

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

Appeal No. E/1038/2006-1040/2006 - EX[DB]

Date 27/10/2010

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

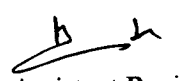
Appellant

Vs
Respondent

M/S CHEMIPLAST INDUSTRIES

2010 EX[DB] dated 25-10-10

I am directed to transmit herewith a certified copy of Final order No. 746-748/
passed by the Tribunal under Section 35-C(1) of Central Excises Act, 1944


Assistant Registrar
(Excise Appeal Branch)

Copy to :

1. Respondent

M/S CHEMIPLAST INDUSTRIES

PLOT NO 55-57, SECTOR-I INDL. AREA PARWANOO

2. Adv. / Consult

NONE

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

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-15

12 LAWCRUX Advisors Pvt Ltd, LAW House, 1-8, Sector - 10, Faridabad 121003 (Harvana)

13 TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor, Vasant Arcade, Nelson Mandela Road, Vasant Kunj, New Delhi - 110070

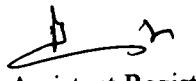
14 Office Copy

15 Guard file

16. HON'BLE PRESIDENT.

17. M/S KARAN & CO.,
PLOT NO.17, INDL. AREA, SECTOR-1, PARWANOO,
DISTT. SOLAN

18. SH. M. L. GUPTA
PLOT No. 55-57, SECTOR-I, INDL. AREA,
PARWANOO


Assistant Registrar
(Excise Appeal Branch)

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

COURT NO. I

DATE OF HEARING : 05/05/2010.

DATE OF DECISION : 25/10/2010

Excise Appeal Nos. 1038-1040 of 2006

[Arising out of the Order-in-Appeal No. 472-474/CE/CHD/2005 dated 29/12/2005 passed by The Commissioner (Appeals), Central Excise, Chandigarh.]

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? | : |
| <hr/> | | |
| CCE, Chandigarh | | Appellant |

Versus

- | | | |
|----|------------------------------------|------------|
| 1. | M/s Chemiplast Industries |] |
| 2. | M/s Karan & Co. |] |
| 3. | Shri M.L. Gupta, Manager & Partner |] |
| | of M/s Chemiplast Industries |] |
| | | Respondent |

Appearance

Shri Mahesh Rastogi, Authorized Representative (DR) – for the Appellants.

None – for the Respondent.

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

FINAL Order No. 746-748/10 ^{EX} Dated : _____

Per. Rakesh Kumar :-

The facts leading to these three appeals filed by the Department are in brief, as under.

1.1 M/s Chemiplast Industries, Parwanoo (Respondent No. 1) are engaged in the manufacture of PVC and HDPE pipes and fittings, chargeable to Central Excise Duty under Chapter 39 of the Central Excise Tariff. They avail Cenvat credit of duty on inputs and capital goods as per the provisions of the Central Excise Rules, 1944. Shri M.L. Gupta (Respondent No. 2) is the partner of M/s Chemiplast Industries who manages its affairs. M/s Karan & Co., Parwanoo (Respondent No. 3) are a registered dealer receiving plastic granules from IPCL, Reliance Industries Ltd. and GAIL and during the period of dispute i.e. from 1998-99 to 2000-2001 they were supplying the plastic granules, PVC resin etc. to the respondent No. 1 under cenvatable invoices, on the basis of which Cenvat credit was being taken by the respondent No. 1.

1.2 Based on the intelligence that the respondent No. 1 and their other sister concerns were availing the Cenvat credit fraudulently by arranging cenvatable invoices without actually

receiving any raw material describe therein, the officers of DGCEI searched the following premises on 11/7/2000 and 12/7/2000

- (1) M/s Sturdy Polymers Limited, 28, Ashoka Chamber, Pusa Road, New Delhi
- (2) The premises of respondent No. 1 at 56-57, Sector-1, Parwanoo. H.P.
- (3) The premises of respondent No. 3 at Shop No. 6, Old Kasauli Road, Parwanoo, H.P.

1.3 During the course of search of the above premises, certain documents were recovered which were resumed. Inquiry was made with Shri M.L. Gupta, Partner of the respondent No. 1 and his statement was recorded wherein he stated that the respondent No. 1 were procuring raw material directly from Indian Petrochemicals Ltd. (IPCL), Gandhar/Nagothane, M/s National Organic Chemical Industries Ltd. (NOCIL) and M/s Gas Authority of India Ltd. (GAIL) and also from registered dealers M/s Karan & Co., Parwanoo (C&F agent of M/s IPCL), M/s K.L. Oswal (authorised dealer of M/s NOCIL) and M/s United Polymers (C&F agent of GAIL), that at the time of purchase of the raw material, sales tax was paid by them, that at the time of entry of the goods into the State of Himachal Pradesh, a form ST-XXVI-A as prescribed by the Sales Tax Department of the State is required to be filed by the owner of the goods/carrier and submitted at the sales tax barrier, Parwanoo, and that all the consignments of goods coming from outside the State into

Parwanoo have to pass through the sales tax barrier at Parwanoo. Inquiry was also made with Shri Ramesh Gupta, the authorised signatory of respondent No. 1 and his statement was recorded on 30th May 2003, wherein he stated that the respondent No. 1 were manufacturing plastic pipes and fittings for which the raw material were plastic granules - LLDPE, PVC resin etc., that the raw materials were being procured from IPCL, RIL, GAIL as well as through M/s Karan & Co., Parwanoo, a C&F agent of M/s IPCL, that M/s Karan & Co., Parwanoo are registered with Central Excise Department as a registered dealer for issue of cenvatable invoices, that in respect of the goods purchased from M/s Karan & Co., they were taking Cenvat credit on the basis of the invoices issued by them, that for transportation of the goods from the premises of M/s Karan & Co., the trucks had been engaged for which the freights was paid to drivers in cash, as the freight involved was very small because of the short distant between their factory and the godown of the respondent No. 3, that for entry of the goods into Parwanoo from outside the State, form ST-XXVI-A was required to be filed in triplicate at sales tax barrier, of which two copies are retained by sales tax authorities at the check post and one copy duly signed is returned to the carrier of the goods/owner of the goods, that filing of ST-XXVI-A form at the sales tax barrier in respect of the goods received from outside the State is mandatory and that the person receiving the goods from outside the state is required to maintain the record of the receipt of the consignments from outside the State in Form ST-XXVI-B register. The Investigating Officers

examined the ST-XXVI-B register maintained by the respondent No. 3 for 1998-1999, 1999-2000 and 2000-2001 and compared it with the "invoice register" containing details of consignments received alongwith reference to page No. of RG-23D register and it was found that in respect of a number of consignments which are claimed to have been received as per the invoice register and thereafter sold under cenvatable invoices to the respondent No. 1, there were no entries in ST-XXVI-B register. Details of such consignments for 1996-99, 1999-2000 and 2000-2001 were compiled and are given in Annexure A,B & C to the show cause notice. Inquiry at the sales tax check post revealed that in respect of a number of consignments, as detailed in Annexure A1, A2 and A3 to the show cause notice, there was no entry of the truck numbers in which those consignments are claimed to have been received. It was found that during the period from 1998-1999, 2000-2001 a total Cenvat credit of Rs. 45,28,023/- had been taken on the basis of cenvatable invoices issued by the respondent No. 3 against the consignments detailed in Annexure A,B & C pertaining to 1998-1999, 1999-2000 and 2000-2001 respectively. It, therefore, appeared that the respondent no. 3 have shown the receipt of consignments from IPCL without actually receiving any material and against such bogus receipts, have issued cenvatable invoices to the respondent No. 1 without supplying any material and on the basis of such invoices the respondent No. 1 have taken Cenvat credit amounting to Rs. 45,28,023/- during the period from 1998-1999, 2000-2001. It is

on this basis that show cause notice dated 1/8/03 was issued to the three respondents for –

- (a) recovery of Cenvat credit amounting to Rs. 45,28,023/- as detailed in Annexure A, B & C to the show cause notice from respondent No. 1, which was alleged to have been taken by them fraudulently during 1998-1999, 1999-2000 and 2000-2001 against bogus invoices without receiving any material and also the interest on this wrongly taken Cenvat credit ;
- (b) imposition of penalty on the respondent No. 1 under Rule 57I/57 AH of the Central Excise Rules, 1944 readwith Section 11AC of the Central Excise Act and also under Rule 173 Q (1) of Central Excise Rules, 1944 ;
- (c) imposition of penalty on respondent No. 3 under Rule 173Q of Central Excise Rules, 1944 and
- (d) imposition of penalty on respondent No. 2 under Rule 209A of the Central Excise Rules, 1944.

1.4 The show cause notice was adjudicated by the Additional Commissioner vide order-in-original dated 14/10/05 by which :-

- (i) out of total Cenvat credit of Rs. 45,28,023/-, the demand of Rs. 21,26,832/- was confirmed alongwith interest and the remaining demand of Rs. 24,01,191/- was dropped ;
- (ii) penalty of Rs. 21,26,832/- was imposed on respondent No. 1 under Rule 57I/67 AH of the Central Excise Rules, 1944 readwith Section 11AC of the Central Excise Act and penalty of same amount was imposed on respondent No. 3 under Rule 173Q (1) of the Central Excise Rules, 1944, and

(iii) penalty of Rs. 5,00,000/- was imposed on respondent No. 2 under Rule 173Q of Central Excise Rules, 1944.

1.5 All the three respondents filed appeals to the Commissioner (Appeals) against the above-mentioned orders of the Additional Commissioner and the Commissioner (Appeals) vide impugned order-in-appeal No. 172-174/CE/CHD/05 dated 29/12/05 set aside the Additional Commissioner's order. It is against this order of the Commissioner (Appeals), these appeals have been filed by the Revenue.

2. None appeared for the respondent, though a notice regarding the date of hearing had been issued and received by them. Since the respondent, did not turn up in spite of notice having been received, the matter against them is being decided ex-parte.

3. Heard Shri Mahesh Rastogi, the learned Departmental Representative who assailed the impugned order, reiterating the grounds of appeal in the Revenue's appeal. He emphasised that in terms of the provisions of Section 22 (4) of the Himachal Pradesh General Sales Tax Act, 1968, in respect of the goods entering into the State from other states or leaving the state, a declaration in ST-XXVI-A form is required to be filed at the check post by the owner of the goods or by the carrier, that Rule 56 of the Himachal Pradesh General Sales Tax Rules, 1970 prescribes

the detailed procedure regarding the filing of the declaration in form ST-XXVI-A, that ST-XXVI-A forms prescribed by the State Government is a vital document which is used by the parties for proving the movements of the goods from one State to another, that the case has been booked primarily on the basis of sales tax records pertaining to Respondent No. 3 and as per evidence gathered from sales tax authorities, the goods claimed to have been received by Respondent No. 3 and sold to Respondent No. 1, had not even crossed the state border on the dates on which the same are claimed to have been received and that the Commissioner (Appeals) while setting aside the Additional Commissioner's order, has not appreciated the evidence on regard against the Respondents.

4. We have carefully considered the submissions of the learned Departmental Representative and have perused the records. Initially, the show cause notice had been issued to the respondent No. 1 for recovery of allegedly wrongly taken Cenvat credit and imposition of penalty and to respondent No. 2 and 3 for imposition of penalty, on the ground that while respondent No. 1 have taken Cenvat credit on the basis of the invoices for plastic granules issued by respondent No. 3, respondent No. 3, in turn, a registered dealer, had issued the invoices to respondent No. 1, in respect of the goods claimed to have been received from the depots of IPCL, at Baroda, Nagothane and Ludhiana, but in respect of the consignments detailed in Annexure A, B & C to the show cause notice, which are claimed to have been received

by the respondent No. 3 from IPCL, there were no entries in the ST-XXVI-B register maintained by them and they were not in a position to produce the corresponding ST-XXVI-A forms showing the entry of those consignments into Himachal Pradesh, Parwanoo through the check post, which shows that no goods had been received and bogus entries had been made in RG 23D register. However, subsequently when respondent No. 3 produced ST-XXVI-A forms in respect of the consignments listed in the Annexure A,B & C to the show cause notice and claimed that all those consignments had actually been received by them, the Adjudicating Authority after examining their claim, dropped the demand for an amount of Rs. 24,01,191/- and confirmed the Cenvat credit demand of Rs. 21,26,832/-. The Cenvat credit demand of Rs. 21,26,832/- was confirmed only in respect of those consignments where the date of entry into Parwanoo as per the records of the sales tax check post was on date prior to the date of depot invoice, while the goods could have been despatched from the depot only on or after the date of issue of the invoice and there was no way the consignments could have reached the Parwanoo check post prior to that date. The details of such discrepancies are given in the – "discussion and findings portion" of the order-in-original. No explanation has been given as to how the date of depot invoices under which the goods had been despatched from the IPCL depot at Ludhiana, Baroda or Nagothane is after the date on which the entry of the goods is shown at Parwanoo check post. It is on this basis the Adjudicating Authority has concluded that in respect of the cases

where the date of entry at the check post is prior to the date of despatch, the ST-XXVI-A forms have been filed without any goods having been received. On going through the impugned order-in-appeal we find that none of the evidence, as discussed above, relied upon by the department has been discussed and the Commissioner (Appeals) has simply set aside the Additional Commissioner's order on the ground that -

- (a) the demand in question has been confirmed only on the ground that entry of the inputs was not found in the records of the sales tax barrier, but there is no provision under the Central Excise Law for the requirement of producing ST-XXVI-A form, failing which material would be treated as have not having been received and credit would be disallowed and in terms of Central excise law, the receipt of the inputs is established from the statutory central excise records and
- (b) the respondent No. 1 have made payment for the goods to their supplier - respondent No. 3 through account payee cheques in their favour and this fact has not been denied by the department.

4.1 We do not agree with this view of the Commissioner (Appeals). While there is no provision in the central excise law requiring the production of ST-XXVI-A form in respect of the goods coming from outside the state, failing which the goods would be treated having not been received, the requirement of law is that for availing Cenvat credit by a manufacturer or a registered dealer on the basis of an invoice or any other duty

paying document, the goods have actually been received and if there are doubts about the receipt of the goods, the central excise authorities are well within their right to conduct investigation in this regard. When the goods have been received from outside the State and are supposed to have passed through sales tax barrier on the border, the entry of the goods on the sales tax barrier is an important evidence regarding the entry of the goods into the state and in absence of such an entry, the burden would be on the assessee to prove that the goods had actually been received. In this case, it is not in dispute that except for a few consignments, all the consignments reaching Parwanoo, had come through the check post. When the goods are claimed to have been received from IPCL's depot at Ludhiana, Baroda or Nagothane and the record show that the date of entry as per ST-XXVI-A form is prior to the date of despatch of the goods from the depot, the consignee have to explain this discrepancy. Since the respondent No. 3 have not been able to give any explanation for this, the central excise authorities are justified in drawing adverse conclusion from this that these are only paper transactions and no goods has been received and, therefore, the invoices showing the sales of the goods received under such fictitious invoices to respondent No. 1 would also be fictitious. In view of the above discussion, we hold that the impugned order setting aside the Cenvat credit demand alongwith interest against respondent no. 1 and also setting aside the imposition of penalty on respondent No. 1, 2 and 3 is not correct. The same is set aside and the order-in-original passed by

the Adjudicating Authority is restored. The Revenue's appeals are allowed.

(Pronounced in the open court on 25/10/2016)

(Justice R.M.S. Khandeparkar)
President

(Rakesh Kumar)
Member (Technical)

PK