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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/289 /2006 - EX[DB]

Date **28/12/2010**

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

To :
M/S VINDHYACHAL AIR PRODUCTS PVT. LTD.
82, MANANA MARG, UJJAIN, M.P.

M/S VINDHYACHAL AIR PRODUCTS PVT. LTD. Appellant
Vs
C.C.E BHOPAL Respondent

I am directed to transmit herewith a certified copy of **Final order No. 877/ 2010 EX[DB]** dated 09-12-10 passed by the Tribunal under **Section 35-C(1)of Central Excises Act, 1944**

Assistant Registrar
(Excise Appeal Branch)

Copy to :

1. Respondent
C.C.E BHOPAL
HOSHANGABAD ROAD, 48,
ADMINISTRATIVE AREA, AREA
HILLS, BHOPAL (M.P.) 462011
2. Adv. / Consult SH. S. YADAVA & SH. K.K. ANAND, ADV.,
A-5, BASEMENT,
LAJPAT NAGAR-III,
N. DELHI-24
3. C.D.R
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)

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. I

Excise Appeal No. 289 of 2006

[Arising out of the Order-in-Appeal No. 95-CE/IND/91 dated 24/10/1991 passed by The Commissioner (Appeals), Central Excise & Customs, Bhopal.]

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?	:
2.	Whether it would 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 Department Authorities?	:

M/s Vindhyachal Air Products Pvt. Ltd. Appellant

Versus

CCE, Bhopal Respondent

Appearance

Shri S. Yadav, Advocate of Shri K.K. Anand, Advocate – for the appellant.

Shri I. Baig, Authorized Representative (DR) – for the Respondent.

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

DATE OF HEARING : 09/12/2010.
DATE OF DECISION : 09/12/2010.

FINAL Order No. 877/10-EX Dated : ____________

Per. Rakesh Kumar :-

In this case three refund claims were filed by the appellant for the period from 1/4/89 to 31/8/89, 1/9/89 to 31/1/90 and 1/2/90 to 5/3/90, which were sanctioned by the Jurisdictional Assistant Commissioner vide orders-in-original each dated 31/10/91. The Assistant Commissioner's orders were reviewed by the Commissioner and review appeal were filed before the Commissioner of Central Excise (Appeals), who vide order-in-appeal No. 90/CE/BPL/05 dated 29/9/05, while upholding the Assistant Commissioner's orders sanctioning the refund for the period from 1/4/89 to 8/11/89 on the ground that this period was covered under provisional assessment, reversed the Assistant Commissioner's order sanctioning the refund claim for the period from 9/11/89 to 5/3/90 on the ground of unjust enrichment holding that for this period the principle of unjust enrichment would apply. The present appeal has been filed against the portion of the Commissioner (Appeals)'s order rejecting the refund claim for the period from 9/11/89 to 5/3/90 on the ground of unjust enrichment.

2. Heard both the sides.

2.1 Shri S. Yadav, Advocate, the learned Counsel representing the appellant cited the judgment of Hon'ble Supreme Court in the case of **CCE, Mumbai – II vs. Allied Photographics India Ltd.** reported in **2004 (166) E.LT. 3 (S.C.)** and pleaded that in terms of this judgment, the bar of unjust enrichment is not applicable to this case. He also pleaded that in view of Board's Circular No. 423/56/98-CX dated 22/9/98 based on Hon'ble Supreme Court's judgment in case of **CCE vs. Re-rolling Mills** reported in **1997 (94) E.L.T. 8 (S.C.)**, show cause notice under Section 11A of Central Excise Act, 1944 for demand of erroneous refund should have been issued, which in this case have not been issued.

2.2 Shri I. Baig, the learned Departmental Representative, however, pleaded that in view of the judgment of Hon'ble Supreme Court in the case of **Sahakari Khand Udyog Mandal Ltd. vs. CCE & Cus.** reported in **2005 (181) E.L.T. 328 (S.C.)**, wherein it was held that doctrine of unjust enrichment is based on equity and, therefore, irrespective of the applicability of Section 11B of Central Excise Act 1944, it can be invoked to deny the benefit to which a person is not entitled, the refund claim, in question is not admissible.

3. We have carefully considered the submissions from both the sides and perused the records.

3.1 In view of judgment of Hon'ble Supreme Court in the case of **Sahakari Khand Udyog Mandal Ltd. vs. CCE & Cus.** (supra), wherein it was held that the doctrine of unjust enrichment is applicable to all the cases of refunds irrespective of whether the provision of Section 11B of the Act are applicable or not, the refund claim, in question, would be subject to the principle of unjust enrichment. In the judgment of Hon'ble Supreme Court in case of **CCE, Mumbai – II vs. Allied Photographics India Ltd.** (supra) cited by Shri Yadav, it has been held that in a case of refund arising on decision on protest, when the duty had been paid under protest, the doctrine of unjust enrichment would be attracted and that payment of duty under protest cannot be equated with provisional assessment. It has not been explained by Shri Yadav as to how this judgment helps the Appellant in this case as the assessment were not provisional during 9/11/89 to 5/3/90 periods.

3.2 As regards the Appellant's plea that since no show cause notice for recovery of erroneous refund had been issued under Section 11A within the prescribed time limit, no recovery can be made in view of Board's Circular No. 423/56/98-CX dated 22/9/98, we find that in the review appeals filed by the Assistant Commissioner before CCE (Appeals), in pursuance of the orders passed by the Commissioner under Section 35E (2) of the Central Excise Act, 1944, there were prayers for recovery of the erroneously granted refund in addition to prayers for setting aside the Assistant Commissioner's order sanctioning the refund. Since the CCE (Appeals) has allowed the Department's appeal for 9/11/89 to 5/3/90 period, the effect of this order would be that not only the Assistant Commissioner's order sanctioning refund for this period has been set aside, the refund sanctioned has become recoverable. Moreover Hon'ble Supreme Court in its judgment in case of **CCE vs. Re-rolling Mills** (supra), which in turn, is based on its judgment in case of **Union of India vs. Jain Sudh Vanaspati Ltd.** reported in **1996 (86) E.L.T. - 460 (S.C.)** had held that when an assessment order has been obtained by fraudulent means, resulting in short levy of duty, for recovery of duty the assessment order is not required to be set aside by exercising the review power. This judgment has no relevance to the issue involved in this case.

4. In view of the above, we do not find any infirmity in the impugned order. The appeal is dismissed.

(Operative part of the order pronounced in the open court.)

(Justice R.M.S. Khandeparkar)
President

(Rakesh Kumar)
Member (Technical)

PK

Excise Stay No. 249 of 2006
Excise Appeal No. 289 of 2006

M/s. Vindhyachal Air Products (P) Ltd.
Vs. CCE, Bhopal.

Per Justice Abichandani (for the Bench)

Compliance of the direction to make pre-deposit is reported. This appeal will now come up for final hearing in its due course.

(Pronounced and dictated in the open Court)

(Justice R.K. Abichandani)
President

(K.C. Mamgain)
Member(Technical)

Dt: 24.4.2006
ss