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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

Date **04/08/2011**

Appeal No. E/2628/2009 - EX[DB]

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

To :
M/S APL APOLLO TUBES LIMITED
A-19, INDUSTRIAL AREA, SIKANDRABAD (U.P.)

M/S APL APOLLO TUBES LIMITED Appellant

Vs

C.C.E. NOIDA Respondent

I am directed to transmit herewith a certified copy of **Final order No.692/ 2011 EX[DB]** dated 26-7-11 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.M.P. SINGH
43,SAMAJ KALYAN APARTMENT F-BLOCK,VIKASPURI,N.DELHI-18

3. C.D.R
4. Bar association. CESTAT. New Delhi
5. Director Publications. Customs. Excise. I.P. Estate. New Delhi
6. M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -
7. Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
8. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi - 110005
9. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road, Ahmedabad-15
10. LAWCRUX Advisors Pvt Ltd. LAW House,1-8,Sector - 10, Faridabad 121003 (Haryana)
11. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
12. Office Copy
13. Guard file
14. HON'BLE PRESIDENT.

Assistant Registra
(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 : 26/07/2011.
DATE OF DECISION : 26/07/2011.

Excise Appeal No. 2628 of 2009

[Arising out of the Order-in-Appeal No. 194/CE/APPL/ NOIDA/2009 dated 29/07/2009 passed by The Commissioner (Appeals), Central Excise & Customs, Meerut – II, Noida.]

For Approval and signature :
Hon'ble Shri 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?	: 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?	:
4.	Whether order is to be circulated to the Department Authorities?	:

M/s APL Apollo Tubes Ltd. — Appellants

Versus

CCE, Noida — Respondent

Appearance

Shri M.P. Singh, Advocate – for the Appellants.

Shri K.P. Singh, Authorized Representative (DR) – for the respondent.

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

FINAL Order No. 692/2011-EX Dated : 26/07/2011

Per. Shri Justice R.M.S. Khandeparkar :-

Heard the advocate for the appellants and DR for the respondent. The present appeal arises from order dated 29th July 2009 passed by the Commissioner (Appeals), Noida. By the impugned order the appeal filed by the appellants against order dated 16th December 2008 passed by Additional Commissioner, Noida has been dismissed. The Additional Commissioner by his said order had confirmed the demand of Rs. 47,17,745/- alongwith interest thereof and had imposed equal amount of penalty. The only issue which arises for consideration is whether the zinc ash and dross emerging during the process of galvanization of steel sheets/pipes would be excisable product and, therefore, dutiable as has been held by the lower authorities.

2. The learned advocate for the appellants placing reliance on the decision of the Hon'ble Supreme Court in the matter of **CCE, Patna vs. Tata Iron & Steel Co. Ltd.** reported in **2004 (165) E.L.T. 386 (S.C.)** and in the matter of **Vishal Pipes vs. CCE, Noida** reported in **2010 (255) E.L.T. 532 (Tri. - Del.),** submitted that the period involved in the matter is from March 2004 to September 2007. Considering the definition of the term excisable goods as was in force at the relevant time under the statutory provision and in view of the law laid

down by the Apex Court, it is the contention on behalf of the appellants that the authorities below erred in holding the zinc ash and dross emerging during the process of galvanization of steel sheets and pipes to be an excisable product and thereby confirming the demand. It is further contention on behalf of the appellants that the product being non-excisable one, the provisions of Rule 6 (2) of the Cenvat Credit Rules are not at all attracted and for the same reason question as to whether the final product is exempt or not is also of no relevancy.

3. The DR on the other hand submitted that zinc ash and dross emerges in the process of galvanization and, therefore, the authorities below rightly confirmed the demand by taking resort to the provisions comprised under Rule 6 (2) of the Cenvat Credit Rules.

4. The Apex Court in **Tata Iron & Steel Co. Ltd.** case, while dealing with the matter wherein the department had sought to raise demand of duty in relation to the zinc ash and dross and flux skimming emerging in the process of galvanization of steel sheets holding the same as being by-product, after considering various provisions of law, held that :

> "we are of the opinion that the dross and skimming are merely the refuse, scum or rubbish throughout in the process of manufacture of aluminium sheets and, therefore,

cannot be said the result of treatment, labour or manipulation whereby a new and different article emerges with a distinctive name, character or use which can ordinarily come to the market to be brought and sold. Merely because such refuse or scum may fetch some price in the market does not justify it being called a by-product, much less an end-product or a finished product."

It was further held that :-

"this court held that the zinc dross and flux skimming arisen as by-product during galvanization process are not excisable goods."

5. While following the said decision, the Tribunal in **Vishal Pipes** case was held that "process of generation of zinc ash, dross and other residue during the manufacture of galvanized pipes does not involve any manufacturing process and such goods cannot be held to be excisable goods".

6. As rightly pointed out by the learned advocate, the matter relates to period prior to May 2008 and the explanation clause was added to Section 2 (d) of the Central Excise Act under Finance Act, 2008 came into force from 10^{th} May 2008. The explanation provided that the clause excisable goods under Section 2 (d) would include any article material or substance which is capable of being brought and sold for consideration and such goods shall be deemed to be marketable.

7. Considering the provision of law and particularly the definition of the term excisable goods as was prevalent at the relevant time and bearing in mind the decisions of the Apex Court in **Tata Iron & Steel Co. Ltd.** case and of the Tribunal in **Vishal Pipes** case, the appellants are justified in contending that the product, in question, being not an excisable product, the issue as to whether the final product is dutiable or exempted is of no relevancy and the provisions of the Rule 6 (2) of the Cenvat Credit Rules cannot be of any help to the Department to justify the demand. In fact, the present case is squarely covered by the decision of the Apex Court and of the Tribunal in above reported decisions. While applying the same to the facts in case in hand, the impugned order is liable to be set aside and the appeal is to be allowed. Accordingly, the appeal succeeds and the same is allowed. The impugned order is set aside with consequential relief.

(Justice R.M.S. Khandeparkar)
President

(Rakesh Kumar)
Member (Technical)

PK