to 31st July 2003 alongwith the interest thereon and penalty of Rs. 50,000/-. Aggrieved by the said order, the assessee had carried the matter in appeal before the Commissioner (Appeals). The Commissioner (Appeals) set aside the demand and observed that there was no specific provision for demand of duty on removal of used cenvated capital goods. However, the assessee had preferred the said appeal.

17. In any case, the decision in **Madura Coats Pvt. Ltd.** is not in consonance with the decision of the Larger Bench and, therefore, cannot be of any help to the appellants. Besides the same related to the period from March to July 2003 that is much prior to the 16th May 2005. For the same reason the decision in **L.G. Balakrishnan & Bros.** case also is of no help to the appellants.

18. As rightly pointed out by the learned DR, the decision in **Maruti Suzuki** case was relating to the utilization of the inputs in order to avail the cenvat credit and it has nothing to do with the issue relating to removal of capital goods. Similar is the case in relation to **Gujarat Narmada Fertilizers** case. The decisions relating to the issue of admissibility of the credit cannot be of any help on the issue of obligation to return the benefit availed under the Cenvat Credit Rules.

19. Once the provision of law clearly required the appellants to pay an amount equal to the credit availed in respect of capital goods which were removed as such, and that the same was required to be paid at the time of such removal of the goods, and admittedly the appellants having not complied with the said obligation, the consequences provided under the statutory provisions are bound to follow. It cannot be held in such circumstances that the removal of the goods was not with any intention of avoiding the revenue liability. As in case of claim of exemption from payment of duty, the burden lies upon the assessee to establish that the assessee falls within the four corners of the provision granting the exemption, similarly in a case of non-payment of duty or discharge of any revenue liability, it is for the assessee to establish that he or she was not liable to discharge such revenue liability for valid reasons. Mere contention that on account of frequent changes in the provision of law, which itself is

devoid of substance, cannot be a justification to avoid the penal liability resulting from failure to discharge the revenue liability by the assessee.

20. The contention that the revenue had accepted the decisions of the Tribunal in identical cases and that, therefore, the Department has no reason to hold contra view in the appellant's case is totally devoid of substance. In fact, in the face of the decision of the Larger Bench in **Modernova Plastyles Pvt. Ltd.** case, the argument sought to be canvassed is to be rejected being totally devoid of substance.

21. Before we part with the matter, it is necessary to make reference to one of the decisions by us in the matter of M/s **Greenply Industries Ltd.** vs. **CCE, Jaipur** in Excise Appeal No. 2620 of 2009 delivered on 15.03.2010. The said decision was delivered on the basis of applicability of proviso to the said Rule. It came into force w.e.f. 13.11.2007. Unfortunately, the said fact and on that count it would not apply to the facts of that case, was not brought to our notice by either of the parties in the said case.

22. For the reasons stated above, the appeals and applications fail and are accordingly dismissed.

[Justice R.M.S. Khandeparkar]
President

[Rakesh Kumar]
Member [Technical]

/Pant/