

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

Appeal No. E/3073 TO 3078/04 & E/4662 & 4677/04

Date 18/09/2008

Assistant Registrar
C.E.S.T.A.T, New DelhiTo :
M/S PHILCO EXPORTS

11-SSI, ESTATE G.T. KARNAL ROAD, DELHI - 33

M/S PHILCO EXPORTS

C.C.E. DELHI

Appellant

Vs
Respondent

I am directed to transmit herewith a certified copy of Final order No. 696-703/08-EX

EX[BR] dated 16-9-08

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. DELHI

CENTRAL REVENUE BUILDING, I.P. ESTATE, NEW DELHI

2. Adv. / Consult

SH. T.R. RASTOGI, ADV.,

SD-8N, TOWAR APARTMENTS,
PITAMPURA, DELHI-34

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 Publications (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

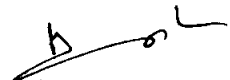
12. Commercial Laws of India Pvt Ltd Post Bag No. 1033, No.70(Old No. 88), Thyagaraya Road, T. Nagar, Chennai 60017

13. Taxindiaonline.com Pvt.Ltd, B-XI/8183, Vasant Kunj, New Delhi - 110070

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

15. Office Copy

16. Guard file


ASSISTANT REGISTRAR -EX

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

**Excise Appeal Nos. 3073 to 3078 of 2004
Excise Appeal Nos. 4662 & 4677 of 2004**

[Arising out of Order-in-Appeal No. 510-15-CE/DLH/03 dated 10.12.03 No.103-CE/DLH/2004 dated 21.6.2004 passed by Commissioner [Appeals-I] Customs & Central Excise, New Delhi]

Date of Hearing : 17.7.2008
Date of decision : 16.9.2008

For approval and signature:

Hon'ble Mrs. Archana Wadhwa, Member (Judicial)
Hon'ble Mr. M. Veeraiyan, 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?	Yes
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

M/s. Philco Exports

Appellant

Vs.

CCE, New Delhi

Respondent

Appearance:

Shri T.R. Rastogi Advocate for the Appellants
Shri Sanjay Kumar, DR for the respondent

CORAM: Hon'ble Mrs. Archana Wadhwa, Member (Judicial)
Hon'ble Mr. M. Veeraiyan, Member (Technical)

FINAL ORDER NO. 696-703/08-EX

Per M. Veeraiyan (for the Bench):

1.1 Excise Appeals Nos. 3073 to 3078 of 2004 are by the same party; they arise out of the common orders-in-Appeal No. 510-15-CE/DLH/2003 dated 10.12.2003; the issues involved in all these appeals are also identical and relate to denial/ restriction of part of the refund claims filed by the appellant.

1.2 Excise Appeal No. 4662 of 2004 is also by the same appellant against the Order-in-Appeal of the Commissioner (Appeals) No. 103-CE/DLH/2004 dated 21.06.2004. Excise Appeal No. 4677 is by the Department against the same Order-in-Appeal of the Commissioner of Central Excise (Appeals) No. 103-CE/DLH/2004 dated 21.6.2004.

1.3. The issues in the six appeals referred in para 1.1. above and the issues in the appeals referred in para 1.2. are some what inter connected and therefore all these are being disposed of by a common order.

2. Heard both sides.

3.1. The relevant facts in respect of six appeals, in brief, are as follows:-

a) The appellant is a manufacturer of kitchen and household articles. These items became dutiable w.e.f. 01.03.2002 and the levy was withdrawn w.e.f. 01.03.2003.

b) The appellant procured duty paid inputs and used them in the manufacturing of the excisable goods(final products). The final products were removed from the factory under Rule 19 (Notification No. 42/2001) under Letter of Undertaking and thereafter exported.

c) As they were not selling the final products in the local market and were basically exporting them out of India, they were not in a position to utilise the

credit of the duty on inputs allowed under Rule 3 of the Cenvat Credit Rules, 2002 .

d) The ex-factory prices declared by them for the final products cleared by them for export was the F.O.B. price; they have not claimed the Duty Drawback under Duty Drawback Scheme.

e) As they were not in a position to utilise the credit of the duty on inputs allowed under Rule 3 of the Cenvat Credit Rules, 2002, they preferred claims for cash refunds of credit against the goods exported during the quarter or the month to which claim relates. The refund claims were filed in prescribed time limit under the Act.

f) The original authority, on principle, held that they are eligible for the refunds claimed. However, he reduced the refund claims on two grounds-

- The appellant sold scrap generated during the manufacture of the final products without payment of duty. Each of the refund claim was reduced to the extent of duty held payable on the scrap.
- In respect of some months the appellant has claimed refund of cenvat even in respect of inputs, which though received in the particular month to which the refund related, were not utilised in the same month.

g) The details of refund applied, sanctioned and total deduction are as follows:-

Month of 2002	Refund applied	Refund sanctioned	Deduction on a/c scrap duty adjustment	Deduction on account of material not consumed in the same quarter/ month	Total deduction	Scrap duty rate applied
1	2	3	4	5	6	7
April	3581026	3371457	209569	0	209569	16%
June						
July	1012027	532559	98400	381068	479468	16%

August	1581021	1159919	106743	314359	421102	9.60%
Sept.	478256	389415	55783	33058	88841	9.60%
Oct.	2206623	1380666	112177	713780	825957	16%
Nov.	728001	338979	71729	317293	389022	9.60%
Totals	9586954	7172995	654401	1759558	2413959	

h) Thus, out of a total refund of Rs. 9586954/- sought by the appellant, only a sum of Rs. 71,72,995/- was sanctioned as cash refund; a sum of Rs. 6,54,401/- was reduced on account of duty on the scrap cleared; and a sum of Rs. 17,59,558/- was held inadmissible on the ground that the claim related to inputs which was not consumed in the same month for which the claim related to.

3.2. The relevant facts in respect of other two appeals, in brief, are as follows:-

a) Show cause notices were issued proposing demand of Rs. 6,11,704/- as duty on waste and scrap of stainless steel (which amount was withheld from the cash refunds sought by the appellant).

b) The original authority confirmed the demand and also imposed a penalty of Rs. 25,000/- on M/s Philco Exports.

c) Commissioner (Appeals) upheld the demand; he further held that sum of Rs. 6,54,401/- stands already recovered by way of reducing the refund amount and, therefore, the order of the original authority debiting a further sum of Rs. 6,54,401/- in cenvat credit account was not correct.

d) The appellant is in appeal against demand of Rs. 6,54,401/- which has been upheld by the Commissioner (Appeals). The Department is on appeal contending that the claim of refund was for the credit accumulated in the cenvat account; the amount of Rs. 6,54,401/- which was not sanctioned continued lie in the account of the appellant, therefore, the order of the original authority in directing debiting of Rs. 6,54,401/- from the said account is legal and the Commissioner (Appeals) should not have interfered with the said decision.

4.1. Learned Advocate made the following submissions. The refund of Rs. 17,59,558/- has been denied for minor breach of procedure. The ground that the credit related to inputs which have not been used in the same month is only a technical ground. Whatever portion of the refund has been denied for the month of July 2002 was eligible to be granted for the month of August 2002. To deny a part of the refund on the ground that material was not used in the month of July 2002 and at the same time not to grant the said with-held-amount along with the claim for the month of August 2002 is not justified. The entire inputs relating to which the refunds have been sought were utilised in kitchenware and household articles which were exported by them. Therefore, he submitted that this withheld amount should be ordered to be refunded along with interest.

4.2.1. The reduction of refund on the ground that the scrap cleared by them was dutiable was incorrect. If the Department felt that the scrap cleared by them was dutiable, a show cause notice should have been issued indicating the grounds on which demand was proposed, so that the same could have been effectively defended. The reduction in refund claims at the first instance was not justified.

4.2.2. He submits that no duty is due to be paid on the scrap. The show cause notices proposing demand of duty was clearly time barred as they have furnished all the relevant information by their letter dated 27.10.2002.

4.2.3. Even if it is held that duty is payable on the scrap, they are eligible for the benefit of Notification No. 9/2002. Denial of the concessional rate of duty prescribed under Notification No. 9/2002 merely on the ground that option was not exercised is not justified. It was also submitted that only for certain months the rate of duty on scrap has been applied erroneously by denying the concession under Notification No. 9/2002 .

5.1. Learned DR submits that the scrap generated during the course of manufacture was dutiable; inasmuch as they have availed credit on the inputs, the condition for availing benefit of the Notification No. 8/2002 is violated and, therefore, duty requires to be paid. As regards to the eligibility for concessional

rate of duty prescribed under Notification No. 9/2002, the exercise of option was one of the conditions to be fulfilled and the appellant has not fulfilled.

5.2. He also submitted that when the appellant claimed refunds of amounts lying in cenvat credit; reduced amounts were sanctioned. Whatever amount was not sanctioned continued to lie in their cenvat account. It was not a case of adjustment of any dues from the refund sanctioned. The decision of the Commissioner(appeals) that there was no need to debit Rs. 6,54,401/- from their cenvat credit as held by the original authority was erroneous .

6.1. We have carefully considered the submissions from both sides. The appellant has brought duty paid inputs; taken credit on the same; used the inputs for manufacture of the goods which were exported; they could not utilize the credit as the final products have not been cleared for home consumption. There is no dispute that they were eligible for grant of cash refund of the accumulated credit lying in their account. In fact, out of a total refund of Rs. 9586954/- sought by the appellant, a sum of Rs. 71,72,995/- has already been sanctioned as cash refund.

6.2. Totally an amount of Rs. 17,59,558/- has been denied on the ground that part of the amount claimed in each refund related to credits on inputs which inputs have not been used in the same month. This ground is only technical in nature. There is time lag between the date of receipt of the inputs, the date on which they use the particular consignment of inputs and the date of export of the final products. They have claimed the refunds of the credit month wise i.e. month in which the input has been received. The refund claims relating to the period from April 2002 to November 2002 have been sanctioned in the months of May 2003(one claim), August 2003(one claim) and September 2003(4 claims). It has not been denied that the entire inputs have been used for the manufacture of the final products in the succeeding months and the final products have been exported. Therefore, the said amount still lying in their account shall be paid as cash refund. The question of payment of interest for amount lying in cenvat credit account does not arise,

7.1. As regards the dutiability of the scrap we uphold the view of the department that the same is dutiable; the appellant having taken input credit on coils and sheets are not eligible for the benefit of SSI exemption under Notification No. 8/2002. However, the benefit of Notification No. 9/2002 wherein a concessional rate of 60% of the normal rate has been prescribed requires to be extended as the same cannot be denied merely on the ground that the option was not exercised as the appellant are satisfying the other substantial conditions. The appellant's claim that, they were under the bonafide belief that the scrap was not dutiable and if they had known that the same was dutiable, they would have exercised the option is acceptable. We find that the department itself has allowed this benefit for some months.

7.2. The processing of claims of refund from the cenvat account is one thing and demand of duty on the scrap is entirely a different thing. Therefore, the demand of duty should have been raised separately after following the procedure prescribed. The show cause notices have been issued on 18.9.2003, 29.9.2003, 03.10.2003, 07.01.2003, 9.10.2003 and 09.10.2003. The demand relates to the period from April 2002 to November 2002. The appellant have furnished the relevant information vide their letter dated 22.10.2002. Therefore, the demand should be restricted to the normal period of limitation.

7.3. We find that the appellant claimed refund of amount lying in cenvat credit; and reduced amount was sanctioned. We agree with the Ld DR that whatever amount was not sanctioned continued to lie in their cenvat account. It was not a case of adjustment of any dues from the refund sanctioned. The question adjusting amounts which are not confirmed demands does not arise. Then there was no need to issue notices proposing demand of duties and issue of speaking orders. The decision of the Commissioner (appeals) that there was no need to debit the duty demanded from their cenvat credit as per the direction of the original authority was erroneous. The revised demand relating to normal period of limitation to be worked out as per para 7.2 shall be payable by debit in the cenvat account.

8. The appeals are disposed of on the following terms:

- a) The amount of Rs 17,59,558/-still lying in their account shall be paid as cash refund .
- b) We hold that the scrap is dutiable; as the appellant has taken input credit on coils and sheets they are not eligible for the benefit of SSI exemption under Notification No. 8/2002. However, the benefit of Notification No. 9/2002 wherein a concessional rate of 60% of the normal rate has been prescribed requires to be extended. The demand, however, should be restricted to the normal period of limitation.
- c) The revised demand relating to the normal period of limitation to be worked out as per para 7.2 shall be payable by debit in the cenvat account or by cash as per the convenience of the assessee.

(Order pronounced in the open Court on 16.09.2008)


[Archana Wadhwa]
Member [Judicial]

[M. Veeraiyan]
Member [Technical]

[Pant]