

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
EXCISE APPEAL BRANCH

Date 20/03/2012

Appeal No. E/1218-1221/2005 - EX[DB]

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

To :
M/S BHARAT HEAVY ELECTRICALS LTD
SR. MANAGER (FINANCE / EXCISE), P.O. BHEL
KHAILAR, JHANSI (UP)
284129

M/S BHARAT HEAVY ELECTRICALS LTD

Appellant

Vs
Respondent

C.C.E. KANPUR

I am directed to transmit herewith a certified copy of Final order No. A/291-294/2012 EX[DB] dated 13.03.2012
passed by the Tribunal under Section 35-C(1) of Central Excises Act, 1944


Assistant Registrar
(Excise Appeal Branch)

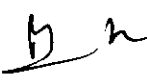
Copy to :

1. Respondent
C.C.E. KANPUR
117/7, SARVODAYA NAGAR,
KANPUR 208005.

2. Adv. / Consult
MR.Z. U. ALVI

D-8, BDA COLONY, ADJACENT GARUDA TRAVELS. KOH-E-FIZA BHOPAL-01

3. C.D.R
4. Bar association. CESTAT. New Delhi
5. Director Publications, Customs, Excise. I.P. Estate, New Delhi
6. M/s Centax Publications 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)
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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 : 13.1.2012
Date of Pronouncement: 13-03-12**

Excise Appeal No. 1218 to 1221 of 2005

[Arising out of the Order-in-Appeal No. 642, 644, 643, 551-CE/APPL/KNP/2004 dated 31.12.2004/1.10.2004 passed by the Commissioner (Appeals), Customs & Central Excise, Kanpur]

For Approval & Signature:

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

1.	Whether Press Reporter 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 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 Bharat Heavy Electricals Ltd.

Appellants

Vs.

CCE, Kanpur

Respondent

Appearance:

Appeared for Appellant : Shri Z.U. Alvi, Advocate

Appeared for Respondent : Shri R.K. Verma, A.R.

CORAM: Hon'ble Ms. Archana Wadhwa, Member (Judicial)
Hon'ble Shri Mathew John, Member (Technical)

FINAL Order No. A/291-294/2012 - EXCISE dated.....

Per Mathew John :

In this proceeding four Appeals filed by M/s Bharat Heavy Electricals Ltd. are being considered. All the Appeals relate to

admissibility of Cenvat credit taken by the Appellants, broadly during the period November 1997 to October 1999, though the reasons for admissibility and the period involved in each of the appeals are different. It is considered proper to examine each Appeal separately.

Appeal No. E/1218/2005

2. In this Appeal the total disputed amount is Rs.14,08,949/- this amount is classified under three different headings and the submissions of the Appellants are recorded as under :-

2.1 Non Filing of Declaration under Rule 173 G CER 1944 before Receipt of Inputs (credit of Rs.14,25,580/-)

Since various suppliers denote their products by varying specific names and as Appellant have been manufacturing customs built equipment, it was not always possible to declare the inputs especially fitments/components with specific nomenclature used by their suppliers. Nonetheless, immediately on receipt of the inputs were received declaration under Rule 173G was filed and credit taken thereon. Subsequently, an application for condoning of delay for filing the declaration was also filed which did not find favour with the adjudicating authority. There is no dispute about either about receipt of inputs in the factory or about its duty paid character and utilization in the manufacture of final dutiable products. The Counsel also relies on the following decisions in the matter to argue that credit cannot be denied in such cases.

- (a) ***Kamakhya Steels (P) Ltd. vs. CCE*** -2000 (121) ELT 247.
- (b) ***Grasim Cement Ltd. Vs. CCE*** 1997 (96) ELT 354.
- (c) ***UP State Sugar Corporation Ltd. Vs. CCE*** -2001 (137) ELT 1029

2.2 Restoration of Wrongly Debited Credit (Rs.2,34,000/-)

Appellants by mistake debited duty corresponding to three sets of windings whereas only one set of winding was dispatched. The wrong debit of Rs.2,34,000/- was restored vide re-credit entry No. 4255 dated 23.12.1998 (At the relevant period the Appellant's assessment were provisional only). Since the debit was clearly erroneous and related to goods which were never dispatched/removed, not being case of valuation or rate of duty, it fell in the category of proper correct maintenance of accounts under Rule 226 CER 1944 and the re-credit entry was for the sole purpose of proper and correct maintenance of statutorily Accounts. Following rulings of the Tribunal are relied upon in this regard:

- (a) Vishakhapatnam Steel Vs. CCE** 2002 (149) ELT 708 (T)
- (b) CCE Vs. Punjab Maize Products Vs.** 1996 (84) ELT 360
- (c) Indo American Electricals Vs. CCE** 1999 (108) ELT 797 (T)
- (d) CCE Vs, Kumar Auto Cast** 1996 (82) ELT 137 (T).

In any case since the assessments were provisional and if the jurisdictional authorities were clear and consistent in their stand in that event the refund ought to have been allowed at the time of finalisation of assessments, since it is not in dispute that the amount was mistakenly debited and Appellants were entitled to the credit.

2.3 Credit on Part/Component of Capital goods (Rs.4,320/)

The credit is denied on the ground that the Tariff headings under which the goods were classified were not specified in Rule 57 Q for allowing Cenvat credit on capital goods. The Appellants contest that they were entitled to credit under rule 57Q (5) under which there was no restriction in terms of specified Tariff Headings. The Tribunal has in the following cases allowed the credit on parts of capital goods irrespective of their tariff classification.

- (a) Dwarikesh Sugar Industrials Vs.** CCE 2007 (220) ELT 938
- (b) CCE Patna Vs. Bihar Caustic & Chemicals** 2000 (118) ELT 196
- (c) Shri Ajudhia Sugar Mills Vs. CCE** 1998 (100) ELT 381 .

In Appellant's own case on similar issue the Hon'ble Tribunal has allowed the credit in F.O. No. 506-508/2008-Ex. dated 22.7.2008

Appeal No. 1219/2005

3. In this case, the total disputed amount is Rs.22,19,114/-. This amount is split into two separate categories and submissions made by the Appellants in respect of these two categories are as under :-

3.1 Disallowance of Credit Adjustment Entry **(Rs.21,48,000)**

3.1.1 It is not in dispute that Appellants were eligible to clear the transformer to M/s A.P. Taransco for their project funded by World Bank Loan without payment of duty under exemption Notification No. 108/95-CE dated 28.8.1995 w.e.f. 15.9.1999 as duly allowed by jurisdictional Deputy Commissioner C.E. on submission on 15.9.99 of requisite certificate which was found to be satisfactory in terms of the Notification. However, while Appellant were under the pressure under the contractual terms to dispatch the transformers, there was delay in communication on the part of Superintendent C.E. about Deputy Commissioner, C.E.'s acceptance of certificate and permission to clear w.e.f. 16.9.1999 the transformer without payment of duty under Notification No. 108/95-CE dated 8.8.95.

3.1.2. Thus despite the fact that Appellant had duly submitted the requisite certificate in terms of Notification No. 108/95-CE on 15.9.1999, since formal permission was not conveyed to them by jurisdictional Supdt. C.E. they made the provisional debit in their RG-23A Part-II Account in October while clearing the transformers to M/s A.P. Transco. However, on receipt of the information about admissibility of exemption w.e.f. 15.9.1999 the Appellant passed a re-credit entry adjusting the provisional debits made within the same month.

3.1.3. Following rulings are also relied upon as regards re-crediting of RG 23A Part-II Account to correct and rectify wrong/mistaken debit entry.

- (a) Vishakhapatnam Steel Plant Vs. CCE 2002 (149) ELT 708 (T)
- (b) CCE Vs. Punjab Maize Products 1996 (84) ELT 360 (T)
- (c) Indo American Electrical Vs. CCE 1999 (108) ELT 797 (T)
- (d) CCE Vs. Kumar Auto Cast 1996 (82) ELT 137 (T).

3.2 Restoration of Provisional Debit Due Negative Price Variation (Rs.71,480)

3.2.1. Since Appellant's assessments were provisional as such the debits of duty in RG-23A Part-II Account also stood provisional. Hence when the effective contractual price came down due to negative price variation making initial provisional debits of duty in excess of duty legally leviable, the excess debits were restored through re-credit entry.

3.2.2. Since the facts that duty was debited under duly approved provisional assessment procedure under Rule 9B, only and Department has not disputed that there was excess debit of duty, such excess debit ought to have been allowed credit at the time of finalisation of assessment.

3.2.3. It is prayed that the matter be remanded to original adjudicating authority to verify about allowance of credit towards excess payment debits, at the time of finalisation of the provisional assessments.

E/1220/2005

4. In this case, the total disputed amount is Rs.14,00,040/- and it relates to non filing of declaration under Rule 173 G before receipt

of inputs. The submissions in the matter are the same as submissions already recorded against such matter in respect of appeal No. Appeal No. E/1218/2005

E/1221/2005

5. The total disputed amount in this appeal is Rs.19,97,158/-. This amount is split into two categories and the Appellants make the following submissions :-

5.1 Filing of Declaration after Receipt of Inputs (Credit Rs.14,25,580/-)

The submissions in the matter are the same as submissions already recorded against such matter in respect of appeal No. Appeal No. E/1218/2005

5.2 Re-credit Entry After 180 Days from date of issuance U/r 57F(4) in Modvated Inputs (After initial availment of credit) on receipt from Job Worker (Credit Rs.5,71,569/-)

5.2.1 The relevant provision sub rule 57F(4) & (5) at the material time stipulated debiting of @ 10% value of the MODVATED Inputs at the time of issuance under 57F(4) Challan to Job Worker for processing into intermediate goods which were to be received back within 180 days. Sub-rules 57F(7) read with (8) & (9) provided for re-crediting of the amount debited on receipt of full quantity of inputs issued under the cover of duplicate copy of the Challans under rule 57F(4).

5.2.2 Parts of inputs issued were received back after 180 days however, there is no dispute that re-crediting of amount debited has been done only after full quantity of inputs were, after processing, received back in Appellant factory in terms of rule 57F (7) & (9). Since full quantity of inputs issued to the job workers has undisputedly been received re-credit under rule 57F(7) was

admissible. Rule 57G(5) which has been invoked for disallowing the re-credits, applied to initial availment of credit under Rule 57A.

5.2.3 Since sub-rule 57F(7) starts with non obstante clause "Notwithstanding anything contained in Rule 57A, hence sub-rule 57(G) which govern admissibility of credit u/r 57(A) has not application to the case. In similar situation in Appellant own case the Hon'ble Tribunal has vide following orders, allowed the credit.

(a) F.O. No: 506-508/2008-Ex. dated 22.7.2008

(b) F.O. No.: 817/07-SM(BR) dated 21.3.2007.

6.1 The Ld A. R. Appearing for Revenue did not raise any arguments in matters relating to credit taken before filing of declarations under Rule 173G and Modvat credit taken on inputs received back from job-worker to distinguish the case at hand from the facts of the cases already decided by Tribunal relating the said issues.

6.2 The Ld A. R. has contested that the action of the appellants in taking suo moto credit of duty already paid on goods is not proper. His contention is that if there is any excess payments made the appellants should have applied for refund and no such application has been filed in these cases and so such suo motto credit taken should be reversed.

6.3 He also strongly contests the issue of suo motto refund taken due to negative price variation and he contests that there is no provision for refunding of duty in such cases. He relies on the decision in BDH Industries Ltd. v. Commissioner-2008 (229) E.L.T. 364 (Tribunal-LB) in support of his argument.

7. The Ld Counsel submitted that he was not pressing for refund on this count and his contention is mainly on amounts involved on other counts.

8. We have considered arguments on both sides. We find that the matter relating to non-filing of declaration under Rule 173 G before receipt of inputs is already decided in favour of the appellants in many decisions and there is no need to re-examine this issue.

9. The only issues to be examined are those listed in para 2.2 (re-credit of debits made by wrong entries) and para 3.1 (re-credit on account of clearances for which exemption notification 108/95).

10. We find that in the issue at para 2.2 is that the appellants made two debits for the same clearance by mistake. Whether a refund application is required to be filed to reverse such wrong debits is an issue on which contrary decisions of the Tribunal exists. We follow the decision of the Larger Bench of the Tribunal in the case of BDH Industries *supra* and hold that the suo motto credit taken is not proper and is recoverable.

11.1 Now the issue is about the re-credit taken as discussed in para 3.2. The duty payment was made without availing the exemption under notification 108/95-CE later they reversed the entry showing duty payment on the ground that they were eligible for the exemption. This type of re-credit clearly amounts to taking refund of excise duty paid. Such refund has to pass through the test of time bar and unjust enrichment. So assessee could not have re-credited the amount in his account on his own without filing a refund claim.

11.2 However the appellants submit that the assessments are still provisional. This is to be confirmed by Revenue. If the assessments are provisional there cannot be any time bar in filing a refund claim. If such refund claim is filed Revenue shall process such claim and pass order as per law.

FAX : 011-26108426

REGISTERED / AD

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK NO.2, R.K.PURAM, NEW DELHI-110066
EXCISE APPEAL BRANCH

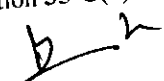
Dated: 08/11/2012

To

1. Appellant as per address in table below
2. Respondent as per address in table below

Misc Order No. MO/1147/2012 dated 26/10/2012

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section 35-C(1) of the Central Excise and Salt Act, 1944.


Assistant Registrar
EXCISE Appeal Branch

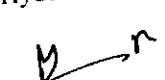
S.No	Application	Appeal	Name and Address of Appellant	Name and Address of Respondent
1.	E/ROM/3779/2012	E/1218/2005	BHARAT HEAVY ELECTRICALS LTD Sr. Manager (Finance / Excise), P.O. BHEL Khailar, Jhansi (UP)	C.C.E. KANPUR 117/7, Sarvodaya Nagar, Kanpur 208005.

Copy To

1. Advocate(s) / Consultant(s):

Z. U. Alvi
D-8, BDA COLONY,
ADJACENT GARUDA TRAVELS.,
KOH-E-FIZA,
BHOPAL,
MADHYA PRADESH
462001

-
2. Bar Association, CESTAT, Delhi
3. Director Publications, Customs, Excise. I.P. Estate, Delhi
4. M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, New Delhi-3
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9. TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070
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11. C.D.R 12. Office Copy 13. Guard File 14. Second Folder


Assistant Registrar
EXCISE Appeal Branch

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

E/ROM No.3779/2012, E/Appeal No.1218/2005

Date of Hearing: 26.10.2012

M/s B.H.E.L.

Applicants

Vs

CCE, Kanpur

Respondent

Appeared for the Appellant: None
Appeared for the Respondent: Shri Sanjay Jain, DR

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

MISC. ORDER No. 1147/2012 By (BJ)

Per Mathew John:

The application stands filed by the Revenue pointing to a typographical mistake in para 11.1. of Final Order No. A/291-294/2012-EX(BR) dated 13.3.2012. The said para makes a reference to earlier para 3.2. According to Revenue, para 3.2 should be read as para 3.1.

We rectify the said ^{mistake.} reference to para 3.2 in para 11.1 of the Final Order No. A/291-294/2012-EX(BR) dated 13.3.2012 ^{to} ~~should~~ be read as para 3.1. The ROM is disposed of in the above manner.

(Order dictated and pronounced in the open Court.)

(MATHEW JOHN)
Member (Technical)
MPS*

(ARCHANA WADHWA)
Member (Judicial)