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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/195 /2008 – SM[BR] WITH CO / 105 / 2008 –SM[BR] Date 27/01/2010

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

To :
C.C.E. CHANDIGARH
C.R. BUILDING, PLOT NO. 19, SECTOR 17-C,
CHANDIGARH 160017

C.C.E. CHANDIGARH Appellant

Vs

M/S DURABLE PIPES PVT. LTD. Respondent

I am directed to transmit herewith a certified copy of **Final order No.** 113 / 2010 –SM[BR] dated 19.1.2010 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 DURABLE PIPES PVT. LTD.
   BHAWANIGARH ROAD, VILL-GAJEWAS, SAMANA, DIST-PATIALA, PUNJAB
2. Adv. / Consult SHRI JITENDER MOHAN CONSLTANT
   N/V;---

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)
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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: 19.1.2010

Central Excise Appeal No.195of 2008-SM with Cross-Objection No.105 of 2008

Arising out of the order in appeal No.651/CE/CHD/2007 dated 23.11.2007 passed by the Commissioner (Appeals), Central Excise, Chandigarh.

For Approval and Signature:

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.E., Chandigarh ... Appellant

Vs.

M/s Durable Pipes Pvt. Ltd. .... Respondent

Appearance:

Shri S.K. Bhaskar, Authorized Departmental Representative (JDR) for the Revenue and Shri Jitender Mohan, Consultant for the respondent

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

Oral Order No. 113/2010 SM (BR)

Per M. Veeraiyan:

Appeal No.E/195/2008 is by the Department against the order of Commissioner (Appeals) No. 651/CE/CHD/2007 dated 23.11.2007. Cross-Objection No.105/2008 is connected to this appeal.

2. Heard both sides.

3. The relevant facts, in brief , are that the respondent received a DG set vide Invoice No.235 dated 2.5.2002 and took credit amounting to Rs.55,448/-; they used the generator for some period and they removed; on sale the said generator for a sum of Rs.1,30,000/- in terms of Invoice No.216 dated 23.3.2006 and paid duty amounting to Rs.20,800/-, that is by adopting the sale value at time of removal on 23.3.2006. The original authority holding that DG set has been cleared as such that is DG set and they ought to have paid duty equal to the credit availed by them amounting to Rs.55,448/- and accordingly, confirmed differential duty of Rs.34,648/- along with interest and imposed equal amount as penalty. On appeal by the party, the Commissioner (Appeals) relying on the decision of the Tribunal in the case of Madura Coats Pvt. Ltd. vs. C.C.E., - 2005 (190) ELT 450 set aside the order of the original authority and allowed the appeal.

4. Learned DR submits that inasmuch as they have cleared the DG set received as the capital goods only as DG set ~~a~~ and not as waste or scrap, they are required to pay the entire credit taken by them amounting to Rs.55,448/-. He relies on the decision of the Larger Bench in the case of Modernova Plastyles Pvt. Ltd. vs. C.C.E., Raigad – 2008 (232) ELT 29 (Tri-LB) interpreting the term clearance "as such" appearing in Rule 3(4)(c) of Cenvat Credit Rules, 2002 and Rule 4(5)(a) of Cenvat Credit Rules, 2004.

5. Learned Consultant submits that they have used the DG set for more than 2 years for the intended purpose and sold them obviously at much lower price than the purchase price. The question of treating such used DG set as clearance of DG set as procured in 2002 does not arise. When the DG set was received in 2002, the Cenvat Credit Rules , 2002 was in force which has specifically envisaged that when the capital goods are cleared 'as such' the

rate of duty and valuation should be adopted as was in force at the time of removal of the goods. He therefore, submits that either clearance of DG set in 2006 should be treated as not "as such" or alternatively, the obligations to pay duty should be determined in terms of Cenvat Credit Rules, 2002 by adopting the sale price at the time of removal. He also submits that the decision of the Larger Bench did not specifically consider the aspect of the goods received during currency of Cenvat Credit Rules, 2002 having been removed during the currency of Cenvat Credit Rules, 2004. He also submits that the ratio of the decision in the case of Madura Coats Pvt. Ltd. relied upon by the Commissioner (Appeals) has been upheld by the Hon'ble High Court of Bombay in Appeal by the Department against the decision of the Tribunal in the case of Cummins India Ltd. vs. C.C.E., Pune III reported in 2007 (219) ELT 911 (Tri-Mumbai) as reported in 2009 (234) ELT A 120 (Bom.).

6. I have carefully considered the submissions from both sides. Cenvat Credit Rules , 2002 had provisions relating to rate of duty and valuation applicable to cases of removal of inputs and capital goods as such which are different from the provisions relating to rate of duty and valuation in the Cenvat Credit Rules, 2004. In the present case, undisputedly, the capital goods have been received during the currency of Cenvat Credit Rules, 2002 and used by the respondent for more than 2 years and cleared during the currency of Cenvat Credit Rules, 2004. The plea of the respondent that for the purpose of valuation, the Cenvat Credit Rules, 2002 should be applied even though the goods have been cleared in 2006 deserves to be accepted. What was cleared after using for more than 2 years could not be treated as clearance 'as such' as held by the Tribunal in the case of Cummins India Ltd. It is noticed that the Department's appeal against said decision has been dismissed by the Bombay High Court. In view of the above and in the peculiar facts and circumstances of the case, there is no basis for demand of

differential duty and imposition of penalty as held by the original authority. Therefore, there is no valid ground for interfering with the order of Commissioner (Appeals).

7. The appeal by the Department is rejected. Cross-Objection which is merely in support of the order of the Commissioner (Appeals) is also disposed of.

(M. Veeraiyan)
Member (Technical)

scd/