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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/3139/2004 - EX[DB] WITH E/CO/373/2004 Date **13/06/2011**

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

To :
C.C.E. INDORE

COMMISSIONER CUSTOMS & CENTRAL EXCISE,
MANIK BAGH PALACE, INDORE (M.P.)
C.C.E. INDORE Appellant

Vs

M/S POWER ELECTRICALS & ELECTRONICS Respondent

I am directed to transmit herewith a certified copy of **Final order No.**475/ **2011 EX[DB]** dated 08-6-11 passed by the Tribunal under **Section 35-C(1)of Central Excises Act, 1944**

Assistant Registrar
(Excise Appeal Branch)

Copy to :

1. Respondent
M/S POWER ELECTRICALS & ELECTRONICS
M/S POWER ELECTRICALS &
ELECTRONICS, D-2/34, SANWER
ROAD, INDUSTRIAL AREA,
INDORE (M.P.)
2. Adv. / Consult SH. G. K. SARKAR, ADV.,
K. K. ANAND,
A-5, BASEMENT, LAJPAT NAGAR-III,
N. DELHI-24
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. Taxmann Allied Service Pvt Ltd., 59/32. New Rohtak Road. New Delhi - 110005
9. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road, Ahmedabad-15
10. LAWCRUX Advisors Pvt Ltd. LAW House.1-8.Sector - 10. Faridabad 121003 (Haryana)
11. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
12. Office Copy
13. Guard file
14. HON'BLE PRESIDENT.

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.
Principal Bench, New Delhi

COURT NO. I

Excise Appeal No. 3139 of 2004 alongwith C.O. Application No. 373 of 2004

[Arising out of the Order-in-Appeal No. IND-I/120/2004 dated 16/03/2004 passed by The Commissioner (Appeals-I), Customs & Central Excise, Indore.]

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 would 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 Department Authorities?	:

CCE, Indore — Appellant

Versus

M/s Power Electrical & Electronics — Respondent

Appearance

Mrs. Monica Batra, Authorized Representative (DR) – for the appellant.

Shri G.K. Sarkar, Advocate - for the Respondent.

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

DATE OF HEARING : 16/12/2010.
DATE OF DECISION : 8/6/2011

Final Order No. 475/2011 - EX Dated : 08.06.2011

Per. Rakesh Kumar :-

The fact relating to filing of this appeal by the revenue are, in brief, as under.

1.1 The respondent are engaged in the manufacture of transformers chargeable to Central Excise Duty. They also undertake the repair of the transformers received from their customers. The respondent availed Cenvat credit of Central Excise Duty paid on inputs used in or in relation to manufacture of their final product. On 12/9/97, the jurisdictional central excise officers visited the respondent's factory and according to them there is shortage of –

(a) 10 transformers of 100 KVA involving Cenvat credit duty of Rs. 32,846/- and

(b) shortage of cenvated inputs namely 30.745 M.T. of BP sheets involving Cenvat credit duty of Rs. 69,879/- and 29.650 M.T. of CRGO electrical steel sheet involving Cenvat credit of Rs. 1,13,631/-.

1.2 The shortage of BP sheets was determined by taking into account the stock, as per the stock of this item in RG-23A Pt.-I register as on 12/09/97 and total quantity of this item issued during the period from 01/09/97 to 12/09/97 for manufacturing of transformers and thereafter comparing the total quantity with the goods available in the stock and in the factory in various stages of processing. The shortage of CRGO sheets was also determined in a similar manner. The respondent, however, at that time accepted the shortage and debited the Cenvat credit involved on the alleged shortage of BP sheets and CRGO sheets.

1.3 The officers, thereafter, examined the records of the respondent. They ascertained the quantity of another input - wire and strips received during the period from 1/4/93 to 12/9/97. They also determined the consumption of this item on the basis of certain norms called "Guaranteed technical particular specifications" (GTP specifications). After comparing the total quantity of wire and strips received during 1/4/93 to 12/9/97 period with the consumption of this item as ascertained on the basis of GTP specifications, the officers were of the view that the appellant have not been able to account for 14.124 M.T. of wire and strips received by them in respect of which Cenvat credit had been taken and hence amount equal to this Cenvat credit would be recoverable from them.

1.4 As per the records of the respondent, it was found that they had shown loss due to fire of 9,000 kg. of coils and wires valued at Rs. 8,64,000/- involving Modvat credit of Rs. 2,16,000/-. While the fire accidents were claimed to have taken place during 1994 and 1995, as per the records, the appellant had never intimated the department about the same. The department was, therefore, of the view that this much quantity of cenvated inputs had been illicitly diverted and the amount equal to the Cenvat credit involved would be recoverable from them.

1.5 It is in view of the above facts that a show cause notice dated 11/8/98 was issued to the respondent for –

(a) recovery of Central Excise Duty amounting to Rs. 32,846/- payable on 10 transformers of 100 KVA each, alleged to be found short at the time of the officer's visit, under Section 11A (1) of Central Excise Act, 1944 ;

(b) recovery of Cenvat credit amounting to Rs. 7,38,492/- on the cenvated input found short or unaccounted under Rule 57 I (1) (ii) of Central Excise Rules, 1944 ;

(c) imposition of penalty on the respondent under Section 11AC of Central Excise Act, 1944 and Rule 57 I (4) of Central Excise Rules, 1944 for removing finished goods as well as cenvated inputs in a clandestine manner without payment of duty and

(d) imposition of penalty under Rule 173Q (1) (d),

readwith Rule 209 (1) (d) of Central Excise Rules, 1944 for contravention of Rules 9 (1) 52A, 53, 57F (3), 173F and 173G of Central Excise Rules, 1944.

1.6 The above show cause notice was adjudicated by the Joint Commissioner vide order-in-original dated 31/8/99 by which –

(a) the duty and Cenvat credit demand as made in the show cause notice were confirmed ;

(b) while penalty of Rs. 32,846/- was imposed on the respondent under Section 11AC, penalty of Rs. 7,38,492/-

was imposed on them under Rule 57 I (4) of Central Excise Rules, 1944,

(c) another penalty of Rs. 4,00,000/- was imposed on them under Rule 173Q (1) (d) of Central Excise Rules.

In course of hearing before the Joint Commissioner, the respondent had pleaded that there was no shortage of the transformers, as the 10 transformers alleged to be found short were available in the factory, as the same had been put in oven for reovening and similarly there is no shortage of other cenvated inputs, but this plea of the respondent was not accepted by Joint Commissioner.

1.7 The respondent filed appeal before the Commissioner (Appeals) against the Joint Commissioner order and the Commissioner (Appeals) vide order-in-appeal dated 16/3/04 set aside the order-in-original and allowed the appeal.

1.8 It is against this order of the Commissioner (Appeals) that this appeal had been filed by the Revenue. The respondent have filed a cross objection in respect of the Revenue's appeal.

2. Heard both the sides.

2.1 Mrs. Monica Batra, the learned Departmental Representative, assailed the impugned order by reiterating the grounds of appeal in the Revenue's appeal and pleaded that at the time of officer's visit to the factory when shortage of 10 transformers vis-à-vis balance in RG-1 was detected, the was imposed on them under Rule 57 I (4) of Central Excise Rules, 1944,

(c) another penalty of Rs. 4,00,000/- was imposed on them under Rule 173Q (1) (d) of Central Excise Rules.

In course of hearing before the Joint Commissioner, the respondent had pleaded that there was no shortage of the transformers, as the 10 transformers alleged to be found short were available in the factory, as the same had been put in oven for reovening and similarly there is no shortage of other cenvated inputs, but this plea of the respondent was not accepted by Joint Commissioner.

1.7 The respondent filed appeal before the Commissioner (Appeals) against the Joint Commissioner order and the Commissioner (Appeals) vide order-in-appeal dated 16/3/04 set aside the order-in-original and allowed the appeal.

1.8 It is against this order of the Commissioner (Appeals) that this appeal had been filed by the Revenue. The respondent have filed a cross objection in respect of the Revenue's appeal.

2. Heard both the sides.

2.1 Mrs. Monica Batra, the learned Departmental Representative, assailed the impugned order by reiterating the grounds of appeal in the Revenue's appeal and pleaded that at the time of officer's visit to the factory when shortage of 10 transformers vis-à-vis balance in RG-1 was detected, the respondent had admitted that shortage, that similarly they had also accepted the shortage in respect of inputs namely CRGO sheets and BP sheets, that in view of this, their plea at much later stage that there was no shortage of transformers or cenvated inputs cannot be accepted, that the respondent have failed to account for 14.124 M.T. of wires and strips received by them during period from 1/4/93 to 12/9/97 in respect of which Cenvat credit had been taken by them and no satisfactory explanation have been given by them, that, therefore, the duty demand in respect of this quantity has been rightly confirmed by the original Adjudicating Authority and the Commissioner (Appeals)'s order setting aside the same is not correct, that the appellant have claimed loss of 9,000 kg. of wires and strips in fire accidents during the year 1994 and 1995, but these fire accidents were never reported to the department, that the respondent's claim about loss of 9,000 kg. of wires and strips during 1994 and 1995 in respect of which the Cenvat credit had been taken, due to fire accidents is a bogus claim and it is clear that this much quantity had been illicitly diverted, that in view of this, the Commissioner (Appeals)'s order setting aside the Cenvat credit demand in respect of this quantity is not correct, that the judgment of the Tribunal in the case of **Inalsa Ltd. vs. CCE, New Delhi** reported in **1997 (90) E.L.T. 417** is not applicable to the facts of this case and that in view of this, the impugned order is not correct.

2.2 Shri G.K. Sarkar, Advocate, the learned Counsel for the respondent, defended the impugned order by reiterating the findings of the Commissioner (Appeals) and pleaded that the 10 transformers alleged to be found short were very much available in the factory and at the time of officer's visit, the same had been kept in oven for reovening, that this fact had been stated by the respondent's representative at that time, but the officers did not verify this claim, that there was no shortage in the stock of BP sheets and CRGO sheets, that these shortages had not been determined by comparing the stock of these items available with the respondent with the stock as shown in RG-23A Pt. I register, that the shortage of 14.124 M.T. of wire and strips based on presumed consumption of this item during 1/4/93 to 12/9/97 period is not actual shortage, that there is no evidence regarding clandestine removal of such quantity, that no Cenvat credit was required to be reversed in respect of quantity of 9,000 kg. of wires and strips contained in the transformers which had been lost in fire accident in 1994 and 1995, that there is no finding in the order-in-original that the respondent are guilty of fraud or wilful suppression of relevant information with intent to evade the payment of duty and, hence, the imposition of penalty under Section 11AC of Central Excise Act/Rule 57 I of Central Excise Rules, 1944 is not called for, and that in view of this, there is no infirmity in the impugned order.

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

4. Coming first to the allegation of clandestine removal of 10 transformers and demand of duty in respect of the same, we find that the basis of this allegation is that according to the department, at the time of officer's visit to the factory on 12/9/97, when the stock of finished goods was checked, 10 transformers of 100 KVA were found short vis-à-vis the balance of RG-1 register. However, on going through the Panchnama, we find that in the Panchnama itself it has been recorded that when Shri Dubey of the respondent company was asked about the 10 missing transformers, he explained that the same have been put in the oven, but the oven was not opened at that time as it was not feasible to do so. We find that Shri Ravi Dubey of the appellant company in his statement dated 12/9/97 recorded under Section 14 of Central Excise Act, 1944 has also made the same statement that the 10 transformers had been put in the oven for reovening. Just because there was no entry in the RG-1 register regarding transfer of 10 transformers from the bonded store room to the manufacturing section of the factory for reovening and when this fact was told to the officers at that time but still they did not verify, it cannot be concluded that there was unexplained shortage of 10 transformers. In view of this, we hold that the duty demand on the 10 transformers has been correctly set aside.

5. As regards Cenvat credit duty demand in respect of alleged shortage of cenvated inputs namely 30.745 M.T. of BP sheets and 29.65 M.T. of CRGO electrical steel sheets, we find that these

shortages had not been detected by comparing their stock available in the factory at the time of officer's visit on 12/9/97 with the stock as reflected in RG-23A Pt. I register. What the investigating officers have done is that in respect of BP sheets they added the quantity issued for manufacturing during period from 1/9/97 to 12/9/97 to the stock of BP sheets as reflected in RG-23A Pt. I register and, thereafter, compared this total with the stock of BP sheets lying in store room as well as in the factory in various stages of processing. The shortage in respect of CRGO sheets has also been determined in the same manner. However, the appellant's plea is that in ascertaining the stock of cenvated inputs in this manner the officers have not taken into account certain quantity which was available in the factory and certain quantity which has been used in the manufacture of finished goods. In view of this, we concur with the finding of learned Commissioner (Appeals) that the department has not been able to prove that there was actual shortage of BP sheets and CRGO sheets as alleged in the show cause notice.

6. As regards the allegation of clandestine removal of 14.124 M.T. of wires and strips in respect of Cenvat credit had been taken during the period from 1/4/93 to 12/9/97, we find that this allegation is based on the presumptive consumption of this item by the department and as such there is no evidence regarding any removal of this item without payment of duty. The department's allegation is simply based on the total quantity of wire and strips purchased by the respondent during period from

1/4/93 to 12/9/97 and the total quantity supposed to have been consumed on the basis of GTP specifications, while the respondent's plea is the consumption is not always according to the GTP specifications and can be higher also. In view of this, we find no infirmity in the order of the Commissioner (Appeals) dropping the Cenvat credit demand in respect of alleged clandestine removal of 14.124 M.T. of cenvated wires and strips during the period from 1/4/93 to 12/9/97.

7. Coming to the last allegation regarding illicit removal without payment of duty of 9 M.T. of cenvated wires and strips which is shown to have been destroyed in fire in 1994 and 1995, we find that the appellant's claim is that this large quantity of wires and strips was contained in the newly made as well as repaired transformers which had been totally destroyed in fire accidents in the factory in 1994 and 1995. However, it is an admitted fact that neither the respondent had reported about any fire accident during this period nor any claim for remission of duty on the transformers claimed to have been lost in fire have been made. In view of this, the respondent's claim that 9 M.T. of wires and strips contained in newly made as well as repaired transformers had been totally lost in fire is difficult to believe and as such the Commissioner (Appeals)'s order setting aside the demand in respect of the same is not correct. The judgments of Tribunal in the case of **Inalsa Ltd. vs. CCE, New Delhi** (supra), **Electrolux Kelvinator Ltd. vs. CCE** reported in **2004 (163) E.L.T. 395 (Tri. – Del.)** and **Golden Polymex (India) Ltd. vs.**

CCE reported in **2003 (160) E.L.T. 545 (T)** relied upon by the Commissioner (Appeals), wherein it was held that no Cenvat credit is required to be reversed in respect of inputs used in the manufacture of finished goods which are lost in fire and in respect of which remission of duty is allowed, are not applicable to this case, as in this case neither there is any evidence of loss of finished goods due to fire nor any claim for remission of duty on the finished goods lost in fire has been made. The respondents in their books of account show that 9,000 kg. of wires and strips in respect of which Cenvat credit taken by them had been used in the manufacture of new transformers as well as repaired of old transformers and those transformers had been totally lost in fire. But when there is no intimation by the respondent to the department about any such fire accident and no claim for remission of duty in respect of finished goods lost in fire has been made, such a claim cannot be accepted. The respondent, therefore, would be liable to pay duty equal to the amount of Cenvat credit availed on 9,000 kg. of wires and strips. The Commissioner (Appeals)'s order dropping the Cenvat credit demand on this quantity is not sustainable and hence the same is set aside and in this regard the order-in-original is restored. The respondent would also be liable for penalty under Rule 57I (4) for taking this wrong Cenvat credit.

8. In view of the above discussion, the impugned order is upheld except for the part of the order in respect of Cenvat credit demand and penalty with regard to 9,000 kg. of wire and strips

and in this regard the order-in-original passed by the original Adjudicating Authority is restored. The original Adjudicating Authority, however, must quantify the Cenvat credit demand in respect of 9,000 kg. of wires and strips contained in transformers which are claimed to have been destroyed in fire. The penalty imposable under Rule 57 I (4) would be equal to the duty confirmed. The Revenue's appeal is partly allowed. The cross objection filed by the Respondent also stand disposed of.

(Pronounced in the open court on 8/6/2011.)

(Justice R.M.S. Khandeparkar)
President

(Rakesh Kumar)
Member (Technical)

PK