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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/2496/2008 - EX[DB] & E/S/2499/2008-EX   Date 05/02/2009

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

To :
M/S PRABHAT ZARDA FACTORY PVT LTD
GI, 7&8, G.T. KARNAL ROAD, DELHI.
110033

M/S PRABHAT ZARDA FACTORY PVT LTD   Appellant
Vs
C.E.E. NOIDA   Respondent

I am directed to transmit herewith a certified copy of **Final order No.**100/09 & S.O.NO.125/09- **EX[DB]** 2-2-09

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. NOIDA
   B-123, SECTOR 5, NOIDA.
2. Adv. / Consult
   MR.L.P ASTHANA
   R-163, SECOND FLOOR, GREATER KAILASH-1, NEW DELHI - 110 048.

3 C.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)

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
R.K. PURAM, W.B. NO.2, PRINCIPAL BENCH
NEW DELHI, COURT NO.I

Excise Appeal No. 2496 of 2008 with Excise Stay Application No. 2499 of 2008
[Arising out of order-in-appeal No. 94/CE/APPL/NOIDA/08 dated 27.8.2008 passed by the Commissioner of Central Excise (Appeals), Noida.]

Date of Hearing/Decision : 02.01.2009

For approval and signature:

Hon'ble Ms. Jyoti Balasundaram, 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.	No
2	Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	Yes
3	Whether Their Lordships wish to see the fair copy of the Order?	seen
4	Whether Order is to be circulated to the Departmental authorities?	yes

M/s Prabhat Zarda Factory Pvt. Ltd., Appellant
[Rep. by Mr. L.P. Asthana, Advocate]

Versus

CC&CE, Noida Respondent
[Rep. by Mr. M.M. Singh, SDR]

CORAM: Hon'ble Ms. Jyoti Balasundaram, Vice-President
Hon'ble Mr. Rakesh Kumar, Member [Technical]

STAY Order NO. 125/2009-CO.
FINAL ORDER NO 100/2009-CO

Per Jyoti Balasundaram:

After hearing both sides for some time on the application for waiver of pre-deposit of Rs. 11,03,276/-, we find that it is possible to decide the ~~case~~ appeal itself at this stage as the impugned order is one of ~~the~~ dismissal ~~s~~ for non-compliance of the order of the Commissioner (Appeals) and not on the merit of the demand. Hence after granting the prayer for stay, we proceed to deal with the appeal itself.

2. We have heard both sides.

3. This case has a chequered history. By an order dated 29.05.2002 the assessee's request for finalization of provisional assessment was accepted and the Deputy Commissioner ordered that the duty paid by the appellant during the period 2000-2001 in excess in respect of octroi and luxury tax stood finalized. By the order dated 7.3.2003 the Deputy Commissioner sanctioned a claim for refund of Rs.11,03,276/- after being satisfied that this amount was paid by the assessee and also after satisfying himself on perusing the report of the jurisdictional range officer to the effect that the assessee has not charged this amount from their customers and did not charge/ realize any amount on account of Central Excise duty as is evident from the invoices, and that the proviso to sub-section (2) of Section 11B of the Central Excise Act was not invokable against the assessee. This order was not challenged by way of appeal by the Revenue. In March 2004, a show cause notice was issued to the assessee proposing recovery of erroneous refund of the amount above mentioned on the ground that the claim for refund was hit by unjust enrichment; the notice was adjudicated by the Additional Commissioner who held that the assessee has not rebutted the legal presumption that he had passed on the incidence of duty to their customer and confirmed the demand of the amount granted by way of refund. This order was challenged before the Commissioner (Appeals) who remanded the case back to the Additional Commissioner vide order dated 30.6.2006. No order was passed at this stage requiring pre-deposit and the order was passed straightway by way of remand. Pursuant to the remand order the present adjudication order has been passed holding that the claim of the assessee was hit by the provision of unjust enrichment and therefore the confirmation of duty by this order was challenged before the Commissioner (Appeals) who vide order dated 30.04.2008 directed the appellant to deposit an amount of Rs. 6 lacs as pre-deposit within twenty days from the date of receipt of the order and dismissed the appeal for non-compliance of the stay order. Hence this appeal.

4. We find that a prima-facie case has been made out by the assessee for the reason that the Deputy Commissioner, on the basis of the report of the jurisdiction Range Officer, vide his order dated 7.3.2003 held that the refund has arisen pursuant to the finalization of provisional assessment and unjust enrichment is not attracted. This order was not appealed against by the Revenue. Further, the Commissioner (Appeals) passed the order and remanded the case to the adjudicating authority to re-examine and decide the issue of unjust enrichment afresh after providing the party effective opportunity of hearing to present their case without any pre-deposit. We are informed that Appeal No. E/2806/06 is pending before the Tribunal against the first remand order on the ground that once refund was sanctioned, notice proposing erroneous recovery of refund cannot be issued in the absence of challenge by way of an appeal. We, therefore, set aside the impugned order and remand the case to the lower appellate authority for decision on merit without insisting on pre-deposit. The Commissioner shall pass an order after extending the reasonable opportunity of hearing to the appellant of being heard in their defence. The appeal is thus allowed by way of remand.

[Dictated and pronounced in the open Court]

[Jyoti Balasundaram]
Vice President

[Rakesh Kumar]
Member [Technical]

[Pant]