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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/287 /2010 - EX[DB] WITH E/COD/38/10 & E/S/286/10-EX

Date 20/07/2010

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

To :
M/S JAY CEE AUTO FAB (P) LTD
PLOT NO 59-A, SECTOR-25, FARIDABAD.

M/S JAY CEE AUTO FAB (P) LTD — Appellant

Vs

C.C.E. DELHI IV — Respondent

STAY ORDER NO.490/2010-EX
MISC ORDER NO.409/2010-EX

I am directed to transmit herewith a certified copy of **Final order No. 464 2010 EX[DB]** dated 16-7-10 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. DELHI IV
   NEW CGO COMPLEX, NH-IV, FARIDABAD, HARYANA 121001.
2. Adv. / Consult SH. S.P. KAUSHIK, ADV., A-14/3, SFS FLATS, SAKET N. DELHI - 17
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 Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
9 M/s. Deeparchie Publications, M-93, Marg. 46, Saket, New Delhi 110017
10 Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi - 110005
11 Easy Service Tax Online Dot Com Pvt.Ltd.407A.Iscon Mall.Above Star India Bazar.Satellite Road.Ahmedabad-15
12 LAWCRUX Advisors Pvt Ltd. LAW House.1-8.Sector - 10. Faridabad 121003 (Haryana)
13 TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
14 Office Copy
15 Guard file
16. HON'BLE PRESIDENT.

Assistant Registrar
(Excise Appeal Branch)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block 2, R.K.Puram,New Delhi-110066
Principal Bench, New Delhi.

E/287/10 with E/COD/38/10 and E/S/286/10

(Arising out of Order-in-Appeal No.144/CE/APPL/DLH-IV/2009 dt.27.10.09 passed by Commissioner(Appeals), Faridabad)

For approval and signature:
Hon'ble Mr. Justice R.M.S.Khandeparkar, President
Hon'ble Mr. Rakesh Kumar, Member (Technical)

1. Whether Press Reporters may be allowed to see: the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?
2. Whether it would 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 : Department Authorities:

M/s. Jay Cee Auto Fab(P) Ltd. — Appellant

Versus

CCE, Faridabad — Respondent

Appearance
Sh. J.P.Kaushik, Adv. For Appellant

Shri B.L.Soni, DR for Respondent

Coram: Hon'ble Mr. JUSTICE R.M.S.KHANDEPARKAR, PRESIDENT
Hon'ble Mr. RAKESH KUMAR, MEMBER (TECHNICAL)

Date of hearing: 7.5.2010
Date of Decision: 16/7/10

FINAL Order No. 464/10-EX
STAY Order No. 490/10-EX
MISC Order No. 409/10-EX

Per Rakesh Kumar:

This is an appeal against order-in-Appeal No.144/CE/APPL/DLH-IV/2009 dt.27.10.09 passed by Commissioner(Appeals) by which the Commissioner(Appeals) dismissed the appeal filed by the Appellant against order-in-original No.10/D-II/08 dt. 20.6.08 passed by the Asstt. Commissioner, Central Excise Division-II, Faridabad by which a duty demand of Rs.1,93,055/- had been confirmed against the Appellant alongwith interest under proviso to Section 11A(1) of Central Excise Act,1944 and penalty of equal amount had been imposed on them under Section 11AC of Central Excise Act. There is 10 days' delay in filing of the appeal for which the Appellant have filed an application for condonation of delay on the ground as mentioned in their application. Looking to the grounds on which the condonation of 10 day's delay is sought, the same is condoned.

2. Though this matter was listed today for hearing of stay application and condonation of delay application, on hearing the stay matter for sometime, we are of the view that there is no point in keeping this appeal pending and accordingly, the matter was taken up for final disposal.

3. The facts leading to filing of this appeal are, in brief, as under:

3.1 The Appellant are engaged in the manufacture of crane parts, chargeable to Central Excise duty under sub-heading 8707.10 of Central Excise Tariff. For manufacture of crane parts for their customers, the Appellant required some tools which were purchased for which the Appellant charged an amount of Rs.11,82,936/- from their customers vide invoice No.943 dt.2.1.06. The Department was of the view that the charges for the tools recovered from the customers are includible in the assessable value of the goods under proviso to Rule 6 of Central Excise Valuation Rules,2000, while the Appellant had not included the same in the assessable value of the goods. It is on this basis that a show cause notice dt.20.7.07 was issued to the Appellant for recovery of duty amounting to Rs.1,93,055/- on the tooling charges of Rs.11,82,936/- recovered by them from their customers, alongwith interest on this duty at the applicable rate as per the provisions of Section 11AB of Central Excise Act,1944 and imposition of penalty on the Appellant under Section 11AC of Central Excise Act. The show cause notice sought the recovery of duty by invoking extended period under proviso to Section 11A(1) of Central Excise Act on the ground that the appellant had not disclosed to the Department the fact that they had charged an amount of Rs.11,82,936/-, the non-inclusion of which in the assessable value resulted in short payment of Central Excise duty amounting to Rs.1,93,055/-. The show cause notice was adjudicated by the Asstt. Commissioner vide order-in-original dt.20.608 by which the entire duty demand was confirmed under proviso to Section 11A(1) of Central Excise Act,1944 alongwith interest on this duty. The Asstt. Commissioner also imposed an equal amount of penalty on the Appellant under Section 11AC. On appeal to Commissioner(Appeals), the appeal was dismissed by the Commissioner(Appeals) vide order-in-appeal dt.27.10.09, against which the present appeal has been filed.

4. Heard both the sides.

4.1 Shri J.P.Kaushik, Advocate, learned Counsel for the Appellant pleaded that the Appellant manufacturer various crane parts; that they had received a purchase order from M/s. JCB India Ltd. for manufacture of P-92 cabins for which a tool - a particular die, was required and the same was purchased by the Appellant and since ~~a~~ the die was to be used for the manufacture of P-92 cabin for M/s. JCB, they were billed by the Appellant for the cost of die - Rs.11,82,936/-; that the Appellant had sold P-92 cabins to M/s. JCB in which the cost of the die was already intrinsically included, as the buyer had capitalized the value in their book of accounts, which ultimately increased the cost of final product; that the cost of die was not includible in the assessable value of the goods; that this is a revenue neutral case, as even if the Central Excise duty is paid on the tooling cost, Cenvat credit would be available to M/s. JCB; that since the issue was revenue neutral, no intention can be attributed to the Appellant for non-payment of duty and hence longer limitation period is not available to the Department; that Tribunal in the case of Automotive Axles Ltd. vs CCE, Bangalore reported in 1995(79)ELT.275 has held that tooling and development charges collected in bulk for development of new products are not includible in the assessable value of the goods, unless they are attributable to any particular clearances, that the same view had been taken by the Hon'ble Supreme Court in the case of International

Auto Ltd. vs CCE, Bihar reported in 2005(183)ELT.239(SC) wherein it was held by the Hon'ble Supreme Court that the Appellants are not liable to pay duty on the inputs supplied by final product manufacturer since they had not taken Modvat credit in respect of such inputs; that ratio of this judgment of the Hon'ble Supreme Court is applicable to this case and that in view of this, the impugned order is not correct.

4.2 Shri B.L.Soni, the learned DR, defending the impugned order, pleaded that the tools had been purchased by the Appellant for producing P-92 cabins for M/s. JCB as per their order and since the tools had been exclusively used in the manufacture of P-92 cabins for M/s. JCB, the charges for tools - Rs.11,82,936/- were charged by them from M/s. JCB by Invoice No.943 dt.2.1.06; that recovery of the full tooling charges from M/s. JCB amounts to customers providing the tools free of cost to the Appellant for manufacture of crane parts for them; that in these circumstances, the value of the tools has to be treated as additional consideration, which in accordance with the provisions of Rule 6 of Central Excise Valuation Rules,2000, has to be added to the assessable value; that as per the provisions of Rule 6 of Central Excise Valuation Rules where the excisable goods are sold in the circumstances specified in clause (a) of sub-section (1) of Section 4 of the Act, except the circumstance where the price is not the sole consideration for sale, the value of such goods shall be deemed to be the aggregate of such transaction value and the amount of money value of any additional consideration flowing directly or indirectly from the buyer to the assessee; that as the explanation 1 to Rule 6, value of tools, dies, moulds, drawings, blue prints, technical maps, charts and similar items, received from the customers free of charge or at reduced cost for manufacture of goods has to be added to the assessable value; and that since in this case, the Appellant did not include the value of the tools in the assessable value and did not pay any duty on the same; the duty demand on the value of the tools has been correctly upheld. He also pleaded that since the Appellant had never disclosed to the Department that the value of the tools had been fully recovered from the customers; the Appellants are guilty of suppressing this vital fact and hence, longer limitation period for recovery of short paid duty is invokable and for the same reason, penalty under Section 11AC equal to the duty short paid would be imposable on the Appellant. Learned DR cited the Larger Bench judgment of the Tribunal in the case of Mutual Industries Ltd. vs CCE, Mumbai reported in 2000(117)ELT.578(Tri.) wherein it was held that the proportionate cost of moulds & dies manufactured by the Appellant and sold to the customers would be includible in the assessable value of the goods when such moulds and dies are used for manufacture of goods for their customers.

5. We have carefully considered the submissions from both the sides and perused the records. The Appellant had received an order for supply of P-92 cabins from their customers M/s. JCB India Ltd. and for manufacture of such cabins, they had purchased a die for which they charged an amount of Rs.11,82,936/- from M/s. JCB. This die had been exclusively

used for manufacture of P-92 cabins and once the Appellant had received its full cost from M/s. JCB, it amounts to M/s. JCB supplying the dies free of charge for manufacture of P-92 cabins. As per the provisions of Rule 6 of Central Excise Valuation Rules,2000 the value of certain goods and services, as mentioned in this rule, whether supplied directly or indirectly by the buyer free of charge or at reduced cost for use in connection with production and sale of such goods, to the extent that such value has not been included in the price actually paid, shall be treated as the amount of money value of additional consideration flowing directly or indirectly from the buyer to the assessee in relation to sale of the goods being valued. One of the items of goods mentioned is supply of tools, dies, moulds, technical maps and charts and similar items used by the buyer free of charge or at reduced cost for use in production of goods. Since as discussed above, in this case tools valued at Rs.11,82,936/- were supplied free of charge by M/s. JCB to the Appellant, in the sense that JCB had purchased these tools for use in the manufacture of P-92 cabins and charged this amount from M/s.JCB, the cost of these tools would have to be treated as additional consideration flowing to the appellant and hence the same would be includible in the assessable value. However, the cost included in the assessable value would be amortised cost, while in this case the duty on the entire amount charged by the Appellant from JCB has been demanded. The duty to be demanded from the Appellant, therefore, has to be re-worked on this basis.

6. As regards the longer limitation period, we find that since the Appellant had not disclosed the relevant fact regarding the charging of tooling charges from their customers, the Department is right in invoking longer limitation period for recovery of short paid duty, as the Appellant's conduct amounts to suppression of relevant facts. For the same reason, they would also be liable for penalty under Section 11AC.

7. In view of the above discussion while holding that the amortised value of the tools is to be included in the assessable value of the goods manufactured by the Appellant for supply to their customer, the matter is remanded to the Commissioner(Appeals) for requantifying the duty demand, as per our observations in this order and also re-determining the quantum of penalty under Section 11AC based on the revised duty demand .

(Order pronounced in the open Court on 16/7/10

(Justice R.M.S.Khandeparkar)
President

(Rakesh Kumar)
Member Technical

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