14

TELEGRAM : CEGCANAL
Website : www.cestat.gov.in

REGISTERED / AD
Email : cestat08@gmail.com

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

Appeal No. E/2405/2005 - EX[DB] Date **16/02/2012**

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

To :
M/S BHARAT HEAVY ELECTRICALS LTD.
P.O. BHEL, KHAILAR, JHANSI U.P.

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. A/167/ 2012 EX[DB]** dated 14-2-12 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. KANPUR
117/7, SARVODAYA NAGAR,
KANPUR 208005.

2. Adv. / Consult
MR.Z. U. ALVI
D-8,BDA COLONY, ADJACENT GARUDA TRAVELS.
KOH-E-FIZA BHOPAL-01

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-3
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
(Excise Appeal Branch)

3

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI PRINCIPAL BENCH, COURT NO. III

Excise Appeal No. 2405 of 2005

[Arising out of Order-in-Appeal No. 194-CE/APPL/KNP/2005 dated 28.3.2005 passed by the Commissioner of Customs & Central Excise, Kanpur (UP)]

For approval and signature:
Hon'ble Ms. Archana Wadhwa, 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? : No
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

---

M/s. Bharat Heavy Electricals Ltd. — Appellants

Vs.

Commissioner of Central Excise
Kanpur — Respondent

Appearance:
Shri Z.U. Alvi, Advocate for the Appellants
Shri I. Baig, SDR for the Respondent

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

Date of Hearing /decision: 7.2.2012

FINAL **ORAL ORDER NO. A/167/2012-EX (BR)**

Per Archna Wadhwa:

Learned advocate appearing for the appellant fairly agrees that the issue involved in the present appeal i.e. free supplied machinery parts during the period of warranty for the purpose of replacement are liable to discharge duty or not stands decided against them by the decision of the Hon'ble Supreme Court in their own case reported as Bharat Heavy Electricals Ltd. vs. Commissioner v [2003 (154) 10 SC]. However, he submits that the demand is barred by limitation having been raised vide show cause notice dated 5.9.2002 for the period of April, 1997 to March, 2002. He submits that inasmuch as the issue involved was of a legal interpretation and the appellants was under the bonafide belief that the replacement parts are to be cleared without payment of duty, no suppression can be attributable to them. He accordingly, prays for setting aside the impugned order on the point of limitation.

2. Learned DR appearing for the revenue submits that as the disputed issue stands settled against the appellants, the impugned order is required to be upheld.

3. We find that the period involved in the present appeal is from April, 1997 to March, 2002. It is seen that the earlier appeal of the same appellant was decided by the Tribunal vide its Final Order No. 179-

180/99 A dated 23.2.99. On going through the said order of the Tribunal, we note that the entire duty confirmed against the appellant as also the penalty imposed upon them was upheld. Infact there is averment in the said order to the effect that the appellants had not informed the department that they were clearing warranty replacement without payment of duty, the Collector also found that there was suppression on the part of the appellant and, therefore, penalties was also imposable on them. Accordingly, relief on the point of penalty was not extended to them. The said order of the Tribunal stand confirmed by the Hon'ble Supreme Court as referred supra.

4. As such, it is evident that penalty stands imposed in the earlier proceedings, by referring to the suppression on the part of the appellant stands upheld. The criteria for imposition of penalty as also for invocation of longer period of limitation are identical i.e. malafide intention. Once the suppression though, for the purpose of imposition of penalty stands attributed to the appellant, and upheld till the order of the Hon'ble Supreme Court, we find no reason to take a different view in the present case. As such, suppression is held to be there on the part of the assessee. This may be specifically held so on the ground that the earlier order of the Tribunal was passed in 1999 and inspite of that appellant continued to clear warranty parts without payment of duty. As such, we are of the view that element of suppression being there, as was observed by the Tribunal and upheld by the Supreme Court, the

invocation of longer period of limitation by the Revenue cannot be faulted upon. We accordingly, find no reason to interfere in the impugned order of the lower authorities. The appeal is accordingly rejected.

(Pronounced in the open Court)

(Archana Wadhwa)
Member(Judicial)

(Mathew John)
Member(Technical)

ss

FAX : 011-26108426 **REGISTERED / AD**

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

Dated: **07/11/2012**

To

1. Appellant as per address in table below
2. Respondent as per address in table below

[redacted]Misc Order No. **MO/1133/2012** dated **06/11/2012**

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section **35-C(1) of the Central Excise and Salt Act, 1944.**

Assistant Registrar
EXCISE Appeal Branch

S.No	Application	Appeal	Name and Address of Appellant	Name and Address of Respondent
1.	E/ROM/21/2012	E/2405/2005	**BHARAT HEAVY ELECTRICALS LTD. P.O.BHEL KHAILER,** Jhansi U.P. 284129	**C.C.E. KANPUR** 117/7, Sarvodaya Nagar, Kanpur 208005.

--

--

Copy To
1. Advocate(s) / Consultant(s):

Z. U. Alvi
D-8,BDA COLONY,
ADJACENT GARUDA TRAVELS.,
KOH-E-FIZA,
BHOPAL,
MADHYA PRADESH
462001

--

--

2. Bar Association, CESTAT, Delhi **3.** Director Publications, Customs, Excise. I.P. Estate, Delhi

4. M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, New Delhi-3

5. Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17

6. Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005

7. Easy Service Tax Online Dot Com Pvt. Ltd., 407A, Iscon Mall, Satellite Road, Ahmedabad-15

8. LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)

9. TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070

10. Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Ameer Pet, Hyderabad – 500038

11. C.D.R 12. Office Copy 13. Guard File 14. Second Folder

Assistant Registrar
EXCISE Appeal Branch

CUSTOMS EXCISE & SERVICE TAX APPLELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
COURT NO. 3

E/ROM / 21 / 2012 in Appeal No. E / 2405 / 2005

Date of Hearing: 23.8.2012
Date of decision : .2012

M/s. Bharat Heavy Electricals Ltd. Applicant

Vs

C.C.E. Kanpur Respondent

Appearance:

Shri Z.U. Alvi, Advocate for the Appellants
Shri R.K. Verma, DR for the Respondent

CORAM:

Hon'ble Ms. Archana Wadhwa, Member (Judicial)
Hon'ble Mr. Mathew John, Member (Technical)

MISC- **ORDER NO.** 1133/2012-Ex(BR)

Per Archna Wadhwa (for the Bench):

The present application stand filed by the applicant –appellant for rectifying the mistake in the Tribunal's Final Order No. A/167/2012-Ex(BR) dated 7.2.2012. The appellants had raised the following issues for rectification:

(i) Where Applicant paying duty, in advance, on Free Warranty Replacement, at the time of clearance of main equipment, by adding 2.5% value of goods and raising Excise invoices for FWR indicating 'duty already paid' or non billable material (NBM) , or could it be said to be a case of suppression of fact with intent to evade payment of duty?

(ii) Applicant's advance payment of duty on FWR was based on Supreme Court's ruling on valuation in Bombay Tyre International's case, which has been expressly incorporated in section 4 CEA 1944 vide amendment dated 01.07.2000, what would be the implication of this amendment on the mode and manner of payment of duty on FWR post 01.07.2000?"

2. After hearing both the sides duly represented by Shri Z.U. Alvi, Advocate for the appellant and Shri R.K. Verma, DR for the Revenue, we find that the issue No.1(i) i.e. whether the value of free warranty replacement is required to be added in the assessable value of the main equipment or the extended period of limitation was available to the Revenue for raising the demand stand discussed in the said Final Order and based upon the Hon'ble Supreme Court decision in the same appellants case reported as BHEL vs. CCE reported as [2003 ELT (154) 10 (SC)], the same were held against the appellant. Following the earlier decision of the Hon'ble Supreme Court for deciding the issue on

merits cannot be held to be a mistake apparent on the face of the records so as to rectify the same. As per the settled law, appellant cannot seek review of the order in the guise of rectification of mistake. As such, we find no merit in the above ground raised by the appellant.

3. As regards the second ground, the applicant's contention is that the definition of assessable value was changed with effect from 1.7.2000 which provided the transaction value as the assessable value. Inasmuch as it is not the Revenue's case that the applicant-appellant charged any extra amount from their buyers for replacing the defective parts, it has to be held that the value of the said free replacement was already included in the transactional value. Inasmuch the period involved in the present appeal is from April, 1997 to March, 2002, the changed definition was required to be considered for the period post 1.7.2000.

4. Though from the impugned order passed by the adjudicating authority as also by the appellate authority, we note that no such ground were specifically raised before the adjudicating authority but from the memo of appeal filed before the Tribunal, we find that ground No. 5.12 is to the following effect:

> "5.2 *The learned Commissioner (Appeals) has erred to note that the law as regards valuation underwent a material change consequent to amendment dt. 1/07/2000 whereby normal wholesale cash price was substituted by 'Transaction Value' as assessable value and the warranty costs were specifically covered and included under the assessable value u/s 4(3)(d)*

thereby demolishing the very basis of liability to a fresh duty on warranty replacements at the time of their clearance. "

5. We also note that learned advocate never argued on the above raised ground at the time of hearing of appeal. Nevertheless taking into account the fact that the ground was raised in the memo of appeal, though not at the time of argument, we deem it fit to pass orders on the same and add the following para in FInal Order No. A/167/2012-Ex(Br) dated 7.2.2012.

> "5. We further note that as the said ground was not raised before the authorities below, and their comments and views on the same are not available, we partly remand the matter to the original adjudicating authority for passing orders on the above ground on confirmation of demand for the period post 1.7.2000. We make it clear that our order for the period prior to 1.7.2000, confirming the demand and imposing penalties is not disturbed."

6. ROM application is disposed of in the above manner.

(Pronounced in the open Court on 6/11/12

Archana Wadhwa
(Judicial Member)

Mathew Jonn
(Technical Member)

ss