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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 28/02/2012

Appeal No. E/395 /2011 - EX[DB]
E/S/486/2011-EX

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

To :
M/S BHARAT ALUMINIUM CO. LTD.,
BALCO, BALCO NAGAR, DISTT. KORBA (C.G.)

M/S BHARAT ALUMINIUM CO. LTD., Appellant

Vs

C.C.E. RAIPUR Respondent

STAY ORDER NO. 354/2012-EX

I am directed to transmit herewith a certified copy of **Final order No. A/229/ 2012 EX[DB]** dated 27-2-12 passed by the Tribunal under **Section 35-C(1)of Central Excises Act, 1944**

Assistant Registrar
(Excise Appeal Branch)

Copy to :

1. Respondent
C.C.E. RAIPUR
CENTRAL EXCISE BUILDING,
DHAMTARI ROAD, TIKRAPARA,
RAIPUR 492001.

2. Adv. / Consult
MR.V. LAXMIKUMARAN
B-6/10, SAFDARJUNG ENCLAVE, NEW DELHI-110029

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)

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

Date of Hearing : 19.12.2011

Excise Stay No. 486 of 2011 and Excise Appeal No. 395 of 2011

[Arising out of Order-in-Original No. COMMISSIONER/RPR/59/2010 dated 4.11.2010 passed by the Commissioner, Customs & Central Excise, Raipur]

Coram:
Hon'ble Shri D.N. Panda, Judicial Member
Hon'ble Shri Mathew John, Technical Member

1.	Whether Press Reporter may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	No
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 Bharat Aluminium Co. Ltd. — Appellant

Vs.

CCE, Raipur — Respondent

Appearance:

Appeared for Appellant : Shri Hemant Bajaj, Advocate
Appeared for Respondent : Shri I. Baig, DR

CORAM: Hon'ble Shri D.N. Panda, Judicial Member
Hon'ble Shri Mathew John, Technical Member

STAY order no. 354/2012-EX(BR)
FINAL Order No. A/229/2012-EX(BR) dated............

Per D.N. Panda :

Ld. Counsel inviting attention to para 4 (iv) of the impugned order submits that the disallowance of Cenvat credit of

Rs.1,72,77,833/- comprise disallowance of Rs.90,41,052/- on account of Cenvat credit claimed in respect of service tax paid on transportation of goods meant for export from factory and balance of claim of Rs.82,36,781/- relates to transportation of goods from the factory to buyer's premises.

2. Ld. Adjudicating Authority without examining the first count claim of Rs.90,41,052/- as to whether pertains to export, acted arbitrarily and [illegible] disallowed the same. In so far as second count of claim of Rs.82,36,781/- is concerned, that is legitimate since transport of services was actually availed. For no application of mind by the Authority below there should not be pre-deposit for hearing the appeal.

3. Ld. DR on the other hand, says that the Appellant could not satisfy the Authority about its claim for which that was disallowed.

4. Heard both sides and perused the record.

5. When we find that a substantial claim relates to export of the goods, it is not preferable to simply pass stay order and keep the appeal pending in Tribunal. When paragraph 4(iv) of the impugned order is

read with paragraph 7.2 thereof that clearly throws light that the Authority was under confusion without examination of the evidence on record and law. What that is input service is defined by Rule 2(l) of Cenvat Credit Rules, 2004. Transport of goods from the place of removal is input service. Although Finance Act, 1994 has not defined the term a "place of removal" legislature intended that meaning of the said term should be borrowed from Central Excise Act, 1944 in consonance with Rule 2 (t) of Cenvat Credit Rules 2004. At this stage, ld. Counsel says that proposition of law in this regard is laid down by Hon'ble High Court of Gujarat in ST Appeal No. 419/2010 in terms of order dated 6.4.2011.

6. Once goods are under export and transport service is availed for that purpose there is no rationale to disallow Cenvat credit for the basic reason that we do not intend taxes to be exported. Similarly when the meaning of "place of removal" is clear, without examining the law in that regard, no decision should be taken arbitrarily.

7. For certain observations made above, we direct the Adjudicating Authority to examine the evidence relating to export and to satisfy whether the transport service related to export and also examine the

claim of credit on "place of removal" plea and pass a reasoned and speaking order. The ratio laid down in judgment of Hon'ble High Court of Gujarat and the decision of Hon'ble High Court of Karnataka in **CCE Vs. ABB Ltd.** – 2011-TIOL-395-HC cited by ld. Counsel needs to be looked into by ld. Adjudicating Authority while readjudicating claim of the Appellant. Granting fair opportunity of hearing, a reasoned and speaking order be passed on both counts of the claim.

8. In the result both stay application and appeal are disposed of in the above terms.

(Dictated & pronounced in open Court)

(D.N. Panda)
Judicial Member

(Mathew John)
Technical Member

RM

9. While I agree with the order recorded by Judicial Member that the matter has to go back to the adjudicating authority for the verification of certain facts, I have reservation on certain views recorded by Judicial Member. Therefore I consider it necessary to record this separate order.

10. I am of the view that the meaning of the "place of removal" as defined in Section 4(3) (c) of the Act is not yet settled in view of the following decisions which appear to result in contradictory outcomes.

(1) **Escorts JCB Ltd. Vs. CCE** - 2002 (146) ELT 31 (SC)

(2) **Ambuja Cements Ltd. Vs. Union of India** – 2009 (236) ELT 31 (P&H)

11. I take note of the fact that Punjab & Haryana High Court has mainly relied upon Board's Circular No. 97/8/2007-ST dated 23.8.2007 to the effect that the place of delivery of excisable goods can be considered as "place of removal" subject to certain conditions. However, whether this interpretation given by CBEC is in consonance with the definition of place of removal in the Central Excise Act has not been examined by the Hon'ble High Court of Punjab & Haryana. Since the

decision of the Supreme Court in the case of **Escorts JCB Ltd** (supra) appears to be the contrary. I feel that this matter leaves some scope for dispute. The issue to be considered is whether place of delivery can be brought within the meaning of "any other place or premises from where the excisable goods are to be sold". It is to be noted that the words proceedings this expression are "depot or premises of a consignment agent". There can be an argument that place of delivery has a different colour as compared to depot or premises of a consignment agent.

12. However, I take note that in this particular case the period of dispute is from January 2005 to March 2008. The definition of input service as was prevalent during the period, input services included services utilised for removal FROM place of removal as decided by Karnataka High Court the decision in the case of **ABB Ltd.** – 2011-TIOL-395-HC-KAR-ST and CCE Vs. and **Parth Poly Woven Pvt. Ltd. (Tax Appeal No. 419/2010)** decided by Gujarat High Court. Therefore for deciding the issue at hand there is no need to go into the issue as to whether the place of delivery of the goods can be considered as place of removal.

13. In the circumstances, I agree with the order recorded by the Judicial Member that this matter has to go back to the adjudicating authority for verifying the claim whether they are eligible for disputed Cenvat credit, for the period involved, in view of the above said decisions. It will also be necessary that the adjudicating authority give a clear finding whether the credit of Rs.90,41,052/- was in respect of service tax paid on transportation of goods meant for export from the factory to the port.

14. Thus, I concur with the order portion of Judicial Member and accordingly stay petition and appeal are disposed of.

(Mathew John)
Technical Member

RM