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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/489 /2006-491 /2006 - CU[DB], C/M/579/2009 Date 08/06/2010

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

To :
1. PARAS RAJGARHIA
2. PRABHAS RAJGARHIA
3. M/S. ABHISHEK EXPORTS

H-280, UDYOG VIHAR UDAIPUR.

M/S. ABHISHEK EXPORTS Appellant

Vs

COMMISSIONER OF CENTRAL EXCISE,JAIPUR-II MISC. ORDER NO.C/81/2010 Respondent

I am directed to transmit herewith a certified copy of **Final order No. C/86-88/ 2010 CU[DB]** dated 07.06.2010 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 CENTRAL EXCISE,JAIPUR-II
   NCR BUILDING, STATUTE CIRCLE, C-SCHEME, JAIPUR.
2. Adv. / Consult MR. V.L. KUMARAN, ADV.
   B-6/10/, SAFDERJUNG ENCL.,
   NEW DELHI – 110 029.
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. Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
9. M/s. Deeparchie Publications. M-93. Marg. 46. Saket. New Delhi 110017
10. Taxmann Allied Service Pvt Ltd.. 59/32. New Rohtak Road. New Delhi - 110005
11. Easy Service Tax Online Dot Com Pvt.Ltd.407A.Iscon Mall.Above Star India Bazar.Satellite Road.Ahmedabad-15
12. LAWCRUX Advisors Pvt Ltd. LAW House.1-8.Sector - 10. Faridabad 121003 (Haryana)
13. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
14. Office Copy
15. Guard file

Assistant Registrar
(Customs Appeal Branch)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.
Principal Bench, New Delhi

COURT NO. II

DATE OF HEARING : 20/05/10.

Customs Appeal No. 489 of 2006 with Miscellaneous Application No. 579 of 2009

M/s Abhishek Exports — Appellant

Versus

CCE, Jaipur – II — Respondent

Customs Appeal No. 490 of 2006

Shri Paras Rajgharia, Partner — Appellant

Versus

CCE, Jaipur – II — Respondent

Customs Appeal No. 491 of 2006

Shri Prabhas Rajgharia, Partner — Appellant

Versus

CCE, Jaipur – II — Respondent

Appearance

S/Shri A.R.M. Rao and R.K. Hasija, Advocates – for the appellant.

Shri S.K. Panda, Authorized Representative (Jt. CDR) – for the Respondent.

CORAM : **Hon'ble Shri D.N. Panda, Judicial Member**
Hon'ble Shri Rakesh Kumar, Technical Member

Final Order No. C/86-88/10 Dated : ____________
Misc Order No C/81/10

ORDER

Per. D.N. Panda :-

The appeal case Nos. C/489-491 of 2006-CUS were heard on several occasions. But did not reach to its conclusion for some reason or other. In July 2009, there was an averment by the appellant that they shall file a Miscellaneous Application to add new grounds, serving copy thereof on Revenue, for their defence plea. Accordingly, the appellant prayed time of two weeks for that purpose. To such a prayer, revenue desired that the application, upon filing by Appellant shall be sent to the Adjudicating Authority for examination. Accordingly the matter was adjourned to 27th August 2009. Thereafter the matter could not reach for hearing.

2. Yesterday, the matter was heard. Before Revenue opened its arguments, upon closure of the argument by the appellant, learned counsel for the appellant mentioned that the Miscellaneous Application No. 527 of 2009 may be disposed to enable the appellant to proceed with the legal pleading mentioned in para 2 of the application which reads as under :

> "2. The applicant craves leave of this Hon'ble Tribunal to urge the following ground in the memorandum of appeal and add the same after ground No. J.6.

"J.7 Without prejudice and in any case, it is respectfully submitted that the confirmation of customs duty demand on the imported marble slabs as also imposition of excise duty equal to 100% of customs duty as excise duty on the DTA clearances of marble slabs is ex facie unjustified and illegal. Admittedly, in the present case, at the time of DTA clearance of the marble slabs, the appellants have paid excise duty equal to 50% of each of the duties of customs in terms of the applicable central excise notification. It is the appellant's submission that in respect of such DTA sales, since the processes undertaken by the appellants does not amount to manufacture, no excise duty at all is payable as held by this Hon'ble Tribunal vide Final Order No. C/84-85/09-Cus. dated 17.2.2009. Thus excess excise duty stands paid by the appellant in respect of the DTA sales of the marble slabs/tiles. If the customs duty demand on the imported marble slabs is held to be sustainable within the normal period of limitation as held by this Hon'ble Tribunal in Jain Grani's case, then the appellant submits that the customs duty demand on the imported items is to be adjusted against the excise duty equal to customs duty paid on the DTA clearances of the goods. This principle of adjustment of customs duty vis-à-vis the excise duty paid on the DTA clearances has already been held to be permissible in the following judgments of this Hon'ble Tribunal. :

(1) Nikhil Industries Pvt. Ltd. vs. CCE
2005 (180) E.L.T. 321 (T)

(2) STL Exports Ltd. vs. CC
2004 (164) E.L.T. 179 (T)

(3) Opal Fabrics vs. CCE
2004 (164) E.L.T. 70 (T)

The above submission regarding adjustment of duties is without prejudice to the main submission that no part of the duty demand is sustainable."

3. When a legal plea as above came forward from the Appellant, Revenue was asked to show the reason if any as to why such plea shall not be considered and the matter was adjourned. Accordingly, the matter was taken up for hearing today. Learned counsel for Appellant reiterates his arguments stating that although on an earlier occasion when an Assessee could not succeed before Tribunal in appeal case No. C/472-473/06 on similar issues involved in the present appeal, disposed by order dated 17th February 2009 by Tribunal, that Assessee has gone to Hon'ble High Court of Rajasthan. Therefore, the legal plea as per aforesaid ground has been advanced for the defence in present appeal. He submits that para 2 of Miscellaneous Application potraying the ground as extracted aforesaid enables the appellant to raise question of law at any stage of a proceeding and that deserves consideration since Tribunal is final court of facts.

4. Learned counsel following the ratio laid down by Apex Court in **NTPC Ltd. vs. CCE, Income Tax – 1998 (99) E.L.T. 200 (S.C.)** submits that question of law can be raised at any stage of the proceedings. He also relies on the judgment of the Tribunal in **South Asian Petrochem Ltd. vs. CC (Airport & Admn.), Kolkata** reported in **2007 (219) E.L.T. 991 (Tri. – Kolkata)** for its plea aforesaid and in the case of **Nikhil Industries Pvt. Ltd. vs. CCE, Jaipur** reported in **2005 (180)**

E.L.T. 321 (Tri. – Del.). He further submits that tax adjustment as raised in the additional ground of appeal as aforesaid, is permissible, and that is not deniable.

5. To the aforesaid propositions of law and factual matrix, Revenue replies today submitting that the appellant is not entitled to the adjustment of the taxes paid which was not being decided by the Adjudicating Authority in absence of any pleading in that behalf before him. Raising of altogether a new plea today by the Miscellaneous Application is not entertainable.

6. We have made an extensive survey to the genesis of the case. When an assessee on similar matter was before Tribunal earlier, adjudication thereof was made by an order dated 24th April 2006 vide No. 10-11/CE/JP-II/06. The present appeal is against adjudication order No. 12-13/CE/JP-II/06 dated 24th April 2006 on self same issue. Learned counsel submits that the present case of the appellant although is on the similar footing of the factual matrix of the decision of the Tribunal in appeal case No. 472-473/06 disposed on 17th February 2009, this appellant deserves consideration in respect of the legal pleading raised by the Miscellaneous Application since this is first and last forum as final court of facts. His prayer is therefore, that the present appeal may be considered in the light of the amendment proposed by the Miscellaneous Application.

7. Learned Jt. CDR's submission is that when the appellants have already lost their case in a similar matter before Tribunal in the case of M/s Jain Grani Marmo Private Ltd. decided in the appeal case No. 472-473 of 2006 disposed on 17th February 2009, nothing more is entertainable at this stage. He also submits that he has instructions that revenue has gone in appeal to Apex Court against order of the Tribunal. Learned Jt. CDR relies on the doctrine of unjust enrichment and submitted that such doctrine has application to present appeal, the moment tax adjustment is considerable. He cites the judgment of Apex Court in **Sahakari Khand Udyog Mandal Ltd. vs. CCE & Cus.** reported in **2005 (181) E.L.T. 328 (S.C.)** and also in the case of **CCE, Kanpur vs. Premium Suiting Pvt. Ltd.** reported in **2010 (251) E.L.T. 71 (Tri. – Del.)**.

8. Having heard both sides and appreciating that a question of law arises in this case out of the additional ground taken by the appellant through the Miscellaneous Application, we are of opinion that the appellant deserves a hearing on that ground. Also we have noticed that when adjudication in this case was done on 24th April 2006, learned Adjudicating Authority had no advantage of going through the decision of the Tribunal in appeal case No. 472-473 of 2006 in M/s Jain Grani Marmo Private Ltd. and another decided on 17/2/2009. Therefore, it would be proper to grant fair opportunity of hearing to both sides by the learned Adjudicating Authority taking into consideration the developments made as above after adjudication.

9. Having arrived to the above conclusion, we dispose the miscellaneous application and direct both sides to cause their appearance before the learned Adjudicating Authority by end of June 2010 making an application to fix the date of hearing for a fresh decision on all the issues involved in this appeal including fresh ground of appeal extracted as aforesaid. Learned Authority upon receipt of the application for fresh adjudication shall fix an appropriate date of hearing and make effort to dispose of the matter by end of September 2010. While re-adjudicating the matter, it is necessary that he should have a fresh look over the issues taking into consideration the order passed by the Tribunal in the case of M/s Jain Grani Marmo Private Ltd. & Another in appeal case No. 472-473 of 2006 on 17/2/2009, the law of the lad, the additional ground taken today as extracted today, the development, if any, in Customs appeal No. 126 of 2009 before the Hon'ble High Court of Rajasthan and all other legal pleading permissible and relevant to the re-adjudication and pass reasoned and speaking order on all issues involved in the case.

10. Although we did not prefer to send the matter back to the learned Adjudicating Authority for readjudication but it has been considered proper to enable Revenue to examine Revenue implications of the additional ground and to do justice to both sides. We therefore send this matter back with the time frame as above for re-adjudication.

11. With the aforesaid result, both Miscellaneous application and Appeals are disposed of remanding the matter to the learned Adjudicating Authority for redoing the adjudication following aforesaid direction.

(Dictated and pronounced in open court)

(D.N. Panda)
Judicial Member

(Rakesh Kumar)
Technical Member

PK