

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

Appeal No. E/2326/2011 - EX[DB]
E/S/3055/2011

Date **30/05/2012**

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

To :
M/S SAHNI STRIPS & WIRES (P) LTD
RATHDHANA ROAD,AKBARPUR BAROTA,
SONEPAT(HR)
M/S SAHNI STRIPS & WIRES (P) LTD

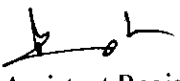
Appellant

Vs
Respondent

C.C.E. ROHTAK

Stay Order No.871/2012-EX (DB)

I am directed to transmit herewith a certified copy of **Final order No. A/639 2012 EX[DB]** dated 29/5/2012
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. ROHTAK

SCO NO,6 SECTOR 1, ROHTAK.

2. Adv. / Consult SH. NAVEEN MULLICK ADV.
B-388, MEERA BAGH
NEW DELHI

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

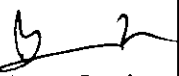
9. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road,
Ahmedabad-15

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

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 AND SERVICE TAX APPELLATE
TRIBUNAL, NEW DELHI, PRINCIPAL BENCH NEW DELHI

Date of Hearing: 3.5.2012

Date of Decision:

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?	

Excise Appeal No.E/2326 of 2011 along with Stay
Application No.E/Stay/3055 of 2011

(Arising out of Order-in-Appeal No.192/BK/RTK/2011 dated 15.06.2011 by the Commissioner of Central Excise (Appeals), Gurgaon).

M/s. Sahni Strips & Wires (P) Ltd.

...Appellant

Vs.

CCE, Rohtak

...Respondent

Coram: Hon'ble Mr. Justice Ajit Bharihoke, President

Hon'ble Mr.Rakesh Kumar, Member (Technical)

Appearance: Shri Navin Mullick, Advocate for the appellants.

Shri Nagesh Pathak, AR for the respondent.

STAY order No. 871/2012-EX (BR)
FINAL Order No. A/639/2012-EX (BR)

Per Rakesh Kumar:

The appellant manufacture galvanized Iron and Steel strips chargeable to central excise duty. In course of galvanization of Iron and Steel Strips, the same ^{are} have passed through molten zinc in a zinc tank. In this process, zinc dross consisting of zinc metal and zinc ash is formed. The period of dispute in this case is from December, 2006 to 1.5.2008. During this period, while galvanized Iron and Steel strips were being cleared on payment of duty, the zinc dross was being cleared without payment of duty in view of Hon'ble Supreme Court's judgement in case of **India Aluminium Co. reported in 1995 (77) ELT 268 (SC)** as a non-excisable product. Since cenvat credit in respect of common inputs used in manufacture of galvanized Iron and Steel strips and zinc dross had been taken and no separate account and inventory of the inputs being used in the manufacture of dutiable final product – (galvanized iron and steel strips) and non-excisable zinc dross could be maintained, the Department was of the view that zinc dross is an exempted final product and hence in respect of clearance of zinc dross, in accordance with the provisions of

Rule 6(3) of Cenvat Credit Rules, 2004, an amount equal to 10% of the sale value of the zinc dross would be payable. It is on this basis that a show cause notice dated 26.08.2009 was issued to the appellant for –

- (a) Recovery of an amount of Rs.2,84,210/- from the appellant under Rule 6(3) of Cenvat Credit Rules, 2004 along with interest under Rule 14 of the Cenvat Credit Rules, 2004; and
- (b) Imposition of penalty on the appellant under Rule 15(2) *ibid*.

1.1 The show cause notice was adjudicated by the Assistant Commissioner vide order-in-original dated 30.11.2009 by which the demand of Rs.2,84,210/- was upheld along with interest and penalty of equal amount was imposed on the appellant under Rule 15(2).

1.2 On appeal to the CCE(Appeals), the Asstt. Commissioner's order was upheld vide order-in-appeal dated 15.6.2011 against which this appeal along with stay application has been filed.

2. Heard both the sides. Though this matter was listed for hearing of the stay application, after hearing the same for sometime, we were of the view that the appeal itself can be decided, as the facts are not disputed and dispute relates only to interpretation of the provision of Cenvat Credit Rules. Accordingly, the requirement of pre-deposit is waived and with the consent of both the sides, the matter was heard for final disposal.

3. Shri Navin Mullick, Advocate, the learned Counsel for the Appellant, pleaded that zinc dross emerges as an unavoidable and inevitable waste in course of galvanization of iron and steel products and, therefore, it is impossible for an assessee to maintain separate account and inventory of inputs meant for dutiable final products (galvanized iron and steel products etc.) and non-excisable ^{or/} zinc dross, and, hence, the provisions of Rule 6(2) and 6(3) are not applicable, that since zinc dross is non-excisable, the same is not covered by the definition of 'exempted goods' as, as given in Rule 2(d) of Cenvat Credit Rules, 2004, 'exempted goods', have to be excisable goods either fully exempt from duty or with 'nil' rate of duty prescribed in the Tariff, that in terms of the Board's clarification, in the CBEC's Central Excise Manual, Cenvat Credit is also admissible in respect of the amount of inputs contained in any of the waste, refuse ^{or} by-product and cenvat credit is not to be denied if inputs are used in any intermediate of the final products, even if such intermediate is exempt from duty, that in any case, the demand is time barred, as there was no wilful mis-statement, fraud or suppression of facts, etc. on the part of the appellant and for the same reason, no penalty under Rule 15(2) of the Cenvat Credit Rules, 2004 read with Section 11 AC is imposable and that the impugned order, therefore, is not sustainable.

4. Shri Nagesh Pathak, the learned Senior Departmental Representative, defending the impugned order by reiterating the findings of the Commissioner (Appeals) in it, pleaded that zinc dross is covered by the definition of 'exempted goods' and hence, the provision of Rule 6(3) of Cenvat Credit Rule have been correctly invoked. He also pleaded that the demand is not time barred and extended period has been correctly invoked as during the period of dispute, the Appellant did not submit to the Department, along with ER-I Returns, the invoices regarding sale of zinc dross.

5. We have carefully considered the rival submissions and perused the records. The provisions of sub-rule 6(2) read with 6(3) of Cenvat Credit Rules are applicable only when a manufacturer avails cenvat credit in respect of any input or input services and uses such inputs and /or input service in respect of final products chargeable to duty as well as "exempted goods". Rule 6(1) provides for disallowing the Cenvat Credit in respect of the quantity of inputs and/or input service used in manufacture of "exempted goods". The term- "exempted goods" as defined under Rule 2(d) of Cenvat Credit Rules, means – "excisable goods which are exempt from the whole of the duty of excise leviable therein and includes goods which are chargeable to "nil" rate of duty". Thus, the exempted goods have to be "excisable goods" first. In this case, there is no dispute that during the period of dispute,

the "zinc dross" ^{being treated as} was non-excisable in view of Apex Court's judgement in case of **India Aluminium Co. Ltd. (Supra)**. Therefore, during the period of dispute, zinc dross being non-excisable was not covered by the definition of "exempted goods" and hence, neither the provisions of Rule 6(1), nor the provision of Rule 6(2) and 6(3) were applicable. In this regard, the findings of CCE (Appeals) in para 5.2 of the impugned order – **"whether the products manufactured by the party are exempted or chargeable to nil rate of duty or non-excisable, the position of payment of 10% under the provisions of Rule 6(3) of Cenvat Credit Rules, 2004 remains the same"**. is incorrect.

6. When the provisions of Rule 6 are not applicable to this case for the reason that zinc dross being non-excisable, is not "exempted goods", the question arises whether the Appellant can enjoy input /input service credit attributable to the non-excisable goods- zinc dross. The answer to this question would be in the negative, as the Authority for framing Cenvat Credit rules, comes from clause (xvii) of Section 37(1) of the Central Excise Act, 1944 which reads as under:-

"provide for the credit of duty paid or deemed to have been paid on the goods used in or in relation to the manufacture of excisable goods"

Therefore, to the extent the inputs/input service are used in the manufacture of non-excisable goods, cenvat credit will not be admissible. This will call for reversal of cenvat credit in proportion to the value of non-excisable by-product or waste.

7. Another point raised by the Appellant is regarding time bar. The period of dispute in this case is from 19.12.2006 to 1.5.2008. The date of show cause notice is 26.08.2009. The show cause notice would be within time limit only if extended period under proviso to section 11 A(1) is available for which it has to be proved that non reversal of proportionate cenvat credit was due to wilful mis-declaration, fraud, suppression of facts, etc. on the part of the Appellant. But these allegations can not be made against the appellant as 2nd para of the show cause notice reads as under-

“Whereas during the course of Audit of records of the said party for the period 2005-07 by Internal Audit party of Central Excise Commissionerate, Delhi – V (Rohtak), it was noticed that the party is engaged in the manufacture of galvanized iron & steel strips /wires scrap of iron & steel, Aluminum, Zinc, etc. and was availing CENVAT Credit on the inputs used in the manufacture of their final products. The party was clearing scrap of zinc, ash, dross, etc. without payment of duty by showing these goods in their ER-I returns as

**exempted under self-assessment under Hon'ble Supreme
Court order 2006 (203) ELT 3 (SC).**

When the Appellant were declaring clearance of Zinc dross/ash without payment of duty as exempted goods in the ER-I Return, they can not be accused of suppressing the relevant information, more so, when there are a series of instructions of the Board directing field offices to scrutinize the ER-I Returns carefully. In view of this, the longer limitation period under provisions of Section 11 A(1) is not available to the Department and show cause notice dated 26.08.2009 is time barred. For the same reason, the penalty under Section 11 AC is also not imposable. The impugned order upholding the demand and imposition of penalty under Section 11 AC is, therefore, not sustainable.

8. In view of the above discussion, the impugned order is set aside. The appeal is allowed.

[pronounced in the open court on ... 29 / 5 / 14]

(Justice Ajit Bharihoke)
President

(Rakesh Kumar)
Member (Technical)

Ckp.