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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

Date 12/05/2010

Appeal No. E/957 /2008,1542/2008 – SM[BR]

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

To :-
C.C.E. INDORE
MANIK BAGH PALACE, POST BOX NO. 10, INDORE
452001 (M.P.)
C.C.E. INDORE

Appellant
Vs
Respondent

M/S DEEPAK SILICATE LTD.

I am directed to transmit herewith a certified copy of **Final order No**. 504 -505 / 2010 –SM[BR] dated 6.5.2010 passed by the Tribunal under Section 35-C(1)of Central Excises Act, 1944

Assistant Registrar
(SM Appeal Branch)

Copy to :

1. Respondent
   M/S DEEPAK SILICATE LTD.
   23, MAHARAJPURA INDUSTRIAL AREA,GWALIOR (M.P.)
2. Adv. / Consult SHRI SANDEEP MUKHERJEE, C.A.
   M/S DEEPAK SILICATE [P] LTD;--------------

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 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-1
12 LAWCRUX Advisors Pvt Ltd. LAW House.1-8.Sector - 10. Faridabad 121003 (Haryana)
13 Office Copy
14 Guard file

2. M/S DEEPAK SILICATE PVT. LTD.
   23-B, MAHARAJPURA INDUSTRIAL AREA,GWALIOR.

15 TAXINDIAONLINE. COM PVT.LTD. UNIT NO. 1, 2ND FLOOR VASANT ARCADE, NELSON MANDELA ROAD, VASANT KUNJ NEW DELHI-70.

Assistant Registr
(SM Appeal Branc

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

West Block No.2, R.K.Puram, New Delhi

COURT-III

SINGLE MEMBER BENCH

Date of hearing/decision:6.5.2010

Central Excise Appeal No.957 of 2008 -SM

Arising out of the order in appeal No.IND-I/31/2008 dated 13.02.2008 passed by the Commissioner (Appeals), Customs & Central Excise, Indore.

Central Excise Appeal No.1542 of 2008 -SM

Arising out of the order in appeal No.IND-I/31/2008 dated 13.02.2008 passed by the Commissioner (Appeals), Customs & Central Excise, Indore.

For Approval and Signature:

Hon'ble Shri M. Veeraiyan, Technical Member

1	Whether Press Reporter 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 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

C.C. & C.Ex, Indore .... Appellant

Vs.

M/s Deepak Silicate (P) Ltd. .... Respondent

M/s Deepak Silicate (P) Ltd. .... Appellant

Vs.

C.C.& C.Ex, Indore .... Respondent

Appearance:

Shri S.N. Srivasvata, Authorised Departmental Representative (SDR) for the Revenue and Shri Sandeep Mukherjee, Chartered Accountant for the assessee

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

Final Oral Order No. 504 - 505/2010 SM (BR)

Per M. Veeraiyan:

Appeal No.E/957/08 is by the Department against the order of the Commissioner (Appeals) No. IND-I/31/2008 dated 13.02.2008. Appeal No.E/1542/08 is by the assessee against the very same order of the Commissioner (Appeals).

2. Heard both sides.

3. The relevant facts, in brief, are that the assesee , a manufacturer of silicate of sodium, potassium and sodium hypochlorite was found to have made short-payment of duty during May 2006 to September 2006 and also not found to have submitted the monthly returns for the period on due dates to the jurisdictional Range Officer. The short paid amount totally amounting to Rs.72,218/- relating to the period from May, 2006 to September 2006 was paid on 28.10.06 along with interest of Rs.2,272/-. Show cause notice dated 5th July 2007 was issued holding that the duty paid by the party through cenvat credit during the period from 6.7.06 to 27.10.06 amounting to Rs.4,01,152/- could not be treated as valid payment and accordingly, duty demand was proposed. The original authority confirmed the demand of duty amounting to Rs.4,73,370/- and after appropriating the sum of Rs.72,218/- already paid ordered recovery of Rs.4,01,152/-. He also imposed a penalty of Rs.4,73,370/- under Section 11AC of the Central Excise Act, 1944. On appeal by the party , the Commissioner (Appeals) held that only a sum of Rs.2,66,813/- made during the period August, 2006 to October 2006 by way of debit entry in RG-23A Part II was irregular and accordingly, he ordered recovery of the same in cash and on such payment permitted them to take an equal amount as credit in RG-23A Part II account. He set aside the penalty imposed under Section 11AC but converted the same as penalty of Rs.40,000/- under Rule 25 of the Central Excise Rules, 2002.

4. The Department is in appeal seeking restoration of the order in original by setting aside the order of the Commissioner (Appeals). The party is in

appeal seeking to set aside the demand confirmed and also to set aside the penalty sustained by the Commissioner (Appeals).

5. I have carefully considered the submissions from both sides. The show cause notice has proceeded alleging default in payment of excise duty due from the party during the period from May 2006 to September 2006. On careful perusal of the show cause notice, it is noticed that there was only short payment of duty of Rs.72,218/- during those five months which stood paid by the assessee in October 2006 along with interest. In other words, the show cause notice only alleged short-levy during these five months. Every case of short-levy cannot be treated as a case of default. The show cause notice does not reveal the circumstances under which short payment has occurred.The deemed non-duty paid clearance will arise only in cases of default of assessed duties and the consequences of treating such clearances as non-duty paid clearance such as seizure and confiscation, the prohibition regarding utilisation of cenvat credit, and the requirement of paying consignment wise will follow. In the present case, it is apparent that there is no allegation of default in payment but only short payment of duty in respect of five months. The reasons for short-payment that has occurred have not been dealt with in the show cause notice, order in original and the order in appeal. Under these circumstances, the finding ~~to~~ of the default in payment and consequent liabilities are difficult to sustain. In other words, in the given facts and circumstances of the case, Rule 8(3A) cannot be invoked.

6. Apparently, it was a case of short-payment of Rs.72,218/- relating to the five months and non-filing of returns by the due dates during these months. Therefore, the order of the Commissioner (Appeals) in demanding differential duty and permitting credit of equal amount in cenvat credit account is set aside. However, considering that there was short-payment of Rs.72,218/- during five months and non-submission of the returns for 5 months, which is not disputed, some penalty is imposable but taking the entire facts and circumstances into account, the penalty under Rule 25 of

the Central Excise Rules is reduced from Rs.40,000/- to Rs.10,000/- (rupees ten thousand only).

7. Appeal of the Department is rejected. Appeal of the party is allowed except to the extent of sustaining the penalty of Rs.10,000/-.

(M. Veeraiyan)
Technical Member

scd/