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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/1177/2001 - EX[DB] Date 31/03/2009

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

To:-
M/S WHITE MACHIENE
59,NAJAFGARH ROAD,NEW DELHI
110015

M/S WHITE MACHIENE Appellant
Vs
C.C.E. DELHI-I Respondent

I am directed to transmit herewith a certified copy of **Final order No.** 253/2009- **EX[DB]** dated 27-3-09 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. DELHI-I

2. Adv. / Consult
   MR.NAVEEN MULLICK,ADV
   B-388, MEERA BAGH, N.DELHI

3 C.D.R
~~4 L.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
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Assistant Registrar
(Excise Appeal Branch)

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

Excise Appeal No.1177 of 2001-B

[Arising out of Order-in-Appeal No.203-CE/DLH/2001 dated 20.02.2001 passed by the Commissioner of Central Excise (Appeals), Delhi]

Date of Hearing:23.02.2009
Date of Decision: 27.3.09

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

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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? : No
3. Whether Their Lordships wish to see the fair copy of the Order? :
4. Whether Order is to be circulated to the Departmental authorities? : Yes

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M/s. White Machines ...Appellants
[Rep. by Shri N. Mullick, Advocate]

Vs.

CCE, New Delhi ...Respondent
[Rep. by Shri B.S. Suhag, DR]

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

FINAL Order No..253/09-EX Dated:

Per P.K. Das:

This appeal is taken up for hearing in pursuance of the Order dated 21.02.2008 of the Hon'ble Supreme Court in Civil Appeal No.2155 of 2002 (White Machines Vs. Collector of Central Excise, Delhi), whereby

Tribunal's Final Order No.552/2001-B, dated 12.12.2001 was set aside and the matter was remitted to the Tribunal for passing a fresh order in accordance with law including the point regarding marketability of the intermediary products i.e. C.I. Castings.

2. The relevant facts of the case, in brief, are that the appellants were engaged in the manufacture of C.I. Chilled Rolls classifiable under Heading No.84.37 of the Schedule to the Central Excise Tariff Act, 1985. C.I. Chilled Rolls were exempted from payment of central excise duty vide Notification No.56/95-CE dated 16.3.95. The appellants were also manufacturing C.I. Castings, which are captively consumed in their final products i.e. C.I. Chilled Rolls. The appellants claimed that C.I. Castings can not be said to be casting materials but Blanks, parts of C.I. Chilled Roll. A show cause notice dated 27.09.96 was issued. It has been alleged that C.I. Castings are classifiable under sub-heading No.7207.10 of the Schedule to the Central Excise Tariff Act, 1985 captively used in exempted final product C.I. Chilled Rolls and not eligible for the benefit of Notification No.67/95 dated 13.03.95. There was a demand of duty of Rs.9,98,764/- for the period from 1.1.96 to 24.08.96.The Original Authority confirmed the demand of duty and imposed penalty of Rs.2.5 Lakhs. The Commissioner (appeals) upheld the demand of duty but reduced the penalty to Rs.1,00,000/-. The Tribunal vide Final Order dated 12.12.2001 upheld the demand of duty for the period of 6 months preceding to the date of show cause notice and set aside the penalty. The

assessee filed appeal before the Hon'ble Supreme Court. By Order dated 21.02.2008, the Hon'ble Supreme Court set aside the Final Order of the Tribunal and remitted the case to the Tribunal. For the purpose of proper appreciation of the case, the relevant portion of the order of the Hon'ble Supreme Court is reproduced below:-

> "The Tribunal has not recorded any finding regarding marketability of the intermediary product i.e. C.I. Castings. Counsel appearing for the assessee very fairly concedes that if the intermediary product is marketable, then the excise duty would be payable because the final product i.e. C.I. Chilled Rolls is exempted from payment of excise duty. Since, there is no finding recorded by the Tribunal regarding marketability, excise duty could not be levied on the intermediary product i.e. C.I. Castings. Counsel for the assessee relied upon a number of judgments to contend that unless the intermediary product is marketable, excise duty could not be levied. [cases referred: Union Carbide India Ltd. Vs. Union of India & Others reported in (1986) 2 SCC 547; Gujarat Narmada Valley Fertilizer Co. Ltd. Vs. Collector of Excise & Customs reported in (2005) 7 SCC 94]..."
>
> In the absence of any finding recorded by the Tribunal regarding marketability, we are handicapped and cannot proceed with the case any further. Accordingly, we accept this appeal; set aside the impugned order of the Tribunal and remit the case to the Tribunal for passing as fresh order in accordance with law including the point regarding marketability of the intermediary product i.e. C.I. Castings. All contentions are left open."

3. Ld. Advocate on behalf of the appellant submits that the C.I. Castings is "un-finished Rolls Blank" which has no marketability. He placed photograph of the product. He also submitted written submissions with case law, which have been taken on record. The main contentions of the ld. Advocate, in brief, are as under:-

(a) The goods in question are not marketable and not excisable. He submits that in reply to the show cause notice, they have categorically stated that the goods in question is not capable of being marketed. He submits that the Hon'ble Supreme Court in the case of Gujarat Narmada Valley FART Co. Ltd. Vs. Collector of Central Excise and Customs – 2005 (184) ELT 128 (SC) held that onus was on revenue to establish marketability. In the present case, the Revenue failed to discharge burden of proof.

(b) Even if the goods are marketable, the classification under Heading No.72.07 in incorrect. He submits that Heading No.72.07 covers "semi-finished products of Iron or Non-Alloys Steel", where the process involved is "continuous castings". In reply to the show cause notice, the appellant stated that they have not obtained process of continuous casting.

(c) The goods in question were used in the manufacture of C.I. Chilled Rolls and it is classifiable only under Heading No.84.37 exempted by Notification No.56/95-CE. It is his contention that C.I. Castings, which emerged from the moulds having the essential character of the finished machine parts or as a blank for machine parts, are to be considered as blanks.

(d) Demand of duty is partly barred by limitation. He submits that the Tribunal in its earlier order already confirmed the demand for the normal period of limitation and set aside penalty. Revenue has not filed any appeal against the order of the Tribunal. So, demand of duty for extended period of limitation and penalty are not sustainable.

(e) He also referred to several case laws with his written submissions.

4. Ld. DR reiterates the findings of the Commissioner (Appeals). The main contentions of the ld. DR, in brief, are under:-

(a) He submits that the Hon'ble Supreme Court remanded this matter to examine the issue of marketability. He further submits that the appellant admitted before the Hon'ble Supreme Court that if the intermediary products are marketable, then the demand of duty is correct. So, it is contended by the ld. DR that in the remand proceedings, the appellant cannot go into the other issues.

(b) Regarding the marketability, he submits that the Commissioner (Appeals) categorically observed that these castings were sold to the customers, who placed orders for the same. He further submits that even the goods were manufactured as per specifications of the customers, the same satisfied the criteria of the marketability. He also submits that the appellants did not dispute that the goods in question were sold by them.

(c) Regarding classification of intermediary goods i.e. C.I. Castings under Heading No.7207, he submits that the Adjudicating Authority held that the castings manufactured by the appellant do not have essential character of finished goods, which were not disputed by the appellant, at any stage. He also submits that the Tribunal in the case of Shivaji Works Ltd. Vs. CCE -1994 (69) ELT 674 (T) decided the identical issue. It has been held that the castings will not be classified as machine parts till they have been machined.

(d) That the goods in question cannot be covered under Chapter 84. He submits that both the Authorities below rightly held that the benefit of Notification No.67/95 cannot be extended because final product is exempted.

(e) He also submits that the appellant suppressed the material facts from the Department. It was detected by the Central Excise Officers during the preventive check. So, the extended period of limitation should be invoked and penalty is warranted.

5. After hearing both the sides and on perusal of the records, we are unable to accept the contention of the ld. DR that the remand order is confined only on the issue of marketability. We find that the Hon'ble Supreme Court set aside the order of the Tribunal. Further, the Hon'ble Supreme Court directed that all contentions are left open. So, in our view,

all issues raised by the appellant are required to be considered in the remand proceedings.

6. The main contention of the appellant is that there is no marketability of C.I. Castings and, therefore, it is not excisable. If the goods are excisable, then it would be necessary to decide the classification of the goods under proper heading. In reply to the show cause notice dated 25.10.96, it was contended by the appellant that the show cause notice does not disclose that any inquiry was conducted to ascertain whether such C.I. Castings are available in the market. It is also contended that the Works Manager of the appellant-company in his statement stated that they were not selling the so-called semi-finished products to any buyer. The Original Authority merely observed that the Circular issued by the Board do not speak anything about the marketability of castings. It is held that the castings manufactured by the appellant are capable or being sold in the market. The Commissioner (Appeals) held that these castings were sold to the customers who placed the order and not in the open market. We find that the Hon'ble Supreme Court in the case of Gujarat Narmada Valley Fertilizers Co. Ltd. (supra) held as under:-

> "**6.** This passage would clearly show the level at which the marketability has to be established.
>
> **7.** The onus was on the Revenue. The only piece of evidence which has been produced by the Revenue was a test report which merely stated that the sample showed that the items were organic chemicals . It does not in any way establish marketability. Nor can marketability be established

on the basis of mere stability. Something more would have to be shown to establish that DECA AND CMBE were known in the market as commercial products.

8. The Tribunal has ignored the evidence given by the employees of the appellant. In fact the wrong test was applied to determine the issue. The issue was not whether there was a hypothetical possibility of a purchase and sale of the commodity but whether there was sufficient proof that the product is commercially known.

9. We fail to understand how the letter of M/s. Gharda Chemicals could in any way be stated to have supported the conclusion of the Tribunal that the product was marketable as the letter categorically states that none of the intermediates of Butachlor are marketable in India or overseas.

10. For all these reasons, the decision of the CEGAT is set aside and the order of the Collector (Appeals) is restored. The security, if any, deposited by the appellant pursuant to interim orders of this Court be discharged. The appeal is allowed. There shall be no order as to costs."

7. In the present case, we find that Revenue proposed to classify intermediary goods C.I. Casting under sub-heading no.7207.10 of the CETA, 1985 in the show cause notice. The appellant in reply to the show cause notice took a definite stand that the goods are not marketable. It is supported by the statement of the Works Manager. On the other hand, the ld. DR submits that the appellant had been selling similar casting till 1990. It is well settled that in order to satisfy the test of marketability, it is required to prove that the goods should be capable of being marketed and the product is commercially known. We find that the lower authorities have failed to consider this aspect, which are required to be examined on the basis of evidences.

8. In view of that, we set aside the impugned order. The matter is remanded back to the Original Authority to examine the marketability and the other issues as contended by the ld. Advocate. The appellants are directed to produce the evidences in support of their contention before the original authority in de-novo proceeding. It is needless to say that original authority shall give proper opportunity of hearing before passing of order. The appeal is allowed by way of remand.

(Pronounced in open court on......27|3|09.....)

(M. Veeraiyan)
Member (Technical)

(P.K. Das)
Member (Judicial)

Ckp.