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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/2261/2005 - EX[DB] ,E/CO/199/2005 Date **16/02/2012**

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

To :
C.C.E. MEERUT I
EXCISE CHOWK, UNIVERSITY ROAD, MANGAL
PANDEY NAGAR, MEERUT - 250005.

C.C.E. MEERUT I Appellant

Vs

M/S BHARAT HEAVY ELECTRICALS LTD. Respondent

I am directed to transmit herewith a certified copy of **Final order No. A/165/ 2012 EX[DB]** dated 14-2-12 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 BHARAT HEAVY ELECTRICALS LTD.
RANIPUR HARIDWAR

2. Adv. / Consult
MR.RUPESH KUMAR
F-12A,(L.G.F)KAILASH COLONY, N DELHI.110048

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-3
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

Assistant Registrar
(Excise Appeal Branch)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
West Block No. 2, R.K. Puram, NEW DELHI

COURT No. III

Excise CO Application No.199 of 2005
Excise Appeal No.2261 of 2005

Date of Hearing / Decision : 09.02.2012.

[Arising out of Order-In-Appeal No.40/CE/APPL/Noida/05, dated 29.03.2005 issued by CCE, Noida]

For approval and signature:
Hon'ble Ms. Archana Wadhwa, Judicial Member
Hon'ble Mr. 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?	No
2	Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	Yes
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

CCE, Meerut — Appellant
Versus
M/s BHEL — Respondents

Coram: Hon'ble Ms. Archana Wadhwa, Judicial Member
Hon'ble Mr. Mathew John, Technical Member

Present for the Appellant – Shri R.K.Varma, DR
Present for Respondents – Shri Rupesh Kumar, Adv.

FINAL **Order No.** A/165/2012-EX(BR) **Dated :**__________

Per Ms. Archana Wadhwa:

Being aggrieved with that part of the impugned order passed by Commissioner(Appeals), vide which he has set aside the penalty, Revenue has filed the present appeal. We have heard Shri R.K.Varma, ld. DR appearing for the Revenue and Shri Rupesh Kumar, ld. Adv. appearing for the respondents.

2. It is seen that the dispute arose in respect of Modvat Credit of duty paid on angles and bars, which were used by the respondents in the construction activities. The above non-availability of Modvat Credit was brought to the notice of the respondents by the Department vide their letter dtd. 24.08.01. The respondents immediately acted upon the same and reversed the credit vide two different entries dtd. 3rd and 11th September, 2001. They also paid the interest on the above amount.

3. Commissioner(Appeals) vide his impugned order held as under :-

"14. I have gone through the facts of the case and heard Shri S.K.Dhanda, Consultants and Shri R.K.Arora, Authorised representative on behalf of the appellants. The appellants do not dispute that Cenvat credit is not available to them. They argue that since they had paid the duty much in advance to the show cause notice, penalty should not have been demanded from them. It is not in dispute that information regarding the diversion of inputs of civil works was provided by the appellants after the officers of the Directorate General of Central Excise Intelligence, Kanpur called for this information. The adjudicating authority has rightly held in the context of the Apex Court ruling in Pushpam Pharmaceuticals Company vs. CCE – 1995(78)ELT401(SC), that this amounts to suppression. As long as the appellant did not declare necessary information to the department by which the officers could have come to a conclusion that inputs have been used for civil works, the appellants will have to be held to have suppressed material information. In this background, I uphold the

order confirming the demand as well as interest chargeable under rule 57AH read with Section 11B of the Act.

15. The main issue that arises is whether penalty should be imposed. The letter from the department asking the appellants to supply information is dtd. 24th August, 2001. The appellants responded by reversing the credit through two entries one on 3rd Sept., 2001 and other on 11th Sept., 2001. The promptness with which they corrected the wrong done by them is a distinctly redeeming feature of these proceedings. The appellants have been charged interest for which reason they do not stand to gain in any manner by having availed of inadmissible credit. This appears a fit case for showing a leniency in respect of imposition of penalty."

4. As is seen from above, the appellate authority has attributed suppression to the appellant for the purpose of confirmation of demand of duty. However, while setting aside the penalty, he has observed that as the respondents have acted promptly in reversing the credit and have not gained anything by making wrong entry in their Cenvat Credit A/c, penalty is not imposable upon them.

5. The respondents have filed the Cross Objections against the said order which are required to be treated as appeal. They have challenged the findings of the Commissioner(Appeals) as regards suppression. However, ld. Advocate appearing for the respondents makes it clear that the Cross Objections challenging suppression on their part are for the purpose of penalty only and they are not challenging duty confirmation.

6. In their Cross Objections, the respondents have raised the following pleas:-

> *"9.3 That there was no suppression of facts also as entries in all the statutory records were made; copeis of these documents were submitted to the Revenue from time to time; the Cenvat credit availed was not utilized at all as would appear from the copy of the RG23-A-Part-II for the period 4/2000 to 9/2001, duty attested by the Superintendent, C.E., Hardwar. There is no charge in the SCN that the Cenvat credit so taken as Book Entry was at all utilized, resulting in short or non-payment of duty. There is no finding also in the A/O. There was thus no intention to evade payment of duty also. It was only a wrong Book Entry which was corrected without utilizing the Cenvat credit."*

7. On being questioned, ld. Advocate submits that angles and bars are otherwise Modvatable items for them in as much as they are being used in turbine and generators etc. As such Modvat Credit was being availed on the same by making regular entries in their RG-23(A)(Part-I) as well as in Part-II. It is out of the said stock that certain angles and bars were used for the construction activities without realizing that Modvat Credit is required to be reversed. On being pointed out by the Revenue they complied with the directions and did not even challenge the demand on the question of time bar. In this scenario, he submits that the impugned order of Commissioner(Appeals) setting aside penalty upon them be upheld.

8. From the above para reproduced from Cross Objections, we find that the credit was availed after making entries in the statutory records. We also note that the appellants were regularly making entries of angles and bars. Further it is noted that huge credit was pending unutilized in their account which is more than one crore, the duty involved in the present appeal is only Rs.6.37 lakhs. As such we find no malafide reasons on the part of respondents to avail the Modvat credit with a fraudulent intention. We accordingly agree with the appellate authority that penalty imposed upon respondents is required to be set aside. Revenue's appeal accordingly rejected.

(Dictated and pronounced in the Open Court)

(Archana Wadhwa)
Judicial Member

(Mathew John)
Technical Member

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