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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. C/419 /2008 – SM[BR] Date 25/05/2009

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

To :
C.C. NEW DELHI (IMPORT & GENERAL)
NEW CUSTOM HOUSE, NEAR I.G.I. AIRPORT, NEW DELHI 110037.

C.C. NEW DELHI (IMPORT & GENERAL) Appellant
Vs
M/S SHRI DURGA CHEMICALS INDUSTRIES Respondent

I am directed to transmit herewith a certified copy of **Final order No**. 470 / 2009 –SM[BR] dated 25.3.2009 passed by the Tribunal under Section 129, (B) of the Customs Act,1962 & Financial Act 1994 relating to Service Tax

Assistant Registrar
(SM Appeal Branch)

Copy to :
1. Respondent
M/S SHRI DURGA CHEMICALS,
KILA GATE, NAYA GANJ,HATHRAS (U.P.)
2. Adv. / Consult SHRI SAURABH BHATIA ADV.
50-F, KAMLA NAGAR, KOHLAPUR ROAD
DELHI-110007.

3 S.D.R
4 ~~J.C.D.R.~~
5 Bar association, CESTAT, New Delhi
6 Director Publications, Customs, Excise. I.P. Estate, New Delhi
7 M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi - 3
8 Commercial Laws of India Pvt Ltd. Post Bag No. 1033, No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
9 Raghuraman's 44-B, Regal Flat,Shipra Suncity, Indirapuram - 201010,Ghaziabad, DT, U.P.
10 M/s Manupatra Information Solutions Pvt Ltd. Excise & Customs Cases B-37, Sector - 1, Noida - 201301, Gautam Budh Nagar, (UP)
11 M/s. Deeparchie Publications, M-93, Marg, 46, Saket, New Delhi 110017
12 Taxindiaonline.com Pvt.Ltd, B-XI/8183,Vasant Kunj, New Delhi - 110070
13 Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh, New Delhi - 110026
14 Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road,Ahmedabad-15
15 LAWCRUX Advisors Pvt Ltd, LAW House,1-8,Sector - 10, Faridabad 121003 (Haryana)
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Assistant Registrar
(SM Appeal Branch)

CUSTOMS EXCISE & SERVICE TAX APPELLATETRIBUNAL,
West Block No.2, R.K Puram, New Delhi-110066
Principal Bench.

Date of hearing:25.03.2009

Customs Appeal No.419 of 2008-SM (BR)

(Arising out of Order-in-Appeal No.CC(A)CUS/I&G/D-I/85/08 dated 22.02.2008 passed by the Commissioner of Customs (Appeals),New Delhi)

For approval and signature:

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

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1. Whether Press reporters may be allowed to see the order for publication as per Rule 27 of the 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?

Commissioner of Customs — Appellant/Applicant
(Rep. by Shri R.K. Verma, DR)

Vs.

M/s. Shri Durga Chemicals Inds. — Respondent
(Rep. by Shri Shaurabh Bhatia, Advocate)

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

Final Order No. 470/2009 SM (BR)

Per: P.K. Das

Revenue filed this appeal against the Order-in-Appeal No. CC(A)CUS/I&G/D-I/85/08 dated 22.02.2008, whereby Adjudication Order was set aside and refund was allowed subject to verification of factor of unjust enrichment.

2. After hearing both the sides and on perusal of the records, I find that the respondents at the time of assessment of Bill of Entry contended that the goods were not chargeable to additional duty of Customs. But the concerned Assessing Group assessed the Bill of Entry on higher rate of duty, which was duly paid by the respondents. They have not filed appeal against assessed Bill of Entry. But, the respondents filed the refund claim, which was rejected by the Original authority. Commissioner (appeals) set aside adjudication Order.

3. ld. DR submits that the issue has already been decided by the Hon'ble Supreme Court in the case of Flock India Ltd. reported in 2000 (120) ELT 285 (SC) and Priya Blue Industries Ltd. Vs. CC (Preventive) reported in 2004 (172) ELT 145 (SC).

4. Ld. Advocate relied upon the decision of the Larger Bench of the Tribunal in the case of Faxtel Systems (India) Pvt. Ltd. Vs. CC, Cochin

reported in 2004 (169) ELT 265 (Tribunal-LB). He also relied upon the decisions of the Tribunal in the case of PPN Power Generating Co. P. Ltd. Vs. CC (Seaport), Chennai reported in 2006 (204) ELT 493 (Tribunal-Chennai) and I.P. Rings Ltd. Vs. CC (Air), Chennai reported in 2006 (202) ELT 61 (Tribunal-Chennai), whereby it has been held that the refund claim on the basis of the assessed Bill of Entry is maintainable. Ld. Advocate also relied upon the decision of the Tribunal in the case of CC & CE, Visakhapattnam Vs. Ruchi Infrastructure Ltd. Reported in 2008 (224) ELT 477 (Tribunal-Bang.) He further submits that no speaking order was issued to them for filing appeal before the Commissioner (Appeals).

5. I find that the Hon'ble Supreme Court in the case of Priya Blue Industries Ltd. (supra) held that refund claim contrary to the assessment order is not maintainable, unless order of assessment having been modified in appeal. The relevant portion of the decision of the Hon'ble Supreme Court in the case of Priya Blue Industries Ltd. (supra) is reproduced below:-

> "6. We are unable to accept this submission. Just such a contention has been negatived by this Court in Flock (India)'s case (supra). 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."

6. In view of the decision of the Hon'ble Supreme Court, I find that the respondents had not challenged the assessed Bill of Entry before the Commissioner (Appeals). Therefore, the Original Authority rightly rejected the refund claim. Accordingly, the impugned order of the Commissioner (Appeals) is set aside and the order of the Original Authority is restored. The appeal filed by the Revenue is allowed.

(Dictated and pronounced in the open court).

(P.K. Das)
Member (Judicial)

Ckp.