FAX : 011-26108426

REGISTERED / AD

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

Dated: **26/08/2015**

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. **C/A/52673-52674/2015-CU[DB]** dated **24/08/2015**

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/163/2007 | **C.C, INDORE**<br>Manik Bagh Palace, Post Box No. 10, Indore-452001 (M.P.) |
| 2 | C/Stay/947/2007 | C/224/2007 | **C.T.COTTON YARN LTD.**<br>25-B, INDUSTRIAL AREA, MALANPUR. |
| | | | Name and Address of Respondent |
| 3 | | | -C.C.E. INDORE<br>Manik Bagh Palace, Post Box No. 10, Indore 452001 (M.P.)<br>- |
| 4 | | | -C.T.COTTON YARN LTD.<br>25-B, Industrial Area, Malanpur, Dist.-Bhind (M.P.)<br>- |

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Other Appellants and Respondents as per Annexure

**Copy To**

5Advocate(s) / Consultant(s):

**Jagmohan Bansal**
**2307/1, SECTOR-38 - C,**
**CHANDIGARH**

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6 Additional Party's Name & Address :

7 Bar Association, CESTAT, Delhi

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

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

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

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

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

16 C.D.R. 17 Office Copy 18 Guard File

**Asstt. Registrar(CUSTOMS Appeal Branch)**

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

**DIVISION BENCH**

**Date of Hearing: 05/8/2015**
**Date of Pronouncement:**24.08.2015

**Appeal No. C/163/2007 and C/224/2007-Cus (BR)**

[Arising out of Order-in-Appeal No. IND-1/369/2006 dated 14.12.2006 passed by Commissioner (Appeals-I) Customs & Central Excise, Indore (M.P.)]

| | | |
|---|---|---|
| 1. | Whether Press Reporter may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982? | |
| 2. | Whether it would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not? | |
| 3. | Whether their Lordships wish to see the fair copy of the order? | |
| 4. | Whether order is to be circulated to the Department Authorities? | |

C.C., Indore — Appellant

Vs.

M/s C.T. Cotton Yarn Ltd. — Respondent

**Appearance:**
Present for the Appellant: Smt. Suchitra Shama, DR
Present for the Respondent: None

**Coram: Hon'ble Mr. R.K. Singh, Member (Technical)**
**Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)**

**Final Order No.** 52673-52674/2015

**Per: Sulekha Beevi C.S.**

The Appeal No. 163/2007 is filed by Revenue challenging the impugned order whereas in appeal No. 224/2007 the assessee is in

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appeal challenging the very same order. For convenience the parties are referred to the status of assessee and department hereafter.

2. At the outset, it needs mention that this Tribunal vide interim order dated 22.6.2007 had directed to deposit the duty demand within a period of 6 weeks from the date of order and report compliance on 2.8.2007. The assessee challenged this order before the Hon'ble High Court of Madhya Pradesh and the Hon'ble Court vide order dated 2.8.2007 in W.P. 3537/2007 passed interim order directing that the appeal filed before the Tribunal shall not be dismissed for non-depositing of the amount as directed vide order of Tribunal dated 22.6.2007. The case has ~~been~~ since been pending before this Tribunal. Though several notices were issued, the assessee or counsel has not turned up. It is seen that notices by registered post with A/D have been issued to the assessee by marking copy to the counsel informing the hearing dates as 5.8.2015, 17.12.2014, 25.3.2014, 13.2.2014, 19.11.2013, 01.10.2013, 11.4.2013, 11.2.2013, 28.9.2012, 11.7.2012, 15.5.2012, 27.3.2012, 07.2.2011, 8.9.2011, 26.7.2011, 21.4.2011, 23.2.2011, 02.11.2010, 5.10.2010, 11.8.2010, 18.6.2010, 3.5.2010, 11.01.2010, 11.9.2009. But these notices were returned with endorsement that factory closed. Notice was then directed to be issued to the assessee through the Department vide letter dated 11.5.2012 the Superintendent of Central Excise, Range-X, Malanpur has informed that there was no one available at the assessee factory site to serve the notice and therefore the hearing notice was affixed on the gate of factory in the presence of Panchnama. On 11.4.2013 this Tribunal issued miscellaneous order directing the registry to get information from the High Court of Madhya Pradesh as to what is the

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status of the case pending before the High Court. Reply was received stating that the same is pending before the High Court. Thereafter the case has come up for Regular Hearing several times and has been adjourned and notices repeated to the assessee. The matter thus came up on 5.8.2015 also, when none appeared for the assessee and the learned DR brought to our notice, the interim order passed by the Hon'ble High Court on 08.4.2015 and also order passed on 13.5.2015.

3. On perusal of records and considering the fact that all possible ways to effect service of notice to the assessee has been exhausted we are of the opinion that no purpose will be served by keeping the appeal pending on the file of this Tribunal. Further by order of the Hon'ble Court dated 08.4.2015 the Tribunal is directed to consider and decide the appeal on merits. The order was brought to our notice by the Department only on 5.8.2015, by producing a photocopy. The certified copy of the order of the Hon'ble Court is not produced. None has appeared for the assessee.

4. It is seen that the Hon'ble Court had directed the Tribunal not to dismiss the matter for non-deposit of the amount as per interim order passed by the Tribunal on 22.6.2007. There is no stay in disposing the appeal on merits. This is clarified by subsequent orders dated 8.4.2015 and 13.5.2015. What is stayed is the dismissal of the appeal under Section 35F of the Central Excise Act, 1944 for non-compliance of direction of pre-deposit during the pendency of appeal. With this view we proceed to consider the appeal on merits.

Sulekha Beevi S

4. The issue that poses for consideration in this appeal is whether the assessee is liable to pay the customs duty of textile machinery imported by them in the year 1997 for use within their premises as a 100% EOU in terms of Notification No. 53/97-CUS dated 3.6.1997.

5. Brief facts of the case are as under:

The assessee who was engaged in manufacture of 100% cotton yarn, purchased textile machinery (Automatic Cone Winder) in 1997. Being a 100% EOU they were entitled for duty free import of capital goods under Notification No. 53/97-Cus dated 03.06.1997. This notification imposed conditions for availing duty exemption. Sub clause (a) and (b) of Clause 5 of the said notification states that such capital goods shall not be removed to any other place without permission from Department and such permission can be given on payment of Customs duty leviable on the depreciated value. The said Machine was purchased by assessee by availing a loan from M/s Tata Finance Ltd. (TFL) under a Hire Purchase Agreement and the goods were used by assessee upto the year 2000. The assessee defaulted the installments, M/s TFL approached Mumbai High Court for recovery of loan. In such recovery proceedings the machine was sold by Court Receiver in October 2001 and the same & was purchased by M/s Vamptex Traders, Coimbatore. It is the departments' case that assessee did not intimate them about the court proceedings initiated by M/s TFL, or the removal of the goods by way of sale to M/s Vamptex traders. When the department came to know about removal of goods investigation was conducted and separate Show Cause Notices were issued to the assessee, M/s TFL and M/s Vamptex Traders. Original authority

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passed order confirm~~ed~~ing the duty demand of Rs.33,65,344/- against assessee. Penalty was not imposed on any of the noticees. The assessee filed appeal and vide impugned order the Commissioner (Appeals) taking into account that the machine was warehoused in the premises of the appellant till 31.5.1998 and removed in October, allowed deprecation for a period of 3 (three) years and 2 (two) quarters at the rate of 45% in terms of Board Circular F.No.305/52/85-FTT dated 15.4.1987. The duty liability upon the assessee was thus reduced to Rs.18,50,939/- as per the impugned order. The Revenue has filed the above appeal challenging the allowance of depreciation. The assessee has filed appeal challenging the levy of duty. Before parting with the narration of facts it would be necessary to state that in the impugned order the Commissioner (Appeals) has observed ~~with~~ that the assessee may take appropriate steps, as may be necessary, to collect the duty payable from M/s Vamptex traders so that the ultimate burden of duty does not fall on them. It is also worth to mention that the show cause notices issued to M/s TFL and M/s Vamptex traders was confined only to imposition of penalty under Section 117 of Customs Act, 1962, whereas only the assessee was called upon to show cause as to why customs duty on the machine should not be demanded.

6. The assessee availed duty exemption under Notification No. 53/1997 dated 3.6.1997 and executed bond agreeing to abide by the conditions of the notification for exemption of duty, and on failure to pay the duty. As per ~~thee~~ these conditions the assessee has to seek permission from the development Commissioner before removal of the

machine from the premises. If the machine is removed, the assessee is liable to pay customs duty.

7. The contentions raised by the assessee are that:-

(a) The machine was imported by filing a B/E on joint basis, by assessee and M/s TFL, as the machine was purchased under a Hire Purchase agreement. That being a H. P. agreement the ownership of the goods remained with M/s TFL. The machine was subsequently recovered by M/s TFL under a Court order. Therefore it is M/s TFL being the real owner who are liable to pay the duty.

(b) That the assessee has not intentionally removed the goods. Due to default in installments M/s TFL approached the Mumbai High Court and obtained orders for recovery in an Arbitration Proceeding against the assessee. As there is no intentional removal, and the machine being removed under a court order, there is no violation of the provisions of the notification.

(c) It is also their contention that M/s Vamptex Traders, having purchased the machine in 'as is where is' condition and accepting the 'Terms and conditions' which specifically state that the purchaser shall be liable to pay all taxes and duties applicable; after sale of machinery to M/s Vamptex Traders, they are liable to pay the duty.

(d) In any case, the machine was imported in 1998 and removed/taken away by a court order in 2001. That therefore the assessee is entitled to claim depreciation in the value in regard to duty demand.

8. As already stated, the notices issued to M/s TFL and M/s Vamptex Traders did not include proposals to levy duty but was confined to levy of penalty under 117 of the Customs Act, 1962. The primary adjudicating authority vide order dated 31.8.2006 has dropped levy of penalty against all the three noticees, observing that it would not be proper to impose penalty as the machine was removed by order of court. The Department has not challenged these findings and the same has reached finality. The adjudicating authority confirmed the duty demand against the assessee.

9. The foremost contention raised by the assessee is that as the machine was purchased under a Hire Purchase Agreement, they are not the owner of the machine. M/s TFL being the Financier is the owner and is liable to pay the duty. Though this argument may appear to be attractive on the first blush of it, the same is unacceptable. In a Hire Purchase System, the possession of goods is transferred to the hirer by the financier at the time of entering into the hire purchase agreement with a facility to pay the price in installments. The ownership in goods passes to the hirer only on payment of the last installment. The hirer has an option to purchase the goods at any time during the term of agreement by paying the entire installments. In the instant case, the assessee defaulted the installments and through a court order, the machine was recovered/taken possession of by M/s TFL. Therefore the argument that the responsibility to pay the duty is shifted to M/s TFL does not hold any water. The liability to pay the duty arises from the bond

executed by the assessee with the Department obliging to abide by the conditions in the notification. The plea that the assessee did not violate the provisions of the notification is therefore not sustainable. It is due to the act of default in installments on the part of the assessee that has resulted in recovery of possession of the machine by M/s TFL. It can be safely concluded that assessee is primarily liable to pay the duty.

10. The first appellate authority has examined the liability of M/s Vamptex Traders. In Para 12 of the Show Cause Notice it is seen stated as under:

> "Further, as per the "Terms & Conditions" which were agreed upon by both the parties i.e. by Noticee No. 2 and 3, regarding sale of the said suit machinery, Noticee No. 2 made it very clear at clause-I which follows as herein under:- "The machinery namely – ONE MURATA NO.7 MACH....CONER AUTOMATIC CONEWINDER (TYPE MAGAZINE), more particularly described in the schedule written herein under shall be <u>put up for sale on "as is where is "basis and the sale is subject to the payment by the purchaser of all outstanding duties (inclusive of Customs duty, if applicable) taxes and liabilities attached to the said machineries" and as per clause 13 "the purchaser shall be liable to pay all Central State, Municipal & Other Taxes, duties,</u>

Sreelekha Menon

levies, cesses, all outgoing etc. as may be applicable in respect of the said machinery from any point to timer before the confirmation of the same and thereafter. The price offered by the purchaser is a net price excluding all the Central, State, Municipal & Other Taxes, duties, levies, cesses, all outgoing etc." Thus sale was subject to payment of customs duty. (Annexure X).

11. M/s Vamptex Traders having taken over the goods which are liable to customs duty, being successor of the defaulting importer is liable to meet the dues. As per the proviso to Section 142 inserted by Act No. 23 of 2004, the successor of defaulter would also be held liable. The department has failed to raise any demand of duty against M/s Vamptex Trader in the SCN issued on 28.6.2005. The Commissioner (Appeals) observed that the assessee could take steps against M/s Vamptex traders to recover the amount paid. The adjudicating authority has committed a grave error by not proceeding against M/s Vamptex Trader for demand of duty.

12. The Commissioner (Appeals) has allowed depreciation of 45% observing that the machine was removed after a period of 3 (three) years and 2 quarters relying upon the F.No. 305/52/85-FIT. Revenue vehemently opposed the reduction in duty demand and contended that the depreciation allowed is on the higher side. The machine in question is an Automatic Cone Winder. Taking into consideration, the

peculiar facts presented by the case, we do not think it is a fit case to interfere with the depreciation allowed by the first appellate authority. On these grounds we uphold the order passed by the first appellate authority.

From the above discussions, the appeal filed by the Revenue and that of the assessee both are dismissed.

(Pronounced on 24.08.2015)

**(R.K. SINGH)**
**MEMBER (TECHNICAL)**

Sulekha Beevi

**(Sulekha Beevi C.S.)**
**Member (Judicial)**

K. Gupta