REGISTERED / AD

FAX : 011-26108426

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

Dated: **02/11/2012**

To

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

Final Order No. **A/1295/2012-EX[DB] dated 23/10/2012**

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/851/2005	**C.C.E Bhopal** Hoshangabad Road, 48, Administrative Area, Area Hills, Bhopal (M.P.) 462011	**DIAMOND CEMENT LTD.** Narsingarh, Distt.- Damoh, M.P.

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Copy To
1. Advocate(s) / Consultant(s): SH. R. K. HASIJA, ADV., C/o RESPONDENT.

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2. C.D.R 3. Office Copy 4. Guard File

5. Bar Association, CESTAT, Delhi **6.** Director Publications, Customs, Excise. I.P. Estate, Delhi

7. M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, New Delhi-3

8. Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17

9. Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005

10. Easy Service Tax Online Dot Com Pvt. Ltd., 407A, Iscon Mall, Satellite Road, Ahmedabad-15

11. LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)

12. TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070

13. Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Ameer Pet, Hyderabad – 500038

Assistant Registrar
EXCISE Appeal Branch

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST BLOCK NO.II, R.K. PURAM, NEW DELHI-110066.
Court No.1
Excise Appeal No.851 Of 2005

(Arising out of Order-in-Appeal No.741-CE/BPL/2004 dated 29.10.2004 passed by the CCE(A), Bhopal)

Date of Hearing/Decision: 23.10.2012

For approval and signature:
Hon'ble Mr.Justice Ajit Bharihoke, President
Hon'ble Mr.Rakesh Kumar, Member (Technical)

1	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	
2	Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	
3	Whether Their Lordships wish to see the fair copy of the Order?	
4	Whether Order is to be circulated to the Departmental authorities?	

CCE, Bhopal — Appellants

Vs.

M/s.Dimond Cement Ltd. — Respondent

Present: Shri A.k.Jain, JCDR for the appellant
Present Shri R.k.Hasija, Advocate for the respondent

Coram: **Hon'ble Mr. Justice Ajit Bharihoke, President**
Hon'ble Mr.Rakesh Kumar, Member (Technical)

FINAL **ORDER No.** A/1295/2012-EX(BR)

Per: Rakesh Kumar

The appellant are manufacturer of cement and clinker. The period of dispute in this case is from March, 1995 to December, 1996. The allegation against the appellant is that during this period, they have availed cenvat credit of Rs.69,06,810/- in respect of certain items of capital goods which are not eligible for cenvat credit. On this basis, six separate show cause notices were issued for recovery of cenvat credit of Rs.69,06,810/- in respect of said goods which were adjudicated by the Assistant Commissioner by a common order dated 28.3.2002 by which he dropped the proceedings. On appeals filed by the Revenue before the commissioner (Appeals), the Commissioner (Appeals) by order in appeal dated 29.10.2004, while upholding the Assistant Commissioner's order in respect of the capital goods used in the factory and used in the factory well as in the mine, disallowed the credit in respect of capital goods exclusively used in the mines. The Revenue is in appeal against that part of the order permitting cenvat credit in respect of capital goods used in the factory as well as in the mines.

2. Heard both sides.

3. Shri A.K.Jain, learned JCDR for the appellant, assailed the impugned order by reiterating the grounds of appeal in the Revenue's appeal and pleaded that the Commissioner (Appeals)'s order is not a speaking order and does not give any reasons for allowing credit in respect of the items which are not exclusively used in the factory.

4. Shri R.K.Hasija Advocate, learned Counsel for the respondent, defended the impugned order and pleaded that mine in which capital goods in question were partly used were captive mines, that cenvat credit in respect of capital goods used in captive mines is admissible in view of the judgement of the Apex Court in the case of Vikram Cement vs. CCE, Indore 2006 (197) ELT 145 (SC) in which Apex Court held that the mines which are captive mines, constitute one integrated unit together with the cement factory, and credit in respect of the capital goods used in the mines

would be admissible. He, therefore pleaded in view of this, there is no infirmity in the impugned order.

5. We have considered the submissions made from both sides. In order to appreciate the contention of the party, it would be useful to have a look as to how the Commissioner (Appeals) dealt with the issue.

"(i) On a perusal of the documents submitted by the party, I am quite satisfied that the credit of Rs.61,04,565/- was only in respect of the capital goods used within the factory, and as such, I do not find the issue still remaining to be decided in this appeal. Accordingly, I proceed to consider the eligibility of Modvat credit on the dual use capital goods and those exclusively used in mines.

(ii) During the disputed period 03/95 to 12/96, just on the analogy of the credit allowed on explosives used in mines under the old Modvat rules effective up to 31.03.2000, as per the Apex Court's judgement in Jaypee Rewa case [2000 (133) ELT 3-SC], and as also affirmed by the Court on 03.09.04 in the case of CCE, Jaipur Vs.J.k.Udaipur Uydog Ltd., I allow the disputed credit on the capital goods which were put into dual uses in the mines and the factory prior to the period 01.04.2004 in view of CEGAT's decision reported in 2002 (147) ELT 393, subject to verification of this aspect by the proper officer.

(ii) However, as regards the credit taken on the capital goods exclusively used in the mines, I am inclined to disallow the credit in view o the apex court's aforesaid decision wherein the Court did not accept the contention that the definition of factory also includes mines.

The appeal is disposed of accordingly. "

6. On reading of the above, we find merit in the contention of the Revenue. The Commissioner (Appeals) has not ~~discussed~~ given any ~~evidence~~ reason to justify this conclusion in that appeal. Neither the order- in- original nor the order- in-appeal has discussed the issue of captive mines. The impugned order is, therefore, set aside and the matter is remanded back to the Commissioner (Appeals) for de novo decision after examining the question as to whether or not goods have been used in captive mines and, thereafter, decide the issue, in question, on the basis of Apex Court's decision in Vikram Cement vs. CCE, Indore (supra). The appeal stands disposed of as above.

(Justice Ajit Bharihoke)

President

(Rakesh Kumar)
Member (Technical)

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