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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/3493/2004-3494/2004 - EX[DB] Date 05/04/2010

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

To :
M/S METRO APPLIANCES LTD.
B-12 & 13, SECTOR-4, NOIDA

M/S METRO APPLIANCES LTD. Appellant
Vs
C.C.E. NOIDA Respondent

I am directed to transmit herewith a certified copy of **Final order No. 139-140/ 2010 EX[DB]** dated 04-11-09 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. NOIDA
   C-56/42, SECTOR-62, NOIDA-201307
2. Adv. / Consult
   MR.K.K ANAND
   A-5,BASEMENT,LAJPAT NAGAR-III NEW DELHI-24

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 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
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14 Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road,Ahmedabad-15
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Assistant Registrar
(Excise Appeal Branch)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No.2, R.K.Puram, New Delhi-110066.
Principal Bench, New Delhi.

Excise Appeal No.3493-94/04

[Arising out of Order-in-Appeal No.117-118/CE/Appl/Noida/04 dt.31.3.04 passed by the Commissioner(Appeals),Noida)

For approval and signature:

Hon'ble Mr. Justice R.M.S.Khandeparkar, President
Hon'ble Mr. P.Karthikeyan, 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?	:	Yes
2.Whether it would 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 Department Authorities:	:	Y

M/s. Metro Appliances Ltd. Appellants

Versus

CCE, Noida Respondent

Appearance

Sh. K.K.Anand, Adv. for Appellants

Sh. Anil Khanna, Authorised Departmental Representative(DR) For Respondent

Coram: Hon'ble Mr. Justice R.M.S.Khandeparkar, President
Hon'ble Mr. P.Karthikeyan, Member Technical

Date of decision: 4.11.09
FINAL Oral Order No. 139/2010-EX

Per Justice RMS Khandeparkar:

Since common questions of law and facts arise in both the appeals, they were heard together and are being disposed of by this common order.

2. The appellants challenge the order dated 31.3.04 passed by the Commissioner(Appeals), Noida whereby the appeals filed by the appellants have been disposed of while confirming the demand of duty to the tune of Rs.9,42,876/- and Rs.22008/- in respective appeals and further modifying the penalty by reducing the same to the extent of Rs.2,50,000/- and Rs.5,000/- in respective appeals while confirming the liability to pay interest on the duty amount.

3. The Additional Commissioner, Noida by his order dt.23.11.01 in relation to show cause notice dt.27.4.01 had confirmed the demand to the tune of Rs.9,42,876/- as well as Rs.3,562/- being interest on the said duty amount besides imposing penalty of Rs.9,46,438/-. In another matter arising out of show cause notice dt.3.4.02, the Joint Commissioner , Noida had confirmed the demand to the tune of Rs.22,008/- besides ordering payment of interest and imposing penalty of Rs.22,008/-. While the first show cause notice related to the period 1996-1997 to 1999-2000, the second show cause notice related to the period 2000-2001.

4. The appellants are engaged in the manufacture of excisable goods namely electrical fans and parts thereof

falling under chapter 84 of the schedule to the Central Excise Tariff Act,1985. Following the receipt of intelligence report about disclosure of higher consumption of raw-materials and thereby availment of excess credit under the erstwhile Modvat scheme, the factory premises of the appellants were inspected by the Preventive Officers of Excise Department which revealed certain materials which led to detail investigation in matter against the appellants. The appellants contested the proceedings and ultimately the said orders came to be issued which were sought to be challenged before the Commissioner(Appeals)who by the impugned orders modified the orders passed by the adjudicating authority to the extent stated above.

5. The allegation against the appellants was that the appellants had shown excess consumption of aluminium sheets, copper wire and ball bearings when compared to the norms of consumption in respect of such products and the same was done with intent to avail excess modvat credit so as to avoid payment of duty from PL account and that the excess consumption was sought to be adjusted by recording of scrap of aluminium sheets. The allegation was also to the effect that the appellants had shown excess consumption of ball bearings and the same was not satisfactorily accounted for in the records and similar was the case in relation to the copper wire.

6. The learned Advocate appearing for the appellants while assailing the impugned order submitted that the findings arrived at by the authority below regarding the excess generation of aluminium sheet, scrap and the clandestine removal of the aluminium sheets and copper wire are not based on any cogent evidence. The charge against the appellants being essentially of clandestine removal of the goods with intent to evade the duty, it was necessary for the Department to produce cogent and convincing evidence on record in relation to such allegations and in the absence thereof, the authorities below were not justified in burdening the appellants with duty liability and imposition of penalty. The finding relating to the excess consumption has been arrived at merely on the basis of comparison of the output by two units of the appellants by applying the norms which have no basis. Drawing our attention to the reply filed to show cause notice as well as written submissions which were filed before the Commissioner(Appeals), the learned Advocate submitted that the details about consumption of ball bearings and copper wire as well as aluminium sheets were clearly brought to the notice of the authorities based on statutory records maintained by the appellants and therefore, there was no justification for arriving at the finding about clandestine removal of the goods by the appellants or inflated consumption of those items or to hold that there was an attempt on the part of the appellants to avail excess Modvat credit with intent to minimize the duty liability and

payment thereof from PL account. All the required information having been furnished by the appellants in the course of investigation as well as in the course of adjudicating proceedings and further before the Commissioner(Appeals), according to the learned Advocate, the impugned order cannot be sustained and is liable to be set aside. There was no inquiry with any buyer in relation to the alleged clandestine removal of the product or with the persons who were disclosed by the appellants as the buyers. No evidence has been brought on record regarding manufacture of extra finished goods. The evidence on record placed by the appellants regarding unused ball bearings has been totally overlooked as also the fact that the appellants had reversed the credit around Rs.22,000/- in relation to the alleged shortage of the raw-materials from the job worker. Reliance is placed in the decision in the matter of Nutech Polymers Ltd. vs CCE, Jaipur reported in 2004(173)ELT.385 while submitting that the view taken by the Tribunal has been confirmed by the Apex Court while dismissing the appeal against the said order of the Tribunal. He also placed reliance in the decision in the matter of Rajasthan Petro Synthetics vs CCE, Jaipur reported in 2003(160)ELT.297, Sipani Fibres Ltd. vs CCE, Bangalore-I reported in 2007(212)ELT.374, Timex Watches Ltd. vs CCE, Meerut reported in 2002(141)ELT.152.

7. On the other hand learned DR submitted that the findings arrived at by the authorities below are based on the evidence

collected in the course of investigation and produced before concerned authorities in the adjudication proceedings. He further submitted that the evidence produced by the Department clearly discloses excess consumption of the said products and this fact is not only revealed from the records maintained by the assessee but also on comparison of the output by the two units of the appellants and further that the explanation submitted by the appellants themselves regarding excess production of the scrap has not been substantiated as no evidence regarding alleged power failures and sub-standard raw-material has been produced by the appellants and these aspects had been duly considered by the authorities below while confirming the demand. He further submitted that the initial burden having been discharged by the Department in relation to the proof regarding the clandestine removal of the goods with intent to evade duty and there being no evidence in rebuttal, there is no case for interference in the impugned order. He drew our attention to the decision in the matter of R.R.International vs CCE reported in 2004(177)ELT.650, Monica Electronics Ltd. vs CCE, New Delhi reported in 1995(75)ELT.440 and CCE, Aurangabad vs Greaves Cotton Ltd. reported in 2008(225)ELT.198.

8. The first ground of challenge relates to the finding on the point of excess consumption of aluminium sheets and copper wire and adjustment thereof by showing excess recording of the scrap and consequently clandestine removal of the finished goods with

intent to evade duty. Undoubtedly the accusation of clandestine removal has to be established by producing cogent and convincing material in support of charge in order to substantiate the demand of duty on that count. The law in that regard is well settled and has been reiterated by the Apex Court, High Courts and the Tribunal time and again. In Rajasthan Petro Synthetics' case, the Tribunal had clearly observed that

> "It is well settled that charge of clandestine removal of the goods has to be established by the Department by adducing tangible, acceptable, cogent and convincing evidence. Such charge cannot be based only on assumptions and presumptions. It needs no further elloberation".

9. In case of hand, it cannot be disputed as rightly contended on behalf of the appellants that once the Deptt. alleges disposal of the finished product clandestinely with intent to evade the duty, the Department is expected to bring on record some evidence regarding purchase of such product by the purchaser thereof. In case in hand undisputedly, there is no such material placed on record, nor even investigation had been conducted in that regard. However, it is pertinent to note that in response to the charge of excess consumption of aluminium sheets, copper wire and ball bearings with intent to avail excess credit, the same was sought to be countered with the specific defence that there was higher generation of the scrap on account of failure of electric supply and utilization of sub-standard raw-materials. Undisputedly, both these aspects were within the knowledge of the appellants. It was the case of the appellant themselves that

the generation of the scrap was not at normal rate at which it was normally being generated and the said situation had occurred due to the failure of electric supply and utilization of sub-standard materials. In view of undisputed fact that there was generation of scrap higher than it was normally expected and that being on account of the reasons which were within the exclusive knowledge of the appellants, it was but natural that it was necessary for the appellants to produce cogent evidence in that regard on record.

8. Whether a party on whom the burden lies to establish its case, is able to discharge that burden of law, is a question of fact and is to be ascertained from facts of each case. In the case in hand, the Deptt.'s allegation regarding generation of scrap was not disputed, and on the contrary, it was admitted, and as the reason for the same being in the exclusive knowledge of the appellants, needless to say that the initial burden in that regard was discharged by the Department. However, the appellants apart from merely alleging failure of electric supply and utilization of sub-standard raw-materials, did not bother to produce any evidence in that regard. Mere statement of fact by itself cannot be the proof of the contents of the statement and the same has to be established by producing necessary evidence in support thereof. In the case in hand, the factum of excessive generation of scrap was not disputed by the appellants. It was necessary for the assessee to establish the said reasons for the same which were specifically pleaded by the appellants in response to the said

charge. Being so, it is too late for the appellants to contend that the Department had failed to establish the charge of clandestine removal of the goods.

9. The perusal of impugned orders discloses the demand of duty which has been arrived at after taking into consideration all the statutory documents maintained by the assessee as well as the difference in the output by the two units during the relevant period and after considering the possibility of the waste and scrap being generated in the course of the manufacture of the final product and after going through the required exercise which was expected by the adjudicating authority on proper analysis of those materials, and the same having been thoroughly reviewed by the Commissioner(Appeals), we find no case for interference as regards the demand of duty calculated and confirmed under the impugned order.

10. As regards the claim regarding the consumption of ball bearings and denial of credit in relation to ball bearings, it is to be noted that inputs in the stock being found to be suitable for the manufacture of the final product, the credit thereof cannot be denied is not in dispute. What is sought to be disputed is that the appellants did not produce any evidence about such ball bearings having been in their stock in the stores. It however, sought to be contended by the learned Advocate for the appellants, by drawing our attention to the copies of the sheets of the stock registers produced in the course of the arguments before the

Commissioner(Appeals) that the credit on this quantity was available. We, however, find that these documents are not authenticated as the true copies of the original stock registers maintained by the party. It is also true that all these rejected ball bearings were accounted for in the accounts maintained in the stores. The findings arrived at by the original authority in this respect disclose that what was sought to be contended in the defence by the appellants was that the ball bearings were not found fit and therefore, were rejected by the assembly staff. It leads to the conclusion that the credit cannot be allowed on the ball bearing received in the factory as damaged/rejected for consumption in the final products. The provision of law which entitles the assessee to claim credit relates to those inputs which are retained in stock for utilization in the final dutiable product. In the absence of such evidence, no fault can be found with the duty demanded in the matter in hand by the adjudicating authority.

11. As regards the claim relating to the short receipt of raw-materials from job worker, indeed the adjudicating authority merely observing that the party had failed to produce any details of non-modvatable inputs against which claim had been received by them, no other justification has been given to deny the credit and thereupon to confirm the demand to the tune of Rs.2,52,399.52. As rightly submitted by the learned Advocate for the appellants, they had specifically pleaded about the reversal of

the credit to the extent of about Rs.22,000/- on the ground of shortage of receipt of raw-materials from the job worker. The authorities below do not appear to have considered this aspect at all and without considering the same, the said amount has been confirmed against the appellants. Obviously, the finding in that regard as well as the demand confirmed based thereon cannot be sustained.

12. In Nutech Polymers Ltd.'s case, Tribunal had found a clear evidence against the allegation regarding clandestine removal of the goods and, therefore, the imposition of duty and penalty was set aside. The Apex Court had clearly held that the finding on the point of absence of material in relation to the clandestine removal of the impugned order was a finding of fact and therefore had refused to entertain in that regard.

13. In Sipani Fibres' case the Tribunal had clearly noted that

> "Even though Commissioner has recorded the retracted statements have no evidentiary value, in confirming demand as per Annexure 'D, he has contradicted himself. After making the assessment that 1,05,041 kgs. of granules were diverted in the year 1999-2000, the duty has been arrived at after taking the value of the granules per kgs. Thus, the entire demand is based on theoretical calculation. Similarly, for the years 2000-2001, 2001-2002 and 2002-2003, same method has been adopted. There is no other evidence, not even a single customer who has purchased the so called diverted granules from the appellant is on record. Thus, we do not find any evidence for the diversion of the granules purchased by the appellant".

Obviously that was a case of total evidence/absence of evidence. That is not the casein the matter in hand for the reasons stated above.

14. In Timex Watches Ltd., the Tribunal in relation to Rule 57D had observed that

> "Only when the inputs are contained in any waste, refuse or by product arising during the manufacture of the final product or when the inputs have become waste during the course of manufacture of the final product, the provisions of Rule 57D were applicable. If the inputs are found defective and are not used in the process of manufacture of final products, the benefit of Rule 57D is not applicable to such inputs. Only when the inputs are used in manufacture of the final products and some of those inputs become waste during the course of manufacture of the final product, the credit already taken in respect of such inputs wasted was not to be denied".

It is not the case of the appellant herein that the product in the form of ball bearings were wasted in the course of manufacture of the products. On the contrary it is the case of the appellant that the product being unusable in the manufacture of the products, it was returned to the store. However, no evidence as regards the product in the store had been produced.

15. In R.R.International's case, the Tribunal has observed that the appellant had failed to take into account the excess use of the inputs and therefore, the duty demanded was rightly confirmed. Obviously, the decision was based on the facts of the case.

16. In Monica Electronics Ltd., it was held that the expression 'during the course of manufacture' would not include stages prior to the point at which actual manufacturing operation of the final products commenced. Therefore, it was held that the damaged picture tubes cannot be considered as waste within the meaning of Rule 57(b)(1) and the credit taken on them was, therefore,

required to be reversed. The decision leads support to the contention on behalf of the Department.

17. The decision in Greaves Cotton Ltd. relates to Rule 7(4) of Cenvat Credit Rules,2002 and Rule 9 of Cenvat Credit Rules,2004. Rule 7(4) which provides that the manufacturer of final product shall maintain proper records for the receipt, disposal, consumption and inventory of the inputs and capital goods in which the relevant information regarding the value, duty paid, the person from whom the inputs or capital goods have been procured is recorded and the burden of proof regarding the admissibility of the Cenvat credit lies upon the manufacturer for taking such credit. Undoubtedly, the said Rule incorporates the elementary principle of law that a person seeking to avail certain benefit based on any statutory provision has to make out a case that he is entitled to claim such benefit under such provision of law. Though, prior to enforcement of Cenvat Credit Rules,2002, there was no provision which is similar to the Rule, if one reads Rule 57G(1) & (3) alongwith sub-Rule 4 thereof, it would at once be clear that a manufacturer who wanted to claim such benefits was required to maintain certain registers and documents which were required to be verified by the authorities. Obviously, therefore, the burden was upon the manufacturer to establish the case for entitlement of the Modvat credit on the inputs as per the claim in that regard by such manufacturer. In other words, the burden specifically lies upon the manufacturer in relation to the

admissibility of the Cenvat credit under Rule 7(4). Being so, the principles laid down by the Hon'ble Bombay High Court in Greaves Cotton Ltd. would also apply to the cases in relation to the Modvat credit.

18. For the reasons stated above, therefore, the appeals partly succeed and the finding in relation to the denial of credit amounting to Rs.2,52,399.52 pertaining to short receipt of raw-material from the job workers cannot be sustained and is liable to set aside and the demand to this extent is quashed. Needless to say that claim of interest in that regard also would not be maintainable. As regards the other findings in the impugned order are concerned and remaining demand is concerned, we find no case for interference as also in relation to imposition of penalty.

19. The appeals are accordingly disposed of in above terms with consequential relief.

(Justice R.M.S.Khandeparkar)
President

(P. Karthikeyan)
Member Technical

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