

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/2374/2008 -SM[BR]

Date 07/02/2011

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

To :
M/S AJAY POLY PVT. LTD.
E-119-120, SITE-B, SURAJPUR INDL. AREA,
SURAJPUR, GREATER NOIDA-201306 (U.P.)
M/S AJAY POLY PVT. LTD.

Appellant
Vs
Respondent

C.C.E. NOIDA

I am directed to transmit herewith a certified copy of Final order No. 111 / 2011- SM[BR] dated 30.12.2010
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. NOIDA
C-56/42, SECTOR-62,
NOIDA-201307
2. Adv. / Consult
MR.V.SWAMINATHAN
G-50, LAJPAT NAGAR-III, NEW DELHI-24
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)

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE
TRIBUNAL, NEW DELHI, PRINCIPAL BENCH NEW DELHI

Date of Hearing/Decision: 30.12.2010

For approval and signature:

Hon'ble Shri Rakesh Kumar, Member (Technical)

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1. Whether Press Reporters may be allowed to see 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.2374 of 2008-SM(BR)

[Arising out of Order-in-Appeal No.104/08 dated 30.09.2008 passed by the Commissioner of Central Excise (Appeals), Noida].

M/s. Ajay Poly Pvt. Limited

Appellant

Vs.

CCE, Noida

Respondent

Appearance: Rep. by Shri V. Swaminathan, Advocate for the appellants.
Rep. by Shri R.K. Gupta, DR for the respondent.

CORAM: **Hon'ble Shri Rakesh Kumar, Member (Judicial)**

final

Order No.....111...../2011 SM (BR)
Dated: 30.12.10

Per Rakesh Kumar

The facts leading to this appeal are, in brief, as under:-

1.1 The appellants are manufacturers of refrigerator door gaskets and ferrite magnets chargeable to central excise duty. They also avail the facility of Cenvat credit of central excise duty paid on inputs central and capital goods and service tax paid on input services, under Cenvat Credit Rules, 2004. The appellants received certain taxable services from some service providers in August, 2004 and September, 2004 and total service tax involved was Rs.67,610/-.The invoices have been issued by the service providers on 6.8.2004 and 8.9.2004.

2. Prior to 10.09.2004, there were two sets of Rules for Cenvat Credit and Service Tax Credit—Cenvat Credit Rules, 2002 providing for Cenvat Credit of central excise duty/Additional Customs duty paid on inputs and capital goods used in or in relation to the manufacture of finished products and Service Tax Credit Rules, 2002 providing for credit of service tax paid on inputs services used in or in relation to providing ^{taxable} output ~~taxable~~ services. With effect from 10.09.2004, two sets of Rules were merged and Cenvat Credit Rules, 2004 were notified ~~for~~ providing ^{for} Cenvat Credit of central excise duty/additional customs duty paid on inputs and capital goods and ^{of} service tax paid on input services, used in or

in relation to either for manufacture of finished products or for providing of ^{taxable} output services. Thus, w.e.f. 10.09.2004, the credit of central excise duties/ additional customs duty paid on inputs and capital goods and of service tax paid on input services was available to a manufacturer of finished products and similarly, the credit of central excise duty and additional customs duty paid on inputs and capital goods and of service tax paid on input services was available to a provider of taxable output services.

1.3 In this case, though taxable services had been received by the appellant, prior to 10.09.2004 and the invoices by the service provider had been issued prior to 10.09.2004, the service tax was paid by the service provider, after 10.09.2004, when the payment was received by them. The Appellant on the basis of the above mentioned two invoices dated 6.8.2004 and 8.9.2004 took ^{total} the credit of service tax ~~credit~~ amounting to Rs.67,610/- on 4.10.2004 and 31.3.2005 respectively. Subsequently, when the central excise records were checked by the Central Excise Audit, they objected to this credit and the credit was reversed on 25.3.2006. However, the appellant, on the basis of the legal advice, took re-credit of the same on 1.10.2006 and they also informed the department about this. The Department, however, issued a show cause notice dated 27.09.2007 seeking recovery of this credit along with interest and also imposition of penalty. The show cause notice was issued on the

basis that since the services had been received prior to 10.09.2004, the appellants were not entitled for the credit. The show cause notice was adjudicated by the Asstt. Commissioner vide order-in-original dated 29.02.2008 by which credit demand was confirmed along with interest and besides this, penalty equal to wrongly taken service tax credit was imposed under Rule 15 of the Cenvat Credit Rules, 2004. On appeal to the Commissioner (Appeals) against the Asstt. Commissioner's order, the Commissioner (Appeals), vide order-in-appeal dated 30.09.2008 dismissed the appeal. It is against this order of the Asstt. Commissioner (Appeals) that the present appeal has been filed.

2. Heard both the sides.

2.1 Shri V. Swaminathan, Advocate, Id. Counsel for the appellant, pleaded that services in respect of the input services, in question, though received prior to 10.09.2004, the Service tax had been paid after 10.09.2004, the appellants are eligible for credit in terms of the provisions of Rule 4 (7), according to which, the service tax in respect of the input services shall be allowed on or after the day on which payment is made of the value of input service and the service tax payable, as indicated in invoice/ bill is paid, that since in this case, the payment had been made by the appellant to the services provider after 10.09.2004 and the services provider had been paid the service tax at that time, the credit would be available to the appellant in terms of the sub-rule 4(7) of the Cenvat

Credit Rules, 2004, that the appellant had earned the Cenvat Credit prior to 10.09.2004 when the services had been received and, therefore, this credit would be available to the appellant in terms of the provisions of Rule 11(1) of the Cenvat Credit Rules, 2004, also, according to which, any amount of credit earned by a manufacturer under Cenvat Credit Rules, 2002, as they existed prior to 10.09.2004 or by the provider of output services under Cenvat Credit Rules, 2002 as they existed prior to 10.09.2004 and remaining unutilised on that day, shall be allowed as cenvat credit to such manufacturer or output service provider under these rules, that the Department's contention that since input services were received prior to 10.09.2004, the credit would not be available even if the service tax has been paid after 10.09.2004 is not correct, that since in this case, there is no deliberate intention or suppression of fact is involved and since the appellants had intimated to the department about taking of the credit vide their letter dated 2.11.2006, penalty under Rule 15(2) of the Cenvat Credit Rules, 2004 read with Section 11 AC of the Central Excise Act, 1944 is not called for and that in view of this, the impugned order is not correct.

2.2 Shri R.K. Gupta, Id. SDR defended the impugned order reiterating the Commissioner (Appeals)'s findings and emphasised that -

(a) in terms of Rule 3(1) of Cenvat Credit Rules, 2004, the credit of Service Tax payable under the Finance Act, 1994 is available only on the

input services received by the manufacturer on or after 10.09.2004 or by provider of output services on or after 10.09.2004., while in this case, not only the input services had been received prior to 10.09.2004, but the payment of about Rs..6 Lakhs out of total amount of Rs.8 Lakh, had been received by the service provider prior to 10.09.2004;

(b) transitional provisions under Rule 11C are not applicable to a manufacturer in respect of input services, as prior to 10.09.2004, a manufacturer of finished goods was not entitled at all for any input service credit and, therefore, he could not have earned the same; and

(c) the provisions of Rule 4(7) have to be read with the provisions of Rule 3(1) of the Cenvat Credit Rules.

3. I have carefully considered the submissions from both the sides and perused the records. The point of dispute in this case is as to whether the service tax credit on the basis of invoices dated 6.8.2004 and 8.9.2004, issued by the service provider was available to the appellant, when the service tax in respect of these invoices had been paid by the service provider after 10.09.2004 as the complete payment had been received only after 10.09.2004. Though sub-rule (7) of Rule 4 of the Cenvat Credit Rules, 2004 provides that the service tax credit to a manufacturer or output service provider would be available on the basis of the invoices issued by the service provider only on or after the day on which the payment is made to the service provider of the value of the

input services, Rule 3(1) provides that a manufacturer of final products or a provider of taxable services, shall be eligible for the credit of service tax paid under Section 66 of Finance Act, 1994 on any input services received on or after 10.09.2004. The service tax credit in respect of service received prior to 10.09.2004 would be governed only by the transitional provisions of sub-rule (1) of Rule 11 and in terms of sub-rule (1) of Rule 11, the service tax credit in respect of services received prior to 10.09.2004 would be available only to service provider, as prior to 10.09.2004, a manufacturer was not entitled for credit of service tax paid on any input services. There is no dispute that the services, in question, had been received prior to 10.09.2004. Therefore, ^{in terms of} neither the transitional provisions of Rule 11(1) ~~are applicable~~ nor in terms of 3(1) of Cenvat Credit Rules, 2004, the credit of service tax would be available. In view of this, I do not find any infirmity in the impugned order upholding the Cenvat Credit demand. However, coming to the question of penalty, since it is not disputed that the appellant, after taking the credit second time, had informed the Department about this, they cannot be accused of suppression of facts and hence, the penalty under Rule 15(2) read with Section 11 AC of the Central Excise Act, 1944 would not be called for. However, since this is a case of taking wrong Cenvat credit, normal penalty under Rule 15(1) would be applicable. Accordingly, while the Cenvat credit demand along interest is upheld, penalty on the appellant is

reduced to Rs.10 Thousand only. The impugned order stands modified only to this extent. The appeal stands disposed of as above.

(Rakesh Kumar)
Member (Technical)

Ckp.