

**Ccex Vs. Delta Elastometal Compound Pvt.**

**Ccex Vs. Delta Elastometal Compound Pvt.**

**SooperKanoon Citation :** [sooperkanoon.com/40779](http://sooperkanoon.com/40779)

**Court :** Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

**Decided On :** Nov-14-2005

**Judge :** S T T.V.

**Appellant :** Ccex

**Respondent :** Delta Elastometal Compound Pvt.

**Judgement :**

1. This is an appeal filed by the Revenue against the Order of the Commissioner (Appeals) who had earlier rejected the plea of the Revenue to enhance the penalty. M/s. Delta Elastometal Co. Pvt. Ltd. engaged in the manufacture of rubber compound had availed CENVAT Credit wrongly on Capital goods for which penalty (Rs. 30,000/- and Rs. 20,000/-) was imposed by the lower authorities on the respondents. The penalty was imposed in one case under Section 11AC read with Rule 12 and in another case under Rule 26.

2. The reason given by the Commissioner (Appeals) for non-enhancement of penalty is as follows: However, from the judgments of Hon'ble CEGAT in the cases relied upon by the respondent M/s. Delta Elastometal, Plant II, and so also in the case laws mentioned below it is noticed that Hon'ble CEGAT and Hon'ble High Court have held that penalty under Section 11AC equal to duty amount is maximum but not mandatory. C.C.E. v. TELCO Above judgments of Hon'ble CEGAT & High Court are binding and applicable in this case. In this case full credit availed at Plant I is reversed while preparing the invoice and also the 50% credit availed at Plant II is also reversed and the capital goods on which credit is availed

is also available in Plant II. In view of this the amount of penalty imposed by the adjudicating authority appears to be proper. In view of this I see no reason as to interfere with the penalty imposed by the adjudicating authority.

3. Aggrieved by the said Order of the Commissioner (Appeals) Revenue has come in appeal.

4. During the hearing the learned Jt. C.D.R. reiterates the contents of the appeal. According to him Section 11AC is an important provision which is mandatory in nature and hence, penalty should have been imposed equal to the amount of duty evaded.

5. Learned Advocate representing the Respondents has brought forward the case law relied upon i.e. CCE, Delhi-III, Gurgaon v. Machino Montell (I) Ltd. 2004 (62) RLT 709 (T) contending that leaving alone enhancing the penalty, in their case whatever penalty imposed by the lower authority have to be set aside in view of the said order. For this, learned Jt. C.D.R. informs that the respondents were never aggrieved of the order of the lower authorities and only at this late stage without following the procedure of filing the appeal or cross objection they are pleading for relief.

Tribunal had an occasion to examine similar matter in this case though the Revenue (respondent) had not filed any appeal or cross objection against that part of the order of the Collector (Appeals).

This Order of the Tribunal also referred to Rule 10 of Customs, Excise & Gold (Control) Appellate Tribunal (Procedure) Rules, 1982 which reads as under: 10. Grounds which may be taken in appeal. - The appellant shall not accept by leave of the Tribunal, urge or be heard in support of any ground not set forth in the memorandum of appeal, but the Tribunal, in deciding the appeal, shall not be confined to the grounds set forth in the memorandum of appeal or those taken by leave of the Tribunal under these rules: Provided that the Tribunal shall not rest its decision on any other grounds unless the party who may be affected thereby has had a sufficient opportunity of being heard on that grounds. J.K. Cotton Spg. & Wvg. Mills Co. Ltd. v. CCE - Para 26 of the said judgment refers to the

observations of the Constitution Bench in *Ramanbhai Ashabhai Patel v. Dabhai Ajitkumar Fulsinji and Ors.*

The Constitution Bench held that this Court has power to decide all points arising from the impugned judgment and even in the absence of an express provision like Order 41, Rule 22, CPC, this Court can devise appropriate procedure to be adopted at the hearing. The observations of the Bench which are relevant now are the following: There could be no better way of supplying the deficiency than by drawing upon the provisions of a general law like the Code of Civil Procedure and adopting such of those provisions as are suitable. We cannot lose sight of the fact that normally a party in whose favour the judgment appealed from has been given will not be granted special leave to appeal from it. Consideration of justice, therefore, require that this Court should in appropriate cases permit a party placed in such a position to support the judgment in his favour even upon grounds which were negative in that judgment.

In this judgment the Apex Court held that the respondents cannot be precluded in this appeal from canvassing for reversal of a finding contained in the impugned judgment despite its end result being in their favour. Learned Advocate again refers to the case of *Polycon Papers Ltd.* and argued that the Code Civil Procedure, 1908, Order 41 Rule 33 which empowers the Appellate Court to consider even though appeals may not have been filed against such decree. *Ronuk Industries Ltd. v. Collector of Customs*. In this case the Tribunal has observed the following: It is a settled law that despite the giving up or abandonment of a plea by a party the court or the adjudicating authority decides the issue on merits then the party which abandoned or had given up the issue would be entitled to agitate the point abandoned or given up before the Appellate forum. I, therefore, reject Shri Gidwani's contention that appellant cannot be allowed to challenge the legality of the order passed by the Appellate Collector.

8. Learned Jt. C.D.R. has brought to the notice the following case laws: (Bang.) *Gee Kay Enterprises v. CCE, Bangalore*. In this the Tribunal had an occasion to observe as follows: The appellants did not choose to file an appeal against the Order-in-Original No. 19A/2000, 'dated 13.3.2000. Therefore, such cross-objection

cannot be filed by the appellants against that order portion on which the department is not aggrieved. Such cross-objection is not maintainable. There is no provision carved out in Section 35E to enable the party to file cross-objections in the departmental appeal before the Commissioner (Appeals) on the portion of order not appealed by them.(SC) Jamshed Hormusji Wadia v. Board of Trustees, Port of Mumbai. In this case the Hon'ble Supreme Court has observed as follows: 41. Right to file cross-objection is the exercise of substantive right of appeal conferred by law. Cross-objections partake of the right of preferring an appeal. The procedure is different and so is the rule of limitation [See, Municipal Corporation of Delhi & Engineers and Ors. v. Intl. Security & Intelligence Agency Ltd. and Superintending Engineer and Ors. v. B. Subha Reddy ]. Against a decision by the High Court or Tribunal which is partly in favour of one and partly in favour of the other, both the parties are aggrieved and each one of them has a right to move an application in this Court seeking leave to appeal.

One who does not do so and allows the prescribed period of limitation to lapse, cannot come up by way of cross-objections on the other party coming up in appeal, though we must qualify our statement of law by reference to Sri Babu Ram v. Shrimati Prasanni and Ors.

Learned Jt. C.D.R. has further argued that in this case the Hon'ble Supreme Court had not allowed the party to file cross-objection as the time limit was over. The learned Jt. C.D.R. has also pointed out the case law relating to the appeal filed by Rayman Shoes Company against the CEGAT Order No. A/842/2002-NB, dated 16.7.2002 and . While dismissing the appeal the Hon'ble Supreme Court passed the following order: There is no proper explanation for the inordinate delay of 619 days in filing the Appeal. Application for condonation of delay is dismissed.

The Jt. C.D.R. also referred to the decision of the Tribunal in the case of Saheli Synthetics Pvt. Ltd. v. CCE, Kandla (Order No. A/681 to 683/WZB/05-C-II dated 19.7.2005 in which the Tribunal had upheld the penalty even though duty was paid before issuance of show cause notice.

9. I have examined the case records and heard both sides. While the Revenue has argued for enhancement of penalty, the respondents have come out with

arguments against it. Accordingly to them whatever penalty imposed by Commissioner (A) has to be brought down to NIL in view of the Tribunal's order in the case of Machino Montell (I) Ltd. 10. It is a fact that respondents were given due opportunity to agitate before this Tribunal but they had never availed of this. They have also not bothered to file Cross Objection in the matter. Now, at this late stage they have come up with arguments, for what can be referred to as "fortuitous benefit." Relying upon the Hon'ble Supreme Court's order in Jamshed Hormusji Wadia's case and the Tribunal's order in the case of G.K. Enterprises discussed above. I do not find any merits in the arguments advanced by the respondent in this case. At the same time, in respect of arguments made by the Revenue for enhancement of penalty too, I am not in agreement particularly due to the sea-change effected by the Larger Bench of this Tribunal in Machino Montell (I) Ltd. Case.

11. I, therefore, do not find merits in the arguments of the Revenue as well in so far as enhancement of penalty is concerned. I therefore uphold the order of the Commissioner (A) rejecting the appeal filed by Revenue.

**SooperKanoon - India's Premier Online Legal Search - [sooperkanoon.com](http://sooperkanoon.com)**