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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK NO.2, R.K.PURAM, NEW DELHI-110066
CUSTOMS APPEAL BRANCH

Dated: 12/05/2014

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. **C/A/52068-52069/2014-CU[DB]** dated **30/04/2014**

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section **129-A(4)** of the **Customs Act, 1962.**

Asstt. Registrar(CUSTOMS Appeal Branch)

Application	Appeal	Name and Address of Appellant
1	C/278/2009	**ASIAN LATEX LTD.** 115, TRANSPORT CENTRE, NEW ROHTAK ROAD, PUNJABI BAGH, NEW DELHI-110035.
2	C/547/2009	**C.C. (ICD) NEW DELHI** ICD, Tughlakabad, New Delhi-110020.

	Name and Address of respondent
C/278/2009	**C.C. (ICD) NEW DELHI** ICD, Tughlakabad, New Delhi 110020.
C/547/2009	**ASIAN LATEX LTD.** PLOT NO. 55-A, NOIDA EXPORT PROCESSING ZONE, NOIDA.

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Other Appellants and Respondents as per Annexure

Copy To

3.Advocate(s) / Consultant(s):

J. M. Sharma
252, BASANT ENCLAVE,
(NEAR VASANT VIHAR),
New Delhi-110057

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4. Bar Association, CESTAT, Delhi

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

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST BLOCK NO.II, R.K. PURAM, NEW DELHI-110066.
COURT - II

Appeal No.C/278/2009-CU[DB]
[Arising out of Order-in-Original No.34/2009, dated 01.04.2009 passed by C.C. (ICD), New Delhi]

M/s. Asian Latex Ltd. : ...Appellants

Vs.

C.C. (ICD), New Delhi : ... Respondents

Appeal No.C/547/2009-CU[DB]
[Arising out of Order-in-Original No.34/2009, dated 01.04.2009 passed by C.C. (ICD), New Delhi]

C.C. (ICD), New Delhi : ...Appellants

Vs.

M/s. Asian Latex Ltd. : ... Respondents

Present for M/s. Asian Latex Ltd. : **Shri JM Sharma, Advocate**

Present for CC(ICD), New Delhi : **Shri Sanjay Jain, DR**

Coram: Hon'ble Mr.D.N.Panda, Judicial Member
Hon'ble Mr.Manmohan Singh, Technical Member

Date of Hearing : 30.04.2014

FINAL ORDER NOs. 52068-52069 DATED: 30.04.2014

PER: D.N.PANDA

Both the sides are in controversy. Revenue's Appeal Registered as appeal No.C/547/2009 listed at Sl. No.17 is against the relief granted by the Adjudicating Commissioner to the assessee by order dated 31.03.2009 upon remand from the Tribunal. He held that duty shall be leviable on the depreciated value of the capital goods. Assessee is in appeal and that appeal is registered as Appeal No.C/278/2009 with the grievance that the duty levied by the adjudicating commissioner is not warranted for no violation of the terms of relevant Customs Notification No.133/94, dated 22.06.1994 read with Notification No. 339/85-Cus dated 21.11.1985.

2. To resolve the controversy of both the sides, both the appeals are heard analogues. We surprise that the adjudicating commissioner has proceeded beyond law when the Show Cause Notice made specific allegation as under:-

> *"One of the conditions stipulated in the exemption Notifications referred to above was that the non-duty paid goods, whether indigenous or imported,* ***must be utilized within one year or extended period for manufacture and export of the end product, failing which, duty along with interest @ 20% PA becomes chargeable.*** *Since the capital goods are not being utilized since long and the unit is lying closed, hence benefit of exemption is no longer applicable to such unutilized capital goods.*
>
> *In view of the foregoing, it appears that the said unit has violated the provisions of Notfn. No.339/85-Cust. Dt. 21.11.1985 and 133/94-Cus. Dt. 22.06.1994 (as amended from time to time), 5/86-CE dt.20.01.1986 and 126/94-CE dt. 02.09.1994 (as amended from time to time) and EXIM Policy (as amended) read with provisions of LOA and the Bond executed with Customs. Moreover, the letter of approval issued by the Development Commissioner, NEPZ also stands explained. In absence of its renewal and that the Development Commissioner, NEPZ has forwarded the case of the unit to DGFT for penal action under FI (DR) Act, 1992 vide letter F. No.4/3/90 Proj./2226 dt. 01.04.1998."*

Sd/-

3. It was alleged that the assessee has not at all utilized the duty free capital goods in the NEPZ for manufacture and export of permitted end product although duty was foregone by the Revenue allowing the import free capital goods to the Assessee for installation in the NEPZ.

4. Assesee's averment is that it was carrying out manufacturing operations in the NEPZ, which is proved from plethora of evidence as under:-

(a) Consolidated Index of Import & Exports since inception 1990-91 to till date.

(b) Year-wise details of imports since 1990-91

(c) Year-wise details of exports since 1990-91

(d) Copy of letter dated 23-05-1996 to Asst. Development Commissioner, NEPZ, given details of value addition for the period April, 1990 to 31st March, 1996.

(e) Statement showing value addition achieved upto 31.10.1996.

(f) Certificate from Asst. Development Commissioner certifying exports during the period 1991-92 to 1995-96.

(g) Copy of the Assessment Order of the Sales Tax Department for the year showing export sales, intra-zone sales and domestic sales for the years 1992-93, 19944-95 to 1996-97.

(h) Copy of Balance Sheet for the years 1992-93 to 1996-97 showing earning in foreign exchange.

Anil

According to the ld. consultant, if the authority examines all the above evidence Revenue shall remove its doubt about the functioning of the assessee unit in the NEPZ. Therefore ld. Adjudicating Authority upon examination rightly allowed depreciation.

5. Revenue, on the other hand, says that ld. adjudicating authority has not considered the allegations in the Show Cause Notice at all. But allowed depreciation without the duty free capital goods imported being utilised by the assessee. Revenue's further grievance is that when the allegation in Show Cause Notice was non utilisation of capital goods, the assessee has every time changed its stand to bring new issues at all stages including *de novo* stage. Whether depreciation on such capital goods was allowable or not was not the allegation in Show Cause Notice. Therefore the Adjudicating Commissioner passed an erroneous order.

6. We have carefully heard both the sides and also read the decision of the Tribunal in the appellant's own case reported in **2002 (146) ELT (Tri.-Del.)**. We are surprised to note how the matter proceeded before the Tribunal in altogether a different manner raising the issue as to what is the date of clearance of the goods for the purpose of rate of duty, etc. With great respect, we are able to comprehend today that the real controversy was whether the assessee had utilised the capital goods in accordance with the terms of Notification. But the issue framed by the Tribunal was altogether different. The issue framed erroneously was answered as "the date

of debonding is the material date for the purpose of rate of duty for clearance of goods on payment of duty. The appeal was thus allowed by way of remand for re-calculating the amount of duty. Unfortunately, Revenue did not file appeal against this order.

7. When the Show Cause Notice is read and the facts on record is examined it appears Tribunal has answered the question raised before it and the question not raised is not answered. Therefore the question whether the assessee has utilised the import free capital goods for manufacture and export of end product is still open for answer. This is the allegation which centres round the Show Cause Notice. The date of clearance can only be determined when question of clearance comes and that too subject to conditions of Notification. But grievance of Revenue being that at no point of time any manufacturing activity was carried out by the assessee, the capital goods were not depreciated at all. First this point is to determined.

7. When the matter touches the root and Show Cause Notice alleges that no manufacture and export of end product was done for which duty forgone on the imported capital goods was sought to be recovered, that calls for a detailed examination of the entire material evidence on record to enquire whether the capital goods allowed to be imported by the assessee duty free were installed in NEPZ and utilized for any manufacturing activity carried out and whether export of end product was made. Therefore, ld. adjudicating authority

should make a detailed exercise on the following to resolve the controversy in paras 2, 4 and 5 of the Show Cause Notice to being an end to the controversy:-

(i) The order should specifically state what are the different permissions granted to the assessee under which the capital goods came to India duty free and under which notification.

(ii) Whether any register or record was maintained by the assessee to show import and installation of the capital goods in the NEPZ.

(iii) Date of connection of power with capacity thereof and such power used to operate the capital goods.

(iv) The period of purchase of inputs and value thereof for use in manufacturing activity and whether such inputs were used for carrying out the manufacturing activity. If so what were the statutory records maintained and whether any energy expenditure was incurred during each financial year of manufacture.

(v) All figures should relate to allegation period financial year wise.

(vi) Whether there are any records maintained to show that the manufacture is recorded.

(vii) Whether any Income Tax Returns were filed by the assessee respondent during the allegation period and what was cost of capitalisation of capital goods shown therein and what was the depreciation claimed for the allegation period. So also whether audited balance sheets exist for the relevant financial years.

(viii) Whether any Sales Tax Returns were filed disclosing the turnover, if any, during the allegation period.

(ix) Whether any labour records were maintained to show the utilization of manpower in manufacture.

(x) Enquiry, if necessary, from different authorities required to be carried out to satisfy that the capital goods imported were installed and utilized for manufacture of the permitted output during the allegation period and amount of foreign exchange earned during allegation period.

8. Copies of documents as stated above furnished by the ld. consultant needs to be examined during readjudication for satisfaction of the Authority to test the allegations made in Show Cause Notice. The authority may cause any enquiry that may be warranted to serve the interests of justice. The allegation in para 2, 4 and 5 of the Show Cause Notice should be kept in mind all along to resolve the controversy. All pleadings on facts and law is kept open for the arguments of the assessee.

10. In the result, both the appeals are remanded to adjudicating authority.

(Dictated and pronounced in Open Court)

9.5.2014

(MANMOHAN SINGH)
TECHNICAL MEMBER
SSK

7/5/2014.

(D.N.PANDA)
JUDICIAL MEMBER