TELEGRAM : CEGCANAL
Website : www.cestat.gov.in

REGISTERED / AD
Email : delhi@cestat.gov.in

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

Appeal No. E/4244/2004 Date 04/09/2008

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
C.C.E. NOIDA
B-123, SEC-5, NOIDA

C.C.E. NOIDA Appellant
Vs
M/S BIRLA TRANSASIA CARPETS LTD. Respondent

I am directed to transmit herewith a certified copy of **Final order No.** 681/08-EX **Excise** dated 18-6-08

passed by the Tribunal under Section 35-C(1)of Central Excises Act, 1944

Assistant Registrar
(Excise Appeal Branch)

Copy to :
1. Respondent
M/S BIRLA TRANSASIA CARPETS LTD.
PLOT NO-3 & 4 IND AREA, SIKANDRABAD
2. Adv. / Consult SH. R. SANTHANAM, ADV., C-3/210, JANAKPURI, N. DELHI-58
3. S.D.R.
4. ~~J.C.D.R.~~
5. Bar association, CESTAT, New Delhi
6. M/s. Deeparchi Publications, M-93, Marg. 46, Saket, New Delhi 110017
7. M/s Centax Publictions (P) Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -
8. Excise & Customs cases, B-37, Sector -1, NOIDA - 201301 Gautam Budh Nagar, (U.P.)
9. Raghuraman's 44-B, Regal Flat,Shipra Suncity, Indirapuram - 201010,Ghaziabad, DT, U.P.
10. Nidheshak publications, I.P.Estate, new Delhi
11. Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh, New Delhi - 110026
12. Commercial Laws of India Pvt Ltd Post Bag No. 1033, No.70(Old No. 88), Thyagaraya Road, T. Nagar,Chennai 60017
13. Taxindiaonline.com Pvt.Ltd, B-XI/8183,Vasant Kunj, New Delhi - 110070
14. Easy Service Tax Online Dot Com Pvt. Ltd. 407A, Iscon Mall, Above Star India Bazar, Satellite Road, Ahmedabad - 15
15. Office Copy
16. Guard file

Assistant Registrar
(Excise Appeal Branch)

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI, PRINCIPAL BENCH NEW DELHI

Excise Appeal No.4244 of 2004-Excixe Branch

[Arising out of Order-in-Appeal No.150/CE/APPL/NOIDA/04 dated 20.05.2004 passed by the Commissioner of Central Excise (Appeals), Noida]

Date of Hearing/ Decision:18.06.08

For approval and signature:
Hon'ble Mr. M. Veeraiyan, Member (Technical)
Hon'ble Mr. P.K. Das, Member (Judicial)

---

1. Whether Press Reporters may be allowed to see CESTAT (Procedure) Rules, 1982.

2. Whether it should 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 Departmental authorities? :

Commissioner of Central Excise, Noida ...Appellants
[Rep. by Shri C.S. Rajput, DR for the Appellant]
Vs.

M/s. Birla Transasia Carpets Ltd. ...Respondent
[Rep. by Shri R. Santhanam, Advocate for the Respondent]

Coram:
Hon'ble Mr. M. Veeraiyan, Member (Technical)
Hon'ble Mr. P.K. Das, Member (Judicial)

Final Order No...68/...08-EX..../Dated:18.06.08

Per P.K. Das:

The Revenue filed this appeal against Order-in-Appeal No.150-CE/APPL/NOIDA/04 dated 20.05.2004 passed by the Commissioner (Appeals), Noida, whereby adjudication order was set aside. The adjudicating authority allowed refund claim of Rs.17,25,321.12 but in absence of proof of evidence of duty being borne by the Respondent themselves, the amount was credited to Consumer Welfare Fund.

2. The relevant facts of the case as revealed from the impugned order in brief, are that the Respondent classified their product "Latex mixture" under sub-heading No.4001.00 at nil rate of duty. Revenue proposed to classify the said product under heading no.40.05 attracting 15% Adv. BED duty + 5% SED on Basic Excise Duty. The Respondent paid duty of Rs.17,25,392.12 for the period 23.01.90 to 06.07.92 on the basis of provisional approval of classification list. The Assistant Commissioner of Central Excise vide Order dated 8.3.91 decided the matter against the Respondent. The Commissioner (appeals) by Order dated 30.06.92 set aside the Order dated 8.3.91 of Assistant Commissioner of Central Excise. The Respondent filed three refund claims for Rs.17,25,392.00. Revenue filed appeal before the Tribunal against Order of Commissioner (Appeals). By Order dated 19.03.93, the Tribunal set aside the Order of the Commissioner (Appeals) and remanded back the matter to Adjudicating Authority. In de novo Adjudication Order dated 16.05.94, the Additional Commissioner of Central Excise finalised provisional assessment and classified the products under heading no.40.05. The Commissioner (Appeals) by Order-in-Appeal dated 19.05.95 set aside de novo Adjudication Order, and held that the product is not excisable, which has been upheld by the Tribunal by Order dated 23.8.99.

Thereafter, a show cause notice dated 27.09.2001 was issued proposing to reject the refund claim on the ground of unjust enrichment. By Order dated 30.01.2002, Deputy Commissioner of Central Excise allowed the refund claim but it was credited to Consumer Welfare Fund. The Commissioner (Appeals) set aside the Adjudication Order and allowed refund claim. Hence, Revenue filed this appeal against the Order of the Commissioner (Appeals).

3. After hearing both the sides and on perusal of the records, it is revealed from the Order dated 16.05.94, the Additional Commissioner of Central Excise in de novo proceedings held that the product be classified as "Compounded Rubber" under heading No.40.05 and assessment be finalised accordingly. In view of that, the contention of the ld. DR that in compliance of Order dated 8.3.91, the Respondent started paying duty "under protest" only after finalisation of classification list, has no merit. The ld. DR also contended that in view of the decision of the Hon'ble Supreme Court in the case of Allied Photographics Vs. U.O.I. – 2004 (166) ELT 3 (SC), unjust enrichment is applicable in respect of refund of duty paid under protest after final assessment. We find that the Commissioner (Appeals) had given detailed finding as under:-

> "16. This issue was dealt in the decision of the Southern Bench of CEGAT in the case of M/s. TVS Suzuki Ltd., vide Final Order NO.1786/99 dated 21.07.99 wherein it was held that the provision of unjust enrichment under Section 11 B cannot be invoked in the

case of refund where the assessment were provisional before the insertion of proviso to sub-rule (5) of Rule 9B with effect from 25.06.1999. The revenue filed civil appeal against the aforesaid CEGAT decision in TVS Suzuki Ltd., case and the matter was decided by the Hon'ble Supreme Court on 06.08.2003 reported in 2003 (156) ELT 161 (SC) –CCE, Chennai Vs. TVS Suzuki Ltd., upholding the decision of the CEGAT and rejecting the appeal filed by the department. The Hon'ble Court referred to its earlier ruling in Mafatlal Industries Ltd. case (supra) where a bench of nine judges of the court held that refund claims consequent upon the adjustment under sub-rule (5) of Rule 9B would not be governed by the restrictions of Section 11 A or Section 11 B, as the case may be. The Hon'ble Court further observed in order to get over the situation arising under Mafatlal Industries Ltd. (supra) vide notification no.45/99-CE (NT) dated 25.06.99, an amendment was made in sub-rule (5) of Rule 9B by adding a proviso thereto. The effect of the proviso is that even after finalisation of he provisional assessment under Rule 9 B(5), it is found that an assessee is entitled to refund, such refund shall not be made except in accordance with the procedure established under sub-section (2) of Section 11B of the Act. The court further held that the proviso introduced in sub-rule (5) of Rule 9B cannot have retrospective operation.

17.The Hon'ble court also rejected the department's plea that though the proviso inserted in sub-rule (5) of Rule 9B cannot be said to be retrospective in operation, yet on

> the date on which the proviso was brought into force i.e 25.06.1999, the refund claim was still pending with the departmental authorities and, therefore, to be adjudicated in accordance with the laws as it became enforceable with effect from 25.06.1999. The court observed that merely because the department took a long time to proceed the application for refund, the right of appellant does not get defeated by the subsequent amendment made in Rule 9B (5) effective from 25.06.1999. This ruling stands reaffirmed in the latest decision of the Hon'ble Supreme Court in the matter of CCE VS. Allied Photographics India Ltd. – 2004 (166) ELT 3 (para 14)."

4. We agree with the above finding of the Commissioner (Appeals). So, there is no merit in the appeal of Revenue. It is particularly noted that the Respondent also moved Writ Petition being Civil Misc. Writ Petition No.479 of 1996 under Article 226 of Constitution of India before the Hon'ble High Court at Allahabad and made prayer for refund. By Judgement dated 6.2.2000, the Hon'ble Division Bench of High Court directed the Revenue unless there is a stay order of the CEGAT, the Department should refund the amount deposited by the Respondent within three months of production of a certified copy of the Order before the authority along with 12% of interest from the date of deposit to the date of refund. It is seen that Revenue filed appeal before the Hon'ble Supreme Court against the Judgement of the High Court. By Order dated 7.1.2002, the Hon'ble Supreme Court was not inclined to grant any stay of the

Judgement of the High Court. Subsequently, by Order and Judgement dated 29.04.2003, the Hon'ble Supreme Court observed that there is no infirmity in the judgment of the High Court and dismissed the appeal of the Revenue. In this background, we must say that it is a classic case of needless perpetuation of litigation causing avoidable agony and inconvenience to the assessee even after clear and unambiguous decisions of the Hon'ble Courts, which deserves to be discouraged, to say the least. In view of that, the order of the Commissioner (Appeals) is upheld. The appeal filed by the Revenue is rejected.

(Order dictated & pronounced in open court on 18.06.08.

(M. Veeraiyan)
Member (Technical)

(P.K. Das)
Member (Judicial)

Ckp.