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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/1635/2010 – SM[BR] E / STAY / 1631 / 2010-SM[BR] Date 26/11/2010

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

To :
M/S. SHREE CEMENT LTD.
BANGUR NAGAR, BEAWAR (RAJASTHAN).

M/S. SHREE CEMENT LTD. Appellant

Vs

C.C.E. JAIPUR II Respondent

I am directed to transmit herewith a certified copy of **Final order** No. 1301-A/2010-SM[BR]&S/581/2010 dated 8.11.2010 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. JAIPUR II
N.C.R.BUILDING, STATUE CIRCLE, "C" SCHEME, JAIPUR 302005.
2. Adv. / Consult SHRI BIPIN GARG ADV.
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)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST BLOCK NO.II, R.K. PURAM, NEW DELHI-110066.
BENCH-SM

Date of Hearing/Decision:08.10.2010

Excise Stay Application No. E/S/1631/10-SM in Excise Appeal No.E/1635/10-SM

[Arising out of Order-in-Appeal No.150(KKG)CE/JPR-II/2010 dated 18.03.2010 passed by the Commissioner (Appeals)-II, Central Excise, Jaipur].

Shree Cement Ltd. ...Appellant

Vs.

CCE, Jaipur-II ... Respondent

Present for the Appellant :Ms. Sukriti Das, Advocate
Present for the Respondent:Shri.Anil Khanna,SDR

Coram: HON'BLE MR. D.N. PANDA, JUDICIAL MEMBER

Final **ORDER NO.** 1301-A/2010 SM (Br) & S-581/2010 SM (Br) **DATED:08.10.2010**

PER: D.N.PANDA

The dispute arose because of the audit finding that cenvat credit and capital goods was although inadmissible to the appellant that was enjoyed by the appellant for the period Jan., 2007 to October 2007 till the audit finding was made. When the audit finding came up, the appellant reversed the credit so enjoyed on 31.1.08. Because of the reversal the amount reversed was appropriated towards duty demand for which no duty demand was raised by the adjudication authority. But for the violation of law, Rule 15 of Cenvat Credit Rules 2004 was invoked. Invoking that Rule read with section 11AC of Central Excise Act 1944, the appellant faced show cause notice. Adjudication ended with levy of penalty of Rs.2,45,841/- with interest for the loss suffered by Revenue. When the appellant went before the ld. Appellate Authority, he concurred with the adjudication result.

2. Ld. Counsel appearing today submits that the appellant has reversed the credit, soon after the audit finding for which there should be no penalty and prays for dispensation of pre-deposit.

3. Ld. DR supports the order of the authority below.

4. Heard both sides and perused the records.

5. Perusal of show cause notice indicates that the authorities were not certain to bring the case of the Revenue as to whether it shall fall under Rule 15 (1) of Cenvat Credit Rules 2004 or under sub-rule (2) of Rule 15 thereof. There should not have been any confusion in applying Rules if facts are settled. Such confusion led the adjudication authority to come to a conclusion with its observation which appears to be arbitrary in nature. The authority in para 15 of the order for no certainty noted that the appellant cannot be said to have unutilized the credit on 31.1.2008, when hundreds of credit or debit entries were not in the intervening period of 13 months. With such observation, he was of the opinion that the admissible credit taken by appellant stood utilized as on 31.1.08.

6. When the aforesaid uncertainty comes forward in the adjudication order, it was the duty of the ld. Appellate Authority to exercise his coextensive and coterminous power to examine the original record. He failed to do so. He did not call for the records for examination. None of the authorities could be able to come to conclusion, whether at any point of time, the credit available on record exceeded of Rs.2,45,841/-. Unless the factual finding with certainity is arrived at, the appellant should not face penal consequence of law. It may not be stated that penal proceedings are quasi-criminal in nature. The aggrieved should be brought to charge specifically with the factual finding without any confusion.

7. In view of the aforesaid observation, it would not be proper to keep the appeal pending here, instead of sending the matter back to the ld. Adjudicating Authority to call for the records of the appellant and find out whether on any dates till reversal of credit exceeding Rs.245841/- was existing in the record. There may be hundreds of credits or debit entries in the record. But mechanical observations to this extent shall not serve the purpose of law. The authority should take pain to examine the record to arrive at the conclusion as aforesaid, without any confusion in his mind without passing any arbitrary order.

8. It is needless to mention that the authority has to come to a clear conclusion whether the case of the appellant was either a case of Rule 15 (1) or Rule 15 (2) of the Cenvat Credit Rules 2004. The mandate of the statute being very clear, they

should not put themselves into confusion, when the penal consequence was a proposition in the show cause notice. It may also be stated that the show cause notice may give rise to civil or evil consequences. In the event of evil consequence, the assessee should not suffer unless notice demonstrates that essential ingredients of law were present to bring the assessee into the fold of penal consequence of law.

9. In view of the aforesaid clear observations coming from the adjudication order itself, it is not practically possible to call for pre-deposit. Therefore, that is dispensed and matter is remanded to the ld. Adjudicating Authority to grant fair opportunity of hearing and come to a proper conclusion by a reasoned and speaking order. Consequently, the matter is remanded, setting aside both the orders.

[Dictated & Pronounced in the open Court].

(D.N.PANDA)
JUDICIAL MEMBER

Anita