

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

Appeal No. E/1728/2009 - EX[DB] WITH
E/M/222/2010 & E/M/700/2011-EX

Date 31/01/2012

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

To :
MEENAKSHI ASSOCIATES PVT LTD
B-8, SITE-C, UPSIDC INDUSTRIAL AREA, SURAJPUR,
INDL. AREA, GREATER NOIDA.
MEENAKSHI ASSOCIATES PVT LTD

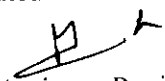
Appellant
Vs
Respondent

C.C.E. NOIDA

MISC ORDER NO. 92&92A/2012-EX

I am directed to transmit herewith a certified copy of Final order No. A/60
passed by the Tribunal under Section 35-C(1) of Central Excises Act, 1944

2012 EX[DB] dated

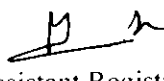

Assistant Registrar
(Excise Appeal Branch)

Copy to :

1. Respondent
C.C.E. NOIDA
C-56/42, SECTOR-62, NOIDA-
201307

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MR.C.HARISHANKAR
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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-3
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


Assistant Registrar
(Excise Appeal Branch)

**CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
Court No.I**

**E/Misc No.222/2010 and Misc No. 700/2011
in E/A No.1728/2009**

(Arising out of order in original No.10-11/Comm/Noida/09 dated 13.3.09 passed by the Commissioner of Customs & Central Excise, Noida)

Date of Hearing: 1.11.2011
Date of Pronouncement: 25.1.2012

For Approval and signature:

Hon'ble Mr S.S. Kang, Vice President
Hon'ble Mr. Mathew John, Technical Member

- | | | |
|----|--|------|
| 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? | Yes |
| 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? | Yes |

M/s Meenakshi Associates

Appellants

Vs

CCE, Noida

Respondent

Appeared for the Appellant: Shri Harishankar, Advocate

Appeared for the Respondent: Shri B.K. Singh, Jt. CDR

Coram: **Hon'ble Mr. S.S. Kang, Vice President**
Hon'ble Mr. Mathew John, Member (Technical)

Misc order NO. 92 & 92 A/2012-EX(BR) 2
FINAL ORDER NO. A/60/2012-EX(BR)

ORDER

Per Mathew John:

There are two Miscellaneous applications numbered as E/Misc No. 222/2010 and E/Misc No.700/2011 filed by the appellants to adduce additional documents on record. These are documents relating to passing of Final Order No. 385-388/08 dated 26.6.08 and Order-in-Original No. 21/Commr/Noida/2011-11 dated 31-12-2010 disposing of a Show Cause Notice issued on similar facts for the period of April 2008 to January 2009, that is a period subsequent to the one involved in this proceeding in respect of the Appellant, by dropping the demand. These records are relevant for deciding the matter. So the Misc Applications are allowed.

2. The Appellants are manufacturers of excisable goods and they were paying excise duty as per provisions in Rule 8 of Central Excise Rules 2002, on monthly basis before the 5th of the next month and filing E-1 returns. The dispute in the present appeal relates to the period June 2006 to March, 2008.

3. Before stating the facts, it is proper to record the relevant Rule which is re-produced below:

"RULE 8. Manner of payment. — (1) *The duty on the goods removed from the factory or the warehouse during a month shall be paid by the 5th day of the following month:*

Provided *that in case of goods removed during the month of March, the duty shall be paid by 31st day of March.*

Provided *further that where an assessee is availing of the exemption under a notification based on the value of clearances in a financial year, the duty on goods cleared during a calendar month shall be paid by the 15th day of the following month except in case of goods removed during the month of March for which the duty shall be paid by the 31st day of March."*

"(3) If the assessee fails to pay the amount of duty by due date, he shall be liable to pay the outstanding amount along with interest at the rate specified by the Central Government vide notification under section 11AB of the Act on the outstanding amount, for the period starting with the first day after due date till the date of actual payment of the outstanding amount.]

(3A) If the assessee defaults in payment of duty beyond thirty days from the due date, as prescribed in sub-rule (1), then notwithstanding anything contained in said sub-rule (1) and sub-rule (4) of rule 3 of CENVAT Credit Rules, 2004, the assessee shall, pay excise duty for each consignment at the time of removal, without utilizing the CENVAT credit till the date the assessee pays the outstanding amount including interest thereon; and in the event of any failure, it shall be deemed that such goods have been cleared without payment of duty and the consequences and penalties as provided in these rules shall follow.]

(4) The provisions of section 11 of the Act shall be applicable for recovery of the duty as assessed under rule 6 and the interest under sub-rule (3) in the same manner as they are applicable for recovery of any duty or other sums payable to the Central Government."

4. Now the facts as stated in the impugned order, are as under:

*"From concerned ER-1(s), it appeared that default in payment of duty remained continue beyond 30 days of the said due dates. During the period June 2006 to March, 2007 and April 2007 to March, 2008, the party has paid an amount of Rs. 61,07,965/- and Rs. 55,16,681/- respectively through PLA and the rest amount i.e. Rs. 67,88,315/- and Rs. 1,00,55,614/- respectively through cenvat credit account as Central Excise duty. This appeared in contravention to the provisions of Rule 8(3A) *ibid*, as the payment of Central Excise duty from the cenvat account in previously mentioned circumstances could not be treated as*

payment of Central Excise duty in respect of clearance affected during the previously mentioned period. Detail of Central excise duty deposited vide R 6 challans during the period June 2006 to March, 2007 and April, 2007 to March, 2008 are shown in respective notices.

From the foregoing, it appeared that the party had not yet made payment of Central excise duty amounting to Rs. 67,88,315/0 payable on the goods cleared during the month of June 2006 to March, 2007 and Rs. 1,00,55,614/- payable on the goods cleared during the month of April 2007 to March, 2008. Since the default in payment of duty was continued beyond 30 days from the due date, the provisions of Rule 8(3A) *ibid* appeared applicable and mandatory in this case. As per this sub rule, it was required to pay excise duty for each consignment at the time of removal without utilizing *cenvat* credit until the date of outstanding amount including interest due thereon be paid by them.

In terms of provisions of Rule 8(3A), all such removals are deemed to be made without payment of duty so central excise duty of Rs. 1,28,96,280/- involved on such removals during the period June 2006 to March 2007 and of Rs. 1,55,72,295/- involved on such removals during the period April 2007 to March 2008 appeared demandable under Section 11A read with Rule 8(3A) along with interest under Section 11AB of the said Act. As the party deliberately contravened the provisions of Rule 4,6,8 of the said rules with intent to evade payment of duty in as much as they did not consciously discharge duty liability in the manner as provided in the said rules, they rendered themselves liable for penal action under Rule 25 of the said rules read with Section 11AC of the said Act. The Central excise duty so demandable from the party is as per Annexure A and Annexure B annexed to said notices.

Accordingly, vide two different show cause notices dated 3.7.07 and 6.5.08, it was alleged:

- i) Demand of Central Excise duty amounting to Rs. 1,28,96,280/- and Rs. 1,55,72,295/- respectively involved in respect of removals of excisable goods

deemed to have been cleared without payment of duty as mandated by Rule 8(3A) of the said rules, effected during the period of June 2006 to March, 2007 and April 2007 to March 2008 respectively under Section 11A of the Central Excise Act, 1944 read with Rule 8(3A) of the said rules along with appropriation of Rs. 61,07,965/- for the period June 2006 to March, 2007 and of Rs. 55,16,681/- for the period April 2007 to March 2008 respectively already debited against the amount of duty so payable;

- ii) Demand of interest leviable on the amount of duty mentioned above under Section 11AB of the said Act read with Rule 8(3A) of the said rules and appropriation of interest of Rs. 81,121/- plus Rs. 26,321/- for the period June 2006 to March, 2007 and Rs 10,825/- plus Rs. 5456/- for the period April 2007 to March, 2008 respectively already deposited against the amount of interest so payable;*
- iii) Imposition of penalty under Rule 25 of the said rules read with Section 11AC of the said Act for deliberate contravention of the rules as aforementioned."*

5. The appellants have submitted the facts of the case as under:

- i) Total duty payable for June 2006 was Rs. 10,38,005/-. At the end of the 30 days amnesty period stipulated in Rule 8(3A) supra, duty of Rs. 5,59,148/- remained to be paid This was paid on 25.9.06 through PLA. However, interest of Rs. 11,610/- inadvertently remained unpaid, which was paid only on 2.1.09.*
- ii) Total duty payable for July 2006 was Rs. 11,86,683/. At the end of the 30 days amnesty period stipulated in Rule 8(3A) supra, duty of Rs. 7,88,703/- remained to be paid This was paid on 25.9.06 and 6.11.06, through PLA. However, interest of Rs. 14,120/-*

inadvertently remained unpaid, which was paid only on 22.1.09.

- iii) Total duty payable for August 2006 was Rs. 9,50,274/. At the end of 30 days amnesty period stipulated in Rule 8(3A) supra, Rs. 5,97,311/- remained to be paid. This was paid on 6.11.06 and 12.12.06 through PLA. Interest thereon of Rs. 12,172/- was also paid on 26.12.06.*
- iv) Total duty payable for September, 2006 was Rs. 23,85,960/. At the end of 30 days amnesty period stipulated in Rule 8(3A) supra, Rs. 21,41,966/- remained to be paid. This was paid on 12.12.06 and 19.12.06 through PLA. However, interest of Rs. 11,610/- inadvertently remained unpaid which was paid only on 22.1.09. Interest thereon of Rs. 14,110/- was also paid on 26.12.06.*
- v) The next default was in January 2007 which was liquidated within 8 days of expiry of the amnesty period i.e. on 13.3.07. However, there were no clearances effected by the appellant during this extra period of 5.3.07 to 13.3.07.*
- vi) No default in paying duty beyond the amnesty period, occurred after January 2007. In fact, the only late duty payment, thereafter, was for the month of April, 2007 in which the short paid duty was paid within the amnesty period on 4.6.07.*

6. The Show cause notices were confirmed vide order dated 27-08-2008. When the order was appealed against, the Tribunal remitted the matter for de-novo adjudication vide order dated 19-01-2009 since that order was passed without complying with principles of natural justice. The de-novo adjudication is now done vide the impugned order. The impugned order confirmed the demands for Rs. 1,28,96,280 and 1,55,72,295 along with appropriate interest and also imposed penalty of Rs. 1,28,96,280 and Rs. 1,55,72,295 under 11AC of the Central Excise Act apart

from appropriating some deposits made by the appellants towards this liability. Aggrieved by this order the Appellants have filed this appeal.

7. The first argument of the appellant is that the short payment of interest for defaulting period occurred due to calculation error and was a bonafide mistake. The appellants themselves brought this to the notice of the department and paid the differential interest involved. The appellants contests that this short payment of interest by itself cannot be considered as default but it is a matter of short payment of interest and this matter has been condoned by the Commissioner himself vide para 5.7 of the order dated 31-12-2010 brought on record through Misc E/700/2011 Ex. So this cannot be a reason to demand duty afresh for time till this small differential payment in interest was made.

8. According to the appellants the real default was only for the following period

- (i) 04-08-2006 to 19-12-2006 because all payments to be made through PLA upto this date was paid
- (ii) Thereafter there was a default in payment of dues for Jan 2007 which default starts from 08-03-2007. The defaulted amount was paid on 13-03-07 but there was no clearance of goods during the defaulting period of 08-03-07 to 13-03-2007.

These contentions are recorded by the adjudicating authority in para 13 of the order and not controverted. The finding is only an emphatic statement in para 22 of the impugned order that they continued default from June 2006 to March 2008 without explaining which submission on facts or law made by the appellant is wrong. So we find it quite appropriate to take the facts as stated by the appellant and recorded in para 13 of the impugned order to be correct and proceed.

9. According to the Counsel, Revenue has demanded duty on all clearances from June 2006 to March 2008 totally ignoring the

rules. The reason why the defaulting period is stated to start from June 06 is not clear when they defaulted for duty payable for the month of June 06 and under the Rule 8 (3A) the defaulting period started from 04-08-2008 that is 30 days after 05-07-2006 when the payment was due. The demand raised by Revenue is maintainable only if the Cenvat credit taken during the defaulting period is denied. The Rule 8(3A) actually does not negate taking of credit; it only negates utilization of credit during defaulting period. The impugned order does not specify what happens to the credit of duty paid on raw materials used in the manufacture of goods during the impugned period apparently because once this issue is dealt with the demand made collapses. It is only because of such calculated silence that the demand from the impugned order are disproportionately high considering the manufacturing activity done by the appellants during the said period, the payments made through PLA and the credit available to them. The Appellants submit that there was some default on their part which was declared to the department through monthly returns and they have paid penalties by way of interest for the defaulting period. If it all any further penalty is payable it cannot be equal to the duty which they have already paid. They argue that provisions of section 11AC of the Act is not applicable for the situation because they had no intention to evade payment of duty but they had declared the duty liability and there was only delay in payment of duty and that cannot be equated with duty evaded maliciously.

10. In reply the Ld Authorized Representative for Revenue did not press the argument that the delay in payment of the differential interest due to calculation mistake can bring the assessee within the mischief of Rule 8 (3A).

11. The Ld. A.R. argues that they have collected the duty on the goods from their customers but did not deposit with the government. Rule 8 (3A) provided for stringent punishment for such practices and the consequences of the sub-rule should be enforced. He submits that as per the rule the appellants could not

have utilized Cenvat credit during the defaulting period and duty paid during the defaulting period using Cenvat credit is no payment at all and that is why the duty is now demanded in cash. He interprets Rule 8(3A) to mean that the Appellants are not eligible for the credit itself. However he is not able to give a proper reasoning for the faulty determination of the defaulting period starting from the very beginning of the month for which payment of duty has been defaulted.

12. We have considered the issue of short payment of interest for the duty which was defaulted. We do not consider that such an error in calculation which was never pointed out to the assessee can take the assessee into the mischief of Rule 8(3A). Default in payment of duty is different from short payment of duty or interest. Further the Commissioner himself has condoned this issue as recorded in para 5.7 of the order dated 31-12-2010. So we do not propose to dwell on this issue in greater detail.

13. We have considered the facts of the case, the law applicable and the arguments. From the provisions in Rule 8(3A) it is clear that the provisions of the sub-rule will apply only after 30 days from the due date for payment of duty for any calendar month. Going by this, the default by the appellants were only for two periods namely,-

- (i) 04-08-2006 to 19-12-2006
- (ii) 08-03-2007 to 13-03-2007

14. Rule 8(3A) puts restriction on utilization of credit and not on taking of credit of duty paid on raw materials used. There can be an ingenious argument that as per rule 8 (3A) of Central Excise Rules, the goods cleared during defaulting period are deemed to be cleared without payment of duty and when goods are cleared without payment of duty a manufacturer cannot take credit of duty paid on raw materials used. This argument has not been raised by revenue but we have considered this argument also. Actually Rule 8 (3A) says that the goods will be deemed to be cleared without

payment of duty and all the consequences under "these Rules" will follow. The reference is only to the C. E. rules and not to the Cenvat Credit Rules, 2004. The deeming fiction will apply only for applying penal consequences under Central Excise Rules 2002. The major consequence is that such goods would have been liable to seizure and confiscation under Rule 25 of C. E. Rules. In fact Rule 8(3A) is drafted to enable this as a means to compel the assessee to pay his declared dues promptly by the due date or at least within thirty days thereafter. Revenue has not chosen to use this deterrent of seizure and confiscation but has chosen to fasten huge liabilities through Show Cause Notices issued after considerable period of time. Once seizure is not adopted as a coercive measure for the impugned situation, the only other penal consequences that the Revenue can enforce are interest and penalties as per C. E. Rules and not denial of taking of Cenvat credit available under Cenvat Credit Rules 2004. The argument that the appellants collected the duty from customers but did not remit it to government is not quite appropriate because the Rules are made knowing fully well that the situations under Rule 8, and not just under Rule 8 (3A) are of that nature. Further even if assessee does not receive payments of the sale proceeds from the buyers then also payments of duty are to be made as provided in Rule 8.

15. During the defaulting period payments should have been made through cash. If it is not paid so but through Cenvat credit is not an appropriate payment. So interest on duty due on each clearance from the date of clearance to the date on which default was made good will be payable at rate specified under section 11AB of the Act till the defaulted amount is paid fully along with interest. That is to say there are two interest components to be paid (i) interest on the defaulted amount till it is paid (ii) interest on duty payable on all the clearances during the defaulted period which duty is not through cash but paid through Cenvat credit. If there was any short levy of interest which was not pointed out by the department when interest was paid such shortfall by itself

cannot be reason for considering the assessee to be in default till the payment of the interest correctly. So Interest for the amounts of duty defaulted for the months of June 06 to September 06 is payable. Further interest on duty due on clearances from 04-08-2006 to 19-12-2006 and also from 08-03-2007 to 13-03-2007 is payable by the appellants. The calculations may not have been checked seriously by the department because the department is too much focused on fastening liabilities too disproportionate to the offence by denying Cenvat credit and not on calculation of proper interest. Revenue may once again check the calculation of interest if they find it necessary.

16. For the sake of clarity we would like to add some more observations on this issue. Non-payment of excise duty arises often in administration of excise levy. Show Cause Notices are issued in such cases as per provisions of Section 11A of the Central Excise Act to recover duty short paid. Normally such short-payment can be made good by paying duty through Cenvat credit as authorized by Central Excise Rules, 2002 and Cenvat Credit Rules, 2004. So there should be a reason why such payment can not be accepted in this case. The reason being quoted is that this is a situation covered by Rule 8(3A) and the Rule prescribes that so long as the assessee is in default for any previous month payment through Cenvat credit is not a proper discharge of duty liability. This prohibition gets lifted the moment the default is made good along with appropriate interest on defaulted amount and normal situation is restored. So payments made through Cenvat credit during the defaulting period also becomes good payment once the default is made good by paying the defaulted amount along with interest. Interest on deemed non-payment of duty on clearances during the period of default is a separate consequence but not critical in deciding whether the assessee continues to be in default.

17. Now the issue to be decided is the quantum of penalty that is to be paid by the appellant. The argument that section 11AC will

not apply to the situation is trite as the assessee himself declares the default while filing the return and there is no suppression in the matter. The only question that can arise is whether penalty under Rule 25 or Rule 26 or Rule 27 will apply in this case. In view of the decision of Gujarat High Court in the case of CCE Vs. Saurashtra Cement Ltd-2010 (260) ELT 71 (Guj) we adopt the view that penalty under Rule 27 is the appropriate penalty and reduce the penalty on the Appellants to Rs. 5,000/-.

18. The appeal is thus partially allowed by setting aside the duty demanded and reducing the penalty to Rs. 5,000/-. If there is any short payment of interest in payments already made, either on defaulted amounts or on unauthorized use of Cenvat credit, by the Appellants the same will be payable if properly calculated and communicated.

(Pronounced in Court on 28-01-12)

(S.S. Kang)
Vice-President

(Mathew John)
Member (Technical)

MPS*