TELEGRAM : CEGCANAL
Website : www.cestat.gov.in

REGISTERED / AD
Email : delhi@cestat.gov.in

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/2832/2007-2833/2007 – SM [BR] Date 15/01/2010

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

To :
C.C.E. MEERUT II
OPP. SAHEED PARK (NEAR ASHOK KI LAT) DELHI
ROAD, MEERUT (UP)
C.C.E. MEERUT II Appellant

Vs

M/S DHAMPUR SUGAR MILLS LTD. Respondent

I am directed to transmit herewith a certified copy of **Final order No**. 76 – 77 / 2010 –SM[BR] dated 12.1.2010 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 DHAMPUR SUGAR MILLS LTD.
   ASMOLI,DISTT MORADABAD
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
15 LAWCRUX Advisors Pvt Ltd. LAW House.1-8.Sector - 10. Faridabad 121003 (Haryana)
16 Office Copy
17 Guard file

3. M/S DHAMPUR SUGAR MILLS LTD.
ASMOLI,DISTT MORADABAD

Assistant Registrar
(SM Appeal Branch)

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

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

COURT-III

Date of hearing/decision:12.1.2010

Central Excise Appeals No.2833 & 2832 of 2007 -SM

Arising out of the order in appeal No.157-158-CE/MRT-II/2007 dated 26.7.2007 passed by the Commissioner (Appeals), Customs & Central Excise, Meerut II.

Hon'ble Shri M. Veeraiyan, Member (Technical)

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., Meerut II ... Appellant

Vs.

M/s Dhampur Sugar Mills Ltd. ... Respondents

Appearance:

Shri I. Baig, Authorized Departmental Representative (SDR) for the Revenue and Shri Atul Gupta, Company Secretary for the respondents

Coram: Hon'ble Mr. M. Veeraiyan, Member (Technical)

Oral Order No. 76-77/2010 SM (BR)

Per M. Veeraiyan:

These two appeals by the Department involve the same respondents and raise same legal issues and accordingly are dealt with by this common order.

2. Heard both sides.

3.1 The facts of the case in Appeal No.E/2833/2007 are that a Show cause notice dated 16.9.96 was issued proposing disallowance of modvat credit on capital goods amounting to Rs.1,65,263/- and modvat credit on the inputs amounting to Rs.65,200/-. The original authority by an order dated 19.12.2005 allowed the credit in respect of capital goods but denied the credit on the inputs. In other words, the order of the original authority was partly in favour of the Department and partly in favour of the assessee. The assessee filed appeal in so far as denial of credit amounting to Rs.65,200/- was concerned and their appeal was rejected vide order dated 28th April , 2006 of the Commissioner (Appeals). The Department also filed an appeal agitating the allowance of credit on the capital goods which was rejected by the Commissioner (Appeals) vide order dated 26th July, 2007 on the ground that the order of the original authority got merged into his order dated 28th April 2006 and therefore, no appeal could be heard by him.

3.2 The facts of the case in Appeal No.E/2832/2007 are similar. In October, 1995, a show cause notice was issued proposing denial of credit on a few capital goods. Vide order dated 15.12.2005, the original authority partly allowed credit on certain items and rejected the credit on other items. The party's appeal against credit disallowed was rejected by the Commissioner (Appeals) vide order dated 21st August, 2006. The Commissioner (Appeals) rejected the Department's appeals vide order dated 26.7.2007 on the ground of merger of order of original authority with his order dated 21.8.2006.

3.3 In other words, the Department's appeals against the orders of the original authority dated 19.12.2005 and 15.12.2005 have been disposed of by a common order dated 26th July, 2007.

4. Learned SDR submits that the issues before the original related to different identifiable issues, in one case, the availability of credit on the capital goods and availability of credit on certain inputs and in another case, the availability of capital goods of different categories. In some issues, the original authority held against the department and right of the Department to file appeal on those issues is not dependent upon filing of appeal by the party in respect of the issues decided against the party. The doctrine of

merger does not apply in such cases. He relies on the following decisions in support of his submissions:

a) ***C.C.E., Bhavnagar vs. Ultra Tech Cement Co. Ltd. -2009 (236) ELT 480 (Tri-Ahmd.)***

b) ***Mauria Udyog Ltd. vs. C.C.E., Delhi II – 2002 (146) ELT 37 (SC).***

5. Learned Company Secretary, on the other hand supports the order of the Commissioner (Appeals). He submits that the scope of the appellate jurisdiction of the Commissioner (Appeals) is very wide, unlike in the case of appeal before Tribunal. When they filed appeals before the Commissioner (Appeals) against the orders dated 19.12.2005 and 15.12.2005, the Commissioner (Appeals) had jurisdiction to go into the correctness of the entire orders of the original authority and not only against the portions of the orders which were agitated by them. Since the Commissioner (Appeals) has such wide jurisdiction to scrutinise the entire orders of the original authority, once he passes an order, the order of the original authority merges with the order passed in appeals. In view of the above, any review of order of the original authority and ~~or~~ filing appeal by the Department against the said order and the Commissioner (Appeals) dealing with such appeal does not arise. He relies on the decision of the Hon'ble Supreme Court in the case of State of Tamil Nadu vs. TVL Jeevanlal Ltd. reported in 1997 (91) ELT 268 (SC) wherein it has been held that "once the order of Appellate Assistant Commissioner is made subject-matter of appeal before the Appellate Tribunal by the assessee who is aggrieved by only a part of such order, the Board of Revenue cannot exercise its revisional jurisdiction against the remaining part of that very order of the Appellate Assistant Commissioner which is in favour of the assessee and against the Revenue". He also relies on the decisions of the Tribunal in the case of Indian Hume Pipe Co. Ltd. vs. C.C.E., Coimbatore reported in 2007 (217) ELT 270 (Tri-Chennai) and in the case of C.C.E., Hyderabad vs. Hari Steel Tubes reported in 2007 (212) ELT 389 (Tri-Bang.).

6.1 I have carefully considered the submissions from both sides. An overview of appellate provisions relating to appeals before Commissioner (Appeals) can be narrated at this juncture. When any decision or order is made by a Central Excise Officer below the rank of Commissioner, the appeal lies to the Commissioner(Appeals). When the order of the original authority is totally against the party, the party naturally is entitled to file an appeal. The question of Department considering filing of appeal does not arise as the order is in favour of the Department unless the order is considered to be not legal or proper. Similarly, when the order of the original authority is totally in favour of the assessee/party, the question of assessee or the party concerned filing appeal does not arise. Only the Department can file the appeal as prescribed in law. The question of cross-objection by the party also does not arise inasmuch as the decision is entirely in favour of the party.

6.2 When the decision of the original authority is partly in favour of the assessee/party and partly in favour of the Department, the law provides for appellate remedy to both the party and the Department. The procedure followed in respect of filing appeal by the Department is distinctly different from the procedure that is to be adopted while filing appeal aggrieved by the party. The right of appeal of the party is not dependent on the right of appeal of the Department and vice versa. Even if party does not file appeal within prescribed time against the portions of order against them, but the department chooses to file appeal against that portion of the order which is against the Department, the party gets a new opportunity to file cross-objection before Commissioner (Appeals) within the time limit specified under Section 35E(4) read with Section 35B(4). This right of filing cross-objection arises out of right of appeal exercised by the Department. In other words, in a decision which is partly favourable to the Department and partly favourable to the party , the primary rights of appeal is available to both sides and right of cross-objection is also available as mentioned above.

7. No doubt that the Commissioner (Appeals) has been given powers under Section 35A to pass an order enhancing any penalty or fine in lieu of

confiscation or confiscating of goods greater value or reducing the amount of refund after following procedure prescribed in 35A(3). This power of the Commissioner (Appeals) cannot be said to interfere with the primary rights of the department or party.

8. Doctrine of merger has to be applied by considering the subject matter of an appeal by the department and the subject matter of an appeal by the party. The decision of the Tribunal in the case of Commissioner of Central Excise, Bhavnagar vs. Ultra Tech Cement Co. Ltd. has dealt with the application of the doctrine of merger in the case of appeals under Central Excise Act in the following terms:

> ***"29. Adverting to the present case, as seen above, the appeal of the assessee was confined to the issue of availability of Modvat/Cenvat credit on spares, accessories and components of Lime Stone Crusher for the period 23-7-1996 to 30-8-1996 only; on the other hand, the Revenue seeks to raise issues relating to availability of credit on various other goods. According to the Revenue, no finding has been recorded with respect to different items, while in respect of some items contradictory findings were recorded by the Commissioner. Further, the Revenue also seeks reconsideration on the point of penalty.***
>
> ***30. The subject matter of the Revenue's appeal would thus appear to be quite distinct from that of the assessee's appeal. Applying the tests laid down in Madurai Mills Co. Ltd. and Kunhayammed (supra), it would follow that not only the subject matter of the two appeals is different, the Appellate Tribunal has no jurisdiction to suo motu grant any relief to the Revenue in the assessee's appeal, and therefore, the Revenue's appeal is not hit by the doctrine of merger.***
>
> ***31. I may observe that another test to determine whether the appeal is barred or hit by the doctrine of merger is whether the two orders - one already passed in the assessee's appeal and the other which may be passed in Revenue's appeal - can stand together or not. In other words, whether there will be conflict in the two orders so as not to stand together. Yet another test may be whether the decision/order in the previous (assessee's) appeal will operate as res judicata. Section 11 of the Civil Procedure Code contains the doctrine of res judicata as per which the bar can be applied when the matter "directly and substantially in issue" has been directly and substantially in issue in the former proceeding - (read appeal). For example, where the adjudicating authority among other things imposes penalty which is challenged by the assessee, with success, the Revenue cannot later file appeal against the same order seeking enhancement. There may be several such cases where the subject matter of the Revenue's appeal was directly or substantially in issue in the assessee's appeal, decided earlier, which cannot be allowed to be re-opened. In these premises, the present appeal by the Revenue would not appear to be barred or maintainable.***
>
> ***32. I am conscious that my understanding of the decision in Tvl. Jeevanlal Ltd. (supra) is in conflict with the Larger Bench and, I would have considered referring the case to a Larger Bench in the light of the decision of the Supreme Court in Union of India v. Paras Laminates (P) Ltd., 1990 (49) E.L.T. 322 (S.C.) (even though the case has come before me on difference of opinion as a third Member), but in view of the decision of the Supreme Court in***

Mauria Udyog Ltd. v. CCE, Delhi-II, 2002 (146) E.L.T. 37 (S.C.), I am not required to take that course. The law declared by the Supreme Court is binding on all Courts and Tribunals under Article 141 of the Constitution of India. In the aforesaid case, the Tribunal had refused to restore the appeal of the assessee on the ground that the impugned order of the Commissioner (Appeals) had merged in the order of the Tribunal as a result of dismissal of the appeal of the Revenue and, therefore, the appeal of the assessee could not be dealt with on merits. Disapproving the approach of the Tribunal, the Supreme Court observed as follows :

"4. It is evident from the facts noticed above that the principle of merger has no applicability. The appeal of the Revenue was restricted to the reduction of the penalty amount by the Commissioner (Appeals). In the appeal of the appellant, the challenge was not only to the penalty but to the entire order including the order of the Commissioner confirming the demand and holding that the freight expenses of the appellant's factory to the buyers factory are includible in the assessable value. The restricted question which was the subject matter of the appeal of the Revenue, under these circumstances, cannot result in the dismissal of appellant's appeal by application of principle of merger. The said principle on the factual situation herein has no applicability whatsoever."

The decision in Mauria Udyog Ltd. (supra) was rendered in the context of the Central Excise Act as compared to Tvl. Jeevanlal Ltd. (supra) which had arisen under the Tamil Nadu General Sales Tax Act having different set of provisions, and I have, therefore, no difficulty in following the decision in Mauria Udyog Ltd. (supra) in preference to the Larger Bench decision in LML Ltd. case (supra) which was decided following Tvl. Jeevanlal Ltd. A division Bench of the Tribunal in CCE v. Maha Lakshmi Dyg. & Printing (I) Pvt. Ltd., 2006 (203) E.L.T. 412, has a similar view and following Mauria Udyog Ltd. held that the doctrine of merger does not apply when the subject matter of appeal is different."

9.1 The original authority dealing with a show cause notice is not expected to confirm entirely the proposals in the show cause notice or drop the proceedings. When the issues are independent and distinct, he can decide some issues in favour of the notice and decide some other issues against the notice. Some issues could be dependent. For example imposition of penalty under Section 11AC depends upon confirmation of demand of duty. He cannot hold that there is no case for demand and still impose penalty.

9.2 In the light of the above, some instances of application of doctrine of merger are worth recording. Let me consider a situation where the original authority confirms a particular demand and imposes a particular penalty and the Department has come on appeal seeking enhancement of the penalty, by which time, the appeal of the party has been decided totally setting aside the demand, the appeal of the Department does not arise as imposition of penalty is dependent on evasion being established.

9.3 If the order of the original authority was clearly on more than one the identifiable and independent issues and in one issue, the decision is in favour of the party and in the another issue, the decision is in favour of the department, both sides are entitled to their primary rights of appeal against the portion of the order which is against each of them. Merely because appeal of the party has been decided, the appeal of the Department cannot be rejected. Similarly, if the appeal of the Department was rejected first, the appeal of the party also cannot be rejected by depriving the primary right of appeal to the party.

9.4 In a case where the party has chosen not to file appeal and the Department has filed appeal, they get another opportunity by way of cross-objection with the relaxed time-limit which start from the date of communication of the appeal filed by the Department.

9.5 The decision of the Hon'ble Supreme Court in the case of State of Tamil Nadu vs. TVL Jeevanlal Ltd. dealt with revisional powers of Board of Revenue when disputed matters could be agitated by the assessee as well as by the appellant Department before Appellate Tribunal itself. In this case, the appeal by the Department as well as by the party are before the Commissioner (Appeals) only. Therefore, the facts of the present case are distinct from the facts of the case in which the judgment of the Hon'ble Supreme Court was rendered.

10. In the given case admittedly, the orders of the original authority dated 19.12.2005 and 15.12.2005 rendered decisions on some issues which are favourable to the party and some issues favourable to the Department. The issues on which the decision was taken in favour of the party and the issues on which the decision was taken in favour of the Department are clearly distinct and independent issues and the decisions stand on their own leg and reasoning. Therefore, the decision of the Commissioner (Appeals) in the appeals made by the party upholding the order of the original authority

confirming demand against them is clearly no bar in entertaining the appeals by the Department on altogether different issues. Therefore, the order of the Commissioner (Appeals) rejecting the appeals of the department, applying the doctrine of merger and without going into merits is erroneous. Therefore, the appeals of the Department are disposed of by setting aside the impugned orders of the Commissioner (Appeals) and with the directions to hear the appeals by the Department afresh on merits after granting reasonable opportunity of hearing to both sides.

(M. Veeraiyan)
Member (Technical)

scd/