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

Appeal No. E/2242/2006-SM[BR]

Date 12/08/2008

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

To :
CCE,BHOPAL
48,ADMIN AREA ARERA HILLS HOSHANGABAD ROAD,BHOPAL
CCE,BHOPAL

Appellant
Vs
Respondent

M/S BIRLA ERICSSON OPTICAL LTD.

I am directed to transmit herewith a certified copy of **Final order No**. 1133 /2008 -SM[BR] dated 22.7.2008 passed by the Tribunal under Section 35-C(1)of Central Excises Act, 1944

Assistant Registrar
(SM Appeal Branch)

Copy to :
1. Respondent
   M/S BIRLA ERICSSON OPTICAL LTD.
   REWA (MP)
2. Adv. / Consult SHRI P.C. JAIN ADV.
   N / V.--------------------
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
(SM Appeal Branch)

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

Excise Appeal No.2242 of 2006-SM (BR)

[Arising out of Order-in-Appeal No.111-CE/BPL/2006 dated 20.04.2006 passed by the Commissioner of Central Excise (Appeals), Bhopal]

Date of Hearing/ Decision:22.07.2008

For approval and signature:

Hon'ble Mr. P.K. Das, Member (Judicial)

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? :
3. Whether Their Lordships wish to see the fair copy of the Order? :
4. Whether Order is to be circulated to the Departmental authorities? :

No.

CCE, Bhopal ...Appellants

[Rep. by Shri S. Gautam, DR]

Vs.

M/s. Birla Ericsson Optical Ltd. ...Respondent

[Rep. by Shri P.C. Jain, Advocate]

CORAM: **Mr. P.K. Das, Member (Judicial)**

Final Order No. 1133/2008-SM(BR)/Dated:22.07.2008

Per P.K. Das:

Revenue filed this appeal against the order of the Commissioner (Appeals), whereby the refund of Rs.31,872/- was sanctioned and it is held that the refund is not hit by doctrine of unjust enrichment.

2. Ld. DR on behalf of the Revenue submits that the Commissioner of Central Excise (Appeals) failed to appreciate that in the case of provisional assessment, refund is subjected to doctrine of unjust enrichment. He submits that Board has clarified vide Circular dated 18.06.87 that even if credit notes are issued or duty collected is refunded by cheque, doctrine of unjust enrichment applies. He relied upon the decision of the Tribunal in the case of Sangam Processors Vs. CCE – 1994 (71) ELT 989 (CESTAT).

3. Ld. Advocate on behalf of the Respondent reiterates the findings of the Commissioner (Appeals). He produced the copy of the refund claim along with the certificate of Bharat Sanchar Nigam Ltd. (a Government of India Enterprise).

4. After hearing both the sides and on perusal of the records, it is seen that the Respondent supplied PIJF telephone cables to BSNL on provisional price. For the proper appreciation of the facts of the case, the relevant portion of the order of the Commissioner (Appeals) is reproduced below:-

> "5. I have carefully gone through the case records, grounds of appeals and other evidence. I find that the appellant is supplying PIJF telephone cables to M/s. Bharat Sanchar Nigam Ltd. (DOT). The clearance of the goods was under provisional assessment as the prices were provisional. Initially, the price for the goods was higher and the appellant issued invoices and paid duty accordingly. However, subsequently, M/s. Bharat Sanchar Nigam Ltd. fixed the

basic price at lower side. The appellant issued credit notes to the buyer and the difference in the price was adjusted by the buyer from the outstanding payment of the appellant. The appellant has preferred a refund claim and has contended that the refund claim is not hit by the bar of unjust enrichment since the incidence of duty was not passed on to the buyer."

5. It is revealed from the certificate issued by BSNL that the BSNL confirmed the adjustment of amount on account of price variation. The Tribunal in the case of Sandeep Metal Craft Pvt. Ltd. Vs. CCE, Nagpur reported in 2008 (226) ELT 428 (T-M) held that the assessee cleared the goods under the contract price of ordinance factory and certificate issued by the Indian Ordnance Factory that the amount paid is only the amount, which has been contracted. It has been held that the assessee has not received any amount over and above of the contract price and incidence of duty has not been passed to the customers.

6. In the present case, the appellant produced the certificate of BSNL confirming the adjustment of higher price of duty and in view of the decision of the Tribunal, I find that the Commissioner (Appeals) rightly sanctioned the refund claim. Accordingly, I do not find any merit in the appeal filed by the Revenue. The appeal is rejected.

Order dictated & pronounced in open court on 22.7.2008.

(P.K. Das)
Member (Judicial)

Ckp.