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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/707 /2008 – SM[BR] Date 17/08/2009

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

To :
M/S BHARTI SONS,
2994, SUNDER NAGAR, NEAR KING PALACE, LUDHIANA.

M/S BHARTI SONS, Appellant
Vs
C.C. (PREVENTIVE) AMRITSAR Respondent

I am directed to transmit herewith a certified copy of **Final order No.** 916 / 2009 –SM[BR] dated 28.7.2009 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
C.C. (PREVENTIVE) AMRITSAR
CUSTOM HOUSE, CENTRAL REVENUE BUILDING, THE MALL, AMRITSAR 143001.
2. Adv. / Consult
MR.SUDHIR MALHOTRA.
13-R, HUKAM CHAND COLONY, NEAR D.A.V COLLEGE, JALANDHAR
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)

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

Customs Appeal No.707 of 2008-SM (BR)

[Arising out of Order-in-Appeal No.95/Cus/Rev/Ldh/08 dated 8.8.2008 passed by the Commissioner of Central Excise (Appeals), Chandigarh]

Date of Hearing/ Decision:28.07.2008

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? : 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

M/s. Bharti Sons ...Appellants

[Rep. by None.]

Vs.

CC, Amritsar ...Respondent

[Rep. by Shri Ishtikhar Baig, DR]

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

Final Order No. 916/09 SM(BR) /Dated:28.07.2009

Per P.K. Das:

The relevant facts of the case, in brief, are that the appellants imported one "Circular Knitting Machine" classifiable under sub-heading

No.8447.90 of the Customs Tariff Act under EPCG Scheme. They claimed exemption of CVD benefit under Notification No.29/97-Cus dated 1.4.97. The Bill of Entry was assessed denying the benefit of exemption notification. The appellant paid duty under protest and also filed refund claim. The said refund claim was rejected on the ground that machine was not covered under EPCG Scheme. The appellant filed appeal before the Commissioner (Appeals), which was also rejected on the ground that the Bill of Entry was not challenged before the Commissioner (Appeals). The Tribunal vide Final Order No.447/2006 – SM (BR) dated 27.2.2006 set aside the impugned orders and remanded back the matter to the Original authority to consider the evidences that may be put-forth by the appellant regarding non-passing over of the incidence of duty to any other person. In terms of the direction of the Tribunal, the Original Authority, after considering the unjust enrichment, sanctioned the refund claim in favour of the appellants. Revenue filed appeal before the Commissioner (Appeals). By the impugned order, the Commissioner (Appeals) allowed the appeal filed by the Revenue. It has been held that the refund claim filed by the appellant is hit by the bar of doctrine of unjust enrichment laid down in Section 27 (2) of the Customs Act, 1962.

2. None appears on behalf of the appellant. Heard the ld. DR on behalf of the Revenue.

3. Ld. DR submits that the appellant merely filed an affidavit without supporting the evidence. He submits that the appellant failed to establish that the incidence of duty has not been passed to any other person. He also submits that the imported machine was captively used in the manufacture of final products and unjust enrichment is applicable. He relied upon the decision of the Larger Bench of the Tribunal in the case of SRF Ltd. Vs. Commissioner of Customs, Chennai reported in 2006 (193) ELT 186 (T-LB). He also relied upon the decision of the Hon'ble Supreme Court in the case of Union of India Vs. Solar Pesticide Ltd. reported in 2000 (116) ELT 401 (SC).

4. After hearing ld. DR and on perusal of the records, I find that Notification No.29/97-Cus dated 1.4.1997 as amended extended benefit of exemption of duty of capital goods imported under EPCG Scheme (Export Promotion Capital Goods). The importer executes a bond binding himself to fulfil export obligation. In this case, the exemption of CVD was allowed as the imported machine would be used for procuring/manufacture of finished goods of export. The Original Authority sanctioned the refund claim after examining the affidavit filed by the appellant. It has been stated in the affidavit that the imported machine was installed in their factory. The goods manufactured were exported in global market at international competitive prices. It has also been stated that the incidence of duty of Rs.2,67,255/- was not passed to

the foreign buyers. Rule 27 of the Customs Act, 1962 provides that, "the application for refund of duty shall be accompanied by such documentary or other evidence as the applicant may furnish to establish that the amount of duty in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such duty had not been passed on by him to any other person."

5. The Commissioner (Appeals) observed that the adjudicating authority relied upon the affidavit of the appellant regarding non-passing of the duty to the buyers but the appellant has not produced any evidence in support of their affidavit during adjudication proceedings or appellate stage.

6. I find that there is no dispute that imported machine was cleared under EPCG Scheme. The affidavit indicates that the imported machine was used for the exported goods. It is also declared that the goods manufactured were exported in global market at international competitive prices. This fact was not disputed by the Commissioner (Appeals). It is noted that Government is providing export incentives so as to make the manufacturer to compete in international market. So, there is no scope to pass incidence of duty to foreign buyers. Hence, the appellant established that the amount of duty in relation to which refund was claimed was not collected from any other person..

7. The ld. DR relied upon the case of Solar Pesticide Pvt. Ltd. (supra). The Hon'ble Supreme Court held that principle of unjust enrichment would apply even on captive consumption of imported goods. In the present case, it has been held that the imported machine captively used in the manufacture of export goods and, therefore, the appellant established that the incidence of duty was not passed to any other person.

8. In view of the above discussions, the impugned order passed by the Commissioner (Appeals) is set aside. The order of the Original Authority is restored. The appeal filed by the appellant is allowed.

Order dictated & pronounced in open court on 28.07.2008.

(P.K. Das)
Member (Judicial)

Ckp.