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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/86 /2006 - EX[DB] Date 17/09/2009

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

To :
NAINKO EXIM PVT. LTD.
C-14, SECTOR-59, NOIDA, GAUTAM BUDH NAGAR,
UTTER PRADESH.

NAINKO EXIM PVT. LTD. Appellant
Vs
C.C.E. NOIDA Respondent

I am directed to transmit herewith a certified copy of **Final order No. 685/ 2009 EX[DB]** dated 14-9-09 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. NOIDA
   C-56/42, SECTOR-62, NOIDA-201307
2. Adv. / Consult
   MR.V. LAXMIKUMARAN
   B-6/10, 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 – 110 066.
Principal Bench, New Delhi

COURT NO. II

DATE OF HEARING : 26/8/09.

Excise Appeal No. 86 of 2006

[Arising out of the Order-in-Appeal No. 100/CE/APPL/NOIDA/ 2005 dated 10/10/2005 passed by The Commissioner of Central Excise (Appeals), Meerut – II, Noida.]

M/s Nainko Exim Pvt. Ltd. — Appellant

Versus

CCE, Noida — Respondent

Appearance

Shri B.L. Narsimhan, Advocate – for the appellant.

Shri S.K. Panda, Authorized Representative (Jt. CDR) – for the Respondent.

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

Final Order No. 685/09-Ex Dated : ____________

ORDER

Per. D.N. Panda :-

This appeal has involved a question whether the appellant is entitled to the refund of Excise Duty paid under Rule 5 of Cenvat Credit Rules, 2002, on the input when Cenvat credit could not be utilised due to exemption of duty on exportable goods and when there was price reduction of input by seller manufacture at a date subsequent to purchase of such input.

2. Learned Counsel Shri Narsimhan submits that the Cenvatable input purchase by the appellant from the manufacturers have suffered duty to the extent indicated in the invoices. The input so purchased was used in the goods manufactured for export as well as for sale in domestic market. So far as the sale in the domestic market is concerned that has suffered excise duty and the excise duty payable on the finished goods got adjusted against the Cenvat credit. But for the quantum of the export made, Cenvat credit could not be utilised for the quantity of the goods exported since no excise duty was payable on export. When Cenvat credit could not be utilised fully, the amount of unutilised credit being refundable to the appellant in terms of Rule 5 of the Cenvat Credit Rules, 2002, the appellant made application to the learned Adjudicating Authority. That authority, in the last para of the order disallowed claim of Rs. 1,78,80,551/- (Rupees One Crore Seventy Eight Lakh Eighty Thousand Five Hundred Fifty One). Such a denial is unjustified.

3. Learned counsel relying on the Circular No. 877/15/2008-CX dated 17/11/2008 submits that excise duty paid for the input purchased not being utilised is to be refunded irrespective of any price reduction by way of discount given by the input manufacturer when there is no reduction of excise duty in the credit note issued by that concern to the appellant. The Circular having clarified the position to resolve dispute, the appellant is entitled to such benefit. Shri Narsimhan also brings out that there

is a bar under Section 11 B (2) (c) of the Central Excise Act, 1944 as to meeting test of unjust enrichment in such cases.

4. Learned Jt. CDR submits that when excisable input is purchased, the invoices exhibits value of goods (input) as well as excise duty thereon. Cost of the inputs alongwith all duties and levies are recovered by manufacturers adding the same to the cost of manufacture alongwith profit. While sale proceeds of such manufacturers recovers excise duty element of the input, passing on the same to the consumer, price discount of input granted to manufacturer by input seller shall not confer right to such manufacturer to get refund of excise duty element to the extent of price of input reduced. The appellant shall be unjustly enriched if refund is granted when appellant has already recovered his cost following the ration laid down by the Apex Court in the case of **Sahakari Khand Udyog Ltd. vs. CCE & Cus. - 2005 (181) E.L.T. 328 (S.C.)**. He therefore submits that denial of refund to the extent indicated by the order of adjudication and confirmed by the Appellate Authority is justified and proper, under law, when the appellant has already sold its goods and realised the sale proceeds alongwith the excise duty element of input, inside the finished goods.

5. Heard both sides and perused the record.

6. There is no difficulty to understand that when excisable inputs are purchased, invoice shows quantum of excise duty and value of goods. Any event subsequent to purchase of the input

giving rise to price slash may be in the nature of discount. The Board in para 3 of Circular No. 877/15/2008-CX dated 17/11/08 has clarified that "the entire amount of duty paid by the input manufacture, as shown in the invoice would be available as credit irrespective of the fact that subsequent to clearance of the goods, the price is reduced by the way of discount or otherwise and only if the duty paid on the inputs is also reduced alongwith the reduction in price, the reduced excise duty only would be available as credit. It may, however, be confirmed that the input supplier, who has paid duty has not failed/claimed refund on account of reduction in price." It may be noted that excise duty element is recovered by prudent manufacturers through sale proceeds of finished goods.

7. In this case both the authorities below, when passed the order had no advantage of the Circular dated 17/11/2008 before them. Therefore to serve interest of justice and to examine stand of both sides, learned Adjudicating Authority should do well to grant fair opportunity of hearing to both the sides and pass appropriate order considering the reasoning of the Circular dated 17/11/2008 and the law cited by revenue today. Refund, if any, admissible in terms of Rule 5 of Cenvat Credit Rules, 2002 shall be ordered in accordance with law. In the result, the matter is remanded to the learned Adjudicating Authority, setting aside the impugned order.

(Dictated and pronounced in open court)

(D.N. Panda)
Judicial Member

(Rakesh Kumar)
Technical Member

PK