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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/1479/2005 - EX[DB] Date **26/04/2011**

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

To :
M/S. BOTECH SYNERGY LTD.
PLOT NO-197,SECTOR-I,PITHAMPUR DISTT-DHAR
M.P.
454775

BOTECH SYNERGY LTD. Appellant

Vs

C.C.E. INDORE Respondent

I am directed to transmit herewith a certified copy of **Final order No.362/ 2011 EX[DB]** dated 18-4-11 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. INDORE
MANIK BAGH PALACE, POST
BOX NO. 10, INDORE 452001 (M.P.)

2. Adv. / Consult SH.ALOK BARTHWAL,ADV., C/O
MR.RAMESH NAIR
LAKSHMI VIHAR, AG- 192, SCHEME NO. 54, VIJAYNAGAR, INDORE(MP)

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.

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI
Court No.I

E/Appeal No.1479/05

(Arising out of order No.nil dated 6.12.2004 passed by th Commissioner of Central Excise,Indore)

Date of Hearing:10.3.2011

For Approval and signature:

Hon'ble Justice Shri R.M.S. Khandeparkar
Hon'ble Shri Mathew John, Technical Member

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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?

M/s Biotech Synergy Ltd — Appellants

Vs

CCE, Indore — Respondent

Appeared for the Appellant: Shri Alok Barthwal, Advocate
Appeared for the Respondent: Shri S.R. Meena, DR

Coram: **Hon'ble Shri Justice R.M.S. Khandeparkar, President**
Hon'ble Shri Mathew John, Member Technical

FINAL ORDER 362/2011-EX

Per: Mathew John:

Heard the Advocate for the Appellant and DR for the Respondent.

2. This appeal arises from order dated 13th April, 2005 passed by the Commissioner (Appeals), Indore. By the impugned order, the Commissioner (Appeals) has confirmed the order passed by the adjudicating authority. The Joint Commissioner by his order dated 27.1.2005, had disallowed the modvat credit amounting to Rs.11,61,660/- and had ordered recovery thereof as also had imposed equal amount of penalty. The appellants are challenging the impugned order to the extent it imposes penalty.

3. At the outset, the learned Advocate appearing for the appellants submitted that though the Memo of Appeal states to various grounds, the Appellants are confining the challenge to the penalty aspect only. Drawing our attention to Rule 57(1)(4) and Rule 57-AH(2) of the Central Excise Rules, 1944 and placing reliance on the decision in the matter of Kalyani Brakes Ltd Vs CCE Aurangabad reported in 2003 (162) ELT 163 and Punjab Communications Ltd Vs CCE Chandigarh reported in 2002 (145) ELT 301 (Tri.-Del), the learned Advocate for the Appellants submitted that undisputedly when the credit was utilized, inputs in question were very much in existence and therefore, there is no case of wrongful availment or wrongful utilization of the credit. It is undisputed fact that the credit was availed prior to 1st January, 1998 and goods got destroyed after 1st January, 1998. Being so, according to the learned Advocate, there was neither any fraud nor misrepresentation nor suppression of any fact which could warrant

imposition of penalty. He further submitted that the fact that the goods were no more available, having been destroyed, was clearly reflected in the balance sheet of the Appellant company for the relevant year. The learned Advocate, therefore, prays for setting aside the impugned order to the extent it imposes penalty.

4. The DR on the other hand, placing reliance on the decision in the matter of Timex Watch Ltd Vs CCE reported in 2002 (141) ELT 152 and ASCO (India) Ltd Vs CESTAT, Chennai reported in 2009 (238) ELT 397 submitted that the fact of availment of credit on the impugned goods subsequently destroyed, was not revealed to the department and came to the light only in the course of investigation. He further submitted that the law on the point that in case of inputs getting destroyed, the credit availed in respect the duty paid thereon, is required to be reversed, is well settled. In spite of that, the Appellants failed to do the needful in that regard, clearly with the intention to avoid obligation to repay the amount which justified imposition of penalty.

5. The facts which are not in dispute are that the Appellants availed credit in respect of the inputs procured prior to January 1998 and utilized the same towards payment of duty on some final product; that such inputs were rendered unuseful raw material due to the expiry of the period during which it should have been utilized; that the factory of the Appellant remained closed from January 1998 to March, 2000 and that even after reopening of the factory and till the investigation started, the fact that the appellant had availed credit on those inputs and that was utilized towards the payment of duty on

final product, was not specifically disclosed to the department. The balance sheets of the Appellant company for the relevant period did disclose disposal of raw materials on account of expiry of the period utilized thereof but the same did not disclose the utilization of the credit availed for payment of duty on final products. The entire controversy regarding imposition of penalty will have to be considered in the background of these undisputed facts.

6. The impugned order represent that order passed by the original authority disclosed that the penalty was imposed in exercise of the powers under Rule 57(1)(4) read with Rule 57-H(2) of the Central Excise Rules, 1944 and Rule 13(2) of the Central Excise Rules, 2001-02.

7. Rule 57-1 deals with the recovery of credit wrongly availed or utilized in an irregular manner. Sub-Rule (4) thereof provides that where the credit of duty paid on inputs have been taken wrongly by reason of fraud, wilful mis-statement, collusion or suppression of facts, or contravention of any of the provisions of the Act or the Rules made thereunder with intention to evade payment of duty, the person who is liable to pay the amount equivalent to the credit disallowed, as determined under clause (iii) of sub-rule (1) shall also be liable to pay penalty equal to the credit so disallowed. Explanation-I to the said sub-rule provides that where credit disallowed is reduced by the Commissioner of Central Excise (Appeals), the Appellate Tribunal or as the case may be, a Court of law, the penalty shall be payable on such reduced amount of credit disallowed. Similar is the provision under

Explanation-II in case of upward modification of allowance or disallowance of credit.

8. Rule 57-AH relates to subject of relief of credit wrongly taken Sub-rule (i) provides that where cenvat credit has been taken or utilized wrongly, the same along with interest shall be recovered from the manufacturer and provision of section 11-A, 11-AA, 11-AB of the Act shall apply mutantis-mutandis for effecting such recovery. Sub-rule (2) provides that where cenvat credit has been taken or utilized wrongly, on account of fraud, wilful misstatement, collusion or suppression of facts or contravention of any provision of the Act or the Rules made thereunder with intention to evade payment of duty, then the manufacturer shall also be liable to pay penalty and that provision of Section 11-AC shall apply mutantis-mutandis.

9. Rule 13 of the Cenvat Credit Rules, 2001 deals with the subject of confiscation and penalty. Sub-rule (1) provides that if any person takes cenvat credit in respect of inputs or capital goods wrongly or without taking reasonable steps to ensure that appropriate duty on the said inputs with capital goods has been paid as indicated in the document accompanying the inputs or the capital goods, specified in Rule 7 or the contravenes of any of the provisions of these rules in respect of any inputs or capital goods, then all such goods shall be liable to confiscation and such person shall be liable to penalty not exceeding the duty on the excisable goods in respect of which any contravention has been committed or Rs.10,000/- which is greater. Sub-rule (2) provides that in case where cenvat credit has been taken or utilized wrongly on account of fraud, wilful mis-statement, collusion

or suppression of fact or contravention of any of the provisions of the Act or Rules made thereunder with intention to evade payment of duty, then, the manufacturer shall also be liable to pay penalty in terms of the provisions of Section 11AC of the Act.

10. The Tribunal in the case of Timex India Ltd, dealt with the issue as to whether the disputed watch parts in respect of which modvat credit had been availed by the assessee had become waste during the course of manufacturing process or whether they were already defective before they could be put to use in the manufacturing process of watches. The issue was also whether the modvat credit was to be denied only if the disputed watch parts had become waste in or in relation to the manufacture of watches. The Tribunal held thus:-

'We consider that the provisions of Rule 57-D are clear and unambiguous. Only when the inputs are contained in any waste, refuse or by product arising during the manufacture of the final product or when the inputs have become waste during the course of manufacture of the final product, the provisions of Rule 57-D were applicable. If the inputs are found defective and are not used in the process of manufacture of final products, the benefit of Rule 57-D is not applicable to such inputs. Only when the inputs are used n the manufacture of final products and some of those inputs become waste during the course of manufacture of the final product, th credit already taken in respect of such inputs wasted was not to be denied. In the present case, the appellants' record in form RDW had not been examined by the adjudicating authority with such understanding in view. He had taken a general view that in all cases the inputs were found defective before they were put to use. We consider that it would be in the interest of justice if the appellants are given an opportunity to explain their records and place evidence with regard to the specific inputs which had become waste during the course of manufacture of wrist watches. The issue with regard to shortages, may also be

examined by the adjudicating authority to whom the matter is being remanded. The procedure adopted for destruction may also be examined by the adjudicating authority after given an opportunity to the appellants to present their case."

11. In the case of Asco (India) Ltd Vs CEGAT, Chennai reported in 2009 (238) ELT 397 (Mad.), the Madras High Court while rejecting the reference had observed with reference to the facts of that case wherein inputs were found short and written off but the credit taken had not been reversed and on account of default, the penal consequences were set in motion, that there was no question of law for consideration by the High Court.

12. Perusal of the provisions of law including Rule 57-D of the said Rules and the decision of the Tribunal in the case of Timax Watches shows that it is now well settled that only when the inputs are utilized in the manufacture of the final product and some of those inputs become waste in the course of manufacture of goods, the credit already taken in the course of manufacture of the final products, cannot be denied and need not be reversed. It is also settled that modvat credit is not available in the case of goods which get destroyed otherwise and in case where the same is rendered un-utilisable on account of expiry of period within which inputs are required to be utilized. Indeed this position is not disputed by the Appellant as the Appellants have conceded the merits of the case and the challenge is confined to penalty aspect only.

13. The sole contention of the Appellant is that there was no suppression, since the fact that the inputs in question were rendered unuseful, was disclosed in the balance sheet. Further the credit availed

in respect of the duty paid thereon, was already utilized prior to the destruction of such inputs.

14. As already observed, the fact of utilization of such credit prior to January 1998 was not disclosed prior to the commencement of the investigation. It came to the light only when statement of authorized signatory of the appellant was taken. Being so, the contention that there was no suppression of relevant fact, cannot be accepted.

15. It is however the contention of the Advocate of the Appellant that suppression can be alleged only when there is an obligation to disclose something and when there is failure to disclose the same. There can hardly be any quarrel about this proposition of law. However, the fact remains that in this case, the appellant themselves state that credit was availed on the inputs in question and was utilized prior to January 1998. Till March, 2000, the factory of the Appellants remained closed. During this period, the concerned inputs were destroyed. Being so, undisputedly, it was necessary for the Appellants to reverse the credit. Admittedly, even after re-commencement of the factory of the Appellant, no steps were been taken by the appellants to reverse the credit or repay the amount. The requirement of reversal on account of destruction of inputs in question and credit earned by them and utilized was not disclosed to the department. Therefore, the obligation on the part of the appellant to reverse or repay credit was not complied with and hence there is suppression of the fact by the appellant.

16. It is also the contention of the learned Counsel for the appellant that in terms of relevant Rule, it cannot be said that there was wrong

availment of the credit by the appellant. The contention of the appellant is that at the time of availment, the inputs in question were very much in existence and were useful in the process of manufacture of final product.

17. It is stated that Rule 57-(H) of erstwhile rules relating to Modvat Credit relates to credit taken wrongly and Rule 57–AH relates to credit taken or utilized wrongly and similar is the case in case of Rule 13 of Cenvat Credit Rules, 2001. The Tribunal in the case of Kalyani Brakes case while considering Rule 57-I(iv) observed that " throughout the rules relating to the modvat at the relevant time, the words 'taken' and 'utilised' are used in different context. Sub-rule 2 of Rule 57-G provides for a manufacturer who has filed a declaration of rule I 'take credit'. Sub-rule (1) of Rule 57-F also refers to taking credit. Sub-rule 2 refers to utilization of credit'. Having so observed therein, held that there was no intention to evade duty in that case. Thus in other words, intention to evade duty comes once it is known that they were not eligible for the credit but did not reverse the credit.

18. In the case of Punjab Communication, it was held that penalty equal to credit disallowed is liable to be recovered in terms of erstwhile Rule 57-I(4) where the credit of duty paid on inputs has been taken wrongly by reason of fraud, wilful mis-statement, collusion or suppression of facts or contravention of any of the provisions of the Act or the Rules made thereunder with intent to evade payment of duty.

19. The law on the point that modvat credit for duty paid on inputs can be utilized in relation to the duty payable not only on final

products manufactured using the same inputs but also on other final products of the assessee is well settled.

20. The entry in the books of account for availment of credit and entry for utilization of credit thereof itself do not amount to availment and utilization of credit. It is merely a record of availment and utilization of credit. Utilization of credit is always in regard to payment of duty.

21. Once this aspect that credit availed was utilized towards the payment of duty on final product, and subsequently it is revealed that the concerned inputs became unusable, as already seen above it becomes the duty of the manufacturer to reverse such credit. Indeed this position in law is not in dispute as the appellants are not challenging the impugned order on that account.

22. Once this position is clear, the appellant had no option but to reverse the credit or repay the amount. In other words, once it was known to the appellant that the goods on which credit was taken, such inputs could not be utilized in terms of the Rules for manufacture of final product, the appellant was aware that from that point of time, that such utilization of credit was rendered wrongful. The allegation of wrong utilization is to be seen with reference to that point of time when the credit became ineligible. The expression would in the case of situation from the penalty would allow such utilization to be rendered wrongfully Once of such utilization is where the inputs are rendered useful in the manufacture of final product and the penalty has already utilized the credit towards the payment of duty to some other final

product. Those such situation that arises in hand, it cannot be aid that the appellants were not guilty of suppression of fact. In the case of Punjab Communication case and in Kalayni Brakes this aspect arose for consideration.

23. In view of what is stated above, we do not find any infirmity in the order passed by the Commissioner. The appeal therefore, fails and is dismissed.

(Pronounced on 18-04-11)

(Justice R.M.S. Khandeparkar)
President

(Mathew John)
Member Technical

MPS*