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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/5358 – 5359 & 5577 / 2004 –SM[BR] Date 18/11/2009

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

To :
(1-2) M/S ASHOKA GENERAL INDUSTRIES
P.B.NO.46, 1-2, KRISHNA NAGAR, MATHURA (U.P.)
281004

[3] M/S ELLKAY SANITATION PVT. LTD.
GAUR KENDRA MATHURA- DELHI BAY PASS
P.O. CHHATIKARA MATHURA [U.P.] 281001

M/S ASHOKA GENERAL INDUSTRIES Appellant

Vs

C.C.E. LUCKNOW Respondent

I am directed to transmit herewith a certified copy of **Final order No.** 1443 – 1445 / 2009 –SM[BR] dated 10.11.2009 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. LUCKNOW
   7-A, ASHOK MARG, LUCKNOW.
2. Adv. / Consult SHRI BIPIN GARG ADV.
   B-1/1289-A, VASANT KUNJ NEW DELHI

3 S.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
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Assistant Registrar
(SM Appeal Branch)

CUSTOMS EXCISE & SERVICE TAX APPEL ATE TRIBUNAL,
West Block No.2, R. K. Puram, New Delhi
COURT-III

Date of hearing/decision: 10.11.2009

Excise Appeal No. 5358-5359 & 5577 of 2004-SM

[Arising out of order-in-Appeal No. 175-176-CE/LKO/2004 dated 30.7.2004 & 70-CE/LKO/2001 dated 9.10.2001 passed by the Commissioner, Central Excise (Appeals), Lucknow]

For approval and signature:

Hon'ble Shri M. Veeraiyan, 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.	Yes
2	Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	Yes
3	Whether Their Lordships wish to see the fair copy of the Order?	Seen
4	Whether Order is to be circulated to the Departmental authorities?	Yes

M/s Ashoka General Industries
M/s Ellkay Sanitation Pvt. Ltd. — Appellant

Vs.

CCE, Lucknow — Respondent

Appearance:
Appeared for the Appellant – Shri Bipin Garg, Advocate

Appeared for the Respondent- Shri S.K. Bhaskar, DR

Coram: Hon'ble Shri M. Veeraiyan, Technical Member

Final Order No. 1443-1445/2009 SM (Br)

Per: M. Veeraiyan:

Appeal Nos. 5358 and 5359 of 2004 are by M/s Ashok General Industries against the common order in appeal of Commissioner (Appeals), Lucknow dated 30.7.2004. Appeal No. 5577 of 2004 is by M/s Ellkay Sanitation Pvt. Ltd. against the order of the Commissioner (Appeals) dated 9.10.2001. These three Appeals involve common issues and accordingly, are disposed of by this common order.

2. Heard both sides.

3. The relevant facts, in brief, are that the Appellants were availing the benefit of Notification No. 16/97 in respect of goods manufactured by them. The said notification is subject to the condition that the manufacturer does not avail of the credit of duty under Rule 57A of the Central Excise Rules, 1944. The Appellants in the course of the financial year opted out of Notification No. 16/97 dated 1.4.97 after availing the benefit of the said Notification for some period and started availing Notification No. 38/97 dated 27.6.97. Show cause notices were issued holding that the Appellants were not entitled to opt out of Notification No. 16/97 before crossing the limit of One crore in respect of value of clearances and, therefore, they were not eligible for Modvat credit taken by them consequent to switching over to Notification No. 38/97 dated 27.6.1997. There is no bar in availing Modvat credit while availing the Notification No. 38/97.

4. The Original Authority held that the Appellants have not fulfilled the condition of filing declaration while opting for Notification No. 38/97 and, therefore, they are not eligible for the benefit of the said Notification and accordingly confirmed the demand by denying the Cenvat credit taken by the Appellants. The original Authority also imposed penalties on the Appellants. On

Appeal by the parties, Commissioner (Appeals) upheld the orders of the original Authority. However, in the cases against M/s Ashoka General Industries, he set aside the penalties imposed by the original Authority.

5. Ld. Advocate for the Appellant submits that show-cause notices were issued to deny the credit on the ground that they opted out of Notification No. 16/97 in the course of the financial year after availing the same for some period but before completing One crore limit on value of clearances which is not permissible. The Authorities below have confirmed the demand going beyond the scope of the show-cause notices and made out new cases holding that the Appellants have not satisfied the conditions prescribed under Notification NO. 38/97. If that be so, then the option to the Department was only to deny the benefit of the Notification 38/97 which was not the case made out in the show-cause notice. He also submits that they are entitled to opt out of 16/97 as has been clarified by the Board vide Circular F.No. B-41/2/97-TRU dated 14.7.97. This has also been upheld by the Tribunal in the case of **Punjab General Manufacturing Works Vs. Commissioner of C. Excise, Lucknow** reported in 2006 (205) ELT 474.

6. Ld. DR reiterated the findings of the Commissioner (Appeals). He submits that the conditions of the Notification have to be strictly construed as held by the Hon'ble Supreme Court in the case of **Eagle Flask Industries Ltd. Vs. Commissioner of C. Ex., Pune** reported in 2004 (171) ELT 296. He also submits that as held by the Tribunal in the case of **Karm Sanitations Vs. Commissioner of Central Excise, Ghaziabad** reported in 2001 (129) ELT 101,

the Appellants having failed to file the declaration in terms of Notification No. 38/97 are not eligible for the benefit of the same and, therefore, the orders of the Commissioner (Appeals) should be upheld.

7. I have carefully considered the submissions from both sides. Perusal of show-cause notices indicate that Modvat credit availed by the Appellants were sought to be denied on the ground that they could not opt out of Notification NO. 16/97 before crossing the limit of Rs. 1 crore in value of clearances. The grounds raised in the show-cause notice do not survive in the light of clarification of the Board dated 14.7.97 wherein it has been held as under :-

> "In terms of Notification No. 38/97-CE a manufacturer has to pay 60% of the normal duty on first clearances upto an aggregate value not exceeding Rs.50 lakhs and 80% of the normal duty, on clearances in excess of Rs.50 lakhs but not exceeding Rs.100 lakhs. Full duty is payable on clearances in excess of Rs.100 lakhs. There is no restriction on availing credit of duty under Rule 57A of the Central Excise Rules or utilising credit of duty under Rule 57Q of the Central Excise Rules.
>
> A manufacturer can opt for the benefit of this notification anytime during the course of the financial year. As has been indicated in para 2(i) of the notification, a manufacturer intending to avail the benefit of this notification shall exercise his option in writing and the option shall be effective from the date of exercise of the option and cannot be changed during the course of the financial year. The manner in which the option has to be exercised is indicated in para 2(ii) of the notification. Para 2(iii) makes it clear that the clearances of specified goods prior to the exercise of the option will be taken into account for computing the aggregate value of clearances as specified in the Table to the notification. In this context, the possible situations that may be encountered are illustrated below:
>
> **ILLUSTRATION 1**: A manufacturer who has been paying concessional duty under Notification NO. 16/97-CE dated 1.4.1997 or full duty, wants to opt for Notification No. 38/97-CE. This is permissible. Notification No. 38/97-CE does not bar such a movement to Notification 38/97-CE.

It may be clarified that the option referred to in para 2(ii) of Notification 16/97-CE is the option to pay full duty instead of the concessional duty of nil, 3% and 5%. The stipulation in Para 2(i) of Notification 16/97-CE that the option (of not availing the exemption under the notification and instead paying full duty) when once exercised cannot be changed in that financial year is therefore applicable vis-à-vis that notification only. It should not be interpreted to mean a bar on opting for Notification 38/97-CE in view of the clear provisions in the notifications. In other words, the restriction on a manufacturer paying full duty is that he cannot opt for the concessional duty of nil, 3% and 5% but he can choose to opt for benefit under notification No. 38/97-CE."

8. The submission of the ld. DR that a notification has to be construed strictly cannot be assailed. The show-cause notices issued to the Appellants were not proposing denial of the Notification 38/97 or any alleged failure of the conditions. Thus, whether the conditions of 38/97 fulfilled or not was not the issue raised in the show-cause notices. Since the ground on which credit under Modvat Scheme was sought to be denied do not survive, the orders of the lower Authorities cannot be sustained.

9. Therefore, the orders of lower Authorities are set aside and the Appeals are allowed with consequential relief as per law.

(Dictated & pronounced in open Court)

(M. VEERAIYAN)
TECHNICAL MEMBER

RM