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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/618 /2007 - CU[DB] Date 13/09/2011

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

To :
M/S BHARAT ELECTRONICS LTD.PANCHKULA
SR. DY. GENERAL MANAGER (MM), BHARAT
ELECTRONIC LTD. 405,INDL. AREA, PHASE-III,
PANCHKULA, (HARYANA)
134113

M/S BHARAT ELECTRONICS LTD.PANCHKULA Appellant

Vs

C.C. NEW DELHI (IMPORT & GENERAL) Respondent

I am directed to transmit herewith a certified copy of **Final order No.C/405/ 2011 CU[DB]** dated 08.09.2011 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. NEW DELHI (IMPORT & GENERAL)
NEW CUSTOM HOUSE, NEAR
I.G.I. AIRPORT, NEW DELHI
110037.

2. Adv. / Consult
MR.VIKRANT KACKRIA
509, SEC-7,PANCHKULA, HARYANA

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)

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

Date of Hearing : 26.8.2011
Date of Pronouncement:

Custom Appeal No. 618 of 2007

[Arising out of Order-in-Appeal No. CC(A)/Cus/104/I&G/D-I/2007 dated 21.6.2007 passed by the Commissioner of Customs (Appeals), New Delhi]

Coram:
Hon'ble Ms. Archana Wadhwa, Member (Judicial)
Hon'ble Shri Mathew John, Member (Technical)

1.	Whether Press Reporter may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	Yes
2.	Whether it would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	NO
3.	Whether their Whether their Lordships wish to see the fair copy of the order?	Seen
4.	Whether order is to be circulated to the Department Authorities?	No

M/s Bharat Electronics Ltd. Appellants

Vs.

CC, New Delhi Respondent

Appearance:
Appeared for Appellant : Shri Vikrant Kakaria, Advocate
Appeared for Respondent : Shri K.K. Jaiswal, SDR

Coram:
Hon'ble Ms. Archana Wadhwa, Member (Judicial)
Hon'ble Shri Mathew John, Member (Technical)

Final Order No. C/405/11 dated 8.9.11

Per **Mathew John:**

The Appellants are a Public Limited Company with Government of India as a major share holder.

2. The Appellants filed Bill of Entry No. 663113 dated 25.3.2004 for clearing imported goods viz. 'wave soldering machine' and paid Customs duty amounting to Rs.12,97,852/-. At the time of import there was an exemption under Sl. No. 57 of Notification No. 25/2002 dated 1.3.2002 under which the Basic Customs Duty on the said machine was exempt. However, the Appellants were not aware of the said exemption and they did not claim that exemption at any time before the clearance of the goods. The Appellants filed a refund claim on 23rd March 2005 claiming refund of excise duty of Rs.6,62,169/- which they need not have paid. They claimed exemption under Notification No. 25/2002 (Sl. No. 57) in their refund application, it is seen that in the proceedings by lower authorities there was no dispute taken about the eligibility of the said exemption. The refund claim was rejected by the lower authority for the reason that the assessment of Bill of Entry had become final and they have not challenged the assessment order on the Bill of Entry and without challenging such assessment order they cannot claim refund. For such argument the Adjudicating Authority relied upon the decision of the Supreme Court in the case of **CCE Vs. Flock (India) Pvt. Ltd.** – 2000 (120) ELT 285 (SC). Aggrieved by the order, the Appellants filed an Appeal with the Commissioner (Appeals). The Commissioner (Appeals) agreed with the finding of the lower authority. He placed further reliance on the decision of the Hon'ble Supreme Court in the case of **M/s Priya Blue Industries Ltd. Vs. CC** – 2004 (172) ELT 145 (SC). Aggrieved by the said order, the Appellants have filed this Appeal.

3. The Appellants submit that the officer of Comptroller and Auditor General of India who audited the account of the appellant's company vide their audit memo No. 7 dated 9.2.2005 have very categorically stated that the customs duty is paid wrongly and its refund should be claimed under Section 27 of Customs Act, 1962. The Appellants are of the view that since the officers of C&AG has also given an opinion in favour of the Appellants eligibility for the refund such refund should have been granted. They also has produced Chartered Accountant's certificate confirming that the impugned duty element has not been passed on to any customer and also produced certificate from Central Excise department confirming that the Cenvat credit has not been taken on the CVD portion of the duty for which refund is claimed. It is their submission that the mistake of not claiming the exemption can be corrected under provisions of Section 149 of the Customs Act which permits amendment of documents after clearance of goods or under Section 154 which permits correction of clerical order in any decisions or orders passed by any officer of customs. It is pointed out that there is no time limit laid down under this Section 149 for making such corrections. They submit that they had applied to the concerned assessment group in the Custom House for reassessing the Bill of Entry. The group was of the view that the Appellants were not required to pay the impugned duty amount and they passed on their refund claim to the refund section for deciding the claim on merits. It is their submission that since the merits of the case is already decided by the Additional Commissioner In charge of the Group they should be given the refund.

4. The ld. SDR, on the other hand, submits that in this case, the refund claim was submitted more than six months after the relevant date as laid down under Section 27 which provides for refund of Customs duty erroneously paid. He submits that the claim is prima facie time-barred. He also points out that now it is well settled that refund claims cannot be made without challenging the assessment order itself. He relies on the decision of the Supreme Court in the case of **Flock (India) Pvt. Ltd**. and in the case of **Priya Blue Industries Ltd.** mentioned above.

5. We have considered arguments on both sides. In the case of **M/s Flock (India) Pvt. Ltd.**, the assessee was trying to reopen an issue already settled through a process of Adjudication and further appeals and the case related to Central Excise duties paid. The decision in the case of **Priya Blue Industries** was with reference to Customs duties paid wherein there was no formal adjudication order issued. The assessment on the Bill of Entry itself was considered by the Court to be an assessment order. However, in that case there was dispute between the assesee and the department before assessment of Bills of Entry and after due consideration of the dispute by both sides duty was paid under protest. It was in that circumstance that the Supreme Court held that the importer should have challenged the assessment order itself. The Hon'ble Delhi High Court has recently considered this issue in the case of **Aman Medical Products Ltd. Vs. CCE** – 2010 (250) ELT 30 (Del.) and explained that the decision of the Apex Court in the case of **Priya Blue Industries** will apply only in a situation where there was a lis at the time of assessment and a

decision was taken in the matter of that lis. The High Court has explained that **Priya Blue Industries** will not apply in a situation where duties were paid due to any error and in such cases refund claims made under Section 27 can be processed even if the assessment made on the Bill of Entry was not challenged.

6. However, it is noticed that in this case the refund claim was beyond the time limit prescribed under Section 27 of the Customs Act. At this stage, the Counsel for the Appellant submits that as per the provisions of Section 27 the time limit for filing refund is one year from the relevant date because they are a Government Company. However, we notice that this issue has not been taken in earlier proceedings and needs to be examined afresh by the Adjudicating Authority. Therefore, we set aside the impugned order and remit the matter to the Adjudicating Authority for examination on the refund claim afresh.

(Pronounced in Court on 9/9/11)

(Archana Wadhwa)
Member (Judicial)

(Mathew John)
Member (Technical)

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