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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/11 /2010 - SM (BR) Date 15/10/2010

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

To :
C.C.(PREVENTIVE)
NEW CUSTOM HOUSE, NEAR I.G.I. AIRPORT, NEW DELHI 110037.
C.C.(PREVENTIVE) Appellant

Vs

M/S. GALAXY FOOTWEAR PVT. LTD. Respondent

I am directed to transmit herewith a certified copy of **Final order No.** 1110 / 2010-SM[BR] dated 20.9.2010 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. GALAXY FOOTWEAR PVT. LTD.
   2424, PART A, MIE, BAHDURGARH

2. Adv. / Consult SHRI S.K.PAHWA ADV.
   D-75 , AMAR COLONY LAJPAT NAGAR-IV,
   NEW DELHI-24.

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
(SM Appeal Branch)

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

Date of Hearing/ Decision:03.09.2010

Excise Appeal No.11 of 2010-SM (BR)

For approval and signature:

Hon'ble Shri Ashok Jindal, Member (Judicial)

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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? :

[Arising out of Order-in-Appeal No.CC(A) CUS/I&G/214/09 dated 12.10.09 passed by the Commissioner of Customs (Appeals), New Delhi].

Commissioner of Customs (I&G) Appellant

Vs.

M/s.Galaxy Footwear Pvt. Ltd. Respondent

Appearance: Rep. by Shri K.P.Singh, SDR on behalf of the appellants.
Rep. by Shri S.K. Pahwa, Advocate on behalf of the respondent/Department.

CORAM: **Hon'ble Shri Ashok Jindal, Member (Judicial)**

Final

Order No....1110/2010 SM(BR)/Dated:03.09.2010

Per Ashok Jindal:

Revenue has filed this appeal against the impugned order, wherein the lower appellate authority had allowed the refund claim of the respondent.

2. The brief facts of the case are that the respondents imported moulds and filed bill of entry on 15.05.2008 and the same was assessed on the same day. Later on, the consignment was examined by the Customs Authorities and on such examination, it was found that the goods are short landed. The same was in the knowledge of the Customs Authorities. Later on, the respondent filed the refund claim on 22.02.2009 for the refund of the amount paid by them as per the assessment done on the bill of entry on 15.05.2008 and the duty deposited on 17.05.2008. The Asstt. Commissioner rejected the refund claim on the ground that the respondent had not submitted the documents required to satisfy himself whether the duty incidence has not been passed on to the customers. In other words, whether the refund claim is hit by bar of unjust enrichment or not. As per Section 27 (B) of the Customs Act, 1962 and he also held that refund claim is barred by limitation as the duty was deposited on 17.05.2008 and the refund claim filed on 22.02.2009 i.e. after a period of six months. Against such rejection of the refund claim, the respondent filed appeal before the Commissioner (Appeals), who allowed the refund claim of the respondent holding that it is a case of refund of short landing

of goods, which was detected by the customs officers during the course of examination of the goods, which is mentioned in the examination report. He held that in a case of short landing, the extra amount paid by the respondent becomes the deposit, not the duty. Hence, the same is not hit by bar of limitation or unjust enrichment. Aggrieved from the said order, the revenue is before me.

4. Shri K.P.Singh, ld. SDR appearing on behalf of the Revenue submitted that in this case, the bill of entry was assessed on 15.05.2008 and in pursuant to that assessment, duty has been paid on 17.05.2008 and the said assessment was not challenged by the respondent and the refund claim is also filed beyond a period of six months. The refund claim sanctioned by the Commissioner (appeals) is not sustainable. He further submits that the respondent failed to submit the documents asked by the adjudicating authority at the time of dealing with their refund application. Hence, the refund claim is liable to be rejected on both the counts on limitation as well as on bar of unjust enrichment. Accordingly, the impugned order is to be set aside and the appeal be allowed.

5. On the other hand, ld. Advocate appearing for the respondent submitted that in this case, no assessment was done by the customs authorities after examination of the goods by them, which is apparent from the examination report. It was a case of short landing of goods and as held by this Tribunal, in a series of decisions, that in case of short landing of goods duty paid on the goods is not the duty but it is a deposit.

He further submitted that on deposit, there is no bar of limitation as well as unjust enrichment. Hence, the impugned order is sustainable and the appeal is liable to rejected.

6. Heard both the sides.

7. On careful examination of the submissions made by both the sides, I find that it is a case of assessment of bill of entry by the Asstt. Commissioner at the time of import of goods as the bill of entry of 15.05.2008 and against the said assessment, the duty was paid on 17.05.2008. After 17.05.2008, the goods were examined and found short. It is not disputed by both the parties. To deal with such a situation, Section 17 (4) of the Customs Act, 1962 is applicable to this case. The same is reproduced below:-

> "17(4) Notwithstanding anything contained in this section, imported goods or export goods may, prior to the examination or testing thereof, be permitted by the proper officer to be assessed to duty on the basis of the statements made in the entry relating thereto and the documents produced and the information furnished under sub-section (3); but if it is found subsequently on examination or testing of the goods or otherwise that any statement in such entry or document or any information so furnished is not true in respect of any matter relevant to the assessment, the goods may, without prejudice to any other action which may be taken under this Act, be re-assessed to duty."

8. On careful reading of Section 17(4) of the Act, I find that in the case of examination of the goods, later on, after assessment of bill of entry, if it is found that there is some discrepancy in the bill of entry or in

the documents, the customs authorities are liable to re-assess the goods. As in this case, after detection of the shortage of the goods, no re-assessment order is on record. Hence, the question of challenging the same does not arise. Further, as held by this Tribunal, in various decisions viz. Southern Sea Foods Pvt. Ltd. Vs. CC, Bombay reported in 1987 (31) E.L.T. 506 (Tribunal), it was held by this Tribunal, that in case of short landing of goods, payment made pursuant to assessment is not the customs duty and the provisions of Section 27 (1) of the Customs Act are not relevant. Accordingly, in this case also, the amount deposited by the respondent in pursuant to the assessment made by the Customs Authorities on 15.05.2008 are not the duty but they are the deposits as rightly held by the Commissioner (Appeals) in the impugned order that the amount deposited by the respondent is a deposit and the provisions of Section 27 of the Customs Act are not applicable. Accordingly, I do not find any infirmity in the impugned order and I hold that as there is no assessment in this case by the Asstt. Commissioner after examination of the goods, refund claim is legally available to the respondent. With these observations, I do not find any merit in this appeal and the same is rejected.

(Ashok Jindal)
Member (Judicial)

Ckp.