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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/683 /2006 - CU[DB] Date **12/09/2011**

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

To :
M/S VELPACK TRADING COMPANY
SUSHILA KUNJ, GULABCHAND KI BAGICHI,
SHASTRI NAGAR, THATIPUR, GWALIOR(MP)

M/S VELPACK TRADING COMPANY Appellant

Vs

C.C.E. INDORE Respondent

I am directed to transmit herewith a certified copy of **Final order No.C/401/ 2011 CU[DB]** dated 06.09.2011 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
C.C.E. INDORE
MANIK BAGH PALACE, POST
BOX NO. 10, INDORE 452001 (M.P.)

2. Adv. / Consult
MR.L.P. ASTHANA & MS REENA KHAIR
R-163, SECOND FLOOR, G. K.-1,
NEW DELHI - 110 048.

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. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi - 110005
9. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road, Ahmedabad-15
10. LAWCRUX Advisors Pvt Ltd. LAW House.1-8,Sector - 10, Faridabad 121003 (Haryana)
11. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
12. Office Copy
13. Guard file

Assistant Registrar
(Customs Appeal Branch)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST BLOCK NO.II, R.K. PURAM, NEW DELHI-110066.

DIVISION BENCH
Court-IV
Customs Appeal No.683 of 2006

Date of Hearing/Decision: 20.07.2011

(Arsing out of Order-in-Appeal No.IND/298/2005 dated 6.9.2005 passed by the CCE(A),Indore)

For approval and signature:

Hon'ble Mr.Ashok Jindal, Member (Judicial)
Hon'ble Mr.Mathew John, 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 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?	

M/s.Velpack Trading Company — Appellant

Vs.

CC, Indore — Respondent

Present for the Appellant: Shri L.P.Asthana, Advocate
Present for the Respondent: Shri Amrish Jain, SDR

Coram: Hon'ble Mr.Ashok Jindal, Member (Judicial)
Hon'ble Mr.Mathew John, Member (Technical)

Final **ORDER NO.** C/401/11

PER: ASHOK JINDAL

The appellants are aggrieved with the impugned order wherein the refund claim was denied on the ground that the appellants had not challenged the assessment order of bill of entry, therefore, their refund claim cannot be entertained ~~in view of the~~ following the decision of the Apex Court in the case of Priya Blues Industries Ltd. vs. CC (Preventive) reported in 2004 (172) ELT 145 (SC).

2. The facts of the case are that the appellants have filed refund claim on the ground that the duty paid by them was in excess against duty payable by them. While considering the said refund claim a show cause notice was issued to them as to why their refund claim should not be rejected. The appellants had contested the issue before the adjudicating authority and after considering the submissions of the appellants, the adjudicating authority passed the following order:-

"ORDER

In view of my discussion and findings in para supra. I pass the following order:

(1) Refund of Rs.2,14,398/- on account of enhanced value is rejected.

(2) I sanction refund of excess duty on account of CVD amounting to Rs.15,67,994/- paid ~~pad~~ by B/E Nos.389/30.09.97, 418/17.10.97, 423/21.1.97, 437/05.11.97, 442/07.11.97, 444/10.11.97, 450/11.11.97 and 460/17.11.97, but for the credit to the welfare fund of Govt.of India. Cheques may be issued accordingly."

3. Aggrieved by the said order of the adjudicating, the appellants preferred the appeal before the Commissioner (Appeals) on the following grounds:

(i) that goods have been sold to various customers. Before the Adjudicating Authority, a Chartered Accountant's certificate dated 23.11.02 was submitted wherein it was shown that the total product value is of Rs.85,12,582/- and the sale value is

Rs.57,39,898/- and consequently the sale has been made at a loss of Rs.27,72,684/-. Since the sales have been made at a substantial loss the question of unjust enrichment does not arise.

(ii) That the said amount has been shown as receivables in the balance sheet and consequently has been included in the cost of production or the price of the goods."

4. The first appellate authority while considering the appeal of the appellants passed the order holding that as the appellants have not challenged the assessment order of bill of entry, the refund claim is not maintainable in view of the Apex Court in the case of Priya Blues Industries Ltd. vs. CC (Preventive). Aggrieved by the said order, the appellants are before us.

5. Shri L.P.Asthana, Advocate, learned Counsel for the appellants appeared and submitted that the appellants have filed refund claim on account of excess duty paid which was considered by the adjudicating authority and thereafter the appellate ~~adjudicating~~ authority rejected their refund claim on two grounds namely, for violation and on account of unjust enrichment and on account of time bar. The said order was challenged before the Commissioner (Appeals) who did not consider the~~se~~ points raised by Appellant and passed the order on different points which was not put to notice of the appellants to argue the same. He further submitted that the adjudication order has not been challenged by the department, therefore, the Commissioner (Appeals) cannot pass the order on different grounds. He prayed the impugned order is to be set aside.

6. On the other hand, Shri Amrish Jain, learned SDR submitted that the decision of the Apex Court in the case of Priya Blues

when order-in-original was passed.

Industries Ltd. vs. CC (Preventive) was not available. The issue involved in this case is whether the refund is maintainable or not without challenge of the assessment of bill of entry has been settled by the Apex Court in the case of Priya Blues Industries Ltd. vs. CC (Preventive) (supra). The Commissioner (Appeals) has rightly dealt

according to him

the issue and rejected the refund claim. Hence, the impugned order is to be upheld.

7. Heard both sides.

8. After hearing both sides, we find that it is admitted that the adjudication order has not been challenged by the Revenue before the Commissioner (Appeals). The Commissioner (Appeals) has rejected their refund claim as not maintainable in view of the Apex Court in the case of Priya Blues Industries Ltd. vs. CC (Preventive) (supra) without giving any opportunity to the appellants to counter the decision. Therefore, in our considered opinion, the appellants should be given an opportunity to argue on this issue before the Commissioner (Appeals).

9. With these observations, we find that the matter needs re-examination at the end of the Commissioner (Appeals) to give an opportunity of hearing to the appellants to present their case on the subject matter. Accordingly, the impugned order is set aside and the appeal is allowed by way of remand with the direction to the Commissioner (Appeals) to give an opportunity of hearing to the appellants to argue the matter on the issue of maintainability and

other issues and thereafter he will pass the order within three months of receipt of this order.

10. The appeal is allowed by way of remand.

(Pronounced in the open court)

(ASHOK JINDAL)
MEMBER (JUDICIAL)

(MATHEW JOHN)
MEMBER (TECHNICAL)

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