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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

Date 24/03/2011

Appeal No. E/703 /2006 - EX[DB]

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

To :
C.C.E. INDORE
MANIK BAGH PALACE, POST BOX NO. 10, INDORE
452001 (M.P.)

C.C.E. INDORE Appellant

Vs

GRASIM INDUSTRIES LTD. (VSF DIVISION) NAGDA. Respondent

I am directed to transmit herewith a certified copy of **Final order No.303/ 2011 EX[DB]** dated 09-3-11 passed by the Tribunal under **Section 35-C(1)of Central Excises Act, 1944**

Assistant Registrar
(Excise Appeal Branch)

Copy to :

1. Respondent

GRASIM INDUSTRIES LTD.
(VSF DIVISION) BIRLAGRAM NAGDA.

2. Adv. / Consult Sh. Sami, Adv, c/o
MR.KHAITAN & CO
12TH FLOOR 1105,ASHOKA ESTATE 24,BARAKHAMBA ROAD,CONNAUGHT PLACE N.DELHI

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 Registra
(Excise Appeal Branch

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

West Block No.2, R.K.Puram, New Delhi

COURT-I

Date of hearing/decision:9.3.2011

Central Excise Appeal No.703 of 2006

[Arising out of order in appeal No.IND-I/494/2005 dated 9.12.2005 passed by Commissioner(Appeals), Customs & Central Excise, Indore.

For Approval and Signature:

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

1	Whether Press Reporter may be allowed to see the Order for publication as per Rule 26 of the CESTAT (Procedure) Rules, 1982?	Yes
2	Whether it should be released under Rule 26 of CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	No
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

C.C. & C.Ex., Indore .. Appellant

Vs.

M/s Grasim Industries Ltd. ... Respondent

Appearance:

Shri V. Chaudhary, Authorized Departmental Representative(DR) for the Revenue and Shri Sahil, Advocate for the respondents

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

FINAL Oral Order No. 303/2011-EX

Per Shri Justice R.M.S. Khandeparkar:

Heard the DR for the appellants and the Advocate for the respondents. This appeal arises from the order dated 9.12.2005 passed by the Commissioner (Appeals), Indore. By the impugned order, the Commissioner (Appeals) has allowed the appeal filed by the respondents against the order of the adjudicating authority dated 13.1.1999. By the said order, the Assistant Commissioner had confirmed the demand of Rs.6,83,033/- and in case failure to pay the same within three months with interest thereon along with penalty of Rs.70,000/-. The respondents were issued a show cause notice dated 15.7.98 on the ground that they had contravened the provisions of Rule 57CC of the Central Excise Rules, 1944 inasmuch as they had not maintained the separate inventory and the receipt and use of common input namely sodium hydroxide used in the manufacture of dutiable as well as exempted products. The respondents contested the proceedings by filing reply dated 11/14-12-1998.

2. The DR placing reliance in the decision in the matter of **Hind Lamps Ltd. vs. C.C.E., Kanpur** reported in 2010 (250) ELT 237 (Tri.-Del.) and **Maruti Suzuki Ltd. vs. C.C.E., Delhi III** reported in 2009 (240) ELT 641 (SC) as well as **C.C.E. vs. Gujarat Narmada Fertilizers Co. Ltd.** reported in 2009 (240) ELT 661 (SC) submitted that the Commissioner (Appeals) erred in setting aside the order passed by the adjudicating authority ignoring the facts that the steam produced with common inputs along with final product manufactured by the respondents was used captively as well as was cleared to others on receipt of consideration and being so, the respondents were duty bound to comply with the provision of Rule 57CC(1) read with sub-rule (9) thereof and this has been well settled by the decisions of the Apex Court in **Maruti Suzuki Ltd. and Gujarat Narmada Fertilizers Co. Ltd.** and further by the Tribunal in Hind Lamps Ltd. case.

3. On the other hand, the Advocate appearing for the applicants placing reliance in the decision of the Tribunal in the matter of **Grasim Industries Ltd. vs. C.C.E., Indore** reported in 2007 (219) ELT 208 (Tri-Mumbai) submitted that the provisions of law which are attracted in the case in hand are essentially Rule 57B(i) and, therefore, in view of the protection

available ~~with~~ To the respondents under the said provision, it has been elaborately explained by the Tribunal in Grasim Industries Ltd. case supra, no fault can be found with the impugned order. The same is merely a by-product and therefore, the case of the respondents is fully covered by the decision of the Tribunal in the said Grasim Industries Ltd. case.

4. It is neither disputed nor can be disputed in terms of the provisions of law comprised under Rule 57CC(1) read with sub-rule (9) thereof in case of utilisation of some of the inputs for the product which can be captively used as well as which is sold outside the factory for consideration, the provision of the rule and the procedure prescribed thereunder is required to be followed and there is no exception to the said Rule. This is further clarified by the decision of the Apex Court in **Maruti Suzuki Ltd.** case as well **as Gujarat Narmada Fertilizers Co. Ltd**. The contention of the respondents, however, is that they can get protection in the facts and circumstances of the case from Rule 57D(1) as has been held in Grasim Industries Ltd. case supra. In Grasim Industries Ltd. case, the appellants availed modvat credit on various inputs used in manufacture of various final products. Some of the inputs were used in generation of super-heated steam for running turban for the purpose of generation of electricity. Some quantity of electricity so generated was captively used whereas residual quantity was sold to others. The Tribunal taking into consideration the provisions of law comprised under Rule 57A, 57B(i)(iv) and 57CC(1) observed thus –

> ***"2.1 In terms of Rule 57B(1)(iv), notwithstanding anything contained in the Rule 57A, the manufacturer of final product shall be allowed to take credit of specified duty paid on the goods used for generation of electricity or steam used for manufacture of final products or for any other purpose, within the factory of production. The basis in the impugned order to invoke the provisions of Rule 57CC(1) is that the appellants had taken Modvat credit on certain quantity of inputs which were used in the generation of steam, which was cleared outside the factory without payment of duty. It is submitted that Rule 57CC(1) would be applicable only if Rule 57C can be made applicable and that the provisions of Rule 57C are not applicable to the present case, since Modvat credit as taken is specifically allowed in respect of goods used for generation of electricity or steam used in the manufacture of final product or for any other***

purpose of production under Rule 57B(1)(iv). In this view if the goods are used for generation of either electricity or steam, used in the manufacture of final product or for any other purpose within the factory of production, credit for the entire quantity of such goods is allowable and no part of such credit can be denied."

5. The Tribunal further observed thus –

"2.3 For the purpose of Rule 57B(1)(4) it is enough if either electricity or steam generated by use of inputs is used within the factory for the manufacture of final products or for any other purpose. In other words, even if part of the steam is cleared outside after the use of the steam in the generation of electricity, credit allowable, so long as the electricity is entirely used within the factory of production. The above submission is supported by the decision of CEGAT in the case of M/s. Raymond Ltd. v. CCE, Bombay in 2000 (117) E.L.T. 104."

6. The Tribunal in the background of the provision of law in relation to the above held thus –

"2.4 The exhausted steam or residual steam emerging after the use of super-heated steam is a by-product and hence the Modvat credit on inputs used in the generation of steam is protected by Rule 57D(i) and not hit by Rule 57C. Therefore, provisions of Rule 57CC(1) are not attracted. This position is now settled by the decision of the CEGAT in the case of Arti Drugs v. CCE, [2001 (133) E.L.T. 385 (Tri.) = 2001 (45) RLT 213 and by the decision of the CEGAT in the case of Gas Authorities of India v. CCE, 2001 (136) E.L.T. 1019 (Tri.) = 2001 (47) RLT 740."

7. The Supreme Court in Maruti Suzuki Ltd. case has held thus –

"19. The question which still remains to be answered is : whether an assessee would be entitled to claim CENVAT credit in cases where it sells electricity outside the factory to the joint ventures, vendors or gives it to the grid for distribution? In the case of Collector of Central Excise v. Rajasthan State Chemical Works reported in 1991 (55) E.L.T. 444 (S.C.) the test laid down by this Court is whether the process and the use are integrally connected. As stated above, electricity generation is more of a process having its own economics. Applying the said test, we hold that when the electricity generation is a captive arrangement and the requirement is for carrying out the manufacturing activity, the electricity generation also forms part of the manufacturing activity and the "input" used in that electricity generation is an "input used in the manufacture" of final product. However, to the extent the excess electricity is cleared to the grid for distribution or to the joint ventures, vendors, and that too for a price (sale) the "process and the use test" fails. In such a case, the nexus between the process and the use gets disconnected. In such a case, it cannot be said that electricity generated is "used in or in relation to the manufacture of final product, within the factory". Therefore, to the extent of the clearance of excess electricity outside the factory to the joint ventures, vendors, grid etc. would not be admissible for CENVAT credit as such wheeled out electricity, cleared for a price, would not fall within the definition of "input" in Rule 2(g) of the CENVAT Credit Rules, 2002. This view is also expressed in para 9 of the judgment of this Court in the case of Collector of Central Excise v. Solaris Chemtech

Limited - 2007 (214) E.L.T. 481 (S.C.). Further, our view is supported by the observations of this Court in the case of Vikram Cement v. Commnr. of Central Excise, Indore - 2006 (194) E.L.T. 3 (S.C.) which is quoted below :-

"It appears to us on a plain reading of the clause that the phrase "within the factory of production" means only such generation of electricity or steam which is used within the factory would qualify as an immediate product. The utilization of inputs in the generation of steam or electricity not being qualified by the phrase "within the factory of production" could be outside the factory. Therefore, whatever goes into generation of electricity or steam which is used within the factory would be an input for the purposes of obtaining credit on the duty payable thereon."

8. Similarly, in Gujarat Narmada Fertilizers Co. Ltd. case, it was held as under:-

"10. In our view, sub-rule (1) is plenary. It restates a principle, namely, that CENVAT credit for duty paid on inputs used in the manufacture of exempted final products is not allowable. This principle is in-built in the very structure of the CENVAT scheme. Sub-rule (1), therefore, merely highlights that principle. Sub-rule (1) covers all inputs, including fuel, whereas sub-rule (2) refers to non-fuel-inputs. Sub-rule (2) covers a situation where common cenvatted inputs are used in or in relation to manufacture of dutiable final product and exempted final product but the fuel-input is excluded from that sub-rule. However, exclusion of fuel-input vis-a-vis non-fuel-input would still fall in sub-rule (1). As stated above, sub-rule (1) is plenary, hence, it cannot be said that because sub-rule (2) is inapplicable to fuel-input(s), CENVAT credit is automatically available to such inputs even if they are used in the manufacture of exempted goods. The cumulative reading of sub-rules (1) and (2) makes it abundantly clear that the circumstances specified in sub-rule (2), which inter alia requires separate accounting of inputs, are not applicable to the fuel-input(s). However, the said sub-rule (2) nowhere says that the legal effect of sub-rule (1) will stand terminated in respect of fuel-inputs which do not fall in sub-rule (2). In other words, the legal effect of sub-rule (1) has to be applied to all inputs including fuel-inputs, only exception being non-fuel-inputs, for which one has to maintain separate accounts or in its absence pay 8% /10% of the total price of the exempted final products. Therefore, sub-rule (1) shall apply in respect of goods used as "fuel" and on such application, the credit will not be permissible on such quantity of fuel which is used in the manufacture of exempted goods. In our view, the above aspect has not been properly appreciated by the Gujarat High Court in the above case of M/s. Gujarat Narmada Valley reported in 2006 (193) E.L.T. 136 (supra)."

9. In Hind Lamps Ltd. case, the Tribunal after taking into consideration of the provisions of Rule 57CC including sub-rule (9) held thus -

"9. The Rule clearly mandates the manufacturer to maintain separate accounts in relation to the inputs utilised in duty payable final products and those in nil-duty payable final products and those which are exempted from duty liability and refrain from availing credit in respect of the inputs utilised in duty free final products. The word " shall" , used in the said Rule with reference to the requirement of maintenance of separate account as well as with reference to obligation not to take credit of the specified duty

paid on the inputs utilised in duty free final products, discloses the purpose and the mandatory nature of the said rule...........”

10. It was also held by the Tribunal in Hind Lamps Ltd. case as under:-

> ***"18. The opening sentence of Rule 57CC(1) clearly states that "where a manufacturer is engaged in manufacture of any final product which is chargeable to duty as well as in any other final product which is exempt..........." Apparently Rule 57CC does not merely relate to exempted final product or the product which is chargeable to nil rate of duty but the subject matter of the rule also includes the goods which are chargeable to duty. Undoubtedly, the liability to pay the amount in terms of the said rule would be on account of failure to comply with requirements of the sub-rule (9). Being so, it would not be correct to say that Rule 57CC applies only to exempted product or the product chargeable to nil rate of duty. In any case, reading clause 4.4 of the said Trade Notice, the provisions comprised under Rule 57D cannot be interpreted to dilute the mandate of sub-rule (9). The rule categorically requires a manufacturer to comply with certain obligations specified thereunder in order to avail certain benefits. Such obligations cannot be sought to be nullified by taking resort to the Trade Notices. The Trade Notice cannot travel beyond the mandate of a statutory rule, nor it can override the provisions of Rule. The said Trade Notice therefore, is of no help to the appellants in the case in hand."***

11. In the case in hand, it is not in dispute that part of steam produced is being captively used whereas the remaining part is disposed of outside the factory for valuable consideration. The observations made by the Tribunal in appellant's own case, earlier reported are to the effect that "Rule 57CC(1) would be applicable only if Rule 57 can be made applicable and that the provisions of Rule 57C are not applicable to the present case, since modvat credit as taken is specifically allowed in respect of the goods used for generation of electricity or steam used in the manufacture of final product or for any other purpose of production under the provision of Rule 57B(i)(iv)". In other words, while deciding the matter, the requirement of use of such product captively by the manufacturer was borne in mind to hold that the assessee was entitled under Rule 57B(i). That being not the case in the facts and circumstances of the case in the matter in hand, the said decision will have no application, apart from the law being well settled by the decisions in **Maruti Suzuki Ltd. case and Gujarat Narmada Fertilizers Co. Ltd.** case.

12. In view of the above circumstances, therefore, the impugned order cannot be sustained and is liable to be set aside and the order of the adjudicating authority is to be restored.

13. Before parting with the matter, we have to observe that in view of the amended provisions of law, nothing prohibits the assessee from approaching the concerned authority for whatever benefit the assessee is entitled in accordance with law for that purpose.

14. The appeal accordingly stands disposed of.

(Justice R.M.S. Khandeparkar)
President

Rakesh Kumar)
Technical Member

scd/