

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/2145/2009 – SM[BR]

Date 02/02/2011

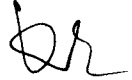
Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
M/S YEE KAY TECHNOCRAT PVT. LTD.
PLOT NO. 1 & 4, BLOCK-H N.H.-2, NIT FARIDABAD.
M/S YEE KAY TECHNOCRAT PVT. LTD.

Appellant
Vs
Respondent

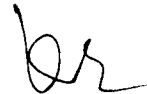
C.C.E. DELHI IV

I am directed to transmit herewith a certified copy of Final order No. 86 / 2011- SM[BR] dated 25.1.2011
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. DELHI IV
NEW CGO COMPLEX, NH-IV,
FARIDABAD, HARYANA 121001.
2. Adv. / Consult
MR.K.L. HANDA, CONSULTANT,
689, SECTOR-16,
FARIDABAD-121002.
3. C.D.R
4. Bar association, CESTAT, New Delhi
5. Director Publications, Customs, Excise. I.P. Estate, New
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 -
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
13. Office Copy
14. Guard file


Assistant Registrar
(SM Appeal Branch)

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

Excise Appeal No.E/2145/2009

Date of Hearing: 25.01.2011

Date of Decision: 25.01.2011

(Arising out of Order-in-Appeal No.49/CE/APPL/DLH-IV/2009
dated 1.05.2009 passed by the CCE(A). Delhi-IV, Faridabad)

For approval and signature:

Hon'ble Mr.M.Veeraiyan 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

M/s.Yee Kay Technocrat (P) Ltd.

Appellant

Vs.

CCE, Delhi-IV

Respondent

Present for the Appellant: Shri K.L.Handa, Consultant

Present for the Respondent: Shri Anil Khanna, SDR

Coram: Hon'ble Mr.M.Veeraiyan, Member (Technical)

Final ORDER NO. 86/2011 SM CBX

PER: M.VEERAIYAN

This appeal is against the order of the Commissioner
(Appeals) No.49/CE/APPL/DLH-IV/2009 dated 1.05.2009.

2. Heard both sides.

3. The appellants availed cenvat credit on capital goods
during the financial years 2001-02 and 2002-03 totally

amounting to Rs.2,77,439/-. They filed income-tax returns relating to the Financial Year 2001-02 (Assessment Year 2002-03) and the Financial Year 2002-03 (Assessment Year 2003-04) and claimed the benefit of depreciation. This is admittedly in violation of Rule 4(4) of Cenvat Credit Rules, 2002. During the audit by the department in December, 2004 the above irregularity was noticed. Thereupon the appellants have filed revised income-tax returns for the Financial Years 2003-04 (Assessment Year 2004-05) foregoing the benefit already availed by them during the Financial Years 2001-02 and 2002-03. The original authority disallowed the credit on the capital goods and confirmed the demand alongwith interest and also imposed equal amount as penalty. The Commissioner (Appeals) has upheld the order of the original authority.

4.1 Learned Consultant submits that it was due to oversight, that they had claimed the benefit of depreciation under income-tax Act for the Financial Years 2001-02 and 2002-03. As soon as the department pointed out the mistake, they filed revised income-tax returns for the Financial Year 2003-04 i.e. Assessment Year 2004-05 and foregone the benefit already availed by them. In view of the above, denial of the credit by the original authority is not justified. He relies on the decision of the Tribunal in the case of Prasad Machinery Pvt.Ltd. vs. CCE, Ahmedabad reported in 2007 (218) ELT 445.

4.2 Further, he submits that the demand is time barred inasmuch as the department was aware of the irregularity in December, 2004 but issued show cause notice only on 3.8.2006 after a lapse of one year from the date of their knowledge. In this regard, he relies on the decision of the Tribunal in the case

of CCE, Ahmedabad vs. Nandeshwari Packaging reported in 2009 (235) ELT 697 and the decision in the case of CCE, Kolkata-II vs. Giriraj Industries reported in 2008 (223) ELT 640. He also submits that the department filed appeal against the decision in the case of Giriraj Industries before the Hon'ble High Court and the High Court did not interfere with the same holding that no substantial question of law was involved in the appeal.

5. Learned SDR reiterated the findings and the reasoning of the Commissioner (Appeals). He submits that the decisions of the Tribunal in the case of Nandeshwari Packaging and in the case of Giriraj Industries are on the facts of those cases and no law as to how to interpret the relevant date for issue of show cause notice in terms of Section 11A of Central Excise Act, 1944 has been laid down. The relevant date has to be reckoned with reference to the obligation on the part of the assessee and not on the date of detection by the department either during audit or during search and seizure operations. When there is suppression of relevant facts, extended period will be invoked and the same reckoned from the relevant date as per Section 11A.

6. I have carefully considered the submissions from both sides and perused the records. It is a case where admittedly the appellants had taken the benefit of cenvat credit on capital goods and also depreciation under the Income-Tax Act. It is clearly in contravention of Rule 4 (4) of Cenvat Credit Rules, 2002. It is not the case of the appellants that they have not availed the income-tax benefit during the Financial Years 2001-02 and 2002-03. They claim that they have subsequently filed returns in the year 2004-05 amending the income-tax returns

for the Financial Year 2003-04 by which they have foregone the benefit of depreciation availed by them for the earlier Financial Years 2001-02 and 2002-03, and therefore denial of credit is not justified. This reason cannot be accepted. The eligibility of credit is subject to their not availing the benefit of depreciation under the Income-tax Act. If their claim is to be accepted, it may lead to a situation even when the assessee foregoes the benefit of depreciation after few years, the violation during the relevant years in taking irregular credit gets nullified. The decision in the case of Prasad Machinery Pvt.Ltd. is based on different facts as the assessee in the said case filed the revised return for the concerned financial year itself.

7. The other submissions that the demand is time barred, is also not acceptable. Section 11A provides for issue of show cause notice demanding duty short-levied non levy or short paid. In certain situations, the show cause notice can be issued demanding duty for a period of five years from the relevant date as defined in the Central Excise Act, which is as under:

"(ii) "relevant date" means, -

(a) in the case of excisable goods on which duty of excise has not been levied or paid or has been short-levied or short-paid -

(A) where under the rules made under this Act a periodical return, showing particulars of the duty paid on the excisable goods removed during the period to which the said return relates, is to be filed by a manufacturer or a producer or a licensee of a warehouse, as the case may be, the date on which such return is so filed;

(B) where no periodical return as aforesaid is filed, the last date on which such return is to be filed under the said rules;

(C) in any other case, the date on which the duty is to be paid thereunder;

(b) in a case where duty of excise is under this Act or the rules made thereunder, the date of provisionally assessed adjustment of duty after the final assessment thereof;

(c) in the case of excisable goods on which duty of excise has been erroneously refunded, the date of such refund."

8. Irregularly availed and utilized credit also requires to be demanded in terms of Section 11A of Central Excise Act, 1944 as per Rule 15 Cenvat Credit Rules, 2002. Learned Consultant has not been able to show as to how the date of audit when the department came to know of the irregularity becomes relevant date in the light of the above provision defining the relevant date under Section 11A. The decisions relied upon by the Consultant do not discuss the definition of relevant date in the context of issue of show cause notice under Section 11A and therefore the said decisions cannot be laying down binding precedent of law and the said decisions are applicable only to the facts of the said cases.

9. In view of the above, I do not find any merits in the appeal. The appeal is, therefore, rejected.

(Pronounced in the open court)

(M.VEERAIYAN)
MEMBER (TECHNICAL)

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