IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH: KOLKATA

Appeal No.E/176/2009, CO-58/2009

(Arising out of Order-in-Original No.42/Commr/CE/Kol-III/2008-09 dated 31.12.2008 passed by the Commissioner of Central Excise, Kolkata-III)

Commissioner of Central Excise, Kolkata-III

Applicant (s)/Appellant (s)

Vs.

M/s. TEXMACO Ltd.

Respondent (s)

<u>Appearance:</u>

Shri D.Haldar, AC(AR) for the Appellant (s)
Shri B.Thakkar, CA for the Respondent (s)

CORAM:
Hon'ble SHRI P.K.CHOUDHARY, Member (Judicial)
Hon'ble SHRI Bijay Kumar, Member (Technical)

Date of Hearing/Decision:- 18.05.2018

ORDER NO.FO/76201/2018

Per Shri P.K.Choudhary

The show cause notice was issued on the ground that the respondent have contravened the provisions of Section 11D and 11DD of Central Excise Act, 1944. The adjudicating authority dropped the proceedings initiated by the show cause notice. Hence, the present appeal before the Tribunal has been filed by the Revenue. The respondent assessee have filed cross objection being CO-58/2009.

2. Ld. AC(AR) on behalf of the appellant Revenue submits that the respondent has a unit at Belgharia which manufactures couplers/bogies and supplies to the respondent's another unit at Agarpara as well as to other

manufacturers. It is the case of the Revenue that the respondent collected the amount under invoice describing the amount of Rs.8,82,41,261/- as Central Excise duty without depositing the same. Similarly they have also collected education cess amounting to Rs.8,07,123/-. He further submits that Sl.No.4 of the Board Circular No.870/08/2008-CX dated 16.05.2008 has prescribed certain conditions. The Adjudicating Authority has not mentioned whether those conditions were complied by the respondent assessee.

3. Ld. Counsel for the respondent assessee submitted that the order passed by the Commissioner of Central Excise, Kolkata-III Commissionerate is just and correct and the appeal filed by the Revenue is misconceived, erroneous and is fit to be dismissed.

Ld. Counsel further submits that it is an admitted fact that from the Belgharia unit they removed the Couplers and Bogies to the Agarpara unit without payment of duty as provided under Notification No.6/2002-CE and 6/2003-CE after remitting 8% or 10% of the price of the same in terms of Rule 6(3) (b) of the Cenvat Credit Rules 2002/2004. The Agarpara Unit manufactured Railway Wagons with inputs viz. Couplers and Bogies received from their Belgharia Unit as well as their other manufacturers of Couplers and Bogies.

Ld. Counsel vehemently argued that the allegation that the said amount has been collected by the respondent from Railway under invoice describing the same as Central Excise duty is not correct. It would be evident from the relevant invoice that the respondent has claimed for reimbursement of total price of Couplers and Bogies as per procurement invoices. He further submitted that in terms of Para 2 (iv) of the contract No.2003/RS(1) 954/5/1477 dated 9.7.2003 and Contract No.2004/RS(1) 954/6/1511 dated 21.5.2004 with Railway Board and the clarification issued by the Railway Board vide its letter Reference No.2006/RS(1) 954/12(ED) (Texmaco) dated 07.12.2006, the amount of 8% or 10% remitted by the manufacturer of Bogies and Couplers as per Rule 6(3)(b) of Cenvat Credit Rules would be reimbursed by the Railways as part of the cost of wagons supplied by the assessee company against submission of documentary evidence of payment of 8% or 10%. IT is also the averment of the ld. Counsel that Section 11D applies in cases of collection of any amount in excess of the duty paid representing the same as excise duty, by the person who is liable to pay excise duty on the goods. In the present case there is no dispute that the assessee company is not liable to pay duty on either couplers , bogies or wagons and therefore question of collection of any amount in excess of the duty paid does not arise at all. In support of his submission he relied upon the decision of the Larger Bench in the case of Unison Metals Ltd. vs. Commissioner of Central Excise, Ahmedabad-1 [2006(204) ELT 323 (Tri.-LB)].

4. Heard both sides and perused the appeal records.

5. We find that the reversal of amount was done by the respondent Belgharia Unit from where the Bogies and Couplers were collected without payment of duty by the respondent. There is no dispute about the reversal of 8% or 10%. We also observed that the amounts were duly debited by TEXMACO Belgharia in terms of Rule 6(3) of Cenvat Credit Rules and it was not alleged that TEXMACO Belgharia raised appeal for recovery of said amount separately from where was recovered through the bill has been paid.

6. We also find that the Tribunal in the respondent assessee’s appeal being Excise Appeal No.465/2007 vide 75411/2016 dated 13.05.2016 by relying upon the Larger Bench decision in the case of Unison Metals Ltd. vs.

Commissioner of Central Excise, Ahmedabad-1 (Supra) and the CBEC Circular No.870/8/2008-CX (supra) have discussed the issue in details and allowed the assessees appeal.

7. Regarding the allegation of education cess amounting to Rs.4,93,532/- has not at all paid to the Government. The Adjudicating Authority has discussed the same in paragraph 10 of his Order, the relevant portion is reproduced for ready reference:

> *" 10. The real identity of the amount 'collected' (whether excise duty is payable or not) is of no relevance of Section 11D. What is relevant is only whether the collection was 'represented' as duty of excise. The representation as well be entirely false. The qualifying of the representation through the words 'in any manner' makes this clear. Therefore, the contentions of both sides on the question as to whether deposits under Rule 57CC are excise duty or not, are beside the point"*
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> *The said order of the Tribunal has been accepted by the department as communicated vide Circular no.870/08/2008-CX dated 16.05.2008. It is further clarified in the said Circular that as long as the amount of 8% or 10% is paid to the Government in terms of erstwhile rule 57CC of the Central Excise Rules, 1944 or rule 6 of the CENVAT credit Rules, the provisions of Section 11D shall not apply even if the amount is recovered from the buyers.*
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> *In the instant case on going through the invoices issued by the said assessee for realization of 8%/10% amount, it is observed that they mentioned 'Claim for reimbursement of total price of Bogies and Couplers as per procurement invoices as per Annexure-I enclosed'. In Annexure-I, they mentioned the same as duty debited by their Belghoria Unit. In the show cause notice, however, it is admitted that those amounts were duly debited by Texmaco, Belghoria in terms of Rule 6(3)(b) of CENVAT Credit Rules and it is not alleged that Texmaco, Belghoria raised bill for recovery of the said amount separately. Therefore whatsoever was recovered through the bill has been paid and in terms of the Hon'ble CESTAT's order read with Board's circular as mentioned supra, there is no scope for recovery of the demanded amount in terms of Section 11D of the Act. The allegation regarding Education Cess amounting to*

Rs.4,93,532/- not at all paid to Govt. has further been verified and it is observed that the same relates to some supplementary claim for which claim was once raised and disputed by Railways and those were paid by their supplier i.e. Belghoria Unit prior to April, 2005."

8. In view of the above discussions we find no infirmity in the impugned order and the same is hereby sustained.

9. In the result, the appeal is dismissed and the cross objection is disposed of.

(Dictated and pronounced in the Open Court)

S/d.
(P.K.Choudhary)
Member (Judicial)

S/d.
(Bijay Kumar)
Member (Technical)

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