TELEGRAM : CEGCANAL
Website : www.cestat.gov.in

REGISTERED / AD
Email : delhi@cestat.gov.in

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/183 /2007- SM[BR] Date 05/09/2008

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

To :
M/S SHYAM FORGING P. LTD
6,K.M.STONE, G.T. ROAD, CHHAPRAULA, DISTT-
GAUTAM BUDH NAGAR
M/S SHYAM FORGING P. LTD Appellant
Vs
Respondent
C.C.E.GHAZIABAD

I am directed to transmit herewith a certified copy of **Final order No**. 1265 / 2008 –SM[BR] dated 7.8.2008 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.GHAZIABAD
   CGO COMPLEX-I,, KAMLA NEHRU NAGAR, GHAZIABAD.
2. Adv. / Consult
   MR.RAJESH CHHIBBER
   FA/9, NEW KAVI NAGAR, GHAZIABAD
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.183/2007–SM (BR)

[Arising out of Order-in-Appeal No.204-CE/GZB/2006 dated 13.12.2006 dated 13.12.2006 passed by the Commissioner of Central Excise (Appeals), Ghaziabad]

Date of Hearing/ Decision:7.8.2008

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? :

M/s.Shyam Forgings P.Ltd. ...Appellants
[Rep. by Shri R. Chhibber, Advocate]

Vs.

CCE, Ghaziabad ....Respondents
[Rep. by Shri A.K. Rastogi, DR]

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

Final Order No.1265/08-SM(BR)/Dated:7.8.2008

Per P.K. Das:

The relevant facts of the case, as per record, in brief, are that by letter dated 11.11.2004, the Appellant informed the Asstt. Commissioner of Central Excise that they have exported the goods by ARE-I No.43/2003-04 dated 27.03.2004 and corresponding invoice charging excise duty at the rate of 16% instead of 8% under Heading No.7218.00. They paid total excise duty of Rs.3,03,188/- instead of Rs.1,51,413/-. They paid excess amount of Rs.1,51,775.00. It has informed that they received the rebate claim of Rs.1,51,413/- vide Order No.34/2004-05 dated 9.6.2004 and the balance excise duty is still pending. Thereafter, the Appellant suo moto took the credit of the said amount in their Cenvat Account on 27.12.2004. A show cause notice dated 3.11.2006 was issued to disallow the suo moto credit availed by them. The Adjudicating Authority disallowed the credit of Rs.1,51,413/- alongwith interest and imposed penalty of equal amount under Section 11 AC of the Act. The Commissioner (Appeals) upheld the Adjudication Order.

2. After hearing both the sides and on perusal of the records, it is seen that the Larger Bench of the Tribunal in the case of BDH Industries Ltd. Vs. CCE (Appeals) Mumbai – 2008 (TIOL) 1211 CESTAT-MUM-LB held that all types of refund have to be filed under Central Excise Act and Rules made thereunder and no suo moto credit of duty paid in excess may be taken by the assessee. The relevant portion of the said decision is reproduced below:-

> "12. We find that there is no provision under Central Excise Act and Rules allowing suo moto taking of credit of refund without sanction by the proper officer. The appellant's contention that refund in respect of duty paid twice cannot be considered as refund of duty and is only the accounting error does not appeal to us as the debit entry made in the accounts is towards payment of duty only and therefore refund of these amounts has to be considered as refund of duty only. The PLA account and the credit

accounts are required to be submitted to the department and any correction carried therein, need to have department's sanction. We also note that the law relating to refund has been fully analysed by the Apex Court in the case of Mafatlal Industries (cited supra) which makes it very clear that all types of refund claim be there of excess duty paid or otherwise are to be filed under Section 11 B and have to pass the proof of not passing on the incidence of duty to others. The recent decisions of Hon'ble Supreme Court in the case of Sahakari Khand Udyog and Others clearly laid down that all refunds have to pass through doctrine of unjust enrichment, even if it is not so expressly provided for in the statute. From these decisions, it clearly emerges that all types of refund have to be filed under Section 11B of the Central Excise Act and no suo moto refund can be taken unless and until the department is satisfied that the incidence of duty has not been passed on."

3. On perusal of the aforesaid decision, it is seen that the Larger Bench of the Tribunal observed that no suo moto refund can be taken unless and until the Department is satisfied that the incidence of duty has not been passed on. In the present case, the Appellant by its letter dated 11.11.2004 informed that they paid excess amount of excise duty of Rs.1,51,413/-. Ld. Advocate submits that the said letter would be treated as the refund claim. Ld. DR on behalf of the Revenue submits that the issue in this appeal is as to whether the Appellant is entitled to take suo moto credit, which has been decided by the Larger Bench and, therefore, the appeal should be rejected. I find that there is a factual dispute of availment of credit. The Larger Bench of the Tribunal also observed that

no suo moto credit can be taken unless and until the Department is satisfied regarding the doctrine of unjust enrichment. In any event, the Appellant applied for availment of Credit by letter dated 11.11.2004. Whether it will be treated as a refund claim or not, will be decided by the Adjudicating Authority.

4. In view of that , the impugned order is set aside and the matter is remanded back to the Adjudicating Authority to decide afresh in the light of decision of the Larger Bench of the Tribunal as well as their letter dated 11.11.2004, in accordance with law.

Order dictated & pronounced in open court on 7.8.2008.

(P.K. Das)
Member (Judicial)

Ckp.