

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
EXCISE APPEAL BRANCH

Appeal No. E/5701/2004 -EX[DB]
E/5895/2004-EX

Date 09/08/2010

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

To :
M/S YAMAHA MOTORS INDIA PVT.LTD.
A-3,SURAJPUR INDUSTRIAL AREA,NOIDA-DADRI
ROAD,SURAJPUR U.P
M/S YAMAHA MOTORS INDIA PVT.LTD.

C.C.E.NOIDA

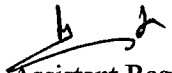
Appellant

Vs

Respondent

I am directed to transmit herewith a certified copy of Final order No. 539-540/
passed by the Tribunal under Section 35-C(1) of Central Excises Act, 1944

2010 EX[DB] dated 06-8-10


Assistant Registrar
(Excise Appeal Branch)

Copy to :

1. Respondent

C.C.E.NOIDA

OFFICE OF COMMISSIONER OF CUSTOMS,CENTRAL EXCISE AND SERVICE TAX, C-56/42, SECTOR-62, NOIDA
- 201307

2. Adv. / Consult

MR.R. KRISHNAN

297-E, POCKET-II, PHASE-I, MAYUR VIHAR DELHI-110091.

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 Publications Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi - 3

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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

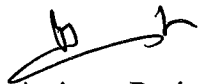
14 Office Copy

15 Guard file

16. HON'BLE PRESIDENT

17.M/S. YAMAHA MOTORS (I) PVT. LTD.

A-3, SURAJPUR INDL. AREA, NOIDA


Assistant Registrar
(Excise Appeal Branch)

**IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.**

COURT NO. I

Excise Appeal No. 5701 of 2004

M/s Yamaha Motors India (P) Ltd. Appellant

Versus

CCE, Noida Respondent

Excise Appeal No. 5895 of 2004

CCE, Noida Appellant

Versus

M/s Yamaha Motors (I) Pvt. Ltd. Respondent

[Arising out of the Order-in-Appeal No. 273/CE/APPL/NOIDA/2004 dated 31/08/2004 passed by The Commissioner (Appeals), Customs & Central Excise, Noida.]

For Approval and signature :

Hon'ble Justice R.M.S. Khandeparkar, President
Hon'ble Shri 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?
-

Appearance

Shri R. Krishanan, Advocate – for the appellant.

Shri B.K. Singh, Authorized Representatives (Jt. CDR) - for the Respondent.

CORAM : Hon'ble Justice R.M.S. Khandeparkar, President
Hon'ble Shri Rakesh Kumar, Member (Technical)

DATE OF HEARING : 08/04/2010.

DATE OF DECISION :

6/8/10

Final Order No. 539-540/10-EG Dated : 6/8/10

Per. Rakesh Kumar :-

The facts giving rise to these appeals are, in brief, as under.

1.1 M/s Yamaha Motors India (P) Ltd., Noida (hereinafter referred to as appellant) are the manufacturers of Yamaha brand motorcycle chargeable to Central Excise Duty under Chapter 87 of the Central Excise Tariff. They availed Cenvat credit on various inputs used in or in relation to the manufacture of the finished product. The appellant's factory was visited by the Jurisdictional Central Excise officers on 21st May 2002 and their records were checked, in course of which the following irregularities were noticed :

(i) the lubricants used in the plant and machinery after use for some period of time become unfit for further use and the same are drained out and sold as waste oil. The department was of the view that this waste oil was chargeable to Central Excise Duty under heading 34.03 of the Tariff but the same was cleared without payment of duty and thus duty amounting to Rs. 20,340/- has been short paid ;

(ii) The appellant were sending cenvated inputs to their job workers for processing and the job workers as per the provisions of the Central Excise Rules were required to return, within the stipulated period, the processed inputs alongwith the waste. It was noticed that in respect of a number of consignments, the scrap had not been received back and the Central Excise Duty involved on the same was Rs. 4,27,326/- which appeared to be recoverable from them ;

(iii) In respect of a number of consignments sent to job workers under job work challans, the goods after processing had not been returned from the job workers and the total duty involved on such goods was Rs. 13,28,079/- which appeared to be recoverable from the appellant ;

(iv) From the scrutiny of the appellant's records, it was found that certain cenvated inputs had been received in damaged and unusable condition, as the appellant had claimed insurance in respect of the same. However, in respect of such inputs, the Cenvat credit was taken on the basis of the invoices, which was not admissible as these inputs had not been used in or in relation to the manufacture of finished products. On this ground, Cenvat credit amounting to Rs. 1,78,040/- appeared to be recoverable from the appellant.

1.2 In view of the above, a show cause notice dated 2nd April 2003 was issued to the appellant for the recovery of the above-mentioned Central Excise Duty and wrongly taken Cenvat credit alongwith interest and also for imposition of penalty on the appellant. The duty/Cenvat credit demand is for the period from 1998-99 to 2001-02. However, even before the issue of show

cause notice, the appellant had paid the entire demand of duty and Cenvat credit amounting to Rs. 18,83,585/-.

1.3 The show cause notice was adjudicated by the Additional Commissioner vide order-in-original No. 5/Addl/Commr/2004 dated 16/01/04 by which the various demands of duty and of Cenvat credit raised in the show cause notice were confirmed alongwith interest, the amount of Rs. 18,83,585/- paid by the appellant was appropriated towards this demand and beside this, penalty of Rs. 18,83,585/- was imposed on the appellant under Section 11AC of Central Excise Act, 1944 readwith Rule 57 I/Rule 57AH of the Central Excise Rules, 1944 on the ground that the non-payment of duty and wrong availment of Cenvat credit was a deliberate act on the part of the appellant. The Additional Commissioner under first proviso to Section 11A also gave an option to the appellant to pay the interest (as duty/Cenvat credit had already been paid) and also 25% of the Cenvat credit/duty demand towards penalty within a period of 30 days from the date of communication of the order. The appellant, however, filed an appeal before the Commissioner (Appeals) who vide order-in-appeal No. 273/CE/APPL/NOIDA/04 dated 31/08/2004, upheld the demand of Rs. 4,27,326/- in respect of scrap not returned from the job workers and demand of Rs. 1,78,040/- in respect of Cenvat credit on the damaged inputs which had not been used in the manufacturing process. However, he dropped the demand of Rs. 20,340/- in respect of waste oil and the demand of Rs. 8,50,966/- out of duty demand of Rs. 13,28,079/- in respect of

cenvated inputs send to job workers, not returned back after processing within the stipulated period, as in course of hearing before the Commissioner (Appeals), the appellant produced the job work challans showing the return of the inputs after processing and the Cenvat credit involved in respect of such challans was Rs. 8,50,966/-. The Commissioner (Appeals) thus confirmed the duty/Cenvat credit demand of Rs. 10,12,281/- only and accordingly reduced the penalty to Rs. 50,000/- and upheld the interest liability only on the duty demand of Rs. 10,12,281/-. While the appellant have filed the appeal No. E/5701/04-EX against the Commissioner (Appeals)'s order challenging upholding of penalty and interest, the department has filed appeal No. E/5985/04-EX against the same order of the Commissioner (Appeals), challenging the setting aside of duty demand on waste oil and reduction of penalty to Rs. 50,000/-. The department in its appeal has also challenged the Commissioner (Appeals)'s order, ordering refund of Rs. 8,50,966/- and also the Commissioner (Appeals)'s order reducing the interest liability of the appellant to the interest on the duty amount of Rs. 10,12,281/- whose demand had been upheld by the Commissioner (Appeals). The department's plea in the appeal is that the interest would be chargeable on the entire amount of the duty demand confirmed by the Additional Commissioner.

2. Heard both the sides.

2.1 Shri R. Krishnan, Advocate, the learned Counsel for the appellants pleaded that Commissioner (Appeals) has rightly set

aside the duty demand on waste oil as no duty is payable on the waste oil for the reasons that it is nothing but the lubricants drained out from the machines after certain period of use and the same is non-excisable, that the major portion of the demand is of Cenvat credit amounting to Rs. 13,28,079/- in respect of the cenvated inputs sent to the job workers, which according to the department, had not been received back after processing within the stipulated period, that in respect of such inputs, in course of hearing before the Commissioner (Appeals), the appellant were able to produce the job work challans involving Cenvat credit of Rs. 8,50,966/- and the challans which could not be produced had been misplaced, that no malafide can be inferred in respect of the appellant's inability to produce the job works challans in respect of the remaining consignments, that the entire duty/Cenvat credit amounting to Rs. 18,83,545/- had been paid by the appellant even prior to the issue of the show cause notice, that when in course of hearing before the Commissioner (Appeals), the appellant were able to produce the job work challans showing the return of the processed inputs involving Cenvat credit of Rs. 8,50,966/- and when on this basis, the Commissioner (Appeals) had set aside the demand for this amount and ordered the refund of the same, this amount should be allowed to be re-credited, that there is no merit in the department's plea that the same cannot be refunded/returned, that since there was no intention to evade the duty payment or wrongly avail the Cenvat credit and since the entire disputed amount of Cenvat credit and duty had been paid even before the issue of show cause notice, there is no

justification for charging interest and imposition of penalty of Rs. 50,000/- on the appellant and that there is no merit in the department's appeal for seeking enhancement of the penalty and charging of the interest on the entire amount confirmed by the Additional Commissioner.

2.2 Shri B.K. Singh, the learned Jt. CDR, reiterating the grounds of appeal in the revenue's appeal, pleaded that the waste oil was correctly classifiable under heading 34.03 of the tariff and its duty demand has been wrongly dropped by the Commissioner (Appeals), that in this regard, he relies upon Tribunal's judgment in the case of **Panama Petro Chem Pvt. Ltd. vs. CC, Ahmedabad** reported in **2003 (151) E.L.T. 670 (Tri. - Del.)**, that clearances without payment of duty of waste oil had not been declared by the appellant to the department, that the major chunk of demand is in respect of the cenvated inputs sent to the job workers for processing, which had not been returned, that even now in respect of a number of consignments sent to the job workers for processing, the proof of return of the same has not been produced, that the appellant were required to intimate to the department the non-return of the processed inputs and their failure to do the same would attract longer limitation period under proviso to Section 11A, that in this regard he relies upon Hon'ble Supreme Court's judgment in the case of **B.P.L. India Ltd. vs. CCE, Cochin** reported in **2002 (143) E.L.T. 3 (S.C.)** (para 15 and 16 of the judgment), that similarly in respect of non-return of the waste of the cenvated inputs sent

to the job workers there was no intimation by the appellant to the department, that the Cenvat credit on the inputs which had been damaged and had not been used, was wrongly taken by the appellant and that too without informing the department about the same and that in view of this, the Commissioner (Appeals)'s order dropping the duty demand in respect of waste oil, reducing the penalty on the appellant and reducing their interest liability is incorrect.

3. We have carefully considered the submissions from both the sides and perused the records.

3.1 So far as duty on the waste oil is concerned, the waste oil is nothing but the lubricant which after use over a period of time becomes unfit for further use and is drained out. The department has relied upon the Tribunal's judgment in the case of Panama Petro Chem Pvt. Ltd. vs. CC, Ahmedabad (supra), wherein it was held that the imported waste lubricating oil would be classifiable under sub-heading 3403.19 of the tariff as "lubricating preparations containing petroleum oil". However, this judgment of the Tribunal is on the issue of classification of imported waste oil in the customs tariff. The issue involved in this case is as to whether the waste oil emerging after use of lubricating oil in the machinery over a period of time, is a manufactured product and hence excisable goods and is chargeable to duty. We find that the Tribunal in a series of the judgments – **CCE, Chennai – I vs. Ashok Leyland Ltd.** reported in **2003 (151) E.L.T. 438 (Tri. – Chennai)**, **Vikrant Tyres Ltd. vs. Commissioner** reported in

2004 (171) E.L.T. 23 (Tribunal), CCE, Chennai vs. Ashok Leyland Ltd. reported in **2008 (230) E.L.T. 470 (Tri. - Chennai)** has held that the waste lubricating oil drained out after use of lubricant over a period of time is non-excisable. Moreover we also find that heading 34.03 covers – “lubricating preparations (including cutting oil preparations, bolt or nut release preparations, anti rust or anti corrosion preparations and mould released preparations based on lubricants) and preparations of a kind use for oil or grease treatment of textile material, leather, fur skin or other materials, but excluding preparations containing, as basic constituent, 70% or more by weight of petroleum oil or of oils obtained from bituminous minerals”. The product in question – waste oil obtained by draining out used lubricants from the machinery after a long period of its use, does not answer to the description of the goods covered by heading 34.03. In view of this, we hold that there is no infirmity in the Commissioner (Appeals)’s order dropping the demand on the waste oil.

3.2 As regards the Cenvat credit demand of Rs. 13,28,079/- in respect of cenvated inputs sent to job workers for processing under job work challans, which according to the department, were not returned back within the stipulated period, we find that in course of hearing before the Commissioner (Appeals), the appellant were able to produce job work challans showing return of the inputs involving Cenvat credit of Rs. 8,50,966/- and on this basis only the Commissioner (Appeals) set aside the demand for

this amount of Rs. 8,50,966/- out of total demand of Rs. 13,28,079/-. The department does not challenge the authenticity of the job work challans produced before the Commissioner (Appeals). In view of this, we do not find any merit in the department's plea that the amount of Rs. 8,50,966/- should not be refunded to the appellant, as they had debited this Cenvat credit, even prior to the issue of the show cause notice. This also shows that the bulk of the input consignments sent to job workers, in respect of which the Cenvat credit demand of Rs. 13,28,079/- had been raised, had actually been returned back. In view of these circumstances, in absence of any positive evidence of illicit diversion of cenvated inputs sent to job-workers for processing, merely on account of inability of the Appellant to produce challans regarding return of processed inputs from the job-workers, in respect of some of the consignments, the penal provisions of Section 11AC cannot be invoked. However, since wrong availment of Cenvat credit of Rs. 10,12,281/- has been upheld, penalty under Rule 57I/57AH of Central Excise Rules, 1944 would be imposable and penalty of Rs. 50,000/- upheld by the Commissioner (Appeals) is moderate and there is no justification for reducing it any further. As regards the Appellant's plea about interest, under Section 11AB, payment of wrongly availed Cenvat credit prior to issue of show cause notice has nothing to do with interest liability under Section 11AB which is attracted in a case of non-payment/short payment/erroneous refund of duty or wrong availment of Cenvat credit. Therefore,

CCE (Appeals)'s order regarding interest on wrongly availed Cenvat credit is upheld.

4. In view of the above discussion, we do not find any infirmity in the impugned order. The appeals filed by the Appellant as well as by the Revenue are dismissed.

(Pronounced in open court on 6/8/2016)

(Justice R.M.S. Khandeparkar)
President

(Rakesh Kumar)
Member (Technical)

PK