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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/3725/2010 - EX[DB] WITH
E/S/3580/2010-EX

Date **14/07/2011**

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

To :
M/S BINANI CEMENT LIMITED
P.O BINANIGRAM, TEH-PINDWARA, DISTT-SIROHI(RAJ)

M/S BINANI CEMENT LIMITED Appellant
Vs
C.C.E. JAIPUR II Respondent

STAY ORDER NO. 725/2011-EX

I am directed to transmit herewith a certified copy of **Final order No.607/ 2011 EX[DB]** dated 24-6-11 passed by the Tribunal under **Section 35-C(1)of Central Excises Act, 1944**

Assistant Registrar
(Excise Appeal Branch)

Copy to :

1. Respondent
C.C.E. JAIPUR II
N.C.R.BUILDING, STATUE CIRCLE, "C" SCHEME, JAIPUR 302005.

2. Adv. / Consult SH. B.L.NARASIMHAN, ADV.,
B-6/10, S.J.ENCLAVE,
N. DELHI-29

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.

Assistant Registrar
(Excise Appeal Branch)

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

E/Stay No.3540/2010 in E/Appeal No.3725 /2010

(Arising out of order in appeal No.312/CB/CE/JPR.II2010 dated 13.8.2010 passed by the Commissioner of Central Excise (Appeals), Jaipur)

Date of Hearing: 24 .6.2011

M/s Binani Cement Ltd — Appellant

Vs

CCE, Jaipur-II — Respondent

Appeared for the Appellant: Shri B.L. Narasimhan , Advocate
Appeared for the Respondent: Shri S.K. Panda, Jt.CDR

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

STAY ORDER No. 725/2011 - EX

Per Justice R.M.S. Khandeparkar:

Heard the Advocate for the Appellant and Joint CDR for the Respondent.

2. As we propose to dispose of the appeal itself, the application is allowed without insisting on any pre-deposit while directing the registry to place the appeal itself for final disposal.

(JUSTICE R.M.S. KHANDEPARKAR)
President

(MATHEW JOHN)
Technical Member

MPS*

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

E/Appeal No.3725 /2010

(Arising out of order in appeal No.312/CB/CE/JPR.II2010 dated 13.8.2010 passed by the Commissioner of Central Excise (Appeals), Jaipur)

Date of Hearing: 24 .6.2011

For Approval and signature:

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

1. Whether Press Reporters may be allowed to see The order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982? Yes

2. Whether it would be released under Rule 27 of the 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 Department Authorities? Yes

M/s Binani Cement Ltd — Appellant

Vs

CCE, Jaipur-II — Respondent

Appeared for the Appellant: Shri B.L. Narasimhan , Advocate
Appeared for the Respondent: Shri S.K. Panda, Jt.CDR

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

FINAL ORDER No. 607/2011-EX

Per Justice R.M.S. Khandeparkar:

Heard the Advocate for the Appellant and Joint CDR for the Respondent.

2. This appeal is heard in terms of the order passed in Stay Application No.3450/2010. The appeal arises from order dated 29th July/13th August, 2010 passed by the Commissioner (Appeals), Jaipur. By the impugned order, the appeal filed by the appellant against the adjudicating authority has been dismissed. The Additional Commissioner, Jaipur by his order dated 31st March, 2009 had disallowed the cenvat credit amounting to Rs. 34,70,499/- and had ordered recovery thereof with interest and equal amount of penalty.

3. The challenge to the impugned order is that both the authorities below have disallowed the Cenvat credit without proper application of mind and without considering the materials placed on record to ascertain whether the credit availed of the duty paid on any of the items could have been disallowed or not.

4. The Departmental Representative, on the other hand, has sought to justify the impugned order by contending that though the authorities below have not considered each item independently, they have taken the overall view in relation to all the items.

5. The Appellants are engaged in the manufacture of cement classifiable under sub-heading 2502.10 and 2502.29 of the Schedule to the Central Excise Tariff Act, 1985. On allegation of the Appellants having availed the credit wrongly to the tune of Rs. 38,64,425/-, a show cause notice dated 21st January, 2008 came to be issued which was contested by the appellants by filing the reply dated 18th February, 2008. The adjudicating authority held thus:-

"The issue is whether the above goods can be treated as capital goods vis-a-vis its classification and final use. As per the facts available on records during material period between January 07 to March 07 and from the uses of the goods in question. I find that the complete fabrication/expansion of new plant was under the process. The impugned goods are used as parts, components and accessories of the Cement Plant and machineries including captive power plant. Since the items except welding electrodes /wires (at Sl No. 33 and 34 above), are parts and accessories of the cement plant and machineries, these are used in fabrication of plant or its parts. All these structures are affixed to earth and built piece by piece. Which can not be moved and hence cannot be termed as 'goods' attracting Central Excise duty. Once Shri Hemant Mogra, the then Assistant Vice President (F&A) of M/s Binani Cement Ltd., Binanigram, Sirohi road had categorically admitted that all the fabricated technological and structures cannot be removed as such. These shall have to be again dismantled piece by piece and the recovery shall be only waste and scrap of steel and not suitable for transportation and installation at any other site as such, as these are engineered and fabricated for this plant. Therefore, these goods cannot be treated as capital goods irrespective of their tariff classification, in terms of Rule 2(a)(iii) of the Cenvat Credit Rules, 2004.

16. As regards contention of assesse in respect of amount of Cenvat credit availed on welding electrodes (amounting to Rs. 1,58,404/- already demanded and adjudicated vide order in original No. 4-5/08 by the Assistant Commissioner) an amount in excess (amounting to Rs. 11,91,138 + Rs.44,384/- taken twice) were included in the amount *demanded. These facts were verified by the RO and reported to be acceptable. I find the contention of assessee acceptable and hold this amount deductible from the amount of show cause notice abinitio.*

17. In view of the above facts, I hold that cenvat credit amounting to Rs. 34,70,499/- (3864425-333926) taken by the assesse on the capital goods is not admissible to them. Accordingly, the penalty is imposable on the assessee. Accordingly, I pas the following order:

1. I disallow the cenvat credit amounting to Rs. 3470,499/- (3864425-393926) and order to recover the same under Rule 14 of the Cenvat Credit Rules, 2004 read with Section 11A of the Central Excise Act, 1944.

2. I order to recover interst on above amount under Rule 14 of the Cenvat Credit Rules, 2004 read with Section 11AB of the Central Excise Act, 1944.

3. I impose a penalty of Rs. 34,70,499/- under Rule 15 of the Cenvat Credit Rules, 2004 read with Section 11A of the Central Excise Act, 1944.

4. I do not impose penalty under Rule 25 of the Central Excise Rules, 2002 as sufficient penalty has been imposed above."

6. Being aggrieved by the said order, the appellants preferred appeal against the same which came to be disposed of while holding thus:-

"I have carefully gone through the facts and submissions made by the appellant of the case. The issue before me is

that the appellant availed cenvat credit amounting to Rs.3470499/- on items of Chapters 72, 73, 39, 59, 69 and 83 of the schedule to the Central Excise Tariff Act, 1985 which are used in construction/fabrication of a complete new cement production line. The adjudicating authority vide impugned order disallowed the cenvat credit on the ground that except welding electrodes/wires, all the items on which credit was availed, were the parts and accessories of the cement plant and machinery and the said plant and machinery were affixed to earth, therefore, cannot be termed as goods, attracting to Central Excise duty. Thus goods on which credit has been taken, cannot be treated as capital goods in terms of Rule 2(a)(iii) of the Cenvat Credit Rules, 2004. Whereas appellant contented that it was immaterial whether the said items went in to cement plant and machinery which was attached to the earth i.e. movable or not and relied upon the case of Nava Bharat Ferro Alloys Ltd reported in 2004 (166) ELT 72 (Tri. Ban).

I find that the present issue is squarely covered by the decision of the Apex Court in the case of Quality Steel Tubes (P) Ltd reported in 1995 (75) ELT 17 (SC) wherein it has been held that Dutiabiity - Goods -Excisable goods - marketability - Plant and machinery embedded to earth, structures, erections and installations are not excisable goods since they do not pass the twin test of being capable of being brought to the market - Sections 2(d) and 3 of Central Excises and Salt Act, 1944.

In view of Apex Court's judgement the case cited by the appellant is not helpful to them. Thus I hold that construction/fabrication of a plant which was embedded to earth is not a excisable goods therefore, cannot be treated as capital goods in terms of Rule 2(a)(i) of the Centvat Credit Rues 2004. Thus, adjudicating authority rightly rejected the credit on the parts and accessories of the said plant.

The contention of the appellant that there was no intention to evade payment of duty as the matter is of repetitive nature involving interpretation for provisions of law, therefore, interest and penalty cannot be involved is not sustainable as appellant has taken wrong cenvat credit by contravening the provisions of law. Therefore, adjudicating authority rightly imposed the interst and penalty. In view of the above, I do not find any infirmity in the findings of the adjudicating authority. Therefore, the same is upheld.

In view of the above, the appeal is rejected."

7. Plain reading of the above orders would disclose that the appellants are justified in contending about non-application of mind by the authorities below to the matter in issue and non-compliance of the basic requirement while dealing with the issue relating to claim of Cenvat credit. As the claim related to 37 different items, it was necessary for the adjudicating authority to deal with each of those items independently and to ascertain whether the claim for credit thereof was justified in the facts and circumstances of the case. Mere reproduction of the well settled principles' that itself is not sufficient to hold that the appellants are

not entitled to avail the credit. The adjudicating authority has to ascertain as to how in the facts and circumstances of the case, those well settled principles of law are attracted and applicable to the facts and circumstances of the case. For that purpose, the authority has to take into consideration each item independently and ascertain the use thereof and also find out whether applying the well settled principles of law and provisions of law, the assesse is justified in availing the credit in respect of each of such items. The authorities below have not undertaken such exercise in relation to the goods in question. Therefore, the impugned orders are liable to be set aside and matter is to be remanded to the adjudicating authority to deal with the claim afresh in accordance with the provisions of law.

8. Accordingly, the impugned order is set aside and the matter is remanded to the adjudicating authority to deal with the matter afresh in accordance with the ~~provisos of~~ provisions in law.

(JUSTICE R.M.S. KHANDEPARKAR)
President

(MATHEW JOHN)
Technical Member

MPS*