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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/1294/2005,1313/2005 - EX[DB] Date **24/01/2011**

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

To :
M/S HERO CYCLES LTD.
HERO NAGAR G.T.ROAD LUDHIANA PUNJAB

M/S HERO CYCLES LTD. Appellant

Vs

C.C.E.LUDHIANA Respondent

I am directed to transmit herewith a certified copy of **Final order No. 92-93/ 2011 EX[DB]** dated 21-1-11 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.LUDHIANA
F-BLOCK RISHI NAGAR
LUDHIANA PUNJAB
2. Adv. / Consult
MR.V. LAXMIKUMARAN
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NEW DELHI-110029
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)

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

Date of Hearing: **16.06.2010**

Date of decision: 21/1/11

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 Appeals Nos. E/1294 and E/1313 of 2005-Excise Branch

[Arising out of common Order-in-Appeal No.686/CE/Appeal/Ldh/04 dated 30.12.2004 passed by the Commissioner of Central Excise (Appeals), Ludhiana].

(1)M/s. Hero Cycles Limited ....Appellants

Vs.

CCE, Ludhiana ...Respondent

AND

CCE, Ludhiana ...Appellants

Vs.

(2)M/s.Hero Cycles Limited ...Appellants

Appearance:

Rep. by Shri M.P. Devnath, Advocate for the appellants.
Rep. by Shri V. Chaudhary, DR for the respondent.

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

FINAL Order No. 92-93/2011-Ex./Dated: 21/1/2011

Per Rakesh Kumar:

The facts giving rise to these appeals are, in brief, as under:-

1.1 M/s. Essar Steels Ltd. (hereinafter referred to as 'ESL') have a manufacturing unit at Hazira, Surat, for manufacture of various steel products including H.R. Coils. They have a depot at Ludhiana which has central excise registration as a registration dealer. On 11.01.99, during the course of road patrol, the preventive staff of Division-I, Ludhiana intercepted a truck bearing registration no.PJV-3271 loaded with 19.315 M.T. of H.R. Coils in transit at G.T. Road, Ludhiana. On being asked, truck driver Shri Piara Singh produced an invoice dated 30.12.98 issued by ESL, Hazira in favour of M/s. Hero Cycles Ltd., Ludhiana (hereinafter referred to as the appellant). However, the driver told that the goods had been loaded from the godown cum depot premises of ESL in Ludhiana on 11.01.99 itself and he was given invoice dated 30.12.98 for this consignment. A statement of Shri Piara Singh was recorded in this regard on the same date. Thereafter, the officers visited the depot of ESL at Ludhiana and made inquiries with Shri J.S. Parmar, Depot Manager also confirmed to have dispatched the intercepted goods and also admitted that they had not issued any invoice on 11.01.99 for the said consignment and that he had covered the same consignment under an earlier invoice dated 30.12.98. Since the goods were not covered under the proper documents, the same were placed under seizure as the same appeared to be liable for confiscation. The officers also checked the stock of ESL at Ludhiana Depot and during stock checking, 60 H.R. Coils weighing 1323.920 M.T. valued at Rs.1,85,07,786/- were found in excess of the balance as recorded in RG-23 D register maintained at the depot and the same were placed under seizure. A show cause notice dated 7.7.99 for confiscation of the goods seized from the truck no.PJV-3271 and the excess goods seized from the depot was issued to ESL which was adjudicated by the Commissioner vide order-in-original dated 24.4.2000.

After detection of the excess stock at the depot of ESL, the officers initiated inquiries against M/s. Hero Cycles Ltd. (the appellant) who were to receive the HR Coils loaded in the Truck No. PJV3271 intercepted on 11.1.99. On checking the records of the appellants, it was found that during the period 21.11.98 to 30.12.98, they had received 77 H.R. Coils from M/s.ESL, Ludhiana through a local transporter, M/s. National Goods Transport Carrier, Ludhiana, but there were no corresponding entries in their RG-23 A Part-I register. The entries in the RG-23 Part-I register of the appellant were showing the receipt of the goods from M/s. ESL, Hazira. Inquiry was made with Mr. Jogendra

Singh, General Manager (Finance) of the appellant and has statement was recorded on 21.06.99 wherein he stated that ESL, Hazira had sent 77 H.R. Coils in excess of their requirements but they refused to accept the same, that for this reason, ESL had to unload the materials in their depot at Ludhiana, from where it was subsequently lifted by them through M/s. National Goods Carrier and due to this reason only, in the RG-23A Part-I Register, the receipt of the materials had been shown from Surat and not from Ludhiana Depot. However, on enquiry, Shri J.S. Parmar, In charge of Depot of ESL at Ludhiana, in his statement dated 22.06.99 categorically denied having received the above 77 coils in their depot and also their subsequent clearance therefrom.

1.2 As the statements of Shri Jogendra Singh, General Manager (Finance) of the appellants and Shri J.S. Parmar, Officer In charge of the Sales Depot at Ludhiana of ESL were contradictory, inquiries were conducted with Shri Sukhinder Singh Mann, Proprietor of National Goods Carrier and Shri Mann in his statement dated 25.06.99 confirmed having transported the said 77 H.R. Coils from the premises of ESL, Ludhiana to the premises of the appellants under proper GRs. When specifically questioned about the invoices/documents, under which these coils were transported, he submitted that they had been given some photocopies of earlier invoices of Hazira Plant of ESL. Since 54 HR Coils had been received from Hazira rail, inquiry were conducted with the railway authorities at Dhandani Kalan, Ludhiana when the ESL Depot is situated and it was found that a transporter, Shri Bhagwan Dass had lifted the HR coils from Railway yard to the premises of ESL's Depot. M/s Timco Steel Industries, who were the handling agents of ESL, Hazira for their Ludhiana Depot also confirmed having received the goods on the instructions of Shri J.S. Parmar and Shri U.V.S. Verma of the ESL Depot at Ludhiana. When confronted with the above evidence, Shri J.S. Parmar, who had earlier denied having received 77 H.R. Coils from ESL, Hazira, accepted having received the same in the depot, but which had not been entered in their excise records. However, as per the records, the appellants during the above mentioned period, had received 77 H.R. Coils from the factory of ESL at Hazira, Surat under invoices issued by Hazira factory and on the basis of those invoices, Cenvat credit of Rs.30,22,774 had been taken. Investigations conducted by the department indicated that the goods had been received from Ludhiana depot of ESL and not from their factory at Hazira, while the invoices covering the goods had been issued by the factory of ESL at Hazira. The Department was, therefore, of the view that the goods had actually been received from Ludhiana Depot of ESL, which being a registered dealer, should have sent the goods under the invoice issued under Rule 57GG of the Central Excise Rules, 1944 and only on the basis of those invoices, the appellants could have been taken the Cenvat credit. The department was, therefore, of the view that Cenvat credit amounting to Rs.30,22,774/- taken on the basis of the invoices issued by ESL, Hazira had been wrongly taken, as the goods had not been supplied by Essar, Hazira to the appellant but had been supplied by ESL, Ludhiana.

1.3 In the course of the scrutiny of the records of the appellant, it was also found that the Cenvat credit amounting to Rs.7,32,490/- had been taken on the basis of original copies of the invoices issued by ESL while it is only the duplicate copy of the invoices which is valid document for availing Cenvat credit. As per the provisions of Rule 56G(6) of Central Excise Rules, 1944 credit could be taken on the basis of original copies of invoices if the duplicate copies of the invoices had been lost and the Asstt. Commissioner was satisfied about the loss of the duplicate copies. But in this regard, no such evidence is available on record to show that the appellant had satisfied the jurisdictional Asstt. Commissioner and no orders had been passed by the jurisdictional Asstt. Commissioner permitting the availment of cenvat credit on the basis of original copies of the invoices.

1.4 It is in view of the above facts that a show cause notice dated 1.12.2003 was issued to ESL (Sales Depot), Ludhiana, Hero Cycles, G.T. Road, Ludhiana (Appellant), M/s. National Goods Carrier, Ludhiana and M/s Timco Steel Industries, Ludhiana for – (a) recovery of Cenvat credit amounting to Rs.37,55,264/- under Rule 57I (1) of Central Excise Rules, 1944 along with interest under Rule 57I(5) of Central Excise Rules, 1944 from the appellant; (b) imposition of penalty on the appellant under Rule 57 I(4)/ Rule 173Q (1) of Central Excise Rules, 1944 for suppressing the materials facts with a view to take irregular Cenvat credit; and (c) imposition of penalty under Rule 209A of Central Excise Rules, 1944 on ESL Sales Depot, Ludhiana; M/s. Timco Industries Ltd. and M/s. National Goods Carrier, Ludhiana.

1.5 The show cause notice was adjudicated by the Asstt. Commissioner vide order-in-original dated 13.08.2004 by which the Modvat credit demand of Rs.37,25,264/- was confirmed against the appellant company along with interest at the applicable rate; (b) penalty of Rs.37,55,264/- was imposed on the appellant company under Rule 57 I(4), and 173Q of the Central Excise Rules, 1944; (c) penalty of Rs.38 Lakh was imposed on ESL, Ludhiana under Rule 209A of the Central Excise Rules, 1944; (d) penalty of Rs.5 Lakh was imposed on M/s.Timco Industries, Dhandari Kalan, Ludhiana under Rule 209A of Central Excise Rules, 1944; and (e) penalty of Rs.10,000/- was imposed on M/s. National Goods Carrier, Lucknow under Rule 209 A of the Central Excise Rules, 1944.

1.6 On appeal, the Commissioner (Appeals) of Central Excise, Ludhiana vide Order-in-Appeal No.686/CCE/ dated 30.12.2008 while upholding the denial of Cenvat credit of Rs.37,55,264/- and confirming its demand, set aside the demand of interest and imposition of penalty on the ground that the entire disputed amount of Cenvat credit had been paid back by the appellants even before the issue of show cause notice and, therefore, in view of the Tribunal's judgement in CCE Vs. Machino

Montell India Limited reported in 2004 (168) ELT 466, the question of imposing penalty and recovery of interest does not arise. While the appellant M/s. Hero Cycles Ltd. filed appeal No. E/1294 of 2005 against the part of the Commissioner (Appeals)'s order upholding the Cenvat credit demand, the Department has filed appeal No. E/1313 of 2005-Ex. against the part of the same order of the Commissioner (Appeals) setting aside the order of the interest and penalty.

2. These appeals were heard on 16.6.2010. Both the sides were directed to file written submissions. While the appellant's written submissions were received on 23.6.2010, the department's written submission were received on 15.7.2010.

2.1 Shri M.P. Devnath, Advocate, ld. Counsel for the appellant, raised the following points in the written as well as oral submissions.

(1) As regards the denial of Cenvat credit amounting to Rs.30,22,774/- the same has been wrongly denied in view of the following:-

(a) the appellants manufacture CR Coils and CR sheets for which the raw material is H.R. Coils which were purchased from various manufactures like ESL, SAIL, TISCO, etc. So far as purchase of H.R. Coils from ESL is concerned, the appellants received the goods – H.R. Coils at their factory gate directly from ESL, Hazira, Surat and at the same time also from their Depot at Ludhiana. The invoices issued by ESL mention various particulars like quantity, weight, vehicle no. etc. The security staff at the factory gate also verified whether the identication number of the coils given in the invoice tallied with the identification No. on the goods received. Thereafter the appellant received the goods after making entries in the Inward Register maintained at the factory gate and also entries in the RG-23A Part-I giving details of the quantity of HR Coils, invoice number, etc. The show cause notice alleges that since the goods have been received from the depot of ESL at Ludhiana depot, the cenvat credit would be admissible only if the goods were accompanied by an invoice issued under Rule 57GG by ESL, Ludhiana while the credit in this case had been taken on the basis of the invoices issued by the Hazira factory at ESL. This contention of the department is incorrect.

(b) There is no dispute about the duty paid nature of the H.R. Coils, in question. They were received in the factory premises of the appellant and their utilisation for manufacture of the finished products is not in dispute. It is also not in dispute that the inputs received are in agreement with the invoices issued by ESL, Hazira and the invoices showed the payment of duty on the goods. Similarly, there is no dispute that the invoices indicate the name of the appellant [M/s Hero Cycles Limited (C.R. Division), Ludhinana] as the consignee and the final product manufactured out of H.R. Coils were cleared on payment of duty. The dispute is only with reference to the invoices on the basis of which the credit has been availed by the appellant. While the HR Coils had been received from the depot of ESL at Ludhiana, the credit has been taken on the basis of the manufacturer's invoices pertaining to the same goods and hence, the credit taken is in accordance with the law.

(c) The goods H.R. Coils received by the appellants are covered by the invoices issued by ESL, Hazira, which are a valid document for availing the Cenvat credit. In view of this, just because the goods dispatched from the factory of ESL were first unloaded at their depot at Ludhiana and from there the same were subsequently transported to the appellant's factory, the credit cannot be denied on the ground that the same could be taken only on the basis of the invoices issued by the ESL's depot under Rule 57GG of the Central Excise Rules, 1944.

(d) In the impugned order-in-appeal the Commissioner (Appeals) has given a clear cut finding that in the instant case the fact that the goods cleared by ESL, Hazira were first unloaded in the factory premises of the appellants from where the same were transported to the factory of the appellants, is not in dispute. The Addl. Commissioner by the impugned order-in-original has also given a finding that the officials at ESL's depot at Ludhiana admitted the fact of having received and dispatched the 77 coils only when enough evidence was collected by the department and that the appellants received the goods from Ludhiana sales depot of ESL but mis-stated and suppressed the fact in the RG23A Part-I Register and showed the receipt from ESL's manufacturing plant at Hazira, with the sole purpose of evading payment of duty. When it is undisputed fact that when 77 HR Coils manufactured by ESL, Hazira had been dispatched by the Hazira Factory to Ludhiana under its invoices issued to the appellants, but the goods, instead of being directly unloaded at the appellant's factory, were first unloaded at ESL's depot at Ludhiana, from where the same were subsequently received by the appellants and when the appellants for this reason have taken Cenvat credit on the basis of the invoices issued by the Hazira factory of ESL and have also shown the receipt of the goods from Hazira factory of ESL, there is no justification for denying the Cenvat credit just on the ground that the movement of the goods from depot to the appellant's factory should have been under the invoice issued by the depot of the ESL at Ludhiana under Rule 57GG and the credit should have been taken only on the basis of those invoices.

(e) A perusal of the provisions of Rule 57A read with Rule 57 G of Central Excise Rules clearly establishes the fact that Rule 57A is substantive rule which has to be fulfilled for availing credit and Rule 57 G lays down the procedure to be followed and the documents on the strength of which credit can be availed by the manufacturer. In this case, there is no dispute about the receipt of 77 coils, their entry in RG-23 Part.I and the fact that the HR Coils were duty paid and had been received under the manufacturer's invoice showing the appellant's name as consignee. There is no dispute that the invoices issued by the manufacturer are valid duty paying documents and the goods received had been utilised for manufacture of the finished products, which had been cleared on payment of duty. In view of this, there is no justification for denying the credit of Rs.30,22,774/- in respect of 77 HR Coils.

(f) The Hon'ble Supreme Court in the case of **Union of India Vs. Marmagoa Steel Ltd. reported in 2008 (229) ELT 481 (SC)** has held that when the goods imported by M/s. Essar Gujarat Ltd. were transferred directly to the assessee from the port and the bills of entry produced by the assessee indicated that M/s. Essar Gujarat Limited had paid duty at the time of import, the credit cannot be denied. The ratio of this judgement of the Hon'ble Supreme Court is squarely applicable to the facts of this case. In addition to this, **Hon'ble Punjab & Haryana High Court in the judgements of CCE, Delhi-III Vs. Bright Brothers Ltd. reported in 2009 (236) ELT 660 (P&H), CCE, Jalandhar Vs. J.C.T. Limited reported in 2009 (234) ELT 47 (P&H) and CCE, Delhi-III, Gurgaon Vs. Myron Electricals Private Limited reported in 2007 (207) ELT**

664 (P&H) have held that substantive benefit cannot be denied due to minor technicalities. The ground on which the Department has denied the Cenvat credit of Rs.30,22,774/- in respect of 77 HR Coils are purely technical grounds.

(2) As regards the denial of credit of Rs.7,32,490/- on the ground that the same had been taken on the basis of original copies of the invoices, the impugned order upholding the denial of this credit is not correct in view of the following:-

(a) When there is no dispute about duty paid nature of the goods and the receipt of the same in the factory and their further use in the manufacture of final product, the mere fact that they are not in possession of the duplicate copy cannot be a ground to deny credit to the appellants. It is not the case of the department that the appellants have availed credit both on the original as well as also on the duplicate copies of the invoice.

(b) The appellants can execute an indemnity bond to the department stating that they will not take credit if a duplicate copy is found available with them. It is settled position in law that credit should not be denied on minor technicalities.

(c) The issue is also settled by the Hon'ble Punjab & Haryana High Court in the case of **Commissioner of Central Excise,**

Ludhiana Vs. Ralson India Ltd. reported in 2006 (202) ELT 759 (P&H).

(3) In this case, the show cause notice dated 1.12.2003 denying the Cenvat credit had been issued for the period from 21.11.98 to 30.11.98 by invoking the extended period under proviso to Section 11 A(1) of the Central Excise Act, 1944. The longer period is not applicable to the Department as the Department was aware of the fact that the appellants have been availing credit on the basis of the manufacturer's invoices issued by ESL as well as ESL's depot at Ludhiana. The appellant had been filing the monthly RT-12 returns along with the invoices every month showing the receipt of various inputs under the cover of the documents under which the same were received and the invoices in dispute were submitted along with RT-12 returns.

(4) The lapse committed by the other party by not issuing an invoice from its depot cannot be taken as a ground to allege suppression on the part of the appellants with an intent to evade payment of duty. It does not materially alter the case as against the appellants whether the input manufacturer issues an invoice from his factory or his depot issues the invoice as registered dealer. In either case, the appellants would be entitled to the cenvat credit.

(5) When no Cenvat credit is recoverable from the appellant, there is no question of any intention on the part of the appellant to evade payment of duty and imposition of penalty on them.

2.2 Shri V. Choudhary, ld. Departmental Representative in his oral as well as written submissions, submitted as under:-

(1) Cenvat credit of Rs.30,22,774/- in respect of the 77 HR Coils received from the ESL has been denied as the same had been taken on the basis of the invoices issued by ESL Haziara, Surat, whereas the goods were received from ESL's Depots at Ludhiana. Since the goods had been received from Ludhiana depot, the same should have been transported under the cover of invoices issued by the sales depot under Rule 57GG as registered dealer and the cenvat credit could be taken only on the basis of those invoices issued under Rule 57GG. When the goods dispatched by ESL, Hazira, had not been received by the appellants directly, they could not take credit on the basis of the invoices issued by ESL, Hazira.

(2) The law mandates that duty paid goods must travel under the cover of valid duty paying documents and cenvat credit is admissible only when the inputs are received under corresponding invoices. In this case, the records establish that cenvat credit has been taken on the basis of invoices

directly received from the manufacturer i.e. ESL Hazira and the appellant had failed to substantiate through any material (transport documents) that goods were also received directly from Hazira along with the invoices.

(3) The cenvat credit of Rs.7,32,490/- has been denied as the same was taken on the original copy of invoices issued by M/s. SAIL. As per the provisions of Rule 52A(3), during the relevant period, duplicate copy of the invoice was the specified document for taking modvat/cenvat credit. Rule 57G(6) lays down that the credit can be taken on the basis of original copy in case of loss of duplicate copy, provided the loss of duplicate copy was reported to the jurisdictional officer and necessary procedure was followed for taking credit on the basis of original copies. In this case, neither the loss of duplicate copy of the invoices was reported nor any such permission was obtained from the department.

(4) It is well settled law that credit can be taken only on the basis of specified documents prescribed by law. In this regard, reliance is placed on the judgements of the Larger Bench of the Tribunal in the case of **CCE, Delhi Vs. Avis Electronics Pvt. Ltd. reported in 2000 (117) ELT 571 (LB)** and of the High Courts in the cases of **Executive Engineer Vs. ACCE Ujjain reported in 2008 (224) ELT**

219 (MP-HC) and S.K. Foils Ltd. Vs. CCE, Delhi-III reported in 2009 (239) ELT 395 (P&H HC).

(5) In view of the above, the impugned order of the Commissioner (Appeals) upholding the Cenvat credit demand is correct.

(6) As regards the penalty and the interest, in this case just because the entire disputed amount had been paid prior to the issue of the show cause notice, the penalty and interest can not be waived. The judgement of the Larger Bench of the Tribunal in the case of **CCE, Delhi Vs. Machino Montell** (supra) is no longer a good law as the same has been reversed by the Punjab & Haryana vide the judgement reported in 2006 (202) ELT—398 (P&H)

In view of this, the Commissioner (Appeals)'s order setting aside the interest and penalty is not correct.

3. We have carefully considered the submissions from both the sides and perused the records.

4. The first point of dispute in this case is regarding taking of Cenvat credit amounting to Rs.7,32,490/- on the basis of the original copies of the invoices. The Department's contention is that as per the provisions of section 57A(3) read with Rule 57 G(6), cenvat credit could be taken only on the basis of duplicate copy of the invoice and under Rule 57G(6) the credit could be taken on the basis of original copy only if the duplicate

copy is lost in transit and intimation regarding the same has been given to the Asstt. Commissioner and he is satisfied that the inputs had been received in the factory, while in this case, the credit on the basis of original copies of the invoice had been availed without following the procedure prescribed under Rule 57G(6). There is no dispute about the fact that the appellants have not given any reason as to why the duplicate copy of the invoice is not available and why the credit was taken on the basis of the original copy of the invoices. There is also no dispute that the loss of duplicate copy of the invoice was never reported to the Department and no permission for taking the credit on the basis of the original copies had been obtained from the jurisdictional Asstt. Commissioner. The Larger Bench of the Tribunal in the case of **Avis Electronics Pvt. Ltd.** (supra) has held that the Tribunal is not to supplement or add words to the Rules and when a particular thing is directed to be performed in a manner prescribed by Rules, it should be performed in that manner itself and not otherwise and accordingly, has held that Cenvat credit cannot be taken on the basis of original copies of the invoices unless the loss of duplicate copy is reported to the jurisdictional Asstt. Commissioner and the necessary permission has been taken for taking Cenvat credit on the basis of the original copies of the invoices. In view of the settled legal position on this issue, we are of the view that the credit amounting to Rs.7,32,490/- taken on the original copy of the invoice has been rightly denied and there is no infirmity in the impugned order of the Commissioner (Appeals) upholding the denial of credit and confirmation of its demand.

5. Coming to the denial of credit amounting to Rs.30,22,774/- in respect of 77 H.R. Coils, we find that the Commissioner (Appeals) in page 3 of the impugned order-in-appeal has given a finding that in this case, the fact that the goods cleared by ESL, Hazira were at first unloaded in their depot premises situated at Ludhiana, from where the same were subsequently transported to the factory premises of the appellant is not in dispute. The Addl. Commissioner in para 24 of the order-in-original has also given a finding that though earlier the Ludhiana depot denied having received the consignments of 77 HR Coils despatched by their Hazira factory which had been consigned to M/s Hero Cycles Limited (the appellant), subsequently, they admitted the fact of having received those and despatched the same to the appellant and that the appellant received the goods from the sales depot of Ludhiana. From this, it is clear that 77 HR Coils, in question, the cenvat credit involved on which is Rs.30,72,774/-, had originally been despatched by ESL, Hazira under their invoices to the appellant. But due to some reasons, the goods were first unloaded at the ESL depot at Ludhiana, from where the same were subsequently despatched to the appellant's factory. If the appellant had received the goods directly from Hazira factory at Ludhiana under their invoices, there would have been no dispute about the cenvat credit on the basis of the invoices issued by the

Hazira factory of ESL. The department's contention is that since there is evidence on record showing that the goods dispatched by ESL, Hazira to the appellant under their invoices were first been unloaded at their depot and the appellants received the goods only from the depot, the Ludhiana depot of ESL should have issued the invoices in respect of those goods under Rule 57GG as registered dealer and it is only under those invoices that the appellant could taken the Cenvat credit. We do not agree with this view of the department, as when there is no dispute about the fact that the goods, in question, had been dispatched by Hazira factory of ESL under their invoices to the appellant and the invoices were in the name of the appellant and due to some reasons, goods were first unloaded at ESL's Ludhiana Depot and were redespatched to the factory of the appellant, Cenvat credit to the appellants on the basis of the invoices issued by the Hazira factory of the ESL can not be denied. Non-issue of invoices by the Ludhiana depot of Essar under Rule 57GG is only a minor technicality for which the Cenvat credit cannot be denied when neither authenticity of the invoices issued by the Hazira factory of the ESL to the appellants is disputed nor the receipt of the goods covered under those invoices by the appellants is disputed. In view of this, the impugned order upholding the Cenvat credit demand of Rs.30,22,774/- in respect of the 77 H.R. Coils is not sustainable and the same is set aside.

6. As regards the Commissioner (Appeals)'s order setting aside the interest and penalty, we find that he has relied upon the judgement of the

Tribunal in the case of **Machino Montell (I) Ltd. reported in 2004 (168) ELT 466** (Tribunal-LB). However, this judgement of the Tribunal is no longer a good law as the same, on a reference appeal having been filed by the Department, has been set aside and reversed by the Punjab & Haryana High Court vide judgement reported in 2006 (202) ELT 398 (P&H). In view of this, the appellants would be liable for interest under Rule 12 of the Cenvat Credit Rules read with Section 11 AB of the Central Excise Act, 1944 on the demand of Cenvat credit of Rs.7,32,490/- . Similarly, since this credit has been wrongly taken, the appellants would be liable for penalty and accordingly, the order-in-original imposing penalty on this count is restored. However, looking to the quantum of Cenvat credit demand, which has been upheld, the quantum of penalty is to be reduced.

7. In view of the above findings while the impugned order upholding the Cenvat credit of Rs.30,22,774/- is set aside, the part of the order upholding the Cenvat credit of Rs.7,32,490/- is upheld. As discussed above, the impugned order setting aside the interest and penalty on the ground that the entire disputed amount of Cenvat credit had been paid prior to the issue of the show cause notice, is also set aside and in this regard, the order-in-original is restored. Accordingly, interest under Rule 12 of the Cenvat Credit Rules read with Section 11 AB would be payable on demand of Cenvat credit of Rs.7,32,490/-, which has been upheld.

Besides this, penalty of Rs.2 lakhs is imposed on the appellant. The appeals stand disposed of as above.

(R.M.S. Khandeparkar)
President

(Rakesh Kumar)
Member (Technical)

Ckp.