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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/807 /2008 – SM[BR] Date 04/09/2009

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

To :
M/S NICKUNJ EXIMP ENTP. PVT. LTD.
37, KM. STONE, DELHI-JAIPUR HIGHWAY, N.H.8,
KHANDSA, GURGAON, HARYANA.

M/S NICKUNJ EXIMP ENTP. PVT. LTD. Appellant
Vs
C.C.(PREVENTIVE) Respondent

I am directed to transmit herewith a certified copy of **Final order No. 1116 / 2009 – SM[BR]** dated 20.8.2009 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)
NEW CUSTOM HOUSE, NEAR I.G.I. AIRPORT, NEW DELHI 110037.
2. Adv. / Consult
MR.SHARMA & ASSOCIATES,
157, 1ST FLOOR, DDA OFFICE COMPLEX, CYCLE MARKET, JHANDEWALAN EXTN. NEW DELHI-110055.
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)
16 Office Copy
17 Guard file

Assistant Registrar
(SM Appeal Branch)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST BLOCK NO. 2, R.K. PURAM, NEW DELHI

COURT – III

CUSTOMS APPEAL NO. 807 OF 2008-SM

[Arising out of Order-in-Appeal No. CC(A)Cus./ICD/321/2008 dated 16.09.2008 passed by the Commissioner (Appeals) Customs, New Customs House, New Delhi]

For approval and signature:

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

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 would 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. Nickunj Eximp Entp. Pvt. Ltd., Appellants

Vs.

C.C., New Delhi Respondent

Appearance:

None for the assessee;
Shri R.K. Saini, DR for the Revenue

Coram:

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

Date of hearing/decision: 20th August, 2009

FINAL ORDER NO. 1116/2009 SM(BR) **dated** ______

Per P.K. Das:

By letter dated 19.8.2009 learned Counsel on behalf of the appellants requested to decide the matter on merits in their absence.

2. Heard learned D.R. on behalf of the Revenue and perused the records.

3. The appellants imported Silicon Metal, grade – 55.3 and paid duty on provisional Bill of Entry No. 602330 dated 12.06.2007. Subsequently, they filed refund claim on 16.7.2007 for Rs. 1,63,691/- as they paid excess customs duty by mistake. It was contended by the appellants that they were entitled for the benefit of CVD vide Notification No. 04/2006-CE dated 1.3.2006 as amended. The original authority rejected the refund claim on the ground that Bill of Entry was not challenged before the Commissioner (Appeals) under Section 128 of the Customs Act, 1965. Commissioner (Appeals) upheld the adjudication order.

4. It is contended by the appellants that Bill of Entry cannot be said to be an assessment order because Appraising Officer finalized the assessment only on verification of the documents. It is also contended that in the case law relied upon by the lower authorities, there was an order of assessment by the Asst. Commissioner after filing of classification list/Bill of Entry but, in the present case there is no such

order of assessment which could be challenged before the Commissioner (Appeals). The appellants relied upon the decision of the Tribunal in the case of TELCO Ltd. vs. C.C., Mumbai, reported in 2003 (158) ELT 640 (Tri. – Mum.). The appellants also relied upon the decision of the Tribunal in the case of G.S. Metalica vs. CC(Import), Nhava Sheva, reported in 2007 (217) ELT 466 (Tri. – Mumbai).

5. In the instant case, I find that the appellants cleared the goods on the basis of assessment order. It is also seen that the appellants have not challenged the assessment order before the appellate authority. The appellant claimed benefit of exemption notification in the refund claim. Thus, the case is squarely covered by the decision of the Hon'ble Supreme Court in the case of CCE, Kanpur vs. Flock (India) Pvt. Ltd., reported in 2000 (120) ELT 285 (SC) and Priya Blue Industries vs. C.C. (Preventive), reported in 2004 (172) ELT 145 (S.C.). The relevant portion of the decision of the Hon'ble Supreme Court in the case of Priya Blue Industries (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 nto 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.

7. We also see no substance in the contention that provisions for a period of limitation indicates that a refund claim could be filed without filing an Appeal. Even under Rule 11 under the Excise Act the claim for refund had to be filed within a period of six months. It was still held, in Flock (India)'s case (supra), that in the absence of any Appeal having been filed no refund claim could b made."

6. In view of the above decision of the Hon'ble Supreme Court, I find that there is no reason to interfere with the order of the Commissioner (Appeals). Accordingly, appeal filed by the appellants is rejected.

(Dictated & pronounced in the Open Court.)

(P.K. DAS)
MEMBER (JUDICIAL)

RK