

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

Appeal No. E/407 /2006 - EX[DB]

Date 04/09/2009

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

To :
OPEL ALLOYS (PVT)LTD.
G.T. ROAD, CHHAPRAULA, GAUTAM BUDH NAGAR.
OPEL ALLOYS (PVT)LTD.

C.C.E. GHAZIABAD

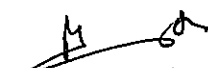
Appellant

Vs
Respondent

EX[DB] dated 04-9-09

I am directed to transmit herewith a certified copy of Final order No. 607/2009-

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. GHAZIABAD

C.G. O. COMPLEX-II, KAMLA NEHRU NAGAR, GHAZIABAD 201302

2. Adv. / Consult

SH. S. SUNIL, ADV.,
46, BANK ENCLAVE,
DELHI-92

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 Publications 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 Kuni, 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

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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, New Delhi**

**COURT NO. II
Excise Appeal No. 407 of 2006**

[Arising out of the Order-in-Appeal No. 120-CE/GZB/2005 dated 30.09.2005 passed by The Commissioner (Appeals), Customs and Central Excise, Ghaziabad.]

For Approval and signature :

Hon'ble Shri D.N. Panda, Judicial Member

Hon'ble Shri Rakesh Kumar, Technical Member

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 would 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 :
Department Authorities?
-

M/s Open Alloys (Pvt.) Ltd.

Appellant

Versus

CCE, Ghaziabad

Respondent

Appearance

Shri S. Sunil, Advocate – for the appellant.

Shri Sansar Chand, Authorized Representative (DR) – for the
Respondent.

**CORAM : Hon'ble Shri D.N. Panda, Judicial Member
Hon'ble Sh. Rakesh Kumar, Technical Member**

DATE OF HEARING : 25/08/2009.

DATE OF DECISION:

4/9/09

Final Order No. 607/09-EX Dated: 4.9.09

Per. Rakesh Kumar :-

This is an appeal against order-in-appeal No. 120-CE/GZB/2005 dated 30/09/2005 passed by CCE (Appeals), Ghaziabad by which the Commissioner (Appeals) upheld the order-in-original No. 78/2004-05 dated 09/2/05 passed by the Assistant Commissioner, Central Excise Division IV, Ghaziabad, rejecting a refund claim of Rs. 8,00,000/- (Rupees Eight Lakh) filed by the respondent. The facts of this case giving rise to this appeal are, in brief, as under :-

1.1 The appellant are engaged in the manufacture of M.S. Ingots, Alloy Steel Ingots and casting of M.S. Steel. Their unit was visited by Central Excise Officers on 3/5/01 in course of which certain records were examined and some records were resumed for detailed scrutiny. After scrutiny of the resumed records and conducting some inquiry, a show cause notice dated 1/5/02 was issued to the appellant and five others seeking recovery of duty of Rs. 2,93,25,164/- (Rupees Two Crore Ninety

Three Lakh Twenty Five Thousand One Hundred Sixty Four) alongwith interest from the appellant and also imposition of penalty on them and other persons. However even before the issue of show cause notice on 4/5/01 itself, the appellant had paid an amount of Rs. 8,00,000/- by debiting RG-23A Part II register vide entry No. 17. The Show cause notice was adjudicated by the Commissioner vide order-in-original dated 31/03/2004 by which the entire duty demand alongwith interest was confirmed and penalties were imposed on the appellant as well as on other noticees. Against the order-in-original dated 31/3/04 passed by Commissioner, the appellant filed an appeal before the Tribunal and the Tribunal vide final order No. 1163-1168/04-NB (A) dated 28/10/2004, while upholding the duty demand of Rs. 1,59,206/- (Rupees One Lakh Fifty Nine Thousand Two Hundred Six) alongwith interest, set aside the remaining duty demand and reduced the penalty on the appellant to Rs. 20,000/- (Rupees Twenty Thousand). On the basis of the Tribunal's final order dated 28/10/04, the appellant vide their letter/application dated 10/11/04 requested for allowing the re-credit of the amount of Rs. 8,00,000/- which had been debited by them in their RG-23A Part II register vide entry No. 17 dated 4/5/01. As regards the duty demand of Rs. 1,59,206/- and penalty of Rs. 20,000/- which was

upheld by the Tribunal, the appellant had paid the entire amount of duty and penalty on 09/11/04 and interest on 31/12/04. The Assistant Commissioner, however, vide order-in-original dated 9/2/05 rejected the aforesaid refund claim on the ground that the amount which was paid by the appellant through debit entry No. 17 dated 4/5/01 in the Cenvat credit account, cannot be considered as pre-deposit under Section 35F and hence for its refund, the refund application as per the provisions of Section 11B should have been filed. The appellant filed an appeal to Commissioner (Appeals) against the above order-in-original dated 9/2/05 of the Assistant Commissioner and the Commissioner (Appeals) vide the impugned order-in-appeal dated 30/9/05 upheld the Assistant Commissioner's order. It is against this order that the present appeal has been filed.

2. Heard both the sides.

2.1 Shri S. Sunil, Advocate, the learned Counsel for the appellant pleaded that the amount of Rs. 8,00,000/- had been deposited by the way of debit entry in the Cenvat credit account much before the issue of the show cause notice, that after the adjudication of the matter and subsequently the Tribunal's decision, the duty demand of Rs. 1,59,206/- alongwith interest has

been paid, that since the Tribunal vide its order-in-appeal dated 28/10/04 had set aside the entire duty demand except an amount of Rs. 1,59,206/- that in view of this, the Cenvat credit of Rs. 8,00,000/- which had been debited by the appellant in RG-23A Part II register on 4/5/01 should be refunded/allowed to be re-credited that in view of Tribunal's judgment in the case of **CCE, Trichirapalli vs. Ravishankar Industries Ltd.** reported in **2002 (150) E.L.T. 1317 (Tri. – Chennai)**, for refund of the amount deposited pending investigation, the bar of unjust enrichment and limitation is not applicable, that there is no question of refund having become time barred, as since the Commissioner's order confirming the duty demand had been contested, the debit of Rs. 8,00,000/- from Cenvat credit account prior to issue of show cause notice has to be treated as having been made under protest and that since the letter/ application for refund of this amount had been made within the limitation period prescribed under Section 11B from the date of the Tribunal's order, the refund cannot be treated as time barred and in this regard reliance is placed on Tribunal's judgment in the case of **Surbhi Enterprises vs. CCE, Ahmedabad** reported in **2007 (210) E.L.T. 588 (Tri. – Ahmd.)**.

2.2 Shri Sansar Chand, the learned Departmental Representative, defended the impugned order, reiterating the Commissioner

(Appeals)'s finding and pleaded that in this case it is on record that the amount under reference had been paid by the appellant on 4/5/01 vide debit entry No. 17 in the RG-23A Part II account, while the application for refund/re-credit was submitted to the Assistant Commissioner on 10/11/04, that is, beyond the period of one year and since the appellant could not produce any evidence that deposit of Rs. 8,00,000/- had been made under protest, the refund application has been rightly rejected as time barred.

3. We have carefully considered the submissions from both the sides and perused the records.

3.1 The disputed amount whose refund is sought, had been paid by the appellant by debit entry in the RG-23A Part II register on 4/5/01, that is, much before the issue of the show cause notice. Though after issue of the show cause notice, when the Commissioner adjudicated the matter, he confirmed much higher amount of duty and imposed penalty on the appellant company and other persons and also appropriated the amount of Rs. 8,00,000/- towards the duty demand confirmed, the appellant challenged this order of the Commissioner by filing an appeal against same before the Tribunal. The Tribunal vide final order dated 28/10/04 upheld the duty demand of only Rs. 1,59,206/- as

against the total confirmed demand of Rs. 2,93,25,164/- confirmed by the Commissioner and reduced the penalty amount of Rs. 20,000/- as against the total penalty of Rs. 2,93,25,164/- imposed by the Commissioner and also set aside the total penalty of Rs. 9,30,000/- imposed on other noticees. The duty demand upheld and the penalty of Rs. 20,000/- and interest on duty had been paid on 9/11/04 and 31/12/04 respectively and the appellant now seek refund of the Cenvat credit of Rs. 8,00,000/- which had been debited by them in the Cenvat credit account on 4/5/01. The point of dispute is as to whether provision of Section 11B would be applicable for its refund and if so whether the refund application, though made immediately after the Tribunal's order dated 28/10/04 – on 10/11/04, that is within a period of one month from the date of the Tribunal's order, but after expiry of period of one year from the date of debit, is to be treated as within the limitation period or time barred.

3.2 Though the amount of Rs. 8,00,000/- had been paid by the way of debit in the Cenvat credit account prior to the issue of show cause notice, on adjudication of this matter, this amount has been appropriated towards the duty demand. The refund claim has arisen when the Commissioner's order was set aside by the Tribunal vide final order dated 28/10/04. The Tribunal in the case

of *Surbhi Enterprise vs. CCE, Ahmedabad (supra)* has held that when the duty paid during investigation has been contested through out from the original stage, its payment has to be treated as under protest. Same view has been taken by the Tribunal in the case of **G.S. Radiators Ltd. vs. CCE, Ludhiana** reported in **2005 (179) E.L.T. 222 (Tri. – Del.)** and **Laxmi Board & Paper Mills Ltd. vs. CCE, Mumbai** reported in **2007 (208) E.L.T. 384 (Tri. – Mumbai)**. Hon'ble Supreme Court, in para 83 of its judgment in case of **Mafatlal Industries Ltd. vs. UOI** reported in **1997 (89) E.L.T. – 247 (S.C.)** has observed that – “when a person proposes to contest his liability by way of appeal, revision or in the higher counts, he would naturally pay the duty, whenever he does, under protest”. Relying on these observations of Hon'ble Supreme Court, the Tribunal in the cases of **CC (Prev.), Jamnagar vs. Continental Petroleums Ltd.**, reported in **2009 (234) E.L.T. 333 (Tri. – Ahmd.)** and **CCE, Aurangabad vs. Klasspak Pvt. Ltd.** reported in **2005 (179) E.L.T. 365 (Tri. – Mumbai)**, has held that when matter is under litigation, payment of duty made is deemed to be payment under protest, even though there is no express mention of payment having been made under protest. Thus in this case, the debit of the disputed amount on 4/1/05 in RG 23A Pt. II account has to be treated as having been

made under protest. Hon'ble Supreme Court in case of **Dena Snuff (P) Ltd. vs. CCE, Chandigarh** reported in **2003 (157) E.L.T. 500 (S.C.)** has held that when the duty is paid under protest, the period of limitation would start to run from the date of final decision in the assessee's own case. Since in this case, the appeal was decided by the Tribunal in favour of the Appellant, on 28/10/04, the limitation period for filing refund ^{application} under Section 11B has to be counted from 28/10/04 and since the refund application has been made on 10/11/04, the same is within time. Since the refund claim is of Cenvat credit debited on 4/1/05 in RG 23A Pt. II account, in view of clause (c) of 1st proviso to Section 11B (2) of principle of unjust enrichment will not be applicable.

4. In view of the above discussion, the impugned order upholding the rejection of the refund claim is not correct and hence, the same is set aside. The appeal is allowed.

(Pronounced in open court on 4/9/05)

(Rakesh Kumar)
Technical Member

(D.N. Panda,
Judicial Member

PK