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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
EXCISE APPEAL BRANCH

Appeal No. E/1647/2005 - EX[DB] Date **20/12/2010**

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

To :
M/S BHARAT HEAVY ELECTRICALS LTD.
P.O.BHEL KHAILER JHANSI U.P.
284129

M/S BHARAT HEAVY ELECTRICALS LTD. Appellant
Vs
C.C.E. KANPUR Respondent

I am directed to transmit herewith a certified copy of **Final order No. 864/ 2010 EX[DB]** dated 22-11-10 passed by the Tribunal under Section 35-C(1)of Central Excises Act, 1944

Assistant Registrar
(Excise Appeal Branch)

Copy to :

1. Respondent
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2. Adv. / Consult
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4. Bar association. CESTAT. New Delhi
5. Director Publications. Customs. Excise. I.P. Estate. New Delhi
6. M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -
7. Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
8. M/s. Deeparchie Publications. M-93. Marg. 46. Saket. New Delhi 110017
9. Taxmann Allied Service Pvt Ltd.. 59/32. New Rohtak Road. New Delhi - 110005
10. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road, Ahmedabad-15
11. LAWCRUX Advisors Pvt Ltd. LAW House.1-8.Sector - 10. Faridabad 121003 (Haryana)
12. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
13. Office Copy
14. Guard file
15. HON'BLE PRESIDENT.

Assistant Registrar
(Excise Appeal Branch)

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
West Block No.2, R. K. Puram, New Delhi.

Date of hearing/decision: 22.11.2010

For approval and signature:

Hon'ble Shri Justice R.M.S. Khandeparkar, President
Hon'ble Shri Rakesh Kumar, Member (Technical)

1.	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982.	Yes
2	Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	Yes
3	Whether Their Lordships wish to see the fair copy of the Order?	Seen
4	Whether Order is to be circulated to the Departmental authorities?	Yes

Excise Appeal No. 1647 of 2005

[Arising out of Order-in-Appeal No. 26/CE/Appl/KNP/2005 dated 17.01.2005 passed by the Commissioner (Appeals) Customs & Central Excise, Kanpur].

M/s Bharat Heavy Electricals Limited — Appellants

Vs.

CCE, Kanpur — Respondent

Appearance:

Rep. by Sh. Z.U. Alvi, Advocate for the appellants.

Rep. by Ms. Monika Batra, DR for the respondent.

Coram: Hon'ble Sh. Justice R.M.S. Khandeparkar, President
Hon'ble Sh. Rakesh Kumar, Member (Technical)

FINAL Oral Order No. 864/10-EX

Per: Hon'ble Sh. Justice R.M.S. Khandeparkar:

Heard the learned Advocate for the appellants and DR for the respondent. We have also perused the written submissions filed by the parties.

2. This appeal arises from order dated 17.1.2005 passed by the Commissioner (Appeals) Kanpur. By the impugned order, the appeal filed by the appellants against the order of the adjudicating authority was dismissed. The Deputy Commissioner, Jhansi by his order dated 31.03.2007 had confirmed the demand of central excise duty of Rs. 6,72,000/- against the appellants in relation to High Voltage Rectifier as being not entitled to avail the benefit of Notification No. 5/99-CE dated 28.02.99.

3. The appellants are engaged in manufacture of transformers and parts thereof, busducts, AC/DC Locomotives and parts thereof classifiable under chapter sub-heading No. 8504.00, 8544.00, 8601.00, 8602.00 and 8607.00 of the Central Excise Tariff Act, 1985.

4. It is the case of the department that pursuant to the scrutiny of RT-12 for the month of December, 1999 and January 2000 filed by the appellants it was observed by the Central Excise Officers that the appellants got cleared 12 sets of High Voltage Rectifiers valued at Rs. 7,00,000/- per set to the Chief Manager Project, National Aluminium Co. Ltd., Damanjodi, Orissa under invoice No. T-658, T-659 both dated 23.12.99, T-693 dated 31.12.99 and T-726 dated 10.1.2000 claiming concessional rate of duty at the rate of 8% Adv. on the basis of Notification No. 5/99-CE dated 28.2.99. The appellants had also submitted a copy of the certificate dated 15.2.99 issued by Ministry of Environment and Forests, New Delhi addressed to the Assistant Commissioner, Central Excise, Ranipet. It was claimed by the appellants that the said High Voltage Rectifier were parts of Electrostatic

Precipitation Systems mentioned in the said notification and said EPS system were being supplied by M/s BHEL, Ranipet to NALCO, Orissa to be used for the Pollution Control purposes and, therefore, were eligible for concessional rate of duty in terms of the said notification. As the explanation was not acceptable to the department, show cause notice dated 26.09.2000 came to be issued to the appellants which was contested by the appellants and ultimately the order dated 31.3.2001 came to be issued. Being aggrieved by the said order, the appellants preferred the appeal before the Commissioner (Appeals) which came to be dismissed by the impugned order.

5. While assailing the orders passed by the authorities below, the learned Advocate for the appellants submitted that the High Voltage Rectifier were cleared for supply to NALCO being part of EPS by lawfully availing concessional rate of duty in terms of the said notification based on the certificate issued by the competent authority. Since the appellants' unit at Ranipet manufactures mechanical items for EPS and coordinating the supply of all other auxiliary plants relating to ESP. The certificate was issued in the name of the unit at Ranipet. The certificate explicitly certifies in terms of the said notification that the goods were ESP and its parts intended for pollution control for M/s NALCO, Damanjodi, Orissa ordered by them on BHEL vide order dated 03.07.98. The notification specifically permits concessional rate of duty not only to the whole of the system but also to the parts used in the system. He further submitted that the notification also permits partial exemption from payment of duty to such system and parts thereof even in relation to those directly dispatched from different sites of the manufacturer and, therefore, merely because the certificate was issued with reference to unit at Ranipet, but actual manufacture at Jhansi's unit

that cannot make any difference as far as manufacturer right to avail the benefit of concessional rate at the time of clearance of such product. Attention was also drawn to the fact that list appended to the notification specifically refers to parts of the various items listed in the said list. He further submitted that the appellants had produced the required certificate in terms of Condition No. 55 of the notification and, therefore, there was no justification for the authorities to deny the benefit of the said notification. It was also sought to be contended that the fact that the high voltage rectifier was part of EPS was never disputed and the same did not form part of challenge in the show cause notice. Placing reliance in the Circular No. 35/11/94 dated 7.09.94 and Notification No. 78/90-CE dated 28.3.90, it was contended that the present notification is nothing but the one which was brought into force in supercession of the earlier Notification No. 78/90-CE and the circular dated 7.9.94 which related to the said Notification No. 78/90-CE applies with equal force to the said notification in question and considering the same it cannot be said that the appellants have in any manner violated the condition of the said notification in question or that authorities could have denied the benefit thereunder to the appellants in relation to the goods in question.

6. Learned Advocate for the appellants further submitted that if the view that is sought to be taken by the department in relation to the notification in question is accepted, it would defeat the very purpose of the notification. In that regard, it was sought to be contended that the Tribunal in various cases has held that the benefit of exemption notification cannot be restricted to the main contractor for the project and could not be denied to the sub-contractor or the vendors who had supplied the goods for the main project to which the exemption under the relevant notification applied too. Reliance was sought

to be placed in the decision in the matter of **CST Limited** vs. **CCE, Hyderabad** reported in 2008 (230) ELT 85, **CST Limited** vs. **Commissioner of Customs and Central Excise, Hyderabad-I** reported in 2007 (217) ELT 513 and **Automatic Electric Limited** vs. **CCE, Mumbai** reported in 2004 (178) ELT 524 (Tri. Mumbai).

7. On the other hand, the DR drawing our attention to the order passed by the adjudicating authority submitted that there was a clear finding arrived at by the adjudicating authority that the appellants had failed to produce any evidence to show that the goods in question were parts of Electro Static Precipitator System and the said finding was neither challenged by the appellants nor disturbed by the Commissioner (Appeals) in the impugned order. Being so, the appellants could not claim the benefit of the said notification. She further submitted that even prior to issuance of the show cause notice the appellants were duly alerted about their obligation to pay the full duty in relation to the goods in question as the goods did not form part of EPS. Drawing our attention to the certificate issued by the competent authority in the case in hand it was submitted on behalf of the respondent that it was specifically issued in favour of BHEL, Ranipet, Tamilnadu and in relation to Electro Static Precipitator and its parts the goods in question were cleared as high voltage rectifier and no evidence was produced to establish that they form part of EPS System and intended to be used for the purpose of pollution control. According to the DR, therefore, the requirement of Condition No. 55 under the said notification was not fulfilled.

8. The claim for concessional rate of duty is undoubtedly based on the Notification No. 5/99-CE dated 28.2.99. Undisputedly, the goods like Electro Static Precipitator System and the parts thereof are entitled for concessional rate of duty as specified under the said notification provided the goods satisfy the Condition No. 55 stated in the said notification. The said condition states that "If an officer of the rank of Deputy Secretary to the Government of India in the Ministry of Environment and Forests certifies in each case to the effect that the goods are intended for pollution control purposes". In other words if the Electro Static Precipitator System and /or its parts are intended for pollution control purposes and is accordingly certified by an officer of the rank of Deputy Secretary to the Government of India in the Ministry of Environment and Forests the manufacturer of such goods would be entitled to clear the goods than concessional rate of duty specified under the said notification. Undoubtedly, certificate in that regard has to be issued in each of the cases.

9. In the case in hand, it is not disputed that there was a certificate dated 15.2.99 issued by the Joint Director from the Ministry of Environment and Forests, Government of India addressed to the Assistant Commissioner of Central Excise & Customs, Ranipet in relation to the products described as Electro Static Precipitator and its parts" described in the same as one quantity.

10. As already stated above, it is also undisputed fact that the appellants cleared 12 sets of high voltage rectifier in the year 1999 by claiming concessional rate of duty under the said notification on the strength of the said certificate.

11. In the background of above facts, it is sought to be contended on behalf of the appellants that bearing in mind the Board circular dated 17.09.1994 merely because the certificate refers to Ranipet unit and the goods were cleared from the appellants' unit at Jhansi. The benefit of the notification could not be denied and secondly that the fact that high voltage rectifier formed part of Electro Static Precipitator System was never in dispute.

12. As regards circular in question, it was admittedly issued with reference to Notification No. 78/90-CE. Though, it was sought to be contended that the notification No. 78/90-CE was nowhere different from the notification in question, it is difficult to accept the said contention. There is basic difference between the two Notifications inasmuch as that the Notification No. 78/90 refers to various items without granting similar benefit to the parts thereof. The list of various items which were eligible to avail the concessional rate of duty under Notification No. 78/90-CE did not include the parts of those items whereas the notification in question specifically makes difference to such parts. The circular dated 07.09.94 was essentially issued to avoid any confusion in the mind of the manufacturer on account of non inclusion of the parts of such items and that is apparent from very first para of the said circular. In any case, none of the portion of the circular can be of any help to the appellants in the case in hand. It is true that the said circular states about the procedure to be adopted in order to avail the benefit under the notification No. 78/90-CE and in that regard stated that "Manufacture and supply of various machinery, components, equipments, instruments, apparatus etc. from the factory of the manufacturer" and further stated that "Supply of standard bought out machinery, components, equipments, instruments, apparatus, etc. direct to

the site from vendors or receive the same at stores and send it along with the manufactured items in the factory to the site". This however does not mean that the manufacturer having obtained the necessary certificate in terms of requirement of the notification in favour of a particular unit of the manufacturer could have manufactured and cleared the goods from totally different unit and claimed he benefit under the notification. No such provision is made in the notification in question. No circular can travel beyond the scope of the notification and if at all it does this to be ignored. Circulars are meant for mere explanation and not to enlarge or breeze of the scope of the notification. Being so, circular in question can be of no help to the appellants in the matter in hand.

13. It is sought to be contended that the finding about absence of evidence regarding the goods in question being part of Electro Static Precipitator System is beyond the scope of the show cause notice. It is difficult to accept this contention. In the show cause notice it was specifically stated thus:-

> "Since this Excise Duty exemption certificate grants exemption to those items which are mentioned in the list No. 7(1) of S. No. 272 of the Notification No. 5/99 and the manufactured by the unit M/s BHEL, Ranipet, therefore, the High Voltage Rectifier manufactured and cleared by M/s BHEL, Jhansi are not eligible to the said concession and were liable to be cleared at full rate of duty @ 16% Adv. leviable at that time and this fact was intimated to the party by the Superintendent, Central Excise, Range-I Jhansi by his letter C. No. 20/Misc/BHEL/SO-1/99/1219 dated 21.7.99, even C. No. 1309 dated 9.9.99 and again C. No. 1724 dated 22.12.99 and also by the undersigned during his discussion on the issue with Sh. K.G. Goyal, AGM, BHEL (Incharge Excise)".

Plain reading of the above facts clearly disclosed that the department had informed the appellants under the show cause notice that the goods in question did not form part of Item No. I of the list of the notification and that the certificate was in favour of unit M/s BHEL, Ranipet whereas the manufacture and clearance of the goods in question were from unit M/s BHEL, Jhansi. It is pertinent to note that the appellants did not file any reply to the show cause notice after service thereof. It was after repeated letters issued to the appellants that the defence reply was filed on 30.03.2001. In the said letter undoubtedly it was stated that the goods in question were to be used for Electro Static Precipitator for NALCO Project. However, apart from the said claim in reply the appellants did not produce any material which could disclose that the high voltage rectifier formed part of Electro Static Precipitator System meant for pollution control, as rightly pointed out by the DR the adjudicating authority in that regard has arrived at a clear finding that the appellants failed to produce any evidence in this respect. It is also pertinent to note that there was no challenge to the said finding before the Commissioner (Appeals). In fact, the order passed by the adjudicating authority was sought to be challenged before the Commissioner (Appeals) on four grounds namely that M/s NALCO had placed order to the integrated office of BHEL and not directly to the Ranipet, that of BHEL units are sister unit and if a project is required to be executed by one unit the goods were not necessarily manufactured by that unit itself but were also supplied by other units to the customers, that the supply order of NALCO placed to the integrated office of BHEL and, therefore, the Jhansi unit of BHEL had supplied high voltage rectifier to M/s NALCO and that the adjudicating authority had passed the order merely in the interest of revenue without considering the case of the appellants. There was no specific challenge to the finding about the absence of evidence in support of the claim that the high voltage rectifier form part of Electro Static Precipitator System meant for pollution control. In fact even in the appeal filed before the Tribunal there is no challenge to the said finding.

14. Where a particular goods form part of larger system or a bigger item is purely a question of fact, being so, when the same is disputed, the party asserting that it forms part of bigger item or system has necessarily to prove the same by producing cogent evidence in that regard. Once there is a clear finding arrived at by the fact finding authority and inspite of appellate remedy being available such finding of fact is not challenge, it goes without saying that the fact in question stands established in terms of such finding by the fact finding authority. Applying this elementary rule of law to the facts of the case it is to late for the appellants now to contend that the goods in question form part of Electro Static Precipitator System. The contention about absence of challenge to the said fact or that the adjudicating authority having exceeding the scope of show cause notice are totally devoid of substance.

15. Even otherwise, if one peruses the certificate dated 15.2.1999 by no stretch of imagination it can be said that in the absence of proper evidence being placed by the appellants on record before the adjudicating authority about the goods in question being part of Electro Static Precipitator the appellants could not have succeeded in claiming the benefit under the said notification. The certificate specifically refers to "Electro Static Precipitator and its parts" being the goods entitled to avail the concessional benefit under the said notification. The certificate on the face of it nowhere refers to high voltage rectifier. It was the case of the appellants themselves that such goods form part of Electro Static Precipitator. Obviously, therefore, it was

necessary for the appellants to establish the same with cogent evidence. There is yet another reason, undoubtedly, which is not disclosed or referred to in the show cause notice, and that is the certificate refers to one quantity. Certificate does not refer to the parts of Electro Static Precipitator as more than one quantity. Condition No. 55 specifically requires certification in each case. Obviously, therefore, the high voltage rectifier which were cleared independently of Electro Static Precipitator and its parts could not have been subject matter of the certificate dated 15.2.99. We are aware this fact has not been referred to in the show cause notice. We have merely refers to it to show how the appellants have indeed misused the certificate to evade the correct payment of duty.

16. The contention that the Tribunal in some cases have held that even the sub-contractors and vendors are entitled for the benefit of exemption granted to the main project under a notification. It is to be noted that in various other decisions we have already held that all those decisions by the Tribunal were in peculiar facts of the case and do not laid down the law as sought to be contended

17. In **CST Limited** case the appellants was a sub-contractor and had supplied goods to the main contractor who was the competitive bidder for carrying on the International Contract granted to M/s BHEL to set up a Mega project for Kahalgaon Super Thermal Power Project. The benefit therein was sought to be claimed with reference to the Notification No. 6/02-CE dated 1.3.2002 as amended by Notification No. 48/04 dated 10.09.2004. The Tribunal merely relying upon the decision of the same Bench passed in **CST Limited** vs. **Hyderabad –I** and while observing that no stay was granted by the Apex Court to the said order, it allowed the claim of the sub-contractor. Plain reading of the order would disclose that the same does not

refer to the facts and analysis of the case. But merely refers to its earlier decision in CST Limited vs. Hyderabad-I case. Obviously, therefore, same cannot be held to lay down any point of law.

18. In **CST Limited** vs. **Hyderabad –I** the benefit was sought to be granted notification to the sub-contractor with the following observations:-

> "The appellants are sub-contractor of M/s BHEL. M/s BHEL is executing the Mega Project for Kahalgaon Super Thermal Power Project by International Bidding. The appellants have submitted all the relevant records. The appellants are also found in the list of sub-contractors. Since the goods are supplied by the appellants to BHEL, who are executing the project by International Competitive Bidding, it is very clear that the goods cleared by the appellants should be considered as "goods supplied against International Competitive Bidding". There is absolutely no need that the appellants themselves should have been the bidder in International Competitive Bidding. In huge projects, the main contractor does not do everything. There is always a system of sub-contractors. If we take a view that the goods cleared by sub-contractors are not entitled for exemption on the ground they are not the bidders, the very purpose of the Notification would be defeated because the main contractor will be having hundreds of sub-contractors in Mega Projects".

19. Before making the above observations, the Tribunal had referred to the notification under which benefit was sought to be claimed as under:-

> "In terms of Notification No. 48/2004, against Sl. No. 301, "all goods supplied against International Competitive Bidding, falling under any Chapter" are exempted subject to condition 64 of the Notification. Condition 64 reads as follows:-
>
> "64. If the goods are exempted from the duties of customs leviable under the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) and the additional duty leviable under Section 3 of the said Customs Tariff Act when imported into India"

20. Obviously, unless condition which is sought to be considered of Notification No. 48/2004 was Condition No. 64 which merely require that the goods exempted when imported are required to be supplied to the project to avail the benefit of the notification. The discussion nowhere refers to as to who is entitle to claim the benefit under the notification. Obviously, therefore, in a case where there is no specific mention as to who should be the supplier of goods, it makes no difference whether the goods are supplied by the contractor or sub-contractors or even by retailer. It was in that regard the exemption under relevant notification was sought to be extended to the sub-contractor. One fails to understand how the said decision can be applied to a case where specific condition are required to be complied with to claim the benefit under notification.

21. In **Automatic Electric** case the order was passed in the undisputed set of facts and that is apparent from para 2(b) of the order. Besides the order related to supply of goods to the project and notification according to the said order did not specify that such supply should be by particular person and on the same ground in CST Limited vs. Hyderabad the benefit was extended to the sub-contractor. That is not the case in the matter in hand. The decision is, therefore, are clearly distinguishable.

22. It was also sought to be contended that the entire dispute is without any substance inasmuch as that the demand is revenue neutral. The demand against the Jhansi unit could have been very well adjusted against the demand in case of Ranipet. It is to be noted that what is sought to be recovered is short duty payment in relation to high voltage rectifier not necessarily because the product is cleared by Jhansi unit and the certificate is in favour of the Ranipet but also on account of the fact that the product in question has not been established to be part of Electro Static Precipitator

System. Being so, it is not a mere question of revenue neutrality. Contention in that regard are therefore devoid of substance.

23. For the reasons stated above, therefore, we find no substance in the appeal and same is hereby dismissed.

[Justice R.M.S. Khandeparkar]
President

[Rakesh Kumar]
Member [Technical]

/Pant/