TELEGRAM : CEGCANAL
Website : www.cestat.gov.in

REGISTERED / AD

Mail : cestat08@gmail.com

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

Appeal No. : E/751/2012-EX[DB] & E/S/908/2012-EX

Dated: **15/05/12**

Assistant Registrar
C.E.S.T.A.T. New Delhi
To,
M/S JK LAKSHMI CEMENT LTD
P.O Jaykaypuram, Distt- sirohi(Raj)

M/S JK LAKSHMI CEMENT LTD (Appellant)

VS

C.C.E. JAIPUR II (Respondent)

I am directed to transmit herewith a certified copy of **Final Order No.** A/566/2012 & S.O.NO.805/2012-**EX|DB|** dated 10-5-12 passed by the Tribunal under section **35-C(1) of the Central Excise and Salt Act, 1944.**

Assistant Registrar
EXCISE Appeal Branch

Copy To,
1. **Respondent**
C.C.E. JAIPUR II
N.C.R.Building, Statue Circle, "C" Scheme, Jaipur 302005.

2. **Advocate(s) / Consultant(s):** SH. K.K. ANAND, ADV, C/O APPELLANT.

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. Gaurd File

Assistant Registrar
EXCISE Appeal Branch

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

West Block No.2, R.K.Puram, New Delhi

COURT-I

Date of hearing/decision: 10.5.2012

Stay Application No.908 of 2012 and
Central Excise Appeal No.751 of 2012

Arising out of the order in original No.139/2010/CE/JPR-II dated 24.11.2011 passed by Commissioner of Central Excise, Jaipur II

Hon'ble Mr. Justice Ajit Bharihoke, President
Hon'ble Mr. Rakesh Kumar, Technical Member

1	Whether Press Reporter may be allowed to see the Order for publication as per Rule 26 of the CESTAT (Procedure) Rules, 1982?	
2	Whether it should be released under Rule 26 of 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?	

J.K. Lakshmi Cement Ltd. .. Appellant

Vs.

Commissioner of Central Excise, Jaipur II .. Respondent

Present Shri K.K. Anand, Advocate for the appellants

Present Shri N. Pathak , A.R. for Revenue

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

STAY order No. 805|2012-Ex(DB)
FINAL Order No. A/566|2012-Ex(DB)

Per Justice Ajit Bharihoke :

This appeal is directed against the order in original No.139/2010/CE/JPR-II dated 24.11.2011 passed by the Commissioner, Central Excise, Jaipur II whereby he disallowed the cenvat credit amounting to Rs.7,75,078/- against the demand of

Rs.87,14,856/- and ordered recovery under Section 11A(2) of the Central Excise Act, 1944. Commissioner also ordered recovery of interest at appropriate rate and imposed penalty of Rs.2 lakhs on the appellant.

2. The major component of cenvat credit disallowed i.e. Rs.7,75,078/- relating to the refractories and refractory materials which are specifically covered by clause (v) of Rule 2(a) of Cenvat Credit Rules, 2004. This amount was disallowed on following reasoning:

> *"I find that refractories and refractory materials are specifically covered by clause (v) of Rule 2(a) of Cenvat Credit Rules, 2004. I also find that in the case of Dwarikesh Sugar Industries Limited vs. Commissioner of Central Excise, Meerut II – reported in 2009 (243) ELT 573 (Tri-Delhi), even Quick Setting Cement used in place of refractory material in boilers cement held to be covered by definition of "Refractory and Refractory materials" under Rule 2(a) of Cenvat Credit Rules, 2004. Hence, cenvat credit is admissible. However, since some of the items mentioned by the assessee were not clearly suggesting whether these were refractories and refractory materials, therefore, the jurisdictional Assistant Commissioner was asked to carry out necessary verification etc. Verification got conducted from jurisdictional Assistant Commissioner in this regard has revealed that items of Chapter 73 cannot be treated and considered as refractory items. Accordingly, I hold that cenvat credit to the extent of Rs.7,75,078/- involved on goods of Chapter 73 such as segmental dip tube, discharge grate segments, clamping ring segments, grinding bar, breaker liner, SS grizly bar, Nose Ring Segment, replaceable lip etc as detailed in , in Annexure –C to their reply claimed to be refractories/refractory materials is not admissible, hence disallowed. However, the availment of cenvat credit to the extent of Rs.72,07,451/- in respect of refractory goods of Chapter 69 (Rs.54,84,268/-) and Chapter 38 (Rs.17,23,183/-) only is in order as far as admissibility of cenvat credit in respect of refractories and refractory materials is concerned.*

3. Learned Counsel for the appellant submits that perusal of the above would show that the finding of the Commissioner (Adjudication) disallowing cenvat credit to the extent of Rs.7,75,078/- is based upon

the report of the jurisdictional Assistant Commissioner dated 30.11.2011 which was submitted after conclusion of the personal hearing given to the appellant. Shri K.K. Anand, Learned Counsel has drawn our attention to para 21 of the impugned order which records personal hearing in this regard was held on 16.11.2011. Learned Counsel submits that that being the case it is clear that the impugned order has been passed at the back of the appellant without affording him an opportunity to represent against the report of the jurisdictional Assistant Commissioner. This has resulted for failure of natural justice. Thus, it is contended that the appellant has a strong prima facie case for waiver of condition of pre-deposit.

4. From the facts narrated above which are not disputed by Shri N. Pathak, learned A.R. for Revenue, we are of the view that appeal itself can be disposed of at this stage. Thus, after waiving the condition of pre-deposit of duty, interest and penalty , we proceed to hear the appeal.

5. Learned Shri N. Pathak, A.R. for Revenue in response to the contention raised by Shri K.K. Anand, Advocate for the appellant has fairly conceded that in the instant case no opportunity was afforded to the appellant to make his submission against the report of the jurisdictional Assistant Commissioner which is the sole basis of the denial of cenvat credit to the appellant in respect of refractories and refractory materials. Thus, he has submitted that this being the case of denial of opportunity of being heard to the appellant , the Department has no objection if the matter is remanded back to the Commissioner (Adjudication) for decision after giving opportunity of being heard to the appellant.

6. We have considered the rival contentions and perused the record. On perusal of the impugned order, it is obvious that the report of the jurisdictional Assistant Commissioner dated 30.11.2011 was

obtained after conclusion of personal hearing. That being the case, the Commissioner (Adjudication) was, if he wanted to rely on the report, expected to give an opportunity to the appellant to make his submissions against the report. The adjudicating authority however has failed to do so. Thus we are of the view that this is a case of failure of natural justice wherein the order has been passed against the appellant without affording proper opportunity of being heard.

7. In view of the above, we accept the appeal and set aside the impugned order and the matter is remanded back to the jurisdictional Commissioner for de novo decision after affording due opportunity of hearing to the appellant.

(Justice Ajit Bharihoke)
President

(Rakesh Kumar)
Technical Member

scd/