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

Appeal No. E/5956/2004 - EX[DB] Date 15/01/2009

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

To :
M/S BIRLA ERICSSON OPTICAL LTD.
UDYOG VIHAR,REWA M.P

M/S BIRLA ERICSSON OPTICAL LTD. Appellant
Vs
C.C.E.GWALIOR Respondent

I am directed to transmit herewith a certified copy of **Final order No.** 38/2009- **EX[DB]** dated 12-1-09

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

Assistant Registrar
(Excise Appeal Branch)

Copy to :
1. Respondent
C.C.E.GWALIOR
19/1265,CITY CENTER,OPP.TOUCHED,
GWALIOR M.P
474011
2. Adv. / Consult SH. P.C. JAIN, ADV.
C/o APPELLANT

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 - 3
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
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)

~~SHRI GOPAL KRISHAN DIRECTOR~~

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.
Principal Bench, New Delhi

COURT NO. I
Excise Appeal No. 5956 of 2004

[Arising out of the Order-in-Appeal No. GWL/599/2004 dated 17/09/2004 passed by The Commissioner (Appeals), Customs & Central Excise, Gwalior.]

For Approval and signature :
Hon'ble Ms. Jyoti Balasunderam, Vice President
Hon'ble Mr. Rakesh Kumar, Member (Technical)

1. Whether Press Reporters 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? :

M/s Birla Ericsson Optical Limited — Appellant

Versus

CCE, Gwalior — Respondent

Appearance

Shri P.C. Jain, Advocate – for the appellant.

Shri C.S. Rajput, Authorized Representative (DR) – for the Respondent.

CORAM:**Hon'ble Ms. Jyoti Balasunderam, Vice President**
Hon'ble Sh. Rakesh Kumar, Member (Technical)

DATE OF HEARING : 01/01/2009.

FINAL Order No. 38/09-EX Dated : ____________

Per. Rakesh Kumar :-

This is an appeal against the impugned order-in-appeal dated 17/09/04 by which the Commissioner (Appeals) upheld the rejection of refund claim to the extent of Rs. 2,30,481/- (Rupees Two Lakh Thirty Thousand Four Hundred Eighty One only) on the ground that the same is inadmissible for the want of payment particulars from the Department of Telecommunication. The facts of the case, in brief, are that, on account of finalization of the provisional assessment, a refund claim of Rs. 8,69,694/- (Rupees Eight Lakh Sixty Nine Thousand Six Hundred Ninety Four only) was filed by the appellant. However, the Department issued a show cause notice seeking restricting the refund only to an amount of Rs. 2,81,810/- (Rupees Two Lakh Eighty One Thousand Eight Hundred Ten only) and rejecting the balance amount on the ground of unjust enrichment. However, the Assistant Commissioner rejected the claim for an amount of Rs.

2,30,481/- on the ground that the same is not admissible for want of payment particulars from the Department of Telecommunication.

2. Heard both the sides.

2.1 Shri P.C. Jain, Advocate, the learned Counsel on behalf of the Appellant, pleaded that the rejection of the refund claim of amount of Rs. 2,30,481/- is prima facie wrong as this claim has been rejected on the ground that payment particulars from the Department of Telecommunication are not available, which is a ground not raised in the show cause notice, that the Appellant had produced the documents showing that the incidence of this amount had been borne by them and, therefore, the refund claim for this amount is not hit by unjust enrichment, and that in any case, as per the Hon'ble Supreme Court's judgments in the cases of **Commissioner vs. TVC Suzuki Limited** reported in **2001 (135) E.L.T. 140** and the Constitutional Bench judgment in the case of **Mafatlal Industries Limited** reported in **1997 (89) E.L.T. 247**, for the period prior to 1999, the refunds arising out of finalization of provisional assessments are not hit by the bar of unjust enrichment. Shri Jain also submitted that in view of the Hon'ble Supreme Court judgment in the case of **Priya Blue Industries Ltd. vs. Commissioner of Customs (Preventive)** reported in **2004 (172) E.L.T. 145 (S.C.)**, the officer considering the refund claim cannot sit in judgment over the final assessment order which had given rise to the refund claim.

3. The learned Departmental Representative defending the impugned order reiterated the findings of the Commissioner (Appeals).

4. We have carefully considered the submissions from both the sides and perused the records. We find that the show cause notice proposing the rejection of the refund claim of Rs. 5,87,884/- out of total refund claim of Rs. 8,69,694/- arising out of finalization of provisional assessments for 1996-1997 period, vide order dated 30/09/99 is only on the basis of unjust enrichment and the show cause notice does not challenge the assessment order. The Assistant Commissioner has obviously travelled beyond the show cause notice by rejecting the refund claim of Rs. 2,30,491/- as inadmissible

has reopened the assessment vide order dated 30/09/99, which he was not allowed, in view of the Hon'ble Supreme Court judgment in the case of Prima Blue Industries Ltd. (Supra). In view of this, the impugned order rejecting the refund claim for the amount of Rs. 2,30,481/- is not sustainable and the refund claim would be admissible to the Appellant. However, the same would be subject to the bar of unjust enrichment as in view of Hon'ble Supreme Court's judgment in case of **Sahakari Khand Udyog Mandal vs. CCE** reported in **2005 (181) E.L.T. 328 (S.C.)**, the principle of unjust enrichment is applicable to all the refund claims. The impugned order is, therefore, set aside and the matter is remanded to the Original Adjudicating Authority for denovo consideration only on the ground of unjust enrichment. The appeal stands disposed of, as indicated above.

(Dictated and pronounced in open court)

(Ms. Jyoti Balasunderam)
Vice President

(Rakesh Kumar)
Member (Technical)

PK