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

Appeal No. E/3043/2005&3142/05 Date 19/06/2008

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

To :
M/S GANGA ENGINEERS
HATHRAS ROAD, RAM BAGH, AGRA

M/S GANGA ENGINEERS Appellant

Vs

C.C.E. KANPUR Respondent

I am directed to transmit herewith a certified copy of **Final order No.**350-351/2008 **Excise** dated 11-6-08 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. KANPUR
   117/7, SARVODAYA NAGAR, KANPUR 208005.
2. Adv. / Consult
   ~~MR.AMIT AWASTHI~~
   ~~113/145, SWARUP NAGAR, KANPUR-208002~~
   SH. C. HARI SHANKAR, ADV., 46, BANK ENCLAVE, N. DELHI - 92
3. S.D.R.
4. ~~J.C.D.R.~~
5. Bar association, CESTAT, New Delhi
6. M/s. Deeparchi Publications, M-93, Marg. 46, Saket, New Delhi 110017
7. M/s Centax Publictions (P) Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -
8. Excise & Customs cases, B-37, Sector -1, NOIDA - 201301 Gautam Budh Nagar, (U.P.)
9. Raghuraman's 44-B, Regal Flat,Shipra Suncity, Indirapuram - 201010,Ghaziabad, DT, U.P.
10. Nidheshak publications, I.P.Estate, new Delhi
11. Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh, New Delhi - 110026
12. Commercial Laws of India Pvt Ltd Post Bag No. 1033, No.70(Old No. 88), Thyagaraya Road, T. Nagar,Chennai 60017
13. Taxindiaonline.com Pvt.Ltd, B-XI/8183,Vasant Kunj, New Delhi - 110070
14. Office Copy
15. Guard file

Assistant Registrar
(Excise Appeal Branch)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI PRINCIPAL BENCH, COURT NO. III**

**Excise Appeal Nos. 3043 & 3142 of 2005**

[Arising out of Order-in-Appeal No. 277-CE/APPL/KNP/04 dated 3.6.2005 passed by Commissioner (Appeals I) Central Excise, Kanpur]

For approval and signature:

Hon'ble Mr. M. Veeraiyan, Member (Technical)
Hon'ble Mr. P.K. Das, Member (Judicial)

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|---|---|---|
| 1. Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982? | : | No |
| 2. Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not? | : | Yes |
| 3. Whether Their Lordships wish to see the fair copy of the Order? | : | Seen |
| 4. Whether Order is to be circulated to the Departmental authorities? | : | Yes |

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M/s. Ganga Engineers — Appellant

Vs.

Commissioner of Central Excise
Kanpur — Respondent

**Appearance:** Mr. C. Hari Shankar, Advocate for the Appellant
Mr. Sanjay Kumar, DR for the Respondent

**CORAM:** Hon'ble Mr. M. Veeraiyan, Member (Technical)
Hon'ble Mr. P.K.Das, Member (Judicial)

Date of decision : 11.6.2008

FINAL **ORDER NO. 350 - 351 / 08-SB**

**Per M. Veeraiyan** (for the Bench):

Both these appeals arise out of same order-in-appeal dated 3.6.05.

2. Heard both sides.

3. Relevant facts ,in brief, are as follows:

(a) The assessee manufactures both dutiable and non-dutiable products and avails Cenvat credit for the common inputs.

(b) They did not maintain separate accounts in respect of inputs meant for dutiable and non-dutiable goods manufactured.

(c) In respect of clearance of exempted products, they have reversed 8% of the value of goods cleared by them during 6.12.95 and 11.10.99, in terms of Rule 57CC(1). The assessee has also mentioned these amounts in the invoices to the customers and collected the said amounts from the customers.

(d) The original authority held that in as much as the amounts representing 8% of the value has been collected as representing excise duty, the same shall be payable in terms of section 11D of the Central Excise Act.

(e) Commissioner (Appeals) has passed the following orders:

"As per the said decision, it is crystal clear that there is no mistake on the part of the Appellants. Further, the Appellants also contended that even if it is presumed that they had collected the amount reversed by them from the customers. Since the amount so collected is price, they had accordingly deposited the 8% of the amount so collected with interest. In this regard, I agree with the contention to the Appellants that the amount reversed can not be termed as Central Excise duty as per provision of Rule 57CC. The amount so collected by the Appellants is nothing but price. If it is a price, the Appellants are required to pay 8% of the total price to fulfil the requirements of the Rule 57-CC. I, therefore, direct the Appellants to pay the 8% of the amount so collected along with the interest within a week of receipt of this order. Therefore, the ingredients of Rule 57-CC/57-AD stands satisfied. However, contravention of Rule to this extent is proved on the part of the Appellants.

I, therefore, modify the impugned Order-in-Originals and set aside the demand of Rs. 29,04,215/-. The penalty imposed is also reduced to Rs.50,000/- on the Appellants. The appeal as above is disposed of accordingly."

4. The assessee is in appeal against the direction to pay 8% of Rs.29.04,215/- and imposition of penalty of Rs.50,000/-. The Department is in appeal and seeks the restoration of the order of the original authority.

5. Learned advocate appearing for the assessee submits that the demand relates to goods which are clearly exempted; no excise duty was payable on the goods; the amount was paid in pursuance of Rule 57CC due to the reason that they have availed credit on common inputs. In as much as Rule 57CC has been complied with on the clearance of exempted goods, the question of paying the amount as excise duty under Section 11D does not arise. He relies on the decision of the Larger Bench in the case of Unison Metals Ltd. vs. CCE, Ahmedabad I [2006 (4) STR 491 (Tri-LB)]. He also relies on the clarification issued by CBEC vide Circular No. 870/08/2008-CX dated 16.5.2008 which has been issued in the light of the above cited decision of Larger Bench of the Tribunal .

6. Learned DR submits that the above judgement and the clarification shall not apply in the present case as they have collected the said amount as representing excise duty as could be seen from the invoices raised by them on the customers.

7. We have carefully considered the submissions. It is not in dispute that demand relates to exempted products. No excise duty is payable on them. What are required to be complied with are provisions relating to Rule 57CC. The relevant portion of decision of Larger Bench in Unison Metals Ltd. (supra) is as follows:-

> "9. The scheme of Central Excise duty payment is that a manufacturer removed goods from the factory of production after payment of duty. While selling the goods, the manufacturer recovered the duty so paid. In doing so, an assessee is recouping the tax already paid. The arrangement is not that the assessee first collected the tax from the buyer of the goods and then remits the amount to the government. Section 11 D has to be read keeping this scheme in view. Therefore, the provisions for "every person who is liable to pay duty..... and has collected any amount from the buyer of any goods in any manner representing as duty of excise, shall forthwith pay the amount so collected to the credit to the Central Government" has application only when equivalent duty had not been deposited at the time of removal of the goods. The scheme of the law is that manufacturers shall not collect amounts falsely representing them as central excise duty and retain them, thus, unjustly, benefiting themselves. In the present cases, (irrespective of whether the 8% payments were duty or not) since the 8% amount remain already paid to the revenue, and no amount is retained by the assessee, Section 11D has no application.
>
> 10. The real identity of the amount 'collected' (whether excise duty payable or not) is of no relevance for Section 11D. What is relevant is only whether the collection was 'represented' as duty of excise. The representation may as well be entirely false. The qualifying of the representation through the words 'in any manner' makes this clear. Therefore, the contentions of both sides on the question, as to whether deposits under Rule 57CC are excise duty or not, are beside the point."

8. The relevant portion of clarification of the Board on this issue is as follows:

> "4. In the light of what is stated above, it is clarified that as long as the amount of 8% or 10% is paid to the Government in terms of erstwhile rule 57CC of the Central Excise Rules, 1944 or rule 6 of the CENVAT Credit Rules, the provisions of section 11D shall not apply even if the amount is recovered from the buyers. However, it may be noted that the CENVAT credit of the said amount of 8% or 10% cannot be taken by the buyer since such payment is not a payment of duty in terms of rule 3 (1) of the CENVAT Credit Rules, 2004.

Therefore, the said 10% amount should be shown in the invoice as "10% amount paid under Rule 6 of the CENVAT Credit Rules, 2004".

9. In the light of the above, we are in agreement with the views expressed by the learned advocate for the assessee. Accordingly, we allow the appeal by the assessee with consequential relief and reject the appeal by the Department.

(Dictated in the open Court)

( M. Veeraiyan )
Member(Technical)

( P.K.Das )
Member(Judicial)

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