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

Appeal No. E/3065/2006-SM[BR] Date 03/09/2008

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

To :
M/S SHIVAM METALS.
6,INDUSTRIAL AREA,JODHPUR.

M/S SHIVAM METALS. Appellant
Vs
C.C.E. JAIPUR II Respondent

I am directed to transmit herewith a certified copy of **Final order No**. 1247 /2008 –SM[BR] dated 5.8.2008 passed by the Tribunal under Section 35-C(1)of Central Excises Act, 1944

Assistant Registrar
(SM Appeal Branch)

Copy to :
1. Respondent
   C.C.E. JAIPUR II
   N.C.R.BUILDING, STATUE CIRCLE, "C" SCHEME, JAIPUR 302005.
2. Adv. / Consult
   MR.OM P.AGARWAL & CO.
   56, SECTION 7, N.P.H ROAD, JODHPUR(RAJ)
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. 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
(SM Appeal Branch)

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI, PRINCIPAL BENCH NEW DELHI

Excise Appeal No.3065 of 2006-SM (BR)

[Arising out of Order-in-Appeal No.417/HKS/CE/JPR-II/06 dated 10.07.2006 passed by the Commissioner of Central Excise (Appeals), Jaipur]

Date of Hearing/ Decision:05.08.2008

For approval and signature:

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

1. Whether Press Reporters may be allowed to see CESTAT (Procedure) Rules, 1982.
2. Whether it should 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 Departmental authorities? :

NO

M/s. Shivam Metals ...Appellants
[Rep. by Shri O.P. Agarwal, Consultant]

Vs.

CCE, Jaipur-II ...Respondent
[Rep. by Shri A.K. Rastogi, DR]

CORAM: **Mr. P.K. Das, Member (Judicial)**

Final Order No..1247/08-SM(BR)....../Dated:05.08.2008

Per P.K. Das:

The Appellants are engaged in the manufacture of dutiable final products i.e. Standard Cold Rolled Patta/Patti classifiable under sub-heading No.7219.90 and exempted goods i.e. Standard Steel Scrap classifiable under sub-heading No.7204.21 of the Schedule to the Central Excise Tariff Act. It has been alleged that the Appellant wrongly utilised Cenvat Credit of Rs.28,219/- for payment of central excise duty on exempted goods i.e. Standard Steel Scrap in order to pass the Cenvat Credit benefit to the consignees. It has further been alleged that the amount so collected as central excise duty is required to be deposited in Government Account under Section 11 D with interest under the Central Excise Act, 1944. The Adjudicating Authority confirmed the amount of Rs.28,219/- collected from their customers in the guise of central excise duty in terms of Section 11 D of the Act along with interest and imposed penalty of Rs.5,000/- under Rule 25 of the Central Excise Rules, 2002, which has been upheld by the Commissioner (Appeals).

2. Ld. Counsel on behalf of the Appellant submits that the Appellant availed Cenvat Credit on the clearance of Stainless Steel Scrap and paid duty @16% Adv. as revealed from the invoices. He further submits that they have not retained any amount and, therefore, Section 11 D of the Act cannot be invoked. He further submits that Section 11D of the Act was amended by the Finance Act, 2008, which shall be deemed to have come into force on the first date of April, 2008. He submits that in terms of the said amendment, if any person has collected, any amount on any excisable goods, which are wholly exempt or are chargeable to nil rate of

duty from any person, in any manner, shall pay the amount so collected to the credit of the Central Government. He further submits that in this case, the Appellant paid duty, which was collected from their customers and, therefore, Section 11 D is not warranted.

3. Ld. DR reiterates the findings of the Commissioner (Appeals). He submits that the Aluminium Scrap is nil rate of duty and, therefore, the amount paid by the Appellant is invalid deposit to the Government Account. In other words, the Appellant collected the amount in their invoice as duty is liable to be deposited in Government Account under Section 11 D of the Act.

4. After hearing both the sides and on perusal of the records, I find that Stainless Steel Scrap is exempted goods. The Appellant paid duty 16% Adv. duty at the time of clearance of the goods and also availed Cenvat Credit. It is seen that the Appellant did not retain the amount collected from the customers. The Tribunal in the case of Starlite Industries (India) Ltd. Vs. CCE, Vapi – 2008 (225) ELT 397 (Tribunal-Ahmd.) held that duty paid from Cenvat Account also excise duty and recovery under Section 11 D of the Act is not sustainable. The Larger Bench of the Tribunal in the case of Unison Metals Ltd. Vs. Commissioner of Central Excise, Ahmedabad-I reported in 2006 (204) ELT 323 (Tribunal-LB) held as under:-

"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 11D has to be read keeping this scheme in view. Therefore, the provisions for "every person who is liable to p ay 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 not 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 as 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."

5. In the present case, the Appellant paid duty on the exempted goods and collected the amount from their customers as evident from the invoice. It is noted that the Appellant had not retained any amount and paid to the Government and, therefore, Section 11 D of the Act cannot be invoked. So, the impugned order is not sustainable, and it is set aside. The Appeal is allowed with consequential relief.

Order dictated & pronounced in open court on 05.8.2008.

(P.K. Das)
Member (Judicial)

Ckp.