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

Appeal No. C/964 /2005 - CU[DB] Date 10/10/2008

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

To : .
M/S ASHA SPEECH & HEARING CLINIC
15/76, OLD RAJINDER NAGER, NEW DELHI

M/S ASHA SPEECH & HEARING CLINIC Appellant

Vs

THE COMMISSIONER OF CUSTOMS, NEW DELHI Respondent

I am directed to transmit herewith a certified copy of Final order No. C/366/08-CUS DATED 01.10.08 passed by the Tribunal under Section 129, (B) of the Customs Act,1962 & Financial Act 1994 relating to Service Tax

Assistant Registrar
(Customs Appeal Branch)

Copy to :

1. Respondent

THE COMMISSIONER OF CUSTOMS, IMPORT & GENERAL,
NEW CUSTOMS HOUSE, IGI AIRPORT, NEW DELHI
110037

2. Adv. / Consult MR.MOHAN LAL, ADV., B-67,
FLATTED FACTORIES COMPLEX,
OKHLA PHASE-III,N DELHI

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
(Customs Appeal Branch)

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

West Block No.2, R.K.Puram, New Delhi

COURT-I

Date of hearing/decision:1.10.2008

Customs Appeal No.964 of 2005

Arising out of the order in appeal No.CC(A)/368/ACU/Delhi I/2005 dated 15.9.05 passed by the Commissioner (Appeals),Customs , Delhi.

For Approval and Signature:

Hon'ble Mr. Justice S.N. Jha, President
Hon'ble Mr. M. Veeraiyan, Member (Technical)

1	Whether Press Reporter 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 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

Appellant		Respondent
M/s Asha Speech & Hearing Clinic	vs.	C.C., New Delhi

Appearance:

Shri Mohan Lal, Advocate for the appellant
Shri D.K. Madan, Authorized Departmental Representative (DR) for the Revenue

Coram: Hon'ble Mr. Justice S.N. Jha, President
Hon'ble Mr. M. Veeraiyan, Member (Technical)

Final Order No. C/366/08

Per M. Veeraiyan:

This is an appeal against the order of the Commissioner (Appeals) No. CC(A)/368/ACU/Delhi I/2005 dated 15.9.05 by which the claim for refund of Rs.64,312/- was rejected.

2. Heard both sides.

3. The appellant imported certain medical equipments and sought clearance of the same. The computer generated check-list indicates that

they have claimed the benefit of concessional basic customs duty under Customs Notification No.21/2002 dated 1.3.2002 (serial No.368A) and also claimed the benefit of total exemption from CVD under Central Excise Notification No.6/2002 dated 1.3.2002 (serial No.269A). Classification claimed was under 90189099 and the description of the goods as furnished in the bill of entry was "Bio Logic Navigator Pro Brain Stem evoked response Audiometer with STD Accessories". The duty worked out as per check-list was for a sum of Rs.18,765/- including cess amount of Rs.367.94. Bill of Entry has been assessed allowing exemption under Customs Notification No.21/2002, as claimed by the appellant, but the benefit of the Central Excise Notification No.6/2002 for CVD has been denied and the duty has been worked out to Rs.83,077/-. The appellant has paid the duty and cleared the consignment and preferred a refund claim later which was rejected by the original authority on the ground that the assessment has not been challenged. The order of the original authority has been upheld by the Commissioner (Appeals).

4. Learned Advocate for the appellants submits that they have claimed the benefit of two Notifications – one relating to basic customs duty and another for CVD as evidenced by the check-list; it was a clerical error attributable to computer processing which led to denial of the benefit; in view of such error, the refund can be sanctioned by the Assistant Commissioner (refund) and there was no need to challenge the assessment order before Commissioner (Appeals). He relies on the following decisions:

a) Karnataka Power Corporation Ltd. vs. C.C.,Chennai – 2002 (143) ELT 482 (SC)

b) ISRO Satellite Centre vs. C.C., Bangalore – 2008 (227) ELT 245 (Tri-Bang.)

c) Aditya Birla Nuvo Limited vs. C.C., Bangalore – 2008 (222) ELT 249 (Tri-Bang.)

d) Mecon Ltd. vs. C.C., Calcutta – 2003 (153) ELT 574 (Tri-Kolkata.

e) in the case of C.C., New Delhi vs. Hero Honda Motors Ltd. Final Order of the Tribunal No.C/97/08 in Customs Appeal No.489/2005.

5. Learned DR submits that there was no clerical mistake involved and it was a conscious decision of assessment denying the benefit of Notification relating to CVD and the proper course would have been to file appeal with the Commissioner (Appeals). Having failed to do so, the claim is not admissible as held by the Larger Bench in the case of C.C. (Imp.), Nhava Sheva vs. Eurotex Indus & Exports Ltd. – 2007 (216) ELT 137 (Tri-LB) which has followed the decisions of the Hon'ble Supreme Court in Collector vs. Flock (India) Ltd. – 2000 (120) ELT 285 (SC) and in the case of Priya Blue Industries Ltd. vs. Commissioner – 2004 (172) ELT 145 (SC).

6.1 We have carefully considered the submissions. The check-list indicates the claim of the appellant for the benefit of Notification for CVD , which stands denied in the assessment order. A close scrutiny of the assessment order clearly indicates the rate of duty for CVD and consequently the total duty payable has been determined as Rs.83,077/- as against Rs.18,765/- which was the amount payable according to made by the appellant as reflected in the check-list. We are not in agreement with the view canvassed by the learned Advocate that this is arising out of the a clerical mistake attributable to the computer processing. This assessment order could have been taken up on appeal. Assistant Commissioner/Deputy Commissioner in-charge of refund, in our opinion has no power to change the decision in assessment by an officer of equal rank.

6.2 The decision of the Hon'ble Supreme Court in the case of Karnataka Power Corporation Ltd. (supra) will not be applicable to the present case. In the said case, the appellant had made a formal application for re-assessment of the duty and for refund of part of the duty paid and in that context the matter was remanded for re-consideration of the application for re-assessment.

6.3 Further the law laid down by the Hon'ble Supreme Court in the cases of Flock (India) Ltd. and Priya Blue Industries to the effect that unless the assessment is challenged in appeal, the refund of excess payment cannot be claimed, would be applicable to the facts of the present case. In the case of Priya Blue Industries, the Supreme Court observed as under:

> *"Once an order of assessment is passed the duty would be payable as per that order. Unless that order of assessment has been reviewed under Section 28 and /or modified in an appeal that order stands. So long as the order of assessment stands the duty would be payable as per that order of assessment. A refund claim is not an appeal proceeding. The officer considering a refund claim cannot sit in appeal over an assessment made by a competent officer. The officer considering the refund claim cannot also review an assessment order.*

The decision in the case of Hero Honda Motors Ltd. is not applicable to the facts of the present case. In the said case, the items have been correctly described, the notification extending the benefit has been correctly claimed and it was based on a wrong serial number mentioned that is serial No.281 instead of 337. In the Bill of Entry, the rate was wrongly adopted in computer processing. The present case stands on a different footing where ~~as~~ the benefit of exemption claim has been denied by the assessing authorities, which could not be reviewed by the officer sanctioning refund. The decision of the Commissioner (Appeals) relying on the judgment of the Hon'ble Supreme Court in the case of Flock (India) Ltd. and Priya Blue Industries Ltd. does not warrant any interference.

7. The appeal is, therefore, rejected.

(Dictated and pronounced in the open Court)

(Justice S.N.Jha)
President

(M. Veeraiyan)
Member (Technical)

scd/