CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
OLD RED BUILDING, 38,M.G.Marg,CIVIL LINES, ALLAHABAD

Dated 11/3/2016

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. **A/ 70176/2016 SM&MISC ORDER NO 70138/2016** dated 08/03/2016

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
E/MISC/50058/2015	E/3096/2012	JAI JAGDAMBA MALLEABLES PVT LTD A-13-14 INDUSTRIAL AREA BIJOLI, JHANSI
	Name and Address of Respondent	COMMISSIONER OF CENTRAL EXCISE, KANPUR 117/7, SARVODAYA NAGAR KANPUR(UP)

Other Appellants and Respondents as per Annexure

Copy To

3Advocate(s) / Consultant(s SH RUPESH KUMAR,ADV
F-12A(L.G.F) KAILASH COLONY
NEW DELHI

4 Bar Association, CESTAT, ALLAHABAD
5 Director Publications, Customs, Excise, I.P. Estate, Delhi

6 M/s Centax Publications Pvt. Ltd., 1512-B, Bhisham 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 Easy Service Tax Online Dot Com Pvt. Ltd., 407A, Iscon Mall, Satellite Road, Ahmedabad-15

10 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)

11 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070

12 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad - 38
13 The ICFAI society, 52, Nagarjuna Hill,Panjagutta Hyderabad.-500082
14 C.D.R. 15 Office Copy ~~16~~ Guard File.17.M.S KNOWLEDGE PROCESSING PVT LTD(TAMMANAGEMENTINDIDA.COM)

Asstt. Registrar
Regional Bench, Allahabad

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, REGIONAL BENCH : ALLAHABAD

Single Member Bench

E/Misc./50058/2015 In Appeal No. E/3096/2012 (SM)

[Arising out of Order-in-Appeal No.276-CE/APPL/KNP/2012 dated 31.08.2012 passed by Commissioner (Appeals), Customs & Central Excise, Kanpur]

1.	Whether Press Reporter may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	No
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 Jai Jagdamba Malleables Pvt. Ltd. **Appellant**

Vs.

CCE, Kanpur **Respondent**

Appearance:

Present for the Appellant: Shri Anurag Mishra, Advocate

Present for the Respondent: Shri S.V. Nair, Assistant Commissioner (AR)

Coram: Hon'ble Shri Anil Choudhary, Judicial Member

Date of Hearing/Decision: 08/03/2016

Final ORDER No. 70176/2016
MISC ORDER No 70138/2016

Per: Anil Choudhary

The appellant is in appeal against Order-in-Appeal dated 31/8/2012 passed by the Commissioner (Appeals) Customs, Central Excise and Service Tax, Kanpur.

2. The appellant a Private Limited Company, purchased the assets of one M/s Hans Pharmaceutical & Chemical Private Ltd. from the Pradeshik Industrial Corporation Ltd. U.P., (PICUP for short) (State Finance Corporation) which sold the assets of the said Hans Pharmaceutical Chemicals exercising – statutory powers under section 29 and 30 of the State Finance Corporation Act. Thereafter the appellant acquired the assets, free of any encumbrances, from the said Corporation, vide agreement of sale dated 21/11/94 for valuable consideration. In the said agreement clause 12 provides, in respect of statutory dues as follows: – "Appellant will have no concerned with any pending dues of the borrower and the appellant is only purchasing assets, sold by the Corporation. Similarly the statutory dues such as Sales Tax, Excise duty etc. would not be borne by the purchaser company."

3. The appellant was granted fresh registration under the Central Excise Act and Rules, sometime in 1996-1997. A notice dated 24/8/2008 was issued by the Range Superintendent Jhansi calling upon the appellants to deposit tax dues amounting to Rs.21,97,506/- pending for realisation against 'Hans Pharmaceutical and Chemicals Private Ltd'. Further stating that the said unit was taken over by pickup for default in the payment of loans to the Corporation, and the assets of the said company were sold to the appellant. It was further stated that the said amount is recoverable, In the light of judgement of Honourable Supreme Court in the case of Macson Marbles Pvt. Ltd. V/s Union of India in (Civil Appeal Number 4463 of 1997 decided on 11/11/2003), 2003(158) ELT424 within 7 days, failing which, special mode of recovery as provided under the Customs Act is likely to be taken. The appellant replied immediately stating that they have only

purchased the assets and have not acquired the business of Hans Pharmaceuticals and Chemicals, as a going concern. Further, the tax dues of Hans Pharmaceuticals and Chemicals, cannot be collected from them and the Revenue may pursue the matter with pickup or Hans Pharmaceuticals.

4. Thereafter on being so advised the appellant preferred a Writ Petition before the Honourable Allahabad High Court being Writ Petition Number 4444 of 2004. In terms of the Interim Order, the appellant deposited Rs.10 lakhs with the revenue, vide TR-6 Challan dated 3/11/2004, a copy of which is Annex~~ure~~ed at page 4 of the Appeal Book. Subsequently, vide the Final Order dated 22/11/2010, the Honourable High Court dismissed the writ petition with a direction to the appellant to seek alternative remedy, as available under Section 35 of the Central Excise Act. The appellant, ~~in~~ considering the view taken by Hon'ble High Court in Laxmi Oil & Vanaspati (P) Ltd. V/s. CCE preferred a review application being R.P. defective number 373 of 2011, which was also dismissed granting liberty to prefer appeal, within a period of one month from the date of order dated 28/5/2012. In response thereto the appellant preferred an appeal before the Commissioner (Appeals), who vide the impugned order held that the confirmed dues of the Seller Company (Hans) are recoverable from the buyer company, that is, appellant and accordingly, rejected the appeal. Being aggrieved the appellant is before this Tribunal.

5. Heard the parties.

6. In the facts and circumstances and having considered the rival contentions I find that there was no appealable order before the

Commissioner (Appeals). As such the order in appeal is set aside as non est. So far as the notice issued by the Superintendent dated the 24/8/2004 it is concerned, I find that the issue is covered in favour of the appellant, in the case of Laxmi Oil & Vanaspati Pvt. Ltd. Vs. C.C.E., of the Honourable Allahabad High Court, in writ petition number 1673/2004 wherein under similar facts and circumstances, vide the Final Order dated 06/8/2010 the Honourable High Court held that Central Excise Department have only 2nd charge over the property and have not right to recover such dues from subsequent bonafide purchaser of PICUP, the 1st charge holder. The Honourable High Court referring to the ruling of the Apex Court in Macscon Marbles Pvt. Ltd. (supra), held is distinguishable and observed that the said ruling nowhere held that Rule 340 of the Rules, create a 1st ~~change~~ charge over property in favour of Central Excise Department.

7. The ld. Counsel also relied on the ruling of the Apex Court in the case of Rana Girders Ltd. versus Union of India reported in 2013 (295) E.L.T. 12 (S.C.) wherein under the fact that the State Finance Corporation, in the event of default had ~~about~~ advertised the unit for sale and as per the public notice as well as the Sale Deed/Agreement having specific clause, that the attached properties were sold free from all encumbrances, but also having the stipulation that "all these statutory liabilities arising out of the land, shall be borne by the purchaser in the sale deed" and "all the statutory liabilities arising out of the said properties" shall be borne by the vendee, and vendor shall not be held responsible, in the agreement of sale. It was held that Excise Duty were not statutory liabilities which arise out of land and building or

plant and machinery and thus did not arise out of the properties. Further held that the dues of Excise Department became payable on manufacturing of excisable items by erstwhile owner, hence they were in respect of those items produced and not plant and machinery which was used for purpose of manufacture. It was also held that only in case where buyer had purchased entire business, as a going concern, he was liable for the Central Excise duty as well. Otherwise, he could not be fastened with liability relating to dues of Government in absence of specific statutory provision stipulating "first charge on the purchaser". It was further held that State Finance Corporation, being secured creditor, had priority over Excise dues.

8. The ld. ~~Advocate~~ A.R. for Revenue relies on Rule 230 of Central Excise Rules 1944 which reads as follows:

> *Rule 230.* ***Goods, plant and machinery chargeable with duty and not paid.***
>
> (1) *When the duty leviable on any goods is owing from or by any person carrying on trade or business, whether as a producer, manufacturer or as dealer in such goods, all excisable goods, and all materials and preparations from which any such goods are made, and all plant, machinery, vessels, utensils, implements and articles for making or manufacturing or producing any such goods, or preparing any materials or by which the trade or business is carried on, in the custody or possession of the person carrying on such trade or business, or in the custody or possession of any agent or other person in trust for or for the use of the person carrying on such trade or business, may be detained for the purpose or exacting such duty; and any officer duty authorised by general or special order of the Central Board of Excise and Customs or the Collector may detain such goods, materials, preparations, plant, machinery, vessels,*

utensils and articles until such duties or any sums recoverable in lieu thereof are paid or recovered.

(2) *Where any such person transfers or otherwise disposes of his business in whole or in part, or effects any change in the ownership thereof, in consequence of which he is succeeded in the business or trade or part thereof by any other person or persons, all excisable goods, materials, preparations, plant, machinery, vessels, utensils, implements and articles in the custody or possession of the person or persons succeeding may also be detained for the purpose of exacting duty due from the producer, manufacturer or dealer up to the time of such transfer, disposal or change, whether such duty has been assessed before such transfer, disposal or change, but has remained unpaid or is assessed thereafter.*

9. He also relies on the ruling of Honourable Gujarat High Court in the case of Gujarat State Textile Corporation Ltd. Vs. Assistant Collector of Customs reported in 1998 (98) E.L.T. 64 (Guj.) where in it was held, detention of goods for ~~the~~ exacting payment of arrears of Central Excise duty under Rule 230 (2) of Central Excise Rules 1944 is possible, from successors when there is voluntary transfer or otherwise the owner is disposing of his business.

10. Having considered the contention of Revenue and appellant, I find that the ruling of Guj. High Court (supra) is not applicable, as in the present case the erstwhile owner, Hans Pharmaceuticals & Chemicals, had not sold the unit directly to the appellant. It was the 'pickup' which auction sold the unit in exercise of their statuary power under Section 29 and 30 of the State Finance Corporation Act. Accordingly I allow the appeal and I also quash the notice dated

24/8/2004, issued by the range Superintendent, Jhansi. The appellant will be entitled to refund of the amount of Rs. 10 lakhs (Rupees Ten Lakhs) deposited under the Interim Order of the Honourable High Court. Thus the appeal is allowed with consequential benefits. The refund shall be granted with interest, as per rules, preferable within 60 days, of receipt or service of this order.

(Dictated and pronounced in the open Court)

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

(K. Gupta)

प्रमाणित प्रति / Certified True Copy
7-6-16
सहायक पंजीकार / Asstt. Registrar
सीमाशुल्क, उत्पादशुल्क एवं सेवा कर
अपील अधिकरण / (C.E.S.T.A.T.)
38, एम. जी. मार्ग, इलाहाबाद-211001
38, M. G. MARG, ALLAHABAD-211001