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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/575 & 1836 /2005 - EX[DB] Date **20/01/2011**

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

To :
C.C.E. LUCKNOW
7-A, ASHOK MARG, LUCKNOW.

C.C.E. LUCKNOW Appellant

Vs

S.V.C. SUPERCHEM LTD. Respondent

I am directed to transmit herewith a certified copy of **Final order No.** 86-87/ **2011 EX[DB]** dated 07-12-10 passed by the Tribunal under **Section 35-C(1)of Central Excises Act, 1944**

Assistant Registrar
(Excise Appeal Branch)

Copy to :

1. Respondent
S.V.C. SUPERCHEM LTD.
CHHATA- BARSANA ROAD,
CHHATA MATHURA
2. Adv. / Consult
MR.RAJESH KUMAR,ADV.,
24A, DDA SFS FLAT, MOUNT KAILASH, EAST OF KAILASH, N. DELHI-65
3. C.D.R
4. Bar association. CESTAT. New Delhi
5. Director Publications. Customs. Excise. I.P. Estate. New Delhi
6. M/s Centax Publictions 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 (Haryana)
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
15. HON'BLE PRESIDENT.

Assistant Registrar
(Excise Appeal Branch)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST BLOCK NO.II, R.K. PURAM, NEW DELHI-110066.
DIVISION BENCH
Central Excise Appeals No.E/575/05-Ex & E/1836/05-Ex

(Arising out of Order-in-Appeal No.382-CE/04 dated 11.11.2004 passed by the CCE (A), Lucknow and Order-in-Original No.24/Commr/LKO/04 dated 31.3.2004 passed by the CCE, Lucknow)

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?	
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?	

CCE, Lucknow — Appellants

Vs.

M/s.S.V.C.Superchem Ltd. — Respondent

Present for the Appellant: Shri R.K.Verma, SDR
Present for the Respondent: Shri Rajesh Kumar, Advocate

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

Date of Hearing/Decision: 07.12.2010

FINAL **ORAL ORDER NO.** 86-87/2011-EX

PER: RAKESH KUMAR

The appeal No.E/575/05 -Ex arises of out of Order-in-Appeal No.382-CE/04 dated 11.11.2004 passed by the CCE (A), Lucknow and the appeal No.E/1836/05-Ex arises of out of Order-in Original No.24/Commr/LKO/04 dated 31.3.2004 passed by the Commissioner, Central Excise, Lucknow. The facts leading to these appeals are, in brief, as under:

1.1. The respondent are manufacturer of Purified Terepthalic Acid (PTA) chargeable to Central Excise duty under chapter sub heading No.2917.20 of Central Excise Tariff. They avail the facility of Modvat credit of duty paid on inputs and capital goods used in or in relation to the manufacture of finished products. They started production of PTA in 1997 and during the period from November, 1997 to March, 1999, they took modvat credit amounting to Rs.1,27,95,483/- on the various inputs received in the factory which had been issued for production. However, during course of scrutiny of RT-12 returns filed by them for this period, it was found that during this period there was no production. On enquiry by the officers, the respondent informed that the inputs, in respect of which modvat creit has been taken, are still in process, as production had to be stopped due to some mechanical failure. The department, therefore, was of the view that they are not eligible for modvat credit, as the inputs in respect of which modvat credit has been taken have not been used in or in relation to the manufacture of finished products and the use of inputs in the trial production cannot be said to be the use in or in relation to manufacture of finished products. It is on this basis, that the following show cause notices were issued to the respondent for recovery of allegedly wrongly taken modvat credit alongwith interest, under the provisions of Rule 57I()1) (ii) of Central Excise Rules, 1944 read with Section 11A (1) of Central Excise Act, 1944 and Rule 57I(5) of Central Excise Rules, 1944 and also imposition of penalty under Rule 57I(4) of Central Excise Rules, 1944 read with Section 11AC of Central Excise Act, 1044.

S. No	Show Cause Notice No. & date	Period of dispute	Amount involved
1	C.No.V(30)Appl.Adj/125/2002 /15094 dt 29.10.2002	November, 1997 to July, 1998	Rs.97,01,793/-
2	SVC/Audit/Kosi/99/284 dt.18.2.99	August to September 1998	Rs.68,694/-
3	SVC/Audit/Kosi/99/288 dt.19.2.99	August, 1998	Rs.7,500/-
4	SVC/Audit/Kosi/99/588 dt. 12.4.99	October to December, 1998	Rs.16,72,029/-
5	SVC/Audit/Kosi/99/977 dt. 5.7.99	January to March, 1999	Rs.13,45,467/-

1.2 The show cause notice dated 29.10.2002 at serial No.1 was adjudicated by the Commissioner of Central Excise, Lucknow vide Order-in-Original No.24/Commr/LKO/04 dated 31.3.2004 by which the proceedings initiated against the respondent were dropped.

1.3 The show cause notices from Serial No.2 to 5 were adjudicated by the Deputy Commissioner of Central Excise, Aligarh by a common order in original No.10/Dem/2001 dated 14.6.2001, by which the modvat credit demand as raised in the show cause notices were confirmed alongwith interest and besides this, penalty of Rs.31,00,000/- was also imposed on the respondent.

1.3.1 Against the Deputy Commissioner's order dated 14.06.2001, the respondent filed appeals before the Commissioner, Central Excise (Appeals), Lucknow, who vide order in appeal No.382-CE/04 dated 11.11.2004 set aside the order of the Deputy Commissioner and allowed the appeal. Against this order of the Commissioner (Appeals), the appeal No.E/575/05 has been filed by the Revenue.

1.3.2 As regards, the Commissioner's order dated 31.3.2004 dropping proceedings against the respondent, the same was reviewed by the CBEC vide Review Order No.73-R/2005 dated 23.3.2005 by which the Board directed the Commissioner to file appeal before the

Tribunal for correct determination of the points arising out of the order of the Commissioner as mentioned in the Review Order. In pursuance of this Review Order dated 23.3.2005 of the Board, the Commissioner filed the appeal No.E/1836/05 before this Tribunal.

1.3.3. Since the facts and the issue involved of both the appeals are same, the same were heard together.

2. Heard both sides.

3. Shri Anil Khanna, the learned DR, assailed the impugned orders, reiterating the grounds in the Revenue's Appeals and emphasised that –

(a) the Commissioner's finding that the test and trial production is part and parcel of the integrated production process and there is no bar on taking modvat credit/cenvat Credit on the inputs used for trial production is incorrect in view of the judgements of the Tribunal in the cases of **Flex Engineering Ltd. vs. CCE, Noida reported in 2004 (61) RLT 161** and **Warner Lambert India Ltd. vs. CCE, Bangalore reported in 2004 (174) ELT 386** wherein the Tribunal has held that the testing is not part and parcel of the manufacture and hence the inputs used for testing are not eligible for modvat credit;

(b) it has been held by the Tribunal in the case of **Reliance Industries Ltd. vs. CCE, Surat reported in 2004 (173) ELT 106** that the items used in the trial runs are not eligible for modvat credit;

(c) during the period from November, 1997 to March, 1999, huge modvat credit has been taken by the respondent on the inputs and those inputs have been issued for production but still the records show no production of finished goods from which it is clear that the inputs, in respect of which modvat credit has been taken, have not been used for manufacture of finished goods and, therefore, the respondent were not eligible for modvat credit; and

(d) if the respondent's activities during the period of dispute is treated as trial run of the plant since it is settled law that trial run of the plant is not manufacturing operation, the inputs used would not be eligible for modvat credit.

4. Shri Rajesh Kumar, Advocate, the learned Counsel representing the respondent, defending the impugned orders, pleaded that the inputs in respect of which modvat credit had been taken, had been received in the respondent's factory and had been issued for production, that the same were under process, as because of certain mechanical problems in the plant, the production had to be stopped and semi processed inputs were lying in the silos, that it is not the allegation of the department that the inputs, in respect of which modvat credit has been taken, had been removed as such from the factory, that in the manufacture of PTA, an intermediate product viz. crude terephthalic acid (CTA) first comes into existence and on its further treatment for removal of impurities, the PTA came into existence; that inputs taken for production were available in the silos in the form of intermediate product - CTA, which were to be processed further, that the show cause notices issued to the respondent are premature; that the first production of PTA from CTA took place in the month of September, 1999 and first clearance therefrom was made in the May, 2000 on payment of duty by utilizing the modvat credit taken; that the respondent during the during from

September, 1999 to 2008-09 have produced 1172.012 MT of PTA and have cleared 1137.680 MT of PTA on payment of duty and this finds entry in the RG-1 register maintained by the respondent, that both the Commissioner and Commissioner(Appeals) have set aside the modvat credit demands on merits based on the documentary evidence placed before them, that the judgements of the Tribunal in the case of Flex Engineering Ltd. (supra), Warner Lambert India Ltd. (supra) and Reliance Industries Ltd. (supra) are not applicable to the facts of the present case; that the modvat credit in this case has been correctly taken on the receipt of the inputs and the inputs have been used manufacature of finished product and subsequently modvat credit was used for payment of duty on the finished goods when the same were cleared, that since the inputs in respect of which modvat credit has been taken, have been used for production of finished products which were cleared on payment of duty, there is no question of recovery of modvat credit on the ground that the same had not been used for manufacture of finished products.

5. We have carefully considered the submissions from both the sides and perused the records. The undisputed facts are that the inputs used for manufacture of PTA were received in the factory of the respondent and the modvat credit amounting to Rs.1,27,95,483/- was taken in respect of the same during the period from November, 1997 to March, 1999 and during this period, no production was recorded in the RG-1 register. It is not the allegation of the department that the inputs in respect of which modvat credit was taken, have been removed as such. The show cause notice alleged that these inputs have been used for trial run of the plant and there is no production of finished goods, and therefore, the respondent would not be eligible for modvat credit. The

Commissioner and the Commissioner (Appeals) have set aside the modvat credit demands against the respondent on the ground that trial production is part and parcel of integrated production process. The Commissioner (Appeals) also observed that some waste has also been generated during trial production and such waste has not been cleared and the same in the form of CTA is still lying in the plant. The contention of the department, on the other hand, is that the inputs used in the trial production are not eligible for modvat credit. However, neither the Commissioner in the order in original dated 31.3.2004 nor the Commissioner (Appeals) in the order in appeal dated 11.11.2004 have given a finding on the respondent's contention that the inputs taken up for processing had been converted into CTA which was lying in the silos and subsequently, the CTA was converted into PTA which was cleared on payment of duty and that during the period from September, 1999 to August, 2000, 1172.012 MT of PTA has been cleared on payment of duty and in the manufacture of PTA the inputs, on which modvat credit taken, have been used. In the Central Excise Rules, 1944 with regard to the modvat credit, no period has been prescibed during which the inputs, in respect of which modvat credit is taken, are to be used and just because ~~of~~ after the receipt of the inputs in the factory and taking modvat credit, if due to some reasons, there is delay in the manufacture of finished products, the modvat credit cannot be denied. In this case, the respondent's contention is that the inputs after some initial delay due to mechanical problems, have been used in the manufacture of PTA, which was cleared on payment of duty, and if this is so, there would not be any reason to deny the modvat credit. However, we find that on this contention of the respondent, there is no finding in the impugned order with reference to their records. The impugned orders, therefore, are set aside and both the matters are remanded to the Commissioner for de novo adjudication after considering the respondent's plea that modvated inputs had been used in the manufacture of finished products, which had been cleared on payment of duty. Since the facts and the issue are involved are common in both the appeals, the same must be decided by the Commissioner of Central Excise, Lucknow.

(The operative portion of this order was pronounced in the open court on 07.12.10)

(JUSTICE R.M.S.KHANDEPARKAR)
PRESIDENT

(RAKESH KUMAR)
MEMEBR (TECHNICAL)

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