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Obligation on Obligation



Author: G. Natarajan, S. Jaikumar

Nevergreen : Hi, Evergreen, How are you! How are things?

Evergreen : Hi! I'm fine! How about you? Anything interesting?

Nevergreen : Yeah! Yesterday, I met another guy like of you, who argues that he can collect the 10% amount paid by him under Rule 6 of the Cenvat Credit Rules, 2004, from his customers.

Evergreen : You mean that he manufactures both dutiable and exempted goods and has not maintained separate records and is paying 10 % of the price of the exempted goods?

Nevergreen : Exactly.

Evergreen : Yeah! He is right! Who says that he cannot collect this 10 % amount from his buyers?

Nevergreen : You stand to your name. How can he collect it? Is it not his obligation?

Evergreen : So what? Even payment of Excise duty is also one's obligation. Should he not collect it from the buyers?

Nevergreen : Rule 6 does not talk anything about such collection.

Evergreen : No Rule shall ever speak of collection from the buyers. It is ones commercial prudence and capability. Ok. Whatever it be, Rule 6 does not also prohibit collecting the same from the buyers. Then where is your problem? As it is said, "What is not prohibited is always permitted".

Nevergreen : But there are umpteen decisions in support of my view.

Evergreen : I can also cite decisions in my support and the case of M/s Nu Wave Shoes Vs CCE – 2001(138) ELT 331, being one. Dear Friend, you may note that, at the first instance, the amount has been paid / debited and then only, it is realised from the buyer. Accordingly, it has been rightly held that the provisions of Section 11 D are not at all attracted.

Nevergreen : But this decision has been distinguished in the case of M/s Vimal Moulders (I) Limited VS CCE – 2004 (164) ELT 302, wherein, the Bench has held that such collection is not at all permissible. Kindly read the following portion from the decision.

"The appellants have opted for the procedure prescribed under subrule (1) of Rule 57CC as they pay an amount equal to 8% of the price of the exempted goods at the time of their clearance. This amount is in lieu of the Modvat credit which has been availed by them in respect of inputs which have gone in the manufacture of the exempted products. It is also not disputed by the Appellants that they had collected duty at the rate of 8% ad valorem from their customers while selling the exempted products. Thus this amount of duty collected from the customers is in excess of the duty leviable on the goods. Section 11D of the Central Excise Act as amended by Section 103 of the Finance Act, 2000, provides that every person who has collected any amount in excess of the duty assessed or determined and paid on any excisable goods, from the buyers shall pay the amount so collected to the credit of the Central Government. As the duty assessed is nil in view of the exemption, the entire amount collected by the Appellants is liable to be paid to the Central Government. With due respect, we differ from the view taken in the case of Nuo Wave Shoes as perhaps the Tribunal was not informed the correct nature of the amount



paid by the manufacturer at the rate of 8% at the time of clearance of the exempted goods”.

So, this payment of 10 % is nothing but reversal of the credit already availed. If the same is collected from the buyers once again, will it not amount to collection of an amount as representing duty of excise, attracting the provisions of section 11 D?

Evergreen : Are you affected by selective amnesia? No doubt, the payment is only in lieu of credit availed on the inputs, which is otherwise not eligible. But, you are forgetting the fact that initially the manufacturer has purchased those inputs on payment of duty and borne the incidence of duty. When such goods are converted into final products (exempted final products) and sold, what is the wrong in collecting the duty incidence suffered by him on the inputs?

Nevergreen : I may have selective amnesia but am afraid you have a judicial amnesia! Please read the decision in the case of M/s P.T. Steel Industries Vs CCE – 2004 (177) ELT 1117, wherein, my view is strongly held beyond doubt.

Evergreen : Why don't you see the recent decision in the case of CCE Vs M/s Pennar Industries – 2005 (183) ELT 382, wherein it has been held that :

"The respondents had correctly debited 8% of the sale value of the exempted goods supplied to M/s. BEML. This amount is not considered as duty. There is no law, which says that they should not collect this amount of 8% from the buyer of the goods. Section 11D of the CE Act, 1944 will be attracted only when duty is collected and not paid to the exchequer. When the amount collected is not duty, Section 11D will not come into the picture."

Nevergreen : Yes. I agree with the judgement. No doubt, the amount payable is not duty. But, when the same is shown as "duty" and collected from the buyers, the same shall attract the vice of Section 11 D. But, it appears that this aspect has not been dealt with in this case. With due regards to the Hon'ble Tribunal, I wish to say that once the amount is collected as "duty", it shall be paid to the Government under Section 11 D, even though the said amount is not duty. In fact, Section 11 D is meant only for those cases, where any "amount" is collected, representing it as "duty of excise".

Evergreen : But you never started your arguments so! You were arguing that the 10% shall never be collected from the buyers. Now you say, it shall not be collected only as "duty"!

Nevergreen : Sorry! I stand corrected. If that 10% is collected as "duty" the entire 10% shall be deposited under Section 11D. If it is not collected as "duty", then the manufacturer shall pay another 10% upon such 10% collected by him, treating that 10% as a part of the sale price!

Evergreen : Ridiculous proposition!

Nevergreen : Hold your words baba! There is a Board Circular on the subject. It is Circular No. 599/36/2001 Dated 12.11.2001.

Evergreen : So what? I respectfully differ from it. The Circular says that Rule 57 CC does not envisage the amount would separately be collected from the buyer. Why should it be envisaged in the Rule? Which Rule says that the excise duty paid by a manufacturer can be collected from the buyer? Since it is an indirect tax, the same can be collected. The above comparison would also highlight that there is no harm, if the amount is collected. The observation in the Circular that if the amount is not collected as duty, 8 % (now 10%) of such 8% has to be collected. What if the said 10 % on 10 % is again collected? 10 % on 10 % of 10 %? How many times?

Nevergreen : If it is ridiculous, then what is your sane proposal?

Evergreen : I have a logical approach to my argument. The payment of 10 % is only in lieu of the input credit availed by the manufacturer, calculated on a notional basis. Let us compare this case with that of removal of inputs as such.

Removal of credit availed inputs as such	Use of credit availed inputs in the manufacture of exempted goods.
Inputs were originally purchased on payment of duty.	Inputs were originally purchased on payment of duty.
Credit of such duty availed.	Credit of such duty availed.
Inputs are removed as such.	Inputs are used in the manufacture of exempted goods.
An invoice is raised for the removal of inputs as such.	An invoice is raised for sale of the exempted goods.
The credit originally availed is reversed.	Payment of 10 % of the price of the exempted goods is made.
The credit thus reversed is shown in the invoice and collected from the buyer.	The said amount of 10 % is shown on the invoice and?

A comparison of the above two situations would reveal that there is no reason to say that the payment of 10 % should not be collected from the buyers. The removal of inputs "as such" and the given transaction are akin in nature and if the said collection is barred under the guise of Section 11 D, it would lead to lack of equity.

Nevergreen : We are talking only about the 10% payment. There is another mode of actual reversal of credit for selected commodities and selected notifications, prescribed under Rule 6. In such cases, what could be your argument? You will collect that actual reversal too?

Evergreen : Interesting! I think that this issue requires to be examined in its entire gamut, preferably by a Larger bench, in view of the conflicting decisions.

Nevergreen : OK. Bye. Take care. See you later!

