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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/641 /2006 – SM [BR]** Date **15/06/2011**

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

To :
M/S AZAD BODY BUILDERS P LTD.
JORWAR SINGH GATE AMER ROAD,JAIPUR(RAJ)

M/S AZAD BODY BUILDERS P LTD. Appellant

Vs

CCE,JAIPUR-I Respondent

I am directed to transmit herewith a certified copy of **Final order No. 319 / 2011-SM[BR]** dated 8.6.2011 passed by the Tribunal under **Section 35-C(1)of Central Excises Act, 1944**

Assistant Registrar
(SM Appeal Branch)

Copy to :

1. Respondent
CCE,JAIPUR-I
NCR
BUILDING,C-SCHEME,JAIPUR

2. Adv. / Consult
MR.ALOK KOTHARI
A-92, MANISH MARG, NEMI NAGAR, GANDHI PATH, VAISHALI NAGAR, JAIPUR

3. C.D.R
4. Bar association. CESTAT. New Delhi
5. Director Publications. Customs. Excise. I.P. Estate. New
6. M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -
7. Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
8. Taxmann Allied Service Pvt Ltd.. 59/32. New Rohtak Road. New Delhi -
9. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road, Ahmedabad-15
10. LAWCRUX Advisors Pvt Ltd. LAW House.1-8.Sector - 10. Faridabad 121003 (Haryana)
11. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
12. Office Copy
13. Guard file

Assistant Registrar
(SM Appeal Branch)

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
West Block No.2, R. K. Puram, New Delhi.

Date of hearing/decision 08.06.2011

For approval and signature:
Hon'ble Shri Justice R.M.S. Khandeparkar, President

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?	No
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

Excise Appeal No. 641 of 2006-SM
[Arising out of order in appeal No. 153(MPM)/CE/JPR-I/2005 dated 24.05.2005 passed by the Commissioner (Appeals-I) Central Excise, Jaipur]

M/s Azad Body Builders Pvt. Limited — Appellants

Vs.

CCE, Jaipur-I — Respondent

Appearance:

Rep. by None (Adj. request) for the appellants.
Rep. by Sh. R.K. Gupta, DR for the respondent.

Coram: Hon'ble Sh. Justice R.M.S. Khandeparkar, President

Final ORAL ORDER NO. 319/2011 SM (BR)

Per: Shri Justice R.M.S. Khandeparkar:

None present for the appellants though served. The DR present for the respondent.

2. This matter is taken up for hearing in terms of order passed by the Hon'ble Supreme Court on 07.07.2009 in Civil Appeal No. 6564/08.

3. I have heard the DR and perused the record with his assistance.

4. The appellants are engaged in the manufacture of bodies for the passenger vehicles classifiable under chapters sub-heading No. 8702.90 of the Schedule to the Central Excise Tariff Act, 1985 and they were availing cenvat credit on the inputs. Pursuant to the visit by the Preventive staff of the Excise department on 20.03.2004, it was revealed on scrutiny of records that during the financial year 2003-04 bus bodies valued at Rs. 5212105/- were dispatched by the appellants to various purchasers by clearing the same at nil rate of duty claiming the benefit of Notification No. 6/2002-CE dated 01.03.2002. Simultaneously, they were also manufacturing dutiable goods which were dispatched on payment of appropriate duty. However, the inputs used in manufacture of exempted as well as dutiable final product were neither stored separately nor records thereof was maintained separately as was otherwise required in order to avail cenvat credit in terms of Rule 3 of the Cenvat Credit Rules, 2002 on the inputs used in the final product. Consequently, the proceedings were initiated by issuing required show cause notice dated 17.05.2004, on conclusion of investigation. The appellants contested the proceedings by filing the reply dated 03.08.2004. The Assistant Commissioner, Jaipur however, by his order dated 31.12.2004 while rejecting the contentions which were sought to be raised confirmed the demand of duty to the tune of Rs. 416968/- alongwith interest and also imposed penalty of equal amount. It is to be noted that the entire duty

amount was paid by the appellants even prior to the issuance of the show cause notice i.e. on 20.03.2004 and the same was appropriated by the authority while passing the adjudicating order. The appellants being aggrieved by imposition of penalty challenged the same before the Commissioner (Appeals) which came to be dismissed by order dated 24.05.2005. Matter was then challenged under appeal to the Tribunal which came to be allowed by order dated 4.12.2007. Order in that regard read thus:-

> "3. The contention of the appellant is that the duty has been paid even prior to issuance of show cause notice, therefore, the imposition of penalty is not sustainable. The contention is that the appellants are situated under the jurisdiction of Hon'ble Rajasthan High Court and the Hon'ble Rajasthan High Court in the case of Union of India vs. T.P.L. Industries Ltd. reported in 2007 (214) ELT 506. The Hon'ble Rajasthan High Court held that the penalty under Section 11AC is not sustainable in case duty has been paid prior to issuance of show cause notice.
>
> 4. The appellant also relied upon the decision of Hon'ble Punjab & Haryana High Court in the case of CCE Vs. Sigma Steel Tubes reported in 2007 (82) RLT 361 where the same view has been taken. In view of the above decisions, as the duty has been paid prior to issuance of show cause notice, therefore, imposition of penalty is not sustainable hence set aside. The appeal is allowed as indicated above".

5. The department being aggrieved by the said order approached the Hon'ble Supreme Court in Civil Appeal No. 6564 of 2008, the Hon'ble Supreme Court set aside the said order and remitted the same by observing thus:-

> "Despite notice, none appears for the respondent.
>
> In view of the subsequent judgment of this Court in the case of Commissioner of Customs and Central Excise vs. Lanco Industries Ltd. reported in 2009 (238) ELT 3 (SC), the matter stands remitted to the Tribunal for fresh consideration in accordance with the law laid down in the above judgement".

6. The Apex Court in the said decision in relation to the liability to pay the penalty held thus:-

> "**18.** One cannot fail to notice that both the proviso to sub-section 1 of Section 11A and Section 11AC use the same expressions : "....by reasons of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty,...". In other words the conditions that would extend the normal period of one year to five years would also attract the imposition of penalty. It, therefore, follows that if the notice under Section 11A(1) states that the escaped duty was the result of any conscious and deliberate wrong doing and in the order passed under Section 11A(2) there is a legally tenable finding to that effect then the provision of Section 11AC would also get attracted. The converse of this, equally true, is that in the absence of such an allegation in the notice the period for which the escaped duty may be reclaimed would be confined to one year and in the absence of such a finding in the order passed under Section 11A(2) there would be no application of the penalty provision in Section 11AC of the Act. On behalf of the assessees it was also submitted that Sections 11A and 11AC not only operate in different fields but the two provisions are also separated by time. The penalty provision of Section 11AC would come into play only after an order is passed under Section 11A(2) with the finding that the escaped duty was the result of deception by the assessee by adopting a means as indicated in Section 11AC.
>
> **19.** From the aforesaid discussion it is clear that penalty under Section 11AC, as the word suggests, is punishment for an act of deliberate deception by the assessee with the intent to evade duty by adopting any of the means mentioned in the section".

7. As regards the liability to pay penalty while contesting the proceedings only defence which was sought to be raised by the appellants was that they were ignorant about requirement of maintenance of separate records relating to the inputs used for dutiable and non-dutiable final product. However, at the same time, the appellants had not failed to avail the benefit of cenvat credit in terms of Rule 3 of the Cenvat Credit Rules, 2002 whereas it was apparent that the appellants had consciously claimed the benefit of cenvat credit, after getting themselves acquainted with the

knowledge of such entitlement of benefit, it is not only difficult to believe that they were ignorant about the requirement of maintenance of separate records but it only discloses intentional avoidance of maintenance of such records so as to gain benefit of evasion of duty. Being so, there is absolutely no justification to accept the contention of the appellants that non payment of duty was not intentional.

8. Applying the law laid down by the Apex Court in Lanco Industries Ltd. (2009 (238) 3 (SC), I find no substance in the grievance of the appellants and authorities were justified in imposing 100% penalty. Hence, the appeal fails and is hereby dismissed.

[Justice R.M.S. Khandeparkar]
President

Pant