

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

Appeal No. E/3883-3889/2005 - EX[DB]

Date **25/08/2011**

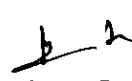
Assistant Registrar
C.E.S.T.A.T., New Delhi

To :
M/S SAMTEL COLOR LTD.
VILL-CHHAPRAULA BULANDSHAHR ROAD
GHAZIABAD
M/S AMTEL COLOR LTD.

Appellant
Vs
Respondent

C.C.E. NOIDA

I am directed to transmit herewith a certified copy of **Final order No.757-763/ 2011 EX[DB]** dated 11-8-11
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.V. LAXMIKUMARAN

B-6/10, SAFDARJUNG ENCLAVE, NEW DELHI-110029

3. C.D.R

4. Bar association, CESTAT, New Delhi

5. Director Publications, Customs, Excise. I.P. Estate, New Delhi

6. M/s Centax Publications 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

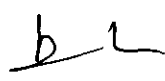
10. LAWCRUX Advisors Pvt Ltd. LAW House, 1-8, Sector - 10, Faridabad 121003 (Harvana)

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

P. T. -2,


Assistant Registrar
(Excise Appeal Branch)

14. MR. ARINDAM GANGULY,
15. MR. M.S. GARG,
M/S SAMTEL COLOR LTD.
VILL-CHHAPRAULA BULANDSHAHAR ROAD GHAZIABAD
16. MR. S.K. SONI,
17. MR. S.K. BHARDWAJ,
18. MR. S.N. RAI,
M/S L.G.ELECTRONICS INDIA PVT.LTD.
PLOT NO-51,UDYOG VIHAR GREATER NOIDA
19. M/S L.G.ELECTRONICS INDIA PVT.LTD.
PLOT NO-51,UDYOG VIHAR SURAJPUR KASNA ROAD GREATER NOIDA U.P.

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

West Block No.2, R.K.Puram, New Delhi

COURT-I

Date of hearing/decision: **11.8.2011**

Central Excise Appeal No.3883-3885 of 2005

Arising out of the order in original No.23/COMMR/2005 dated 30.8.2005 passed by the Commissioner, Central Excise, Noida.

1. M/s Samtel Color Ltd.	..	Appellants
2. Mr. Arindam Ganguly		
3. Mr. M.S. Garg		

Vs.

C.C.E., Noida	...	Respondent
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Central Excise Appeal No.3886-3889 of 2005

Arising out of the order in original No.23/COMMR/2005 dated 30.8.2005 passed by the Commissioner, Central Excise, Noida.

1. M/s L.G. Electronics India Pvt. Ltd.	..	Appellants
2. Mr. S.K. Soni		
3. Mr. S.K. Bhardwaj		
4. Mr. S.N. Rai		

Vs.

C.C.E., Noida	...	Respondent
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For Approval and Signature:

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

1	Whether Press Reporter may be allowed to see the Order for publication as per Rule 26 of the CESTAT (Procedure) Rules, 1982?	
2	Whether it should be released under Rule 26 of 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?	Seen
4	Whether Order is to be circulated to the Departmental authorities?	Yes

Appearance:

Shri B.L. Narasimhan, Advocate for the appellants
 Shri B.K. Singh, Authorised Departmental Representative (Jt.CDR) for the Revenue

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

FINAL Oral Order No. 757-763/2011-EX

Per Shri Justice R.M.S. Khandeparkar:

Since a common question of law and facts arise in these matters, they were heard together and are being disposed of by this common order.

2. Only issue which is sought to be raised in these matters is whether consequent to the reduction in the prices the credit available to the purchaser in relation to the duty paid on the original price would also stand reduced correspondingly.

3. Learned Advocate for the appellants drawing our attention to the Circular No.877/15/2008 dated 17.11.2008 issued by the Board and the unreported decision of the Tribunal in the matter of **ECE Industries Limited vs. C.C.E., Rohtak** in Excise Appeal No.1449 of 2009 delivered on 8.7.2011 submitted that mere reduction in the price cannot affect the right of the purchaser to avail credit equivalent to the duty paid on the goods in terms of the original price.

4. Learned Jt. CDR on the other hand placing reliance in the decision of the Tribunal in the matter of **C.C.E., Shillong vs. Guwahati Carbon Ltd.** reported in 2009 (243) ELT 307 and drawing our attention to Rule 3 of the Cenvat Credit Rules, 2004 submitted that the availability of credit is always restricted to the duty leviable on the goods and therefore, any alteration in the price will affect the right of the purchaser in relation to the availability to the credit.

5. The Circular dated 17.11.2008 issued by the Board reads thus:

"Government of India
Ministry of Finance (Department of Revenue)
Central Board of Excise & Customs, New Delhi

Subject : - Clarification regarding reversal of Cenvat credit in case of trade discount - Regarding.

Representations have been received from trade and industry seeking clarification on the issue whether proportionate credit should be reversed in cases where a manufacturer avails credit of the amount of duty paid by supplier as reflected in the excise invoice, but subsequently the supplier allows some trade discount or reduces the price, without reducing the duty paid by him.

2. The issue has been examined. Since, the discount in such cases are given in respect of the value of inputs and not in respect of the duty paid by the supplier, the effect of reduction of value of inputs may be that the duty required to be paid on the inputs was less than what has been actually paid by the inputs manufacturer. However, the fact remains that the inputs manufacturer had paid the higher duty. Rule 3 of Cenvat Credit Rules, 2004 allows credit of duty "paid" by the inputs manufacturer and not duty "payable" by the said manufacturer. There are many judgments of Hon'ble Tribunal in this regard which have confirmed this view.

3. In view of above, it is clarified that in such cases, the entire amount of duty paid by the manufacturer, as shown in the invoice would be available as credit irrespective of the fact that subsequent to clearance of the goods, the price is reduced by way of discount or otherwise. However, if the duty paid is also reduced, along with the reduction in price, the reduced excise duty would only be available as credit. It may however be confirmed that the supplier, who has paid duty, has not filed/claimed the refund on account of reduction in price.

4. Trade and field formations may be suitably informed.
5. Hindi version will follow.
6. Receipt of this Circular may kindly be acknowledged."

6. The Tribunal in the order dated 8.7.2011 held thus:

12. The issue involved in the matter is apparently that whether the appellants are entitled for refund of the duty amount equivalent to the difference in the amount of duty payable on the amount of transaction disclosed in the invoice and the amount actually received by the assessee as the price for the produce sold under such invoice. As already pointed out above, it is the case of the appellant that though ex-price was mentioned in the invoices at the time of clearance of the goods and accordingly the duty was paid factually the appellants received less amount consequent to the variation of the price on the strength of price variation clause in the agreement between the assessee and the supplier and, therefore, less duty was payable and hence the differential amount in the duty paid and payable is required to be refunded to the appellants.

13. The appellants have not pointed out any specific provision which would entitle the appellants to seek such refund except pointing out Section 11B of the said Act. Section 11B(1) provides that any person claiming refund of any duty of excise and interest, if any, paid on such duty may make an application for refund of such duty and interest, if any, paid on such duty to the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise before the expiry of one year from the relevant date in such form and manner as may be prescribed and the application shall be accompanied by such documentary or other evidence including the documents referred to in section 112A as the applicant may furnish to establish that the amount of duty of excise and interest, if any, paid on such duty in relation to which such refund is claimed was collected from or paid by him and the incidence of such duty and interest, if any, paid on such duty had not been passed on by him to any other person. The first proviso thereto provides that where an application for refund has been

made before the commencement of the Central Excises and Customs Law (Amendment) Act, 1991, such application shall be deemed to have been made under the amended provision of law and second proviso prescribed limitation of one year would not apply where the duty and interest if any paid on such duty has been paid under protest. Provision of law comprised under Section 11B, therefore, relates to the procedure for filing refund claim application. It does not speak of entitlement of refund as such. However, there is one important expression used in the said provision and that is relating to the period within which such application is made and that is very relevant for deciding the matter in hand. The provision under Section 11B specifically provide that refund should be claimed within one year from the 'relevant date'. The expression 'relevant date' has been defined under clause (b) of sub-section 5 of Section 11B. Sub-clause (eb) of Section 'B' provides that the relevant date means, in case where the duty of excise is paid provisionally under the said Act or the rules made thereunder, the date of adjustment of duty after the final assessment thereof. In other words, in case where the duty is paid provisionally under the Act or rules made thereunder the claim for refund can be lodged within a period of one year from the date of adjustment of duty after the final assessment thereof. It would obviously disclose that question of refund of duty on the ground of excess payment can arise in relation to the specify matters under Section 11(5)(b) of the said Act and one of such occasion can be when the duty was provisionally paid and on account of financial assessment, it is revealed that there was excess payment of duty at the time of provisional payment of duty apart from the said provision none of the other provision disclose a situation which could cover the factual matrix of the case in hand. There is no provision under the Act where it is provided that inpite of payment of duty in terms of the price disclosed in the invoices at the time of clearance of the goods if subsequently lesser amount is received by the manufacturer in relation to such goods then the manufacturer would be entitled for reduction in the duty liability in relation to such goods and on that count for refund of the difference in the amount of duty. The fact that there is no such provision under the statute is not in dispute. The contention however is that the authority has no power to recover the amount in excess of duty legally payable. Since the price variation clause empowers the buyer to reduce the price subsequent to the clearance of the goods and actually the price is reduced, therefore, the manufacturer is entitle for refund of the difference between the amount actually paid and amount becoming payable in terms of modified price. The contention is devoid of substance.

14. Section 4(1) of the said Act clearly provides that where under the said Act, the duty of excise is chargeable on any excisable goods with reference to their value, then, on each removal of the goods, such value shall be determined. In case where the goods are sold by the assessee for delivery at the time and place of removal the assessee and the buyer of the goods are not related and the price is the sole consideration for the sale then such value can be the transaction value and in any other case including the case where the goods are not sold, the value shall be the value determined in

such manner as may be prescribed. In other words, for the purpose of determining the duty liability the value of the goods is to be determined either as transaction value or as is prescribed under the rules. It is not in dispute in the case in hand, such value has necessarily to be at the time of removal of the goods. The expression "time of removal" has been defined under clause (cc) of sub-section (3) of Section 4. It provides that the time of removal in respect of the excisable goods removed from the place of removal referred to in sub-clause (iii) of clause (c), shall be deemed to be the time at which such goods are cleared from the factory. Clause (c) (iii) defines the place of removal to mean a depot, premises of a consignment agent or any other place or premises from where the excisable goods are to be sold after their clearance from the factory. Taking into consideration all this aspects of the provisions of Section 4, it is apparent that the valuation is directly related to the time of removal and place of removal. In the case in hand, we are not concerned with the place of removal as such. But the time of removal is very relevant. The duty element is to be determined on the basis of time of removal of the goods by the manufacturer. Undisputedly, the time of removal of the goods in the case in hand was issuance of invoices. The goods are cleared, and are required to be cleared, under invoices the valuation for the purpose of duty liability, therefore, was as disclosed in the invoices we hasn't to record that this does not mean that even in case of under valuation the party can evade the correct duty liability. In case of undervaluation, there are specific provision for recovery of short levy.

15. It is also pertinent to note that it is unbelievable that a manufacturer would value their product that is over and above the value which ought to have been calculated for the purpose of payment of duty. In case of payment of duty or tax, there is no question of any voluntariness, it is always imposed upon the assessee. Being so, there is no presumption that the product can be overvalued.

16. Bearing in mind the above facts and the provisions of law, therefore, it is difficult to accept that on account of variation of price on the lower side by the buyer after the clearance of the product that could evade or in any way result in variation of the valuation of the product for the purpose of determining the duty liability at the time of clearance of the goods. Such a variation of price or lesser payment of price subsequent to the clearance of the goods either on account of some agreement between the manufacturer and the buyer which has no sanction under the statute dealing with the duty liability can be of no help to the assessee to claim refund.

17. Considering the Circular as above and perusal of the impugned order disclose that the lower authorities had no advantage of having before them the said Circular. Considering the fact that the decision of the Tribunal in ECE

Industries Ltd. case was delivered recently on 8.7.2011 the same was also not available before the lower authorities while deciding the matter.

18. The provisions of law being clearly clarified by the Circular and the said decision and as the authorities had no opportunity to take note thereof, in our considered opinion as rightly submitted on behalf of both the parties, it would be appropriate to set aside the impugned order and remand the matter to the adjudicating authority to deal with the same afresh. Needless to say that while considering the provisions of Rule 3 of Cenvat Credit Rules, 2004, the authorities below have also to consider the statutory provision relating to the leviability of the duty.

19. As far as the decision of the Tribunal in Guwahati Carbon Ltd. case is concerned, it was in relation to the claim for inclusion of freight and insurance charges in the assessable value and not on the point in issue.

20. For the reasons stated above, therefore, we allow the appeals and set aside the impugned orders and remand the matters to the adjudicating authority to decide the issue afresh in accordance with the provisions of law and bearing in mind the observations made above.

(Justice R.M.S. Khandeparkar)
President

(Rakesh Kumar)
Technical Member

scd/