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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 **26/03/2012**

Appeal No. E/2257/2011 - EX[DB]
E/S/2952/2011-EX

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

To :
M/S OKAY GLASS INDUSTRIES,
MR. MANISH BANSAL, 65, JIJOLI INDUSTRIAL AREA,
MAKHANPUR, FIROZABAD.

M/S OKAY GLASS INDUSTRIES, Appellant
Vs
C.C.E. KANPUR Respondent

STAY ORDER NO. 488/2012-EX

I am directed to transmit herewith a certified copy of **Final order No. A/346/ 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. KANPUR
117/7, SARVODAYA NAGAR,
KANPUR 208005.

2. Adv. / Consult
MR.KAPIL VAISH
B-51, BUTLER PLAZA, 95, CIVIL LINES, BAREILLY.

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
PRINCIPAL BENCH, NEW DELHI
Court No.III

E/Stay No.2952/2011 in E/Appeal No.2257/2011

(Arising out of order in original No.9/Comm/2011 dated 27.5.2011 passed by the Commissioner of Central Excise, Kanpur)

Date of Hearing: 27.2.2012

For Approval and signature:

Hon'ble Mrs. Archana Wadhwa, Member Judicial
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? 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? No

M/s Orkay Glass Industries — Appellants

Vs

CCE, Kanpur — Respondent

Appeared for the Appellant: Shri Kapil Vaish, C.A.
Appeared for the Respondent: Shri I. Beg, DR

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

STAY ORDER No. 488/2012-EX (BR)
FINAL ORDER No. A/346/2012-EX (BR)

Per Mathew John:

The appellants are manufacturers of different items of glass falling under Chapter 70 of the Central Excise Tariff. During the period

1.4.2008 to 31.3.2010, they had cleared some goods which were dutiable and some other goods were exempted from duty. The Revenue made a case that they had not maintained separate accounts in respect of inputs used in the manufacture of dutiable products and exempted products and for that reason, they had to pay 10% of the value of exempted products under provisions of Rule 6(3) of Cenvat Credit Rules. The rate of payment under Rule 6(3) for a part of the period was only 5%.

2. ~~The~~ A notice was issued for recovery of amount as prescribed under Rule 6(3)(b) of Cenvat Credit Rules 2004 has been ~~adjusted~~ adjudicated confirming demand of Rs. 95,51,744/- for the period 1.4.08 to 31.3.2010 along with interest. Further a penalty equal to the said amount is imposed under Rule 15 of Cenvat Credit Rules, 2004. Aggrieved by the order, the appellants have filed this appeal.

3. The contention of the appellants is that they did not take cenvat credit in respect of inputs that were used in the manufacture of exempted products and they have been maintaining accounts of such raw materials for which they had not taken cenvat credit. Therefore, their main contention is that they have taken credit only as per Rule 6(1) of the said Rules and there is no case for invoking the provisions of Rule 6(3) because that rule is applicable only for a manufacturer who does not maintain separate accounts for inputs used in the manufacture of dutiable and exempted products. They further point out that the cenvat credit taken by them was short of the amounts for which they would have been eligible for credit. They present the facts as under:

1.	Period	April 08- Sept 09	Percentage to Total	Oct 09—Mar 10	Percentage to Total
2.	SCN	29.3.2010		29.10.2010	
3.	Demand as per SCN	Rs.79,59,504/-		Rs.15,92,240/-	
4.	Dutiable Goods value and percentage of total	Rs.4,02,81,666/-	33%	Rs.2,23,77,379/-	41%
5.	Exempted goods value and percentage of total	Rs.8,27,80,158/-	67%	Rs,3,18,44,805/-	59%
6.	Total	Rs.12,30,61,824/-		Rs.5,42,22,184/-	
7.	Cenvat Taken (amount and percentage of total credit)	Rs.23,20,811/-	30%	5,44,427/-	20%
8.	Cenvat not taken amounts and percentage of total	Rs.55,50,508/-	70%	21,44,905/-	80%
9.	Total	Rs,78,71,319/-		Rs.26,89,332/-	
10.	Penalty imposed	Rs.79,59,504/-		Rs.15,92,240/-	
11.	Amount payable in terms of Rule 6(3)(ii)	Rs.52,73,783/-		Rs.15,86,706/-	
12.	Cenvat short taken	Rs.2,76,725/-		Rs.5,58,199/-	

4. The appellants claim that they are eligible for cenvat credit which they have not taken as calculated above and shown in 12th row. They point out that there is no basis at all for demanding any short paid amount from them.

5. It is also argued that the Commissioner has not extended the benefit of retrospective amendment made in Rule 6 of the Cenvat Credit Rules 2004 by section 73 of the Finance Act 2010 while deciding the matters for the period 1.4.2008 to 30.9.2009.

6. They also argue that this is a case where they have been furnishing the required returns and there was no basis for invoking the

extended period of five years for demanding any amount short paid. For the same reasons, they also submit that no penalty is imposable on them.

7. The learned AR for Revenue submits that the appellants have maintained separate account only in respect of Soda Ash and not in respect of other raw materials and therefore, their claim that they were maintaining separate accounts in respect of inputs is false. There is no evidence that they have taken only proportionate credit in respect of other inputs. Since such accounts were not maintained, the demand for 10% / 5% of the value of exempted goods is proper.

8. We see that the applicant had filed an application as prescribed in Section 73 of Finance Act, 2010 amending Rule 6 of Central Excise Rules, 2004 retrospectively. This is noted by the Commissioner in the impugned order. However, the Commissioner has denied the benefit for the reason that the appellants had not followed the condition prescribed as laid down in Rule 6 even after amendment of Central Excise Rules, 2002 by Notification No. 10/2008-CE(NT) dated 1.3.2008 to be effective from 1.4.2008 and therefore, he has confirmed duty payable from 1.4.09 to 31.3.2010. The Commissioner's finding ~~observation~~ in this regard is reproduced below:-

"In the instant case, I find that the party was maintaining separate records of only one input used in the exempted final products as well as in the dutiable final products. For the rest of the inputs/input services, they left a certain amount of cenvat credit of input/input service un-utilized presumably on the basis that those inputs have been used in the manufacture of exempted products. Further, in any opinion, it is impossible to co-relate the quantity of

inputs consumed in the manufacture of finished goods especially when the party was manufacturing a number of varieties of exempted/dutiable final products in the only furnace and were maintaining single RG-I Register, and that too by making entries in the units 'dozens/sets' whereas the inputs were being received, issued and accounted for in unit kgs. They were also having no record showing the co-relation with the weight of the material used in say one dozen of the finished goods. Thus I find that reversal of credit on proportionate basis is virtually impossible in the facts and circumstances of this case, and the party is liable to pay the amount at the prescribed rate during the relevant period."

9. We have considered arguments of both sides.

10. As per the provisions of Section 73(3) of Finance Act, 2010, if the Commissioner finds that the credit reversed by the assessee is not correctly reversed, the only option available to the Commissioner is to calculate it correctly and then ask them to reverse the correct amount. It goes without saying that before adopting the above manner of calculation, he has to give reasons as to why he considers that the calculation given by the assessee is not proper and he has to disclose the method he is going to adopt to the assessee so that the assessee can make ~~the~~ submissions as to why the calculation adopted by him may or may not be justified. After the retrospective amendment made by Section 73 of Finance Act, 2010, there is no scope for demanding the assessee to pay 10% / 5% of the value of the exempted product. Prima facie, we are convinced that the assesse has complied with the provisions of the amended Rule 6 of Cenvat Credit Rules 2004. Therefore, we find it proper to grant waiver from pre-deposit of dues

arising from the impugned order for admission of the appeal. After granting such wavier, we take up the appeal itself for disposal.

10. Since we are of the view that the Commissioner has not given proper reasons why benefit under Section 73 of Finance Act, 2010 is not applicable for the period April 2008 to March, 2010. In our view, this retrospectively amended provisions are applicable for the impugned period also. If the calculations submitted by the appellant is not correct, the Commissioner has to calculate the correct amount to be reversed explaining the method he proposes to adopt and giving an opportunity for hearing the appellant. Therefore, we set aside the impugned order and remand the matter to the adjudicating authority to properly decide the quantum of input credit to be reversed by the appellants as per provisions of Rule ~~[illegible]~~ 6 8 of Cenvat Credit Rules. Thus the stay petition and appeal are disposed of.

(Order dictated and pronounced in the open Court.)

(ARCHANA WADHWA)
Judicial Member

(MATHEW JOHN)
Technical Member

MPS*