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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

Date 29/09/2009

Appeal No. E/391 /2006 - EX[DB]

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

To :
DCM ENGINEERING PRODUCTS
ASRON DISTRICCT NAWAN SHAHAR, PUNJAB..

DCM ENGINEERING PRODUCTS — Appellant
Vs
C.C.E. JALLANDHAR(HQ. AT CHANDIGARH) — Respondent

I am directed to transmit herewith a certified copy of **Final order No. 731/ 2009 EX[DB]** dated 15-9-09 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. JALLANDHAR(HQ. AT CHANDIGARH)
   C.R.BUILDING, PLOT NO. 19, SECTOR 17-C, CHANDIGARH.
2. Adv. / Consult
   MR.S.C. KAMRA & CO.
   B-2/210(BASEMENT), SAFDARJUNG ENCLAVE, NEW DELHI- 110029
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

Assistant Registrar
(Excise Appeal Branch)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No.2, R.K.Puram, New Delhi-110066.
Principal Bench, New Delhi.

E/391/06

(Arising out of Order-in-Appeal No.399/CE/CHD/05 dt.31.10.05 passed by the Commissioner(Appeals), Chandigarh)

M/s. DCM Engineering Products Appellant

Versus

CCE, Jalandhar Respondent

Appearance
Sh. S.C.Kamra & Sh. G.K.Mahajan, Advs. For Appellant

Sh. S.Chand, DR for Respondent

Coram: Hon'ble Mr. D.N.PANDA, JUDICIAL MEMBER
Hon'ble Mr. RAKESH KUMAR, MEMBER (TECHNICAL)

Date of decision: 18.8.09
FINAL Order No. 731/09-EX

Per D.N.Panda:

Without being successful in first appeal, the appellant has come in appeal to Tribunal. Ld. Commissioner(Appeals) held that excise duty of Rs.25,85,800/- is payable under Rule 57U read with Rule 9(2) of Central Excise Rules,1944, and he upheld the order of adjudication giving rise to following consequences:

1. Demand of Rs.25,85,800/- under Rule 57U of the Central Excise Rules,1944 read with rule 9(2) of the Central Excise Rules and Section 11A of the Central Excise Act,1944 was leviable.

2. Penalty of Rs.3,00,000/- under Rule 173Q of Central Excise Rules,1944 was imposable.

3. Interest under Rule 57U(5) read with Section 11AB of the Central Excise Act,1944 was payable.

2. Ld. Counsel Shri S.C.Kamra submits that this appellant purchased pattern toolings from its sister concern in terms of the invoices issued under page 24 of the appeal folder. The said pattern tools were meant for use on behalf of the Maruti Udyog Ltd. for manufacture of automobile components for that concern. One of the condition of the purchase order appearing at page 19 of the appeal folder is that this appellant was to supply pattern tool at a cost of Rs.75 lakhs to Maruti Udyog Ltd. But as per terms of contract and understanding of parties, although purchase order required the appellant to supply pattern tool to Maruti Udyog Ltd., that was to be retained by the former for use in manufacture of automobile components for the later. According to the appellant, para 3 of the purchase order at page 19 conveys such intention of the parties showing that two sets of pattern toolings although agreed to be supplied by way of sale by

the Appellant that was really meant to be used for manufacture of automobile components by the appellant on behalf of Maruti Udyog Ltd., for which that was to be retained by the appellant as custodian of same. One of the conditions of such retention is that property over the pattern tools lies with Maruti Udyog Ltd. and that shall be maintained by the appellant without charging any cost and use of those pattern tools shall be guaranted for a minimum life for manufacturing 1,25,000 OK castings from the two sets of pattern toolings.

3. Ld. Counsel Shri Kanna submitted that While factual position was as above, following terms of the purchase order, the appellant raised an invoice in favour of Maruti Udyog Ltd. which is appearing at page 24 of the appeal folder. The agreed price of the pattern tool being Rs. 75 lacs (Rs.seventy five lacs) that is apparent from page 19 (purchase order) and the same value was only billed to Maruti Udyog Ltd, by way of invoice under Rule 52A and 173G of Central Excise Rules,1944. But in real sense, there was no removal of such goods made by appellant for which the invoice was a mere intimation and not a document to make delivery of the pattern tool to serve the purpose of Rule 52A of the Central Excise Rules,1944 for which no duty is realizable.

4. Ld. Counsel further submits that there was no intention of the appellant to remove the pattern toolings at all for the purpose of Rule 52A nor even at any point of time, there was any physical delivery of the pattern tool made through any invoice by the appellant to Maruti Udyog Ltd. Shri Kamra submits that Rule 52A requires a document to accompany physical delivery of the excisable goods from a factory or a ware house. If such essential feature is absent, there cannot be levy of any Central Excise Duty nor can be denial of any incentive if that is available under any other provision of the statute.

5. Ld. Counsel also submits that show cause notice at page 27 of the appeal folder has brought out charge against the Appellant under Rule 52A calling for compliance under Rule 173G and for ultimate recovery of Modvat credit of Rs.25,85,800/- under the shelter of Rule 57U of Central Excise Rules,1944. According to him when Rule 52A does not apply, there is no question of application of Rule 173G of Central Excise Rules,44. Further, when there is no application of Rule 52A, there shall be no application of Rule 57U for recovery.

6. Shri Kamra, Ld. Counsel further submits that this appellant has made the revenue aware in terms of page 24 of the appeal folder that the pattern tools were delivered from the Baddi unit of the appellant, suffering excise duty and such suffering is proved

from page 22 and 23 of the appeal folder carrying purchase invoices. The goods so delivered was also brought to the knowledge of Revenue indicating that the pattern tools shall be used for manufacture of unmachined iron castings as ordered by the buyer, M/s. Maruti Udyog Ltd. Purchase order number of that buyer also appears in the invoice at page 24 conveying the intention to use the tool for Maruti Udyog Ltd. The purchase order number exhibited in the invoice appearing at page 24 carries the same purchase order number as that appears at page 19 of the appeal folder. Also it is the case of the appellant that revenue has not found physical delivery of the pattern tool to Maruti Udyog Ltd. by the appellant and that is also not allegation in the SCN.

7. With the aforesaid factual background, Shri Kamra submits that Tribunal has already decided similar issue in the case of Mutual Mecaplast Ltd. vs CCE, Daman reported in 2007(220)ELT.888 and also relying upon the Apex Court judgment in the case of J.K.Spinning & Weaving Mills Ltd. vs UOI reported in 1987(32)ELT.234(SC), he argues that the word 'removal' which is significant for realisation and imposition of excise duty by Revenue is to be interpreted according to the meaning given in para 38 of the Apex Court judgment. That paragraph categorically says that the word 'removal'

contemplates physical movement of goods from one place to another. Therefore, following ratio of these two decisions, entire proceedings initiated in the show cause notice at page 27 is unsustainable.

8. Ld. DR Shr Sansar Chand supports order of the authorities below and submits that once invoice was issued by appellant as appearing at page 24 of appeal folder indicating that the same was under Rule 52A and Rule 173G of the Central Excise Rules,44, duty becomes payable. When no duty was paid, the Cenvat credit enjoyed in respect of the pattern tools is reversible. Shri Chand relying on para 2 of the purchase order at page 19 submits that terms of payment was settled between the parties calling for 50% of the tooling cost to be paid upon acceptance of letter of intent and balance 50% of the cost of pattern tool alongwith the excise duty and taxes to be paid on sample approval. Therefore, revenue's contention is that Modvat credit of Rs.25,85,800/- enjoyed by the appellant is to be recovered/disallowed in terms of Rule 57L of the Central Excise Rules,1944. In terms of page 24(invoice under Rule 52A) whole of the amount of cost of pattern tool was charged by the appellant from Maruti Udyog Ltd.

9. Heard both sides and perused the record.

10. During the period Fbe'98 to June'98, appellant had availed Modvat credit of Rs.25,85,800/-. This benefit was availed on the basis of page 22 & 23 of appeal folder showing the invoices relating to purchase of pattern tools from sister concern of the appellant. During the period Sept'98 to Feb'99, the appellant raised an invoice bearing No.04449 showing value of Rs.75 lakhs as assessable value of the pattern tools against Maruti Udyog Ltd. The invoice appearing at page 24 carried following foot notes as under:

"Total rupees eight one lacs sixty thousand only

1) Pattern equipment made in our Baddi unit sold and detained for used in the manufacture of unmachined iron castings as ordered by the buyer.
2) Excise duty at prevailing rate will be charged at the time of physical removal of pattern from our factory".

11. The invoice in question was issued in fulfillment of the contractual obligation of parties as appearing at page 19 of the appeal folder which was a purchase order placed by Maruti Udyog Ltd. with the appellant for supply of two pattern tools. Purchase order placed by Maruti Udyog Ltd. indicated cost of the pattern tools to be Rs.75 lakhs. Manner of discharge of the payment by Maruti Udyog Ltd. for such purchase as well as use thereof by the appellant on behalf of Maruti Udyog Ltd(without delivery of the

same to Maruti Udyog Ltd.) was agreed condition between the parties. While this is the position, the appellant got a show cause notice on 13.3.99 i.e. one month after the invoice dt.19.2.99 was issued in terms of page 24 of the appeal folder. Charge in the show cause notice was that Modvat credit of Rs.25,85,800/- was enjoyed by the appellant in respect of two sets of pattern tool was not admissible in terms of Rule 52A in view of sale thereof effected violating provision of Rule 173G and that called for recovery of modvat credit of Rs.25,85,800/- in terms of Rule 57U of the Central Excise Rules,1944.

12. Appellant's grievance before the authorities below was that there was no removal of the goods (pattern tools) at all made from the factory of the appellant nor there was any delivery of such goods (pattern tool) made by the appellant to Maruti Udyog Ltd. But the appellant had all along used the pattern tool for manufacture of automobile components in its factory using the pattern tool. This factual position is not disputed by revenue and no evidence to the contrary is on record. The appellant satisfied that in terms of page 25, goods manufactured using the pattern tools have suffered duty. The appellant had also not at all physically delivered the pattern tools and no such delivery was proved by revenue by any evidence nor delivery is the allegation in the show cause notice. The appellant had made it clear to

Revenue in the foot note of the invoice at page 24 of appeal folder that excise duty at "prevailing rate" will be charged at the time of physical removal of pattern from its factory. This is sufficient to say that there was no physical delivery of pattern tool ever made by the Appellant even till issuance of SCN. The appellant has proved its fairness indicating that it is prepared to pay excise duty on physical removal of the pattern tools. Such a fair statement enables to conclude that there was no case for revenue to invoke Rule 52A in absence of evidence of delivery without satisfying the twin conditions of the Rule. The conditions of the Rule are:

(1) That there should be delivery of the excisable goods; and

(2) No such delivery shall be without invoice signed by owner of the factory or his authorized agents.

13. Therefore to invoke Rule 52A, not only physical delivery of the excisable goods is necessary but such delivery should also be accompanied by an invoice under that Rule. Such essential ingredients of law is not present in the present case. The case clearly demonstrates that taking delivery of pattern tools by the appellant from the factory of its sister unit, repossession thereof was not given by appellant to Maruti Udyog Ltd. by any physical delivery. Rather the same was used in its factory to manufacture

excisable goods for Maruti Udyog Ltd. The appellant having received the pattern tool from its sister unit directly on behalf of the Maruti Udyog Ltd., and used for the benefit of Maruti Udyog Ltd. only, there was no removal of goods by appellant. Once such factual finding is made, the case of the appellant is squarely covered by the Tribunal's decision in the case of Mutual Mecaplast Ltd. vs CCE reported in 2007(220)ELT.888.

14. We have also advantage of reading para 38, 39 & 40 of the judgment of the Apex Court in the case of J.K.Spinning & Weaving Mills(Supra). Hon'ble Court has categorically held that the word "removal" contemplates physical movement to goods from place to another. In absence of physical movement, there cannot be assumption of physical removal. Reading of para 40 of the judgment throws light that there cannot be construction of deemed removal except to the extent specifically spelt out by law. Rule 52A of the Central Excise Rules does not cover cases of deemed removal. Therefore, physical removal is *sine qua non*. If this is the position of law, the proceeding initiated by the SCN at page 27 of the appeal folder is unsustainable.

15. Contention of Revenue that mere issuance of invoice is sufficient to call for reversal of Cenvat credit, is inconceivable. In view of the ratio laid down by the Apex Court in the aforesaid case, when no physical removal had at any time occurred till

issuance of show cause notice nor there was any evidence on record to support case of revenue, impugned proceeding is fatal.

16. Revenue's another stand is that the payment criteria laid down in para 2 of the purchase order is not supported by page 24. Para 2 has no relevance to the case since para 1 which is dealing with the cost was already subject matter of page 24 of the appeal file.

17. In view of the reason given and following the ratio laid down in aforesaid decisions, the appellant shall succeed for which we allow the appeal, setting aside the impugned order.

18. Ld. Counsel prays that consequential relief shall arise out of result of the appeal. Ld. adjudicating authority shall do well to allow such relief if any admissible, in accordance with law.

Order dictated in the open Court.

(D.N.Panda)
Judicial Member

(Rakesh Kumar)
Member Technical

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