CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
38,MG Marg Civil Lines,Old Red Building,Allahabad-211001
Regional Branch, Allahabad

Dated: 18/10/2016

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. A/70985/2016-EX[DB] dated 31/08/2016

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section 35-C(1) of the **Central Excise and Salt Act, 1944.**

Asstt. Registrar

Application	Appeal	Name and Address of Appellant
1	E/2246/2007	BHARAT HEAVYN ELECTRICAL LTD SR.MANAGER(EXCISE)M/S BHEL, P.O. BHEL KHAILAR, JHANSI(UP)
		Name and Address of Respondent
2		-C.C.E. KANPUR 117/7, Sarvodaya Nagar, Kanpur 208005.

Copy To

3Advocate(s) / Consultant(s):

Z. U. Alvi
D-8,BDA COLONY,
ADJACENT GARUDA TRAVELS.,
KOH-E-FIZA, BHOPAL,
MADHYA PRADESH
462001

4 Bar Association, CESTAT, Allahabad

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

6 M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, 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 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)
10 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070
11 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad -- 38
12 The ICFAI society, 52, Nagarjuna Hill,Punjagutta Hyderabad.-500082
13 M/S Knowledge Processing Pvt. ltd.(taxmanagementindia.com),FF-19,1st Floor,Cross River Mall,CBD Ground,Near Karkardooma Court,Delhi-110032
14 C.D.R. 15 Office Copy 16 Guard File

Asstt. Registrar

27/10/16
ISSUED ON

SIGN. (DESPATCH SECTION)
CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
38, M. G. MARG, ALLAHABAD-211001.

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, REGIONAL BENCH : ALLAHABAD

Appeal No.E/2246/2007-EX[DB]

Arising out of Order-in-Original No.05/Ayukt/2007 dated 18.04.2007 passed by Central Excise, Kanpur.

For approval and signature:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. ANIL G. SHAKKARWAR, MEMBER (TECHNICAL)

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1. Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982? : No
2. Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not? : Yes
3. Whether His Lordship wishes to see the fair copy of the Order? : Seen
4. Whether Order is to be circulated to the Departmental Authorities? : Yes

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M/s Bharat Heavy Electrical Ltd. ...APPELLANT(S)

VERSUS

Commissioner of Central Excise, Kanpur ...RESPONDENT (S)

APPEARANCE:

Shri Z.U. Alvi, Advocate for the Appellant (s)
Shri Rajeev Ranjan, Joint Commr. (AR) for the Respondent (s)

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. ANIL G. SHAKKARWAR, MEMBER (TECHNICAL)

DATE OF HEARING & PRONOUNCEMENT : 31.08.2016

FINAL ORDER NO. – 70985/2016

Per Mr. Anil Choudhary :

This appeal has been preferred by the appellant-assessee against Order-in-Original No.05/Ayukt/2007, dated 18.04.2007, whereby for goods cleared for erection of Mega Power Plant under Notification No.06/2006-CE read with Notification No.21/2002-CUS, the exemption was denied for the reason that as required in Notification No.6/2006-CE, the appellant does not fulfill the related conditions in Notification No.21/2002-CUS being – the power purchasing state has agreed to provide recourse to that state's share of Central plan allocations and other devolutions towards discharge of any outstanding payment in respect of purchase of power.

2. During the scrutiny of records for the period March, 2006 to October, 2006, Revenue observed that the appellant was clearing finished excisable goods under chapter 85 of CET Act, 1985 to M/s Jindal Power Ltd. for their Mega Power Project at Raigarh at Nil rate of duty of under Notification No.6/2006-CE. Serial No.91 of Notification No.6/2006-CE grants exemption to the goods falling under any chapter of the first schedule to the CET Act, 1985 provided that the goods are supplied against International Competitive bidding (ICB). Serial No.91 of Notification No.6/2006-CE is reproduced for ready reference:-

S.N.	Chapter heading/Sub-heading No.	Description of excisable goods	Rate under the First Schedule	Rate under the 2nd Schedule	Condition No.
91	Any Chapter	All goods supplied against International bidding.	NIL	NIL	19

The condition No.19 of Notification No.6/2006-CE dated 01.03.2006 reads as under:-

"19 - If the goods are exempted from the duties of Customs leviable under the First Schedule to the Customs Tariff Act, 1975 and the Additional duty leviable under Section 3 of the said Customs Tariff Act, when imported into India."

3. Thus, for the admissibility of exemption under Notification No.6/2006-CE, it was to be seen as to whether the said goods were exempt or not under Serial No.400 of Notification No.21/2002-Cus dated 1st March, 2002 as amended. The said notification grants exemption to goods required for setting up of Mega Power projects. The serial No.400 of the Customs notification is reproduced here for ready reference:

S.N.	Chapter heading/Sub-heading No.	Description of excisable goods	Standard Rate	Additional Rate	Condition No.
400	9801	Goods required for setting up of any Mega Power project, that is to say: (a) An Inter State Thermal Power Plant of a capacity of 1000 MW or more; or (b) An Inter-State Hydel Power plant of a capacity of 500 MW or more, as certified by an officer not below the rank of a Joint Secretary to the Govt. of India, Ministry of Power.	NIL	NIL	86

Further Condition No.86f of the Customs notification reads as under:-

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(a) If an officer not below the rank of a joint Secretary to the Govt. of India in the Ministry of Power certifies that:-

(i) The power purchasing state has constituted the Regulatory Commission with full powers to fix tariffs;

(ii) The power purchasing state undertakes in principle to privatize distribution in all cities, in that state, each of which has a population of more than one million, within a period to be fixed by Ministry of Power; and

(iii) The power purchasing state has agreed to provide recourse to that state's share of Central plan allocations and other devolution towards discharge of any outstanding payment in respect of purchase of power;

(b) In the case of import by a central Public Sector undertaking, the quantity, total value, description and specifications of the imported goods are certified by the Chairman and Managing Director of the said Public Sector undertaking: and

(c) In the case of import by a Private Sector project, the quantity, total value, description and specifications of the imported goods are certified by the Chief Executive officer of such project.

5. Further facts are that the appellant had been clearing their goods to M/s Jindal Power Ltd. for their 4x250MW OP Jindal Super Thermal power project at Raigarh since March, 2006 which was duly certified by the Joint Secretary to the Government of India,

Ministry of power as Mega Power project vide certificate dated 25.06.2005 as required under Notification No.21/2002-Cus. But the said Joint Secretary certified only condition No.(i) and (ii) of condition No.86(a) of the Notification No.21/2002-Cus, in the certificate dated 25.06.2005. The Range-I Superintendent asked the appellant to produce certificate in respect of Clause (iii) of Condition No.86(a) of Notification No.21/2002-Cus. The appellant produced a letter dated 17th August, 2005 of the Joint Secretary, Ministry of Power, Government of India, which is reproduced for reference :-

"It is clarified that the third stipulation namely the power purchasing State has agreed to provide recourse to that state's share of central plan allocation and other devolutions towards discharge of any outstanding payment in respect of purchase of power certificate, is not applicable in case of Independent Power Projects".

6. It appeared to Revenue that the appellant have not received any certificate or proper certificate for condition No.(iii) in case of Independent Power Projects by the Joint Secretary, Ministry of Power and accordingly certificate for fulfillment of condition No.(iii) was not issued to Jindal Powers Ltd. and as such the appellant could not avail the exemption of Notification No.06/2006 read with Notification No.21/2002-Cus. Accordingly, show-cause-notice was issued dated 15th February, 2007, demanding duty of Rs.1,21,86,287/- along with interest. The SCN was adjudicated on

contest and the proposed demand confirmed along with interest. Being aggrieved the appellant have preferred appeal before this Tribunal.

7. Heard the parties and perused the record.

8. It have been urged by learned Counsel for the appellant that the Condition No.(iii) in serial No.86(a) of Notification No.21/2002-Cus is not applicable in the facts and circumstances of their case as the Mega Power Plant of Jindal is an independent power project. In view of the clarification given by the Joint Secretary, Ministry of Power dated 17th August, 2005 and in view of the facts on record that being an independent power project and the finance from the Central Government not involved therein, the said condition No.(iii) becomes otiose or inapplicable in the facts and circumstances. It is also pointed out that the said condition No.(iii) was subsequently deleted with effect from 26th May, 2006 vide Notification No.49/2006-Cus. The Learned Counsel also pointed out that the issue is no longer res-Integra . In view of the precedent Ruling of this Tribunal in the case of Jindal Steel & Power Ltd. Vs. CCE reported at 2015 (329) E.L.T. 595 (Tri.-Del.), wherein under similar facts and circumstances, the assessee had during the period July, 2005 to May, 2006 supplied materials to L & T Ltd. on account of Jindal Power against ICB at Nil rate of duty under Notification No.06/2002-CE for setting up of 1000 MW Thermal Power Plant by L & T for Jindal Power, under Notification No.6/2002 read with Notification No.21/02-Cus (serial No.400).

The Division Bench of this Tribunal have held, taking notice of certificate of Joint Secretary in the Ministry of Power which certified fulfillment of the first two conditions and in regard to the 3rd condition stated that same is not applicable for independent power project, held- When a particular condition prescribed in Notification No.21/2002-Cus. for full Customs duty exemption is not applicable and for this reason the said condition cannot be certified, its fulfillment cannot be insisted, in accordance with principle of 'lex non cogit ad impossibilia'. Further, holding that denial of exemption was not correct, allowed the appeal.

8. Having carefully considered the rival contentions, we find that the facts of this case are squarely covered on all four by the aforementioned Ruling in Jindal Steel & Power Ltd. (supra) . We further take notice of another Division Bench, ruling of this Tribunal in Kent Introl Pvt. Ltd. Vs. CCE, wherein also, where the manufacturer-assessee had supplied valves to use for petroleum operations, it was held grounds of non-eligibility of Notification Nos.6/2006-CE and 21/2002-CUS were not established under the fact that supply was made as per contract awarded under ICB as certified by the Project Implementing Authority and certificate issued by General Manager (Project) of Oil & Natural Gas Corporation. Further, suppliers name figured as sub-contractor in the certificate. As per Item 15 of list 12 of Notification No.21/2002-CUS all types of valves used for petroleum operations eligible for exemption from Basic Customs duty as also CVD,

satisfying condition No.19 of Notification No.6/2006-CUS. It was further held that condition No.29 of Notification No.21/2002-CUS applies to importer of goods and not to domestic manufacturer of said goods. The said order of this Tribunal was upheld by Hon'ble Bombay High Court reported at 2016 (331) E.L.T. 77, wherein the Hon'ble High Court held as far as Condition No.29(c)(i) to (iii) is concerned, the Tribunal found that all such stipulations, as are referred, have to be fulfilled by the importers of goods. These are not applicable to the domestic importers. Upon perusal of Condition No.29, we are satisfied that the Tribunal's factual conclusion does not raise any substantial question of law. Once the Revenue does not dispute that the assessee is a domestic manufacturer, then assessee has to satisfy only one of those conditions, particularly that the supply must be of goods in relation to contracts awarded under international competitive bidding procedure, then that condition is squarely satisfied. The condition such as Condition No.29 which pertains to an importer of the goods need not be, in the given facts, satisfied by the domestic manufacture, and that is the conclusion reached by the Tribunal.

9. Accordingly, we allow the appeal with consequential benefits and set aside the impugned order.

Sd/-
(ANIL G. SHAKKARWAR)
MEMBER (TECHNICAL)

Sd/-
(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

Mishra

सत्यापित प्रति / Certified True Copy
26.10.16
सहायक रजिस्ट्रार / Asstt. Registrar
सीमाशुल्क, उत्पाद शुल्क एवं सेवा कर अपील अधिकरण / (C.E.S.T.A.T.)
38, एम. जी. मार्ग, इलाहाबाद-211001
38, M. G. MARG, ALLAHABAD-211001