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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/2622/2006 - EX[DB] Date 26/05/2009

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

To :
HINDUSTAN ZINC LTD.
YASHAD BHAWAN, NEAR SWAROOP SAGAR,
UDAIPUR, RAJASTHAN
313001

HINDUSTAN ZINC LTD. Appellant

Vs

C.C.E. JAIPUR II Respondent

I am directed to transmit herewith a certified copy of **Final order No.** 372/2009-EX **EX[DB]** dated 14-5-09

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. JAIPUR II
   N.C.R.BUILDING, STATUE CIRCLE, "C" SCHEME, JAIPUR 302005.
2. Adv. / Consult SH. B.L. NARASIMHAN, ADV.,
   B-6/10, S. J. ENCLAVE,
   N. DELHI - 29
3. C.D.R
4. ~~J.C.D.R.~~
5. Bar association, CESTAT, New Delhi
6. Director Publications, Customs, Excise. I.P. Estate, New Delhi
7. M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi - 3
8. Commercial Laws of India Pvt Ltd. Post Bag No. 1033, No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
9. Raghuraman's 44-B, Regal Flat,Shipra Suncity, Indirapuram - 201010,Ghaziabad, DT, U.P.
10. M/s Manupatra Information Solutions Pvt Ltd. Excise & Customs Cases B-37, Sector - 1, Noida - 201301, Gautam Budh Nagar, (UP)
11. M/s. Deeparchie Publications, M-93, Marg. 46, Saket, New Delhi 110017
12. Taxindiaonline.com Pvt.Ltd, B-XI/8183,Vasant Kunj, New Delhi - 110070
13. Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh, New Delhi - 110026
14. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road,Ahmedabad-15
15. LAWCRUX Advisors Pvt Ltd, LAW House,1-8,Sector - 10, Faridabad 121003 (Haryana)
16. Office Copy
17. Guard file
18. HON'BLE PRESIDENT.

Assistant Registrar
(Excise Appeal Branch)

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

Excise Appeal No. 2622 /2006- Ex(BR)

[Arising out of Order-in-Appeal No.300(HKS)CE/JPR-II/2006 dated 10.5.2006 passed by Commissioner (Appeals II) Central Excise, Jaipur II.]

For approval and signature:

Hon'ble Mr. Justice R.M.S. Khandeparkar, President
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. Hindustan Zinc Ltd. — Appellant

Vs.

Commissioner of Central Excise
Jaipur II — Respondent

Appearance:

Shri B.L. Narasimhan,, Advocate for the Appellant
Shri B.S. Suhag, DR for the Respondent

CORAM:
Hon'ble Mr. Justice R.M.S. Khandeparkar, President
Hon'ble Mr. M. Veeraiyan, Member (Technical)

Date of Hearing/decision : 14.5.2009

N/Final **ORAL ORDER NO.** 372/09-EX

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

This is an appeal against the order of the Commissioner (Appeals) No. 300(HKS)CE/JPR-II/2006 dated 10.5.2006.

2. Heard both sides extensively.

3. Relevant facts, in brief, are that the appellant has more than one unit, some of them are mining units and others are smelting units. They are removing lead and zinc concentrates from the mining units to the smelting units and at the time of removal, the duty was being paid provisionally in pursuance of order of Assistant Commissioner dated 25.4.2000 which reads as follows:

> " Looking to the fact that the actual cost of production can be ascertained at the end of financial year only when the accounts are finalised, I order that the clearance of Lead and Zinc concentrates may be assessed provisionally under Rule 9-B of the Central Excise Rules, 1944 from 1.4.99 onwards as the cost of production for the financial year 1999-2000 is yet to be finalised, subject to furnishing Bond B-13 with the surety and sufficient security amount of the differential duty leviable on the differential assessable value determined under Rule 6(b)(ii) of Central Excise (Valuation) Rules, 1975 and duty on expected (DMT) weight variation. The assessee should submit the records of the actual DMT weight ascertained, proper ascertaining of assessable value under Rule 6(b)(ii) and the details of short levy, if any, during the provisional assessment period, to jurisdictional Range Superintendent. After getting order of final assessment in terms of Rule 9B(6) read with Rule 173-I of Central Excise Rules, 1944, the assessee should deposit the duty short levied immediately on the demand."

4. In pursuance of the said order, the original authority finalised the provisional assessment for the year 2004-2005, and held that for the period from 1.4.2004 to 19.12.2004, there was short payment and accordingly, demanded a sum of Rs.1,16,53,609/-. However, it was noticed that for the period from 20.12.04 to 31.03.05, the appellant has paid in excess amounting to Rs.1,70,78,391/-. The appellant vide their letter dated 14.09.2005 submitted that they would not be claiming refund of excess payment as their smelter units have already availed the excess amount paid by them as CENVAT credit on the goods received by them. He has also ordered for recovery of interest in terms of Rule 7(4) of the Central Excise Rules at the rate prescribed under Section 11AB of the Central Excise Act, 1944. The order of the original authority has been upheld by the Commissioner (Appeals).

5. Learned Advocate for the appellant submitted that they were removing the goods not on sale but on inter-plant transfer; that the value could not be ascertained at the time of removal as the profit margin to be adopted could be ascertained for any financial year only after the end of financial year as per the general practice and as per the provisions of the Companies Act; that they had approximately declared the value and whenever they were factors which necessitated enhancement of the value, they had promptly enhanced the same. During this period, initially it was being transferred at the rate of Rs.5050/- PMT, it was revised on three occasions to Rs.5200/-, Rs.5875/- and to Rs.6500/- PMT. This was the case of bonafide declaration of the value of the goods on provisional basis and

that at the end of the year, finalisation revealed short levy, short payment during the initial period and payment on much higher side for the rest of the period. The Rule 7 of Central Excise Rules, 2002 [Erstwhile Rule 9B of Central Excise Rules 1944] envisages adjustment of excess paid duty towards short paid duty at the time of finalisation. Therefore, the finalisation should be given effect to by adjusting the excess payment towards short payment relating to the entire period of finalisation at one go.

5.2 He made alternative submissions, in case his submission for adjustment on annual basis is not accepted. At any rate, whenever they have paid a higher amount at the time of removal, they have taken credit at the end of smelting units. Whatever short levy attributed, as and when paid by the sending unit is available as Cenvat credit at the end of smelting unit. This is a clear case of Revenue neutrality involved in transfer of goods between the different units of the same company. He relies on the decision of Tribunal in their own case reported in 2008 (232) ELT 687 to claim that in the view of Revenue neutrality, the adjustment on annual basis is justified. He also submits that in terms of Tribunal's order in the case of Goetze (India) Ltd. vs. CCE, Bangalore [2008 (89) RLT 464] the Department is bound to adjust the excess payment made by the assessee with any demand due from the assessee.

5.3. Learned advocate has, alternatively, further submitted that instruction of the Board in part IV of Chapter 3 has prescribed that finalisation of provisional assessment means finalisation of an issue/ ground and thereafter finalisation of ER 1/ER 2/ER 3 Returns.

6. Learned DR submits that the provisional assessment is resorted to in situations specifically mentioned under Rule 7. The provisional assessment can be only on grounds having a bearing on the rate of duty and or valuation. As per section 4 of the Central Excise Act, the valuation has to be adopted for every consignment at the time of removal. During the relevant period, the appellant has been empowered to self-assess the duty liability which presupposes the application of correct rate of duty and value in respect of consignment cleared. When there is any uncertainty on any of the above grounds, provisional assessment is resorted to. Finalisation has to be done based on assessment documents which is the invoice covering /removal of the excisable goods by the assessee. He relies on the decision of the Tribunal in the case of RPG Cables Ltd. vs. CCE, Mysore reported in [2000 (229) ELT 680] to contend that the finalisation has to be done invoice-wise. He also relied on the decision of the Tribunal in the case of Gujarat State Fertilisers & Chemicals Ltd. vs. CCE, Vadodara reported in [2005 (188) ELT 92] wherein it has been held that while adjusting excess paid duty towards short paid at the time of finalisation, the said adjustment have to be considered in the light of bar of unjust enrichment.

7.1 We have carefully considered the submissions from both sides. The assessment takes into account the rate of duty, the value and the end use conditions, if any, attached to the notification which may be claimed by the assessee. The provisional assessment can arise on any of these grounds when such factors are in dispute and are uncertain. While the assessee has been permitted to resort to self-assessment in the normal course and to pay duty as determined by them and to clear the goods, provisional assessment has to be specifically authorised by Asstt. Commissioner/ Deputy Commissioner as provided under Rule 7 after getting necessary bonds executed. The finalisation of the provisional assessment has to be necessarily done by the Assistant Commissioner / Deputy Commissioner. There is time limit of six months for finalisation of provisional assessment but the same extendable. In other words, the time limit prescribed is not specific for the obvious reason that, in some cases, it may take considerable time before finalisation of uncertain factors. In this particular case, the profit margin of the appellant company for the financial year will become available only after a few months of the close of financial year. The plea for adjusting short payment against excess payment depending upon the period taken for finalisation leads to uncertainty and depends upon vagaries attributable on the part of the assessee or on the part of officer whether the delay is justified or not.

7.2 The submission by the learned DR that the Central Excise invoice prepared by the assessee for every consignment at the time of removal is the basic assessment documents is valid. In the course of a month, there can be change in rate of duty when any exemption notification is issued or changed. Such change will apply from the date of effect of notification as prescribed. In other words, the liability of duty on the goods cleared is to be fixed ‘at the time of removal’. The payment of same has been deferred up to 5^{th} of the following month except for the month March, in which case, it will be 31^{st} of March.

7.3 The Board's instruction on the manner of finalisation of provisional assessment relied upon by learned advocate is reproduced below:-

> "2.5 Notwithstanding 'self-assement', all cases of provisional assessment have to be finalised by the Deputy/Assistant Commissioner of Central Excise, within a maximum period of 6 months. All the cases where provisional assessment cannot be finalised within 6 months must be submitted to Commissioner with the request letter of the assessee (through Deputy/Assistant Commissioner of Central Excise) indicating the reasons for non-finalisation and amount of differential duty for future clearances, before the expiry of the above-said period. If the Commissioner is satisfied with the reasons, he may extend the period, or otherwise direct the method to be adopted for finalisation of the assessment. For extending the period beyond one year from the date of provisional assessment, the request letter of the assessee should be put up to the Chief Commissioner in the same manner through Commissioner with his comments. The time limit of finalising the provisional assessment shall be applicable even to cases ordered for provisional assessment prior to 1st July, 2001.
>
> 2.6 Finalisation of provisional assessment means finalisation of an issue/ground and thereafter finalisation of each E.R.-1/E.R.-2/E.R.3 . The amount will be communicated to the assessee at the earliest. The amount of each differential duty shall be paid along with interest at the rate of specified by the Central Government by Notification issued under Section 11AA or 11AB of the Act from the first day of the month succeeding the month for which such amount is determined, till the date of payment thereof. "

7.4 From the above, it is clear that the said instructions have taken note of the fact that the assessee does self-assessment invoice –wise. Taking into account that the actual payment of duty is relatable to ER 1 filed month-wise or other similar returns the finalisation has been prescribed return-wise.

7.5 Learned DR relied on the decision of RPG Cables Ltd. in support of his claim and relied part is reproduced below:-

> "6. On a very careful consideration of the issue, we find that in respect of each invoice, the department has to ascertain whether the duty paid is in excess or short. If the duty paid is in excess, then, the party is entitled for refund on showing that the duty burden has not been passed on to the buyers. With regard to short payment, the party is liable to make good the short payment. Therefore, invoice-wise, this point has to be examined. Hence, the entire monthly excess and short payment cannot be netted off. Therefore, the department's contention is correct and the Commissioner's order with regard to the correct procedure to be adopted is legal and proper. Hence, we do not find any reason to interfere with the order of the Commissioner (Appeals). Thus, the appeals are rejected."

7.6 We agree with the submission of the learned DR that the said decision will apply to the facts of the present case. In other words, while it may take sometime to finalise the uncertain element namely, the profit margin in respect of appellant, once it is determined, the said profit margin has to be applied invoice-wise. We do not find any contradiction as the assessment has been done invoice-wise and, therefore, the finalisation of the assessment has also to be done invoice-wise.

7.7 As regards the excess payment made during certain periods, we notice that the appellant has already availed credit and had intimated to the Department that they have already taken credit at the end of smelting unit and therefore, we are concerned only with the short levy as mentioned in the impugned order.

7.8 Regarding the plea on revenue neutrality, the judgement of the appellant's own case has been given in the facts of the said case and the same has not taken into various submissions canvassed before us in the present proceedings. In the said decision of the Tribunal, the Commissioner, in the remand proceedings went beyond the direction of the Tribunal to finalise the assessable value under erstwhile Section 4 based on monthly cost structure, as against the direction of the Tribunal to determine the same based on the audited data for a particular financial year. Therefore, the same is not applicable. to the facts of the present case.

7.9 The eligibility of credit of duty paid in respect of clearances made by the mining unit at the end of the smelting unit is not in dispute before us.

8. In the light of the above, we reject the appeal of the party.

(Justice R.M.S. Khandeparkar)
President

(M. Veeraiyan)
Member(Technical)

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