

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

STAY Application No. : E/Stay/45/2011
MISC Application No. : E/MISC/564/2012
Appeal No. : E/38/2011-EX[DB]

Dated: 09/07/2012

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

To,

FABRICO (INDIA) PVT. LTD.
VILLAGE-RITHANI, MOHAN PURAM,
DELHI ROAD, MEERUT-250103.

FABRICO (INDIA) PVT. LTD.

(Appellant)

VS

(Respondent)

C.C.E. MEERUT I

I am directed to transmit herewith a certified copy of Final Order No. A/747/2012-EX[DB] dated 27/06/2012 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. MEERUT I

Excise Chowk, Opposite Choudhary
Charan Singh University Mangal Panday
Nagar, Meerut - 250005.

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

MADHUR DHINGRA, ADVOCATE
AMS ASSOCIATES, J-35(BASEMENT)
LAJPAT NAGAR-III, DELHI-110024

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: 27.6.2012

Central Excise Appeal No.38 of 2011

Arising out of the order in appeal No. 205/CE/MRT I/2010-11 dated 31.8.2010 passed by Commissioner (Appeals), Customs & Central Excise, Meerut I.

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?	

Fabrico (India) Pvt. Ltd.

... Appellant

Vs.

C.C.E., Meerut

.. Respondent

Present for the appellant : Shri Madhur Dhingra, Advocate
Present for the respondent : Shri I. Baig, A.R.

FINAL Order No. A/747/2012-Ex(BR)

Per Justice Ajit Bharihoke (Oral):

M/s Fabrico (India) Pvt. Ltd., the appellant herein is engaged in the manufacture of base plate, steel tubular poles classifiable under heading 7308 of the Central Excise Tariff Act, 1985.

2. The appellant established his first manufacturing unit at Meerut and got it registered with the Excise Department.

Subsequently, the appellant established second manufacturing unit at Dabwali Road, Sirsa, Haryana which was also registered with the Excise Department.

3. In the year 2005, the appellant decided to stop production at his second unit located at Dabwali Road, Sirsa. Thus he wrote a letter dated 11.5.2005 to the Assistant Commissioner, Central Excise, Hisar informing him about his intention to close the second unit and to merge the same with the first unit located at Meerut. The appellant also intimated that he intended to transfer the capital goods and also that stock of inputs was nil at the relevant time and requested for permission to transfer his unutilized cenvat credit of Rs.41,20,514/- to his Meerut unit in terms of Rule 10(1) of Cenvat Credit Rules, 2004.

3. Appellant subsequently wrote a letter dated 14.7.2005 to Assistant Commissioner, Central Excise Division, Meerut thereby informing about the closure and shifting of second unit from Dabwali Road, Sirsa to Meerut as also regarding transfer of cenvat credit available in his account in respect of the aforesaid second unit. Along with the letter the appellant also enclosed copies of E.R.1 return for the month of April and May, 2005, Form 31 challan, challan – outward form S.T. -38 of Haryana Government, Challan of UP check post (Baghpat) and GR of transporter as a token of having transported the capital goods from Sirsa to Meerut. The appellant thereafter credited Rs.41,20,514/- to his cenvat credit account at Meerut vide entry No.158 in RG-23A part II register dated 31.7.05. Said entry was subsequently reversed vide entry No.230 dated 9.9.05 of the aforesaid register on the insistence of the jurisdictional authority at Meerut.

4. The appellant exchanged correspondence with the Department requesting them to consider his plea and pass an

appealable order but the Department did not act on the request. Ultimately, the appellant reccredited the unutilized cenvat credit relating to Haryana Unit of Rs.41,20,514 to his cenvat credit account at first unit, Meerut.

5. The Department was of the view that the appellant was not entitled to transfer the cenvat credit in terms of Rule 10(1) of Cenvat Credit Rules, 2004. Thus, the appellant was served with a show cause notice raising demand of Rs.41.20.514/- and imposition of penalty was also proposed in the notice. The appellant contested the show cause notice claiming that he has rightly transferred the unutilized cenvat credit to his account at Meerut in terms of Rule 10(1) of Cenvat Credit Rules, 2004. Additional Commissioner, Central Excise, after hearing the parties vide his order dated 7.5.2010 disallowed the transfer of cenvat credit to the first unit and confirmed the duty demand of Rs.41,20,514/- with interest and also imposed penalty of equal amount.

6. The appeal preferred against the aforesaid order in original did not find favour with the Commissioner (Appeals), who vide impugned order in appeal No. 205/CE/MRT I/2010-11 dated 31.8.2010 dismissed the appeal on the ground that the requirement of Rule 10(1) of Cenvat Credit Rules, 2004 are not satisfied in this case.

7. It is against aforesaid order in appeal dated 31.08.2010 the appellant has preferred appeal before the Tribunal.

8. Shri Madhur Dhingra, Id. Advocate for the appellant pleaded that impugned order is not sustainable as it is based on incorrect appreciation of facts and law. Expanding on the argument Id. Advocate submitted that admittedly the appellant was running two manufacturing units one at Meerut and other at Dabwali Road, Sirsa. It is not disputed that the appellant closed his Sirsa unit and

shifted the capital goods relating to Sirsa unit to Meerut under intimation to the jurisdictional office at Hisar vide letter dated 14.07.2005. That at the relevant time unutilized cenvat credit was available in the account of the Sirsa unit as such in view of Rule 10(3) of Cenvat Credit Rules, 2004 the appellant was entitled to transfer that unutilized cenvat credit to the account of Meerut unit as he has shifted the Sirsa unit to Meerut factory. It is submitted that the Commissioner (Appeals) have erred in holding that closing of manufacturing unit a Sirsa an shifting of capital goods to already existing Meerut unit cannot be termed as shifting the factory at another site as envisaged under Rule 10(1) of the Cenvat Credit Rules and that Commissioner (Appeals) was wrong in denying transfer of cenvat credit to the appellant on this count. Thus, the learned Counsel for the appellant has strongly urged us to accept the appeal and set aside the impugned order.

9. Shri Nagesh Pathak, Id. AR for the department on the contrary has argued in support of impugned order and reiterated the reasoning adopted by the Commissioner (Appeals).

10. We have considered the rival contentions and perused the material on record.

11. The entire ^{controversy} ~~contrary~~ in this appeal revolves round the interpretation of Rule 10(1) and (3) of Cenvat Credit Rules, 2004 which are reproduced thus:

RULE 10. Transfer of CENVAT credit. — (1) If a manufacturer of the final products shifts his factory to another site or the factory is transferred on account of change in ownership or on account of sale, merger, amalgamation, lease or transfer of the factory to a joint venture with the specific provision for transfer of liabilities of such factory, then, the manufacturer shall be allowed to transfer the CENVAT credit lying unutilized in his accounts to such transferred, sold, merged, leased or amalgamated factory.

(2)

(3) The transfer of the CENVAT credit under sub-rules (1) and (2) shall be allowed only if the stock of inputs as such or in process, or the capital goods is also transferred along with the factory or business premises to the new site or ownership and the inputs, or capital goods, on which credit has been availed of are duly accounted for to the satisfaction of the Deputy Commissioner of Central Excise or, as the case may be, the Assistant Commissioner of Central Excise.

12. Before advertng to the impugned order of Commissioner (Appeals) it would be useful to note some undisputed facts. It is not in dispute that the appellant was running two manufacturing units – one at Meerut and other at Dabwali Road, Sirsa. It is also not disputed that in May, 2005 the appellant closed his manufacturing unit at Sirsa and shifted the capital goods lying in the factory at his already existing manufacturing unit at Meerut under intimation to the concerned jurisdictional Assistant Commissioner. It is also not disputed that the official of the Commissionerate, Hisar visited the factory of the appellant at Dabwali Road, Hisar and found that there were no "Inputs" in stock/in process and that the Assistant Commissioner in response to the communication sent by the Commissionerate Meerut intimated them vide letter dated 26.10.2005 addressed to Assistant Commissioner, Central Excise , Meerut (UP) that duty paying documents involving central excise duty of Rs.41,20,514/- have been got verified and the same were found in order. Along with this intimation, photocopy of RG-23A Part I showing nil stock of raw material and finished goods as also copy of the ER-1 return for the month of May 2005 indicating unutilized cenvat credit of Rs.41,20,514/- as also copies of Form – 31 challan, challa outward form, ST -38 of Haryana Government , challan of U.P. check post,

Bagpat and GR of transporter were enclosed. It may also be noted that after shifting the capital goods to his Meerut unit. The appellant had intimated the Assistant Commissioner, Meerut about shifting of his unit from Dabwali Road, Sirsa to Meerut unit, U.P. vide letter dated 14.7.2005 along with letter the appellant annexed copies of ER-1 return for April 2005 showing unutilized cenvat credit of Rs.41,20,514/- as also the document pertaining to transfer of capital goods from Sirsa To Meerut .

13. The Commissioner (Appeals) has disallowed the transfer of utilised cenvat credit to the appellant with the following observations:

" A perusal of Rule 10(1) of the Cenvat Credit Rules, 2004 has revealed that in case a manufacturer of the final products shifts his factory to another site, the manufacturer shall be allowed to transfer the Cenvat credit lying unutilized in his accounts to such transferred factory. A perusal of the case paper as submitted by the appellants has revealed the fact that no stock of inputs as such as well as in process were lying with on the date of said transfer. In fact, only capital goods were lying in the factory and which they have consigned to their already existing unit at Meerut. It has nowhere been noticed from the correspondence as to whether the appellant have shifted their factory from Sirsa to Meerut, it cannot be said to have been transferred to another site since the transferee unit was already in existence at the given address. The intention of the Government is to provide the benefit only when the manufacturer shifts his factory to another site, lock, stock and barrel.

Further , on a perusal of Rule 10(3) of the Cenvat Credit Rules, 2004, it is evident that the transfer of the Cenvat Credit under sub-rules (1) and (2) shall be allowed only if the stock of inputs as such or in process, or the capital goods is also transferred along with the factory to the new site and the inputs, or capital goods, on which credit has been availed of are duly accounted for to the satisfaction of the Deputy Commissioner of Central Excise or , as the case may be, the Assistant Commissioner of Central Excise.

Thus, it is necessary in order to avail the benefit of transfer of the cenvat credit that the inputs as well as capital goods should be transferred to the new site along with the factory. In the instant case, the factory was neither transferred to another site nor to the new site. Instead, only capital goods were consigned/transferred to the already existing factory. The closure of work at Sirsa unit and owning the liabilities of Sirsa unit by Meerut unit could not be termed as shifting of the factory to another site. Hence, the transfer of cenvat credit cannot be granted to the appellants. Thus, they have availed the benefit of cenvat credit wrongly despite knowing the fact that they were not entitled to such credit.

14. On reading of the above, we find that Commissioner (Appeals) has disallowed the transfer of unutilized cenvat credit to the appellant on the ground that the transfer is not permissible in view of Rule 10(1) read with Rule 10(3) of Cenvat Credit Rules, 2004 because the appellant had not shifted his factory from Sirsa to a new site to the already existing manufacturing unit – there were no 'Inputs' raw/under process available at his factory at Sirsa at the time of transfer and also that only the capital goods have been transferred and not the entire factory.

15. On reading of Rule 10(1) of Cenvat Credit Rules, 2004, it is clear that a manufacturer of final product shall be entitled to transfer of the unutilized cenvat credit to the transferred factory provided he shifts his factory at another site and also fulfills the requirement of Rule 10(3) of Cenvat Credit Rules, 2004. The Commissioner (Appeals) has interpreted the word 'another site' as a new site where there was no production unit in existence. This approach of the Commissioner (Appeals), to our mind, is incorrect. The word 'another site' used in Rule 10(1) of Cenvat Credit Rules means the site other than the factory which is being shifted. The second ground for disallowing transfer of unutilized cenvat credit in the impugned order is that at the time of shifting

there were no 'Inputs' as such or in process in the factory of the appellant at Sirsa. As such under Rule 10(3) of Cenvat Credit Rules, the transfer of cenvat credit was not allowable. This approach of the Commissioner (Appeals) is also unacceptable for the reason that Rule 10(3) of the Cenvat Credit Rules provides that the transfer of cenvat credit under Rule 10(1) shall be allowed if the stock of inputs as such or in process, or the capital goods is also transferred along with factory. Admittedly, as it is evident from the letter dated 26.10.2005 of the jurisdictional Excise Office, Hisar when the Excise team visited the factory of the appellant on receipt of intimation regarding the shifting, they did not find any 'Inputs' as such or under process in the stock. If there was no inputs in the stock, there was no occasion for transferring the inputs to the new factory. Admittedly, the appellant has transferred the capital goods to another site at Meerut. Therefore, in our view, the condition of Rule 10(3) of Cenvat Credit Rules for transfer of cenvat credit is fulfilled. Another ground on which Commissioner (Appeals) disallowed transfer of cenvat credit is that the appellant has only shifted the capital goods but not the entire factory, we find no basis for the aforesaid conclusion of the Commissioner (Appeals). There is no evidence on record to show that the appellant has shifted the factory only on paper and the production is still going on at Dabwali Road, Sirsa. In the absence of any such evidence, we do not find any justification in the order of Commissioner (Appeals) to deny transfer of cenvat credit to the appellant.

16. In view of the above discussions we find it difficult to sustain the impugned order. The appeal is therefore, accepted and

the impugned order disallowing the transfer of cenvat credit and confirming duty demand with interest and penalty is set aside.

17. The appeal is disposed of accordingly.

(Justice Ajit Bharihoke)
President

(Rakesh Kumar)
Technical Member

scd/