FAX : 0532-2400149

REGISTERED / AD

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

Dated: 20/11/2017

To

Appellant as per address in table below
Respondent as per address in table below

Final Order No. A/71447-71448/2017-SM[BR] dated 03/11/2017

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/2754/2009	**Birla Transasia Carpets Ltd.** 3 & 4, Industrial Area, Sikanderabad, Distt. Bulandshahar (u.p.)
2	E/2935/2009	**Commissioner CUSTOMS Central EXCISE and SERVICE TAX-Noida** C-56/42...SECTOR 62, NOIDA, UTTAR PRADESH 201307
		Name and Address of Respondent
3		Birla Transasia Carpets Limited 3&4 Industrial Area Sikandrabad, Distt- Bulandshahar(up),,
4		C.C. & C.E. & S.T.-Noida C-56/42...SECTOR 62, NOIDA, UTTAR PRADESH-201307

Other Appellants and Respondents as per Annexure

Copy To

5Advocate(s) / Consultant(s):

PRASHANT MISHRA
ADVOCATE
23,AJAY DEEP BUILDING,2ND FLOOR,PLOT NO.-240,PERIN NARIMAN STREET
FORT,MUMBAI-400001

6 **RAVI PRAKASH PANDEY**
27C/2A CLIVE ROAD, CIVIL LINES-211001

7 Bar Association, CESTAT, Allahabad

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

9 M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, Opp ICICI Bank of Defence Colony New Delhi-3

10 Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17

11 Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005

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

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

14 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad – 38

15 The ICFAI society, 52, Nagarjuna Hill,Punjagutta Hyderabad.-500082

16 M/S Knowledge Processing Pvt. ltd.(taxmanagementindia.com),FF-19,1st Floor,Cross River Mall,CBD Ground,Near Karkardooma Court,Delhi-110032

17 C.D.R. 18 Office Copy 19 Second Folder Copy 20 Guard File

Asstt. Registrar

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH : ALLAHABAD
COURT No. I

APPEAL No. E/2754 & 2935/2009-EX[SM]

(Arising out of Order-in-Appeal No. 205-206/CE/APPL/NOIDA/09 dated 31/07/2009 passed by Commissioner (Appeals), Customs & Central Excise, Noida)

M/s Birla Transasia Carpets Ltd. &
(Appeal No. E/2754/2009-EX[SM])

Commissioner of Central Excise, Noida
(Appeal No. E/2935/2009-EX[SM]) **Appellant(s)**

Vs.

Commissioner of Central Excise, Noida &

M/s Birla Transasia Carpets Ltd. **Respondent(s)**

Appearance:

Shri Prashant Mishra (Advocate) for Appellant/Assessee
Shri Pawan Kumar Singh (DR) for Respondent/Commission

CORAM:

Hon'ble Mr. Anil Choudhary, Member (Judicial)

Date of Hearing : 03/11/2017
Date of Decision : 03/11/2017

FINAL ORDER NO-71447-71448/2017

Per: Anil Choudhary

These cross appeals have been preferred against order of the Commissioner (Appeals) dated 31/07/2009.

2. The brief facts are that M/s Birla Transasia Carpets Ltd., having their factory at Sikandarabad, (U.P.) are in the business of manufacture and sale of carpets/floor coverings. There was some classification dispute and as a result of

which the appellants provisionally paid the tax under the scheme of provisional assessment. By order dated 30th June, 1992, the Commissioner (Appeals) held that the product in question was not dutiable, as the onus of marketability was not discharged. Thereafter the Appellant - assessee applied for refund for an amount of Rs.17,25,392/-(Excess paid). The period for which the duty had been paid was 23/01/1990 to 7th March, 1991. The said refund claim was initially rejected vide Order-in-Original dated 30th January, 2002 on the ground of unjust enrichment and further ordered that the amount be credited to the Consumer Welfare Fund (however, no transfer of funds took place).

3. The Appellant – assessee went in appeal against the aforesaid Order-in-Original No. 07/N-IV/2001-02 dated 30/01/2002 before Commissioner (Appeals), who vide Order-in-Appeal No. 150-CE/Appl/Noida/04 dated 20/05/2004 had held that refund is admissible to the Appellant – assessee in view of the Hon'ble Apex Court's decision regarding non-applicability of unjust enrichment clause, prior to 25/06/1999 and therefore Order-in-Original was set aside. In compliance with the aforesaid Order-in-Appeal, the Deputy Commissioner, Central Excise, Noida passed the Order-in-Original No.60/DC/N-V/06 dated 09/05/2006 holding the refund amount as admissible to Appellants and sanctioned the same accordingly. However, while sanctioning the refund claim of Rs.17,25,392/- to Appellants, he ordered its

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appropriation towards the outstanding demand(s) on arrears, pending against them. The Appellants again went in appeal against the aforesaid Order-in-Original No. 60/DC/N-V/06 dated 09/05/2006 against appropriation of refund amount, towards pending demands of arrears. The Commissioner (Appeals) vide Order-in-Appeal No. 118-CE/Appl/Noida/06 dated 10/08/2006 remanded the case to the Adjudicating Authority with the direction to decide the issue afresh keeping in view the above facts and orders of the Hon'ble Apex Court and High Court, Allahabad passed in this case.

4. Meanwhile, the Department filed an appeal against the Order-in-Appeal No. 150-CE/Appl/Noida/04 dated 20/05/2004 in CESTAT challenging the order of the Commissioner (Appeals) upholding the admissibility of refund to the party. The CESTAT vide is Final Order No.681/08-EX dated 18/06/2008 upheld the order of Commissioner (Appeals) and rejected the appeal of the Revenue. In view of the aforesaid Final Order of the CESTAT dated 18/06/2008, the Assistant Commissioner, Central Excise Division V, Noida vide his Memorandum No.726/R/AC/N-V/08 dated 29/10/2008 allowed the refund of interest, amounting to Rs.29,44,719/- on the duty amount of Rs.17,25,392/- but appropriated this also against the outstanding demand of arrears pending against them. Hence the present appeal against the impugned order.

5. Being aggrieved the Appellant - assessee is before this Tribunal on the ground that the adjustment of so-called outstanding demands without giving them any opportunity of hearing, out of the amount of refund and interest is bad and accordingly, have prayed for setting aside such adjustments with further direction that full refund may be granted.

6. On the other hand Revenue is in appeal on the ground that the impugned Order-in-Appeal is based on the view taken by Hon'ble Supreme Court in M/s Mafatlal Industries, 1997, (89) E.L.T. 247 (SC) and also M/s Allied Photographic India Ltd. 2004 (166) E.L.T. 3 (SC) that refund cannot be rejected on the ground of unjust enrichment as it has arisen out of provisional assessment finalized prior to 26/06/1999 on which date the provisions of unjust enrichment were made applicable to the scheme of provisional assessment. It is urged that if the order of finalization of provisional assessment under Rule 9B(5) is appealed against, then any refund claim arising as a consequence of the decision of such appeal would be governed by Section 11B, implying thereby that such a claim would be subject to bar of unjust enrichment. Revenue also placed reliance on the ruling of Hon'ble Supreme Court in Sahakari Khand Udyog Mandal, 2005 (181) E.L.T. 328 (SC) wherein it was held that even if it is considered that refund claim arising as a consequence to their appeal being allowed by Commissioner (Appeals) vide order dated 30/06/1992, is due to finalization of assessment

under Rule 9B of erstwhile C.E.R. 1944, the refund should be subjects to doctrine of unjust enrichment.

7. Heard the parties and perused the records.

8. I find that the grant of refund has been finalized by this Tribunal along with interest. Further, in Civil Misc. Writ Petition No. 479 of 1996 the Hon'ble Allahabad High Court in the Petition of the assessee has been pleased to direct that the assessee is entitled to refund with 12% interest, being order dated 6th July, 2000. Against the said order Revenue had preferred Civil Appeal No. 1042 of 2001, which was dismissed by the Hon'ble Supreme Court by its order dated 29/04/2003. Under such facts and circumstances, I hold that the subsequent show cause notice issued by the Department being SCN No. V/15/ADJ/Noida/BTCL/77/09/13926 dated 14/09/2009 is ab initio void and accordingly quashed. I also set aside the impugned Order-in-Appeal, as the same is apparently hit by the principles of 'doctrine of merger' and 'hierarchy of Courts'. I further find that the adjustments (out of refund) have been made by the Courts below, from the refund amount as well as interest payable to the Appellants - assessee, under the powers vested in the Authority under Section 11 of the Central Excise Act. However, before such adjustment the Appellants were required to be given notice and opportunity to be heard, which have not been followed, causing prejudice to the Appellants - assessee.

9. Accordingly, I dismiss the appeal filed by the Revenue, having no merits. The appeal of the assessee is allowed to the extent that the adjustments made by the Courts below, out of the refund and interest are set aside and remanded with the direction to issue a fresh show cause notice, giving the details of the adjustments proposed to be made. Thereafter, the Appellants shall be given at least one month's opportunity to reply to such show cause notice and to lead evidence in their answer to the show cause notice. Such show cause notice shall be decided after hearing the Appellant in accordance with law. For this purpose, I remand the matter to the Adjudicating Authority having jurisdiction over the Appellant - assessee. Appellant – assessee is also directed to appear before the concerned Authority and seek opportunity of hearing. It is expected that the concerned Authority shall pass the order within the period of 2 months from the date of issue of show cause notice. Accordingly, the Appeal No. E/2754/2009, by assessee, stands disposed of with directions.

(Dictated & Pronounced in Court)

-Sd/-

(ANIL CHOUDHARY)
Member(JUDICIAL)

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प्रमाणित प्रति/Certified True Copy
06/12/18