

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

**Appeal No. : E/863/2010-EX[DB]
E/S/923/2010-EX**

Dated: 28/06/2012

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

**COSMOS ISPAT PVT. LTD.
149/150, URLA INDUSTRIAL AREA,
RAIPUR (C.G.)**

COSMOS ISPAT PVT. LTD.

(Appellant)

VS

(Respondent)

C.C.E. RAIPUR

I am directed to transmit herewith a certified copy of Final Order No. A/737/2012-EX[DB] and Stay Order No. SO/981/2012 dated 26/06/2012 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. RAIPUR
Central Excise Building, Dhamtari Road,
Tikrapara, Raipur 492001.**

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

**V. Laxmikumaran
5, Jangpura Extension, Link Road, New
Delhi-110014**

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

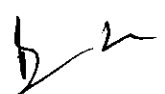
**9. Easy Service Tax Online Dot Com Pvt. Ltd., 407A, Iscon Mall, Above Star India Bazar, Satellite Road,
Ahmedabad-15**

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

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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.
Principal Bench, COURT NO. I**

DATE OF HEARING/DECISION : 26/06/2012.

**Hon'ble Shri Justice Ajit Bharihoke, President
Hon'ble Shri 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. 863 of 2010 with Excise Stay No. 923 of 2010
[Arising out of the Order-in-Appeal No. 104/RPR-I/2009 dated 30.12.2009 passed by The Commissioner (Appeals-I), Central Excise & Customs, Raipur]

M/s Cosmos Ispat Pvt. Ltd.

Appellant

Versus

CCE, Raipur

Respondent

Appearance

Shri B.L. Narasimhan, Advocate – for the Appellant.

Shri Nagesh Pathak, Authorized Representative (DR) – for the Respondent.

**CORAM : Hon'ble Shri Justice Ajit Bharihoke, President
Hon'ble Shri Rakesh Kumar, Member (Technical)**

STAY Oral order No. 981/2012 - Ex (BA)
FINAL Oral Order No. A/737/2012 - Ex (BA)

Shri Justice Ajit Bharihoke (Oral)

The appellants are engaged in manufacture of MS angles, MS Channels, falling under chapter 72 of the Central Excise Tariff Act, 1985. During the period 2004-05, 2005-06 and 2006 (upto October 2006) availed cenvat credit in respect of various items like MS Angles, MS Channels, MS Plates etc. The appellant have been filing ER-1 returns month by month.

2. Audit of the accounts of the appellant was conducted by the audit team of Central Excise in the year 2006 and it was found that the appellant has wrongly availed cenvat credit on various items like MS Angles, MS Channels, MS Plates etc. This lead to issue of show cause notice dated 05.03.2008 against the appellant whereby duty demand in respect of inadmissible cenvat credit amounting to Rs. 1,02,458/- was raised and imposition of penalty under Rule 15 of Cenvat Credit Rules was proposed.

3. The appellant contested the show cause notice wherein he took the plea that the goods in question were used in renovation repairing of pusher oil furnace and not for the construction of factory shed or office building etc. The appellant also took the plea that since all the facts were within the knowledge of the respondent –department there was no justification for invoking extended period of limitation under the proviso to Section 11A of the Central Excise Act, 1944.

4. The jurisdictional Assistant Commissioner after hearing the parties disallowed the cenvat credit availed by the appellant and confirmed the duty demand of Rs. 1,02,458/- with interest and also imposed penalty of equal amount on the appellant.

5. The appellant preferred an appeal against the order-in-original and the appeal was dismissed by the Commissioner (Appeals) vide order-in-appeal No. 104/RPR/APPL-1/2009, it is against the aforesaid order of Commissioner (Appeals) the appellant approached this Tribunal.

6. Learned Shri B.L. Narasimhan, Advocate has assailed the impugned order on two counts. He has submitted that Commissioner (Appeals) has erred in coming to the conclusion that the goods in question were used for construction of the shed and office building. Ld. Counsel contended that the Commissioner (Appeals) has failed to appreciate that the appellant in his reply to show cause notice has given details of user of the items in question and also submitted the certificate dated 26.06.2006 issued by the Chartered Engineer confirming that MS Angles, MS Channels, MS Plates and rail sections were used for fabrication of pusher oil furnace. The second plea taken by the appellant is on the point of limitation. In this regard Id. Sh. Narasimhan has contended that undisputedly the demand has been raised in respect of period upto October 2006 whereas the show cause notice was issued after the expiry of one year from October, 2006 on 05.03.2008. It is contended that the appellant throughout have been submitting ER-1 returns alongwith annexures detailing the cenvat credit availed by him. Therefore, it

can be safely inferred the department was having full knowledge of the fact as such there was no occasion for invoking extended period of limitation when there was no suppression or concealment of fact on the part of the appellant.

7. Shri Nagesh Pathak, Id. AR for the Revenue on the contrary argued in support of the impugned order. He has submitted that the Commissioner (Appeals) was right in coming to the conclusion that the items in question were used for construction of office building and shed on the basis of entries in the ledger maintained by the appellant. He further contended that the certificate of the Chartered Engineer relied upon by the appellant is of no avail to him for the reason that it is vague and unspecific. Regarding limitation, it is submitted that this is a case of fraud practiced upon the department and concealment of fact of user of items in question. In this regard, Id. AR has submitted that the appellant had concealed the fact that the goods in question were used in construction of the office building and shed and by concealing the fact the appellant has practiced fraud on the department to evade payment of excise duty. Thus, it is contended that the department has rightly invoked the extended period of limitation as per proviso to Section 11A of the Central Excise Act, 1944.

8. We have carefully considered the rival submissions and perused the record. In order to appreciate the contention of the rival parties it would be useful to have a look on the impugned order to find out as to how the Commissioner (Appeals) dealt with the matter. The issue regarding the user

of the items in question is dealt with by the Id. Commissioner in para 7 & 8 of the impugned order which is reproduced thus:-

“7. When the ledger accounts of the Appellant itself shows the items in question as used in factory shed/ building or office premises I do not find any reason to treat them as used in repairing/ renovation of plant and machinery as claimed by Appellant without any documentary or corroboratory evidence in support of their argument. The appellant at the personal hearing stage had forwarded a Central Excise Certificate dated 20.06.2006 certifying the use of MS angles, MS Flats, rails, MS Channels and MS plates consumed for repairing at pusher oil furnace. On going through the Central Excise Certificate I find that the said certificate is totally silent on to the point of any relation between the quantity used and the invoices in question and accordingly this certificate cannot be considered as a conclusive evidence establishing any relation between the items in question and the items shown as used in this certificate.

8. Further the items in question were used covering a span of period between 10/2004 to 05/2005 where as the certificate was issued on 26.06.2006 and that too without mentioning that while issuing the certificate which invoices or books of accounts or any physical verifications were taken into account or verified by Central Excise. Also when the audit was conducted on 15.11.2006, show cause notice was issued on 05.03.2008 and further proceedings resulting in impugned order-in-original were carried out why the appellant at every stage failed to produce the said certificate dt. 26.06.2008, as if the same was produced before audit taken it would have resulted in proper verification of its authenticity by counterchecking with books of accounts/ ledgers maintained by Appellant”.

9. On reading of the above it is evident that the finding of the Commissioner (Appeals) against the appellant is based upon the entries contained in the ledger account maintained by the appellant. Therefore the finding based on appellants own record cannot be faulted. As regards the certificate of Chartered Engineer relied upon by the appellant, we may note that the Chartered Engineer has certified about the consumption of structural steel for repairing pusher oil furnace consumed under the heads MS Channels, MS Angles, MS Plates and rail section. The certificate is

vague and do not specifically certify, whether goods in question were actually used for repairing of pusher oil furnace. Since the appellant is claiming cenvat credit on aforesaid goods onus of proving aforesaid so-called inputs were used for manufacture in or in relation to manufacture of final products on the appellant. The appellant has not produced evidence of the persons who did work of repair of furnace nor he has produced bills or account for the said repair work claimed to have been undertaken by him. Since the appellant has failed to lead any evidence in this regard, we do not find any fault in the finding of the appellant based upon the entries contained in the ledger account. Thus, we have no hesitation in considering that the Commissioner (Appeals) has rightly held that the goods in question were used for construction of the office building and the shed etc which by no means can be termed as "Inputs" eligible for cenvat credit.

10. Coming to the issue of limitation. The department has invoked extended period of limitation for five years with the aid of proviso to Section 11A of the Central Excise Act which is reproduced thus:-

"Provided that where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, by reason of fraud, collusion or any wilful mis-statement or suppression of facts or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, by such person or his agent, the provisions of this sub-section shall have effect for the words one year, the words "five years" were substituted".

11. On reading of the proviso to Section 11A of the Act, it is clear that the Department can invoke the extended period of five years limitation in cases of fraud, collusion, or wilful misstatement or suppression of fact by

the assessee or contravention of any provision of the Excise Act or the Rules framed thereunder.

12. Section 2(k) of the Cenvat Credit Rules, 2004 defines "Inputs" as under:

"Input" means –

All goods except light diesel oil high speed diesel oil and motor spirit, commonly known as petrol used in or in relation to the manufacture of final products whether directly or indirectly and whether contained in the final product or not and includes lubricating oils, greases, cutting oils, coolants, accessories of the final products cleared along with the final product, goods used as paint, or as packing material, or as fuel, or for generation of electricity or steam used in or in relation to manufacture of final products or for any other purpose, within the factory of production.."

On reading of the above, it is evident that in order to be eligible for availing and utilising cenvat credit, the assessee is required to establish that the goods in question were used in or in relation to the manufacture of final product. We have already concluded that the Commissioner (Appeals) has rightly held that the appellant used so-called inputs i.e. MS angles, MS plates, MS channels etc. in the construction of the office building , shed etc. Which user, by no means can be termed as use of the goods in question or as in relation to the manufacture of excisable product. That being the case, the goods in question are not covered under the definition of "Input" under Cenvat Credit Rules, 2004. As such, the appellant was not entitled to avail cenvat credit in relation to those goods. Admittedly, the appellant has not informed the Department about the use of the aforesaid goods in question for construction of office and shed. As such, we are of the view that this is a

clear case of suppression of material fact by the appellant with a view to evade liability of excise duty. Thus, we conclude that the extended period of limitation has been rightly invoked in this case. As such the impugned order cannot be faulted on this count.

13. In view of the discussion above, we find no merit in this appeal. The appeal as well as stay application are, therefore, dismissed.

(Justice Ajit Bharihoke)
President

(Rakesh Kumar)
Member (Technical)

Pant