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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/381 /2005-385 /2005 Date 22/08/2008

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

To :
BHAGWATI ENTERPRISES
KANTI MARKET, NAYATOLA MAKHANIA KUAN
MORE, PATNA
BHAGWATI ENTERPRISES Appellant

Vs

COMMISSIONER OF CUSTOMS, KENDRIYA
BHAWAN SECTOR 'H Respondent

I am directed to transmit herewith a certified copy of **Final order No.** C/313-317/08 Customs dated 12.8.08 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
   COMMISSIONER OF CUSTOMS, KENDRIYA BHAWAN SECTOR 'H
   KENDRIYA BHAWAN SECTOR 'H' ALIGANJ, LUCKNOW
2. Adv. / Consult
   MR.NAVEEN MULLICK
   B-388, MERA BAGH, NEW DELHI-63.
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
(Customs 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

CUSTOMS ~~Service Tax~~ Appeal Nos. 381 - 385 of 2005

[Arising out of Order-in-Appeal No. 26 to 30/Cust/Alld/2004 dated 4.3.2004 passed by the Commissioner of Customs (Appeals), Allahabad]

Date of Hearing/ decision: 12.08.2008

For approval and signature:

Hon'ble Mr. Justice S.N. Jha, President
Hon'ble Mr. M. Veeraiyan, 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 Bhagwati Enterprises — Appellant

Vs.

CCE, Lucknow — Respondent

Appearance:

None for the Appellant
Mr. L.B. Yadav, DR for the Respondent

CORAM: Mr. Justice S.N. Jha, President
Mr. M. Veeraiyan, Member (Technical)

Final **ORDER** No C/313-317/08

Per M. Veeraiyan:

These appeals arise out of common orders-in-appeal No. 26 to 30/Cust/Alld/2004 dated 4.3.2004.

8 2. None appears for the appellants. Heard learned DR on behalf of the Department.

3.1. The appellants have imported paper and paper board falling under chapter heading 480200 of the Customs Tariff Act and the goods have been cleared availing benefit of Notification No. 37/96-Cus dated 23.7.96 which was applicable to imports from Nepal.

3.2. The dispute relates to the applicability of Notification No. 6/2000-CE dated 1.3.2000 ~~notification~~ exempting additional duty of Customs imposed in terms of section 3 of the Customs Tariff Act. The Notification No. 6/2000 is subject to the condition No. 15 of the said notification according to which the exemption shall apply only to "paper and paper board cleared for home consumption from a factory". The Department held that as the goods are imported from Nepal, the condition that the same is cleared for "home consumption" and that too from a factory can not be satisfied and that this notification shall apply only in respect of clearances from Indian industries. Accordingly varying amounts of duties stand confirmed against each of the appellant.

4. We find that the goods have been imported from Nepal; the goods are liable to customs duties under section 3 of the Customs Tariff Act which is additional custom duty equal to the Central Excise duty. A level playing field is sought to be maintained in respect of imported goods and the locally manufactured goods by the levy under section 3 of the Customs Tariff Act. In the present case, for the purpose of levy of Additional Customs Duty the imported goods are required to be assessed as if manufactured in India. We are of the considered opinion that the benefit of the Notification No. 6/2000 dated 01.03.2000 shall be applicable. The wording in the notification reads that exemption is available for goods "cleared for home consumption". In our opinion the words "cleared for home consumption" are not significant as what is sought to be exempted under section 5A of the Central Excise Act is basically goods "cleared for home consumption". There are separate provisions in the Central Excise Rules providing for export of goods

8 without payment of duty under bond and for grant of rebate if cleared on payment of duty.

5. Learned DR relied on the decision of the Hon'ble Supreme Court in the case of Motiram Tolaram vs. Union of India reported in 1999 (112) ELT 749 (S.C.). The said case dealt with applicability of excise notification for the purpose of levying additional duty of customs and one of the conditions to be fulfilled was that the raw material out of which the finished goods manufactured ought to have paid excise duty. The Hon'ble Supreme Court found that in such a situation any presumption regarding the duty having been paid on the raw materials used in the said goods can not be made and, therefore, held that the said notification cannot be applied as the importer was not in a position to satisfy the condition of the said notification. This will not apply in the present case.

6. Further similar issue has been decided by the Tribunal in final Order No. C/107-111/08 in the case of CC, Amritsar vs. Malwa Industries Limited relying on the decision of the Hon'ble Supreme Court in the case of Thermax Private Limited vs. Collector of Customs reported in 1992 (61) ELT 354 (S.C).

7. The relevant portion of the said order is re-produced below:-

> "11. It will at once be seen that there is nothing in the scheme of the rule which makes it inapplicable to an importer of goods. The assessee here has imported the goods and is selling them for use in a factory, a use which qualifies for the concession under the Section 8 notifications. The types of use specified in the concessions notified could be of any kind and, even in the notifications under our consideration, they are many and varied. In respect of items falling under S. Nos. 3 and 8, in particular, the actual users may be private individuals or authorities and need not necessarily be manufacturers using the goods in question is an "industrial process" in a narrow sense of that term. For instance, any computer room, hospital or factory purchasing parts of refrigerating and air-conditioning appliances and machinery for use in the computer room, hospital or factory would be entitled to claim the concession by following the prescribed procedure. Only, for claiming a concession in excise duty the user should be the manufacturer himself or he must have made the purchase from a manufacturer liable to pay excise duty on the item whereas in regard to a claim for CVD concession, the supplier will be an importer. The latter will be entitled to sell the goods at the concessional rate of duty (or at nil rate if there is an exemption) if the purchaser from him who puts the goods to the specified use (whether a manufacturer or not) fulfills the requirements of Rule 192. Since the concession under Rule 192 turns only on the nature and use to which the goods are put by the user or purchaser thereof and on whether he has

gone through the procedure outlined in Chapter X, it would not be correct to deny it to a supplier of such goods on the ground that he is an importer and not a manufacturer. That aspect is provided for by Section 3(1) of C.T. Act which specifically mandates that the CVD will be equal to the excise duty for the time being leviable on a like article if produced or manufactured in India. In order words, we have to forget that the goods are imported, imagine that the importer had manufactured the goods in India and determine the amount of excise duty that he would have been called upon to pay in that event. Thus, if the person using the goods is entitled to the remission, the importer will be entitled to say that the CVD should only be the amount of concessional duty and if he has paid more, will be entitled to ask for a refund. In our opinion, the Tribunal was in error in holding that the assesses could not get a refund because the procedure of Chapter X of the rules is inapplicable to importers as such".

8. In the light of the above, we allow the above appeals with consequential relief.

[Dictated and pronounced in the open Court on 12.08.2008]

(Justice S.N. Jha)
President

[M. Veeraiyan]
Member [Technical]

[Pant]