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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/896 /2010-898 /2010 - EX[DB] WITH E/S/959-961/2010-EX & E/M/277/2011-EX   Date **11/07/2011**

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

To :
M/S. APEX RECYCLING PVT. LTD.
B-7, BADLI INDUSTRIAL AREA, NEW DELHI.

M/S. APEX RECYCLING PVT. LTD.   Appellant
Vs
C.C.E. DELHI I   Respondent

STAY ORDER NO. 700-702/2011-EX
MISC ORDER NO.385/2011-EX

I am directed to transmit herewith a certified copy of **Final order No.569-571 2011 EX[DB]** dated 24-6-11 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. DELHI I
C.R. BUILDING, I.P. ESTATE, NEW DELHI 110002

2. Adv. / Consult
MR.C.HARISHANKAR
46, BANK ENCLAVE,DELHI-110092

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
14. HON'BLE PRESIDENT.
15. R K MAHESHWARI
M/S. APEX RECYCLING PVT. LTD. B-7, BADLI INDUSTRIAL AREA, NEW DELHI.
16. SEBASTIAN A C @ WILSON
M/S. APEX RECYCLING PVT. LTD.
B-7, BADLI INDUSTRIAL AREA, NEW DELHI.

Assistant Registrar
(Excise Appeal Branch)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

COURT NO. I

Excise Stay No. 959 of 2010 in Excise Appeal No. 896 of 2010

M/s Apex Recycling P. Ltd. — Appellant

Vs.

CCE, Delhi-I — Respondent

Excise Stay No. 960 of 2010 in Excise Appeal No. 897 of 2010

R.K. Maheshwari — Appellant

Vs.

CCE, Delhi-I — Respondent

Excise Stay No. 961 of 2010 in Excise Appeal No. 898 of 2010

Sebastian A.C. @ Wilson — Appellant

Vs.

CCE, Delhi-I — Respondent

Appearance

Appeared for Appellant : Shri C. Hari Sharnkar, Advocate

Appeared for Respondent : Shri Sunil Kumar, DR

Date of Hearing: 24.6.2011

CORAM: Hon'ble Mr. Justice R.M.S. Khandeparkar, President
Hon'ble Mr. Mathew John, Technical Member

STAY Order No. 700 – 702/2011 – EX ....dated................

Per **Mathew John :**

Heard the learned Advocate for the Appellants and the DR for the Respondent.

2. Since we propose to dispose of the Appeals itself, the Applications are allowed without insisting for any ~~further~~ deposit with direction to the Registry to place the Appeals itself for final hearing forthwith.

3. Applications stand disposed of Accordingly.

(Justice R.M.S. Khandeparkar)
President

(Mathew John)
Member (Technical)

RM

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

COURT NO. I

Excise Misc. No. 277 of 2011 in Appeal No. 896 of 2010

M/s Apex Recycling Pvt. Ltd. — Appellant

Vs.

CCE, Delhi-I — Respondent

Appearance

Appeared for Appellant : Shri C. Hari Shankar, Advocate

Appeared for Respondent : Shri Sunil Kumar, DR

Date of Hearing: 24.6.2011

CORAM: Hon'ble Shri Justice R.M.S. Khandeparkar, President
Hon'ble Shri Mathew John, Technical Member

Misc Order No. 385/2011-EX dated..................

Per **Mathew John:**

The Applicant has filed Misc. Application No. 277 of 2011 in Appeal No. 896 of 2010 seeking to raise additional legal ground. The issue raised is that the impugned Show Cause Notice was issued by the Additional Director General, DRI and he is not a proper officer to issue notice under Section 28 of the Customs Act. Ld. Counsel pleads that this legal position has come to notice only after the Hon'ble Supreme Court pronounced its decision in **CC Vs. Sayed Ali** – 2011-TIOL-20-SC-CUS. He points out that this is purely a legal ground and hence he should be given permission to raise this ground. They had not been raised this ground any proceedings earlier in this matter.

2. After considering the matter in the Appeal, we find that the impugned order in original has been passed without applying with principles of natural justice and there is need to send the matter to the Adjudicating Authority. A detailed order in this regard is being passed. Since the matter is being remitted back by the Adjudicating Authority, it is only proper that the Appellant should be allowed to raise this ground before the adjudicating officer. The Misc. Application is accordingly allowed and the Adjudicating Authority will consider this plea for de novo Adjudication. The Misc. Application accordingly disposed of.

(Justice R.M.S. Khandeparkar)
President

(Mathew John)
Technical Member

RM

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

COURT NO. I

Date of Hearing : 24.6.2011

Excise Appeal No. 896-898 of 2010

[Arising out of common Order-in-Original No. 01/D-I/2010 dated 29.1.2010 passed by the Commissioner of Central Excise, New Delhi]

Coram:
Hon'ble Shri Justice R.M.S. Khandeparkar, President
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?	
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 Whether their Lordships wish to see the fair copy of the order?	
4.	Whether order is to be circulated to the Department Authorities?	

Excise Appeal No. 896 of 2010

M/s Apex Recycling Pvt. Ltd. — Appellant

Vs.

CCE, Delhi-I — Respondent

Excise Appeal No. 897 of 2010

Shri R.K. Maheshwari — Appellant

Vs.

CCE, Delhi-I — Respondent

Excise Appeal No. 898 of 2010

Sebastian A.C. @ Wilson — Appellant

Vs.

CCE, Delhi-I — Respondent

Appearance:

Appeared for Appellant : Shri C. Hari Shankar, Advocate

CORAM: Hon'ble Shri Justice R.M.S. Khandeparkar, President
Hon'ble Shri Mathew John, Member (Technical)

FINAL Order No. 569-571/2011EX dated............

Per Mathew John:

The Appellant is a 100% EOU, which imported various metal scrap availing the benefit of Notifications No. 53/97-Cus dated 3.6.97 and 52/2003-Cus. dated 31.3.2003.

2. Exemption under the above-mentioned Notifications is available subject to fulfillment of the condition of achieving positive Net Foreign Exchange Earning as a Percentage of Export (NFEP).

3. The present proceedings emanate out of Show Cause Notice dated 31.5.2008 issued by the Additional Director General, DRI. The Show Cause Notice alleged under valuation and mis-declaration, by the Appellant, of the goods imported by it, and consequently, proposed a demand of Customs duty of Rs.5,76,63,741/-, under Section 28 of the Customs Act, 1962. The Show Cause Notice also alleged mis-declaration in respect of clearances effected by the Appellant in the DTA and, on this count, proposed a Central Excise duty demand of Rs.5,15,57,631/- under Section 11A(1) of the Central Excise Act, 1944, read with the proviso thereto.

4. The impugned Order-in-Original is only by way of part Adjudication of the Show Cause Notice. The order confirms the proposed Central Excise duty demand of Rs.5,15,57,631/-, with equivalent penalty. However, in so far as the proposed demand of Customs duty is concerned, the impugned order has deferred the adjudication thereof, awaiting determination, by the Development Commissioner, of the issue of fulfillment of positive NFEP.

5. When the case came up for hearing on 06-05-2011 before the Tribunal, the Counsel for the Appellants took the ground of violation of principles of natural justice since the order was passed without a final reply to Show Cause Notice from the Appellants. The Tribunal scrutinized the reasons for passing the order without getting final replies to the Show Cause Notice. The Ld DR brought to the notice of the Tribunal the following reasons recorded by the adjudicating authority.

> "I have gone through the brief facts of the case, all the written replies submitted from time to time and oral as well as written submissions made by the learned counsel on behalf of the noticees at the time of hearings held before my predecessor and me.
>
> During the course of adjudication proceedings in this case, 5 Nos., of Personal Hearing were granted to the Noticees and on five occasions, the Noticee/their counsel sought adjournment/extension of time and the same were granted. The instant Show Cause Notice was issued

letter dated 27.6.09 filed by the counsel on behalf of the noticees, nothing with respect to non-receipt of documents in the case was mentioned. When the first personal hearing, in this proceedings was fixed for 2.9.2009, the Noticees, vide their letter dated 2.9.2009, intimated this office that they had not received the RUDs/documents in the case and that the same be supplied to them. The required RUDs/documents were supplied to them by the investigating agency between 22.11.2009 to 30.11.2009, but they sought further time to file the final reply. However, they were granted further time till 24.12.2009 but they failed again and requested that they may be allowed further time to submit their reply by 31.12.2009. Keeping in view the principles of natural justice, when it was found that no final reply in the case has been filed by the noticees till 12.1.2010, the noticees were asked vide letter C.No. V(72, 74 & 78) 15-CE/D-I/Adj/41/2008/058-61 dated 12.1.2010 by the AC (Adj) to file the final reply in the case. No reply was filed nor did any request for extension was sent to this office by the notices. As the case was pending adjudication for a long time, personal hearing in the case was fixed for 27.1.2010 and the same was intimated to the noticees vide letter dated 14.1.2010, a copy of which was fixed to counsel of the noticees and that the counsel was also informed telephonically on 14.1.2010 itself. But nothing was heard either from noticees or from their counsel till 27.1.2010 when the counsel vide letter dated 27.1.10 sought for another adjournment.

I note that the show cause notice in the case was issued on 31.5.08 for the period 1.1.02 to 19.1.06. The counsel of the noticee on 2.9.09, during the course of PH, intimated the department vide his letter dated 2.9.09 that the documents relating to the present case have not been supplied to them. I am surprised that the noticees did not bother to intimate the department about non-supply of documents, immediately after receipt of the show cause notice and it took them 15 months to ask for the same. Further, I note that the noticees on subsequent period sought adjournments

31.11.2009, deliberately failed to furnish the final reply in the case to unnecessarily avoid the completion of adjudication proceeding on one or the other ground and did not cooperate in the matter. I also like to state in this regard that initially during the course of investigation the noticee No. 2, Shri R.K. Maheshwari, did not cooperate with the DRI and this fact has already been recorded in Panchnama as mentioned in para 12.1 of the SCN. Therefore, I am taking up the case for adjudication on the merits on the basis records available and the interim reply dated 17.11.2009 filed by the noticees counsel."

6. Per contra the Ld Counsel made the following submissions about delay in furnishing reply to SCN.

"(iv) The first notice of personal hearing in respect of the Show Cause Notice was issued to the Appellant for 2.9.2009.

(v) On the Appellant going through the documents and finding that several documents which formed basis of the Show Cause Notice, including the APRs and QPRs, were not made available to it, it addressed a request, dated 2.9.09, to the Commissioner, requesting for copies of the said documents.

(vi) It also requested, in the said letter, for permission to cross-examine the DRI officers who were involved in the overseas investigation on the basis of which under-valuation was alleged against the Appellant. This request, it may be submitted, was in accordance with the decision, dated 26.8.08, of this Hon'ble Tribunal in the Appellant's own earlier case, in which the same evidence were relied upon. This Hon'ble Tribunal had, in the said judgment, directed that cross-examination of the said officers was required to be allowed. This was in view of the findings contained in para 3.3 of the said judgment, wherein the overseas evidence and other material relied upon to question the correctness of the value declared by the Appellant was specifically discountenanced. The said judgment of this Hon'ble Tribunal was carried in Appeal, specifically held that it was not interfering with the directions issued by this Hon'ble Tribunal, thereby lending its imprimatur to the said directions. The Revenue further filed Review Petition before the Hon'ble Delhi High Court which, too, was dismissed vide Order dated 24.4.2009.

(vii) In the circumstances, the Commissioner could not have legally proceeded with the Adjudication without permitting cross-examination of the DRI officers involved in the overseas investigations.

(viii) However, without even a cursory appreciation of these facts, the Commissioner, vide record of proceedings dated 2.9.2009 summarily rejected the said request for cross-examination. No reasons, whatsoever, are forthcoming, for the said decision of the Commissioner.

(ix) In so far as the request for documents were concerned, the Commissioner wrote to the Appellant on 3.9.2009 directing it to collect the said documents from the office of the DRI.

(x) Ultimately, 15000 pages of documents were given to the Appellant between 22.10.2009 and 20.11.2009 and another 2000 pages were made available to it on 20.11.2009.

(xi) Consequent to change in Adjudicating Authority, personal hearing in respect of the Show Cause Notice was fixed on 27.1.2010 at 4.30 P.M.

(xii) The Appellant, however, requested for time till 15.2.2010 (i.e. only a further period of 17 days) to submit its detailed reply to the Show Cause Notice. In view of the voluminous nature of documents which had been made available to it. It is respectfully submitted this request cannot, even by the farther stretch of imagination, be regarded as unreasonable.

(xiii) Without any further communication, the impugned Order-in-Original, running into 81 pages came to be passed within 48 hours, confirming, against the Appellant, a demand of Rs.5,15,57,631/- towards Central Excise duty."

7. After considering the rival submissions in the matter of delay in furnishing final reply to the SCN and adjudication without final reply to the SCN the Tribunal was of the view that there was some dilatory tactics adopted by the Appellant in furnishing reply to the SCN. At the same time the Appellant was not put to notice that adjudication of only a part of the allegations in SCN would be proceeded with in which case the Appellant might have given reply on such short point. So the responsibility for the flawed adjudication is shared by both sides. So the bench felt that a proper course of action would be to ask the Appellants to furnish reply to the SCN before the Tribunal in a sealed cover by 24/06/11 so that further direction in the matter could be given on that day.

8. Accordingly the matter has come up for hearing today. The Appellants have furnished replies to the SCN. At this stage we consider it proper to remit the matter, keeping all issues open, to the adjudicating authority to decide the matter afresh considering the submissions made in the reply now furnished and giving the Appellant proper opportunity for personal hearing.

9. It is made clear that that this Tribunal is not making any observations on the detailed submissions made in the reply to the SCN

It is also made clear that the

examination of any of the witnesses asked for by the Appellants is to be allowed or not. These are all matters to be decided afresh by the adjudicating authority in the proceedings to be taken up by him for fresh adjudication in the matter.

10. Accordingly the appeals are disposed of by setting aside the impugned order and remitting the matter for denovo consideration by the adjudicating authority. The Registry is directed to forward the replies to the SCN furnished by the Appellants, to the Adjudicating Authority.

(Pronounced in open Court)

(Justice R. M.S. Khandeparkar)
(President)

(Mathew John)
Member (Technical)

RM