

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

Appeal No. E/3894/2005 - EX[DB]

Date 30/03/2012

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

To :
M/S BHARAT HEAVY ELECTRICALS LTD., (HEEP)
ADM. BUILDING NO. III, P.O. RANIPUR,
HARIDWAR U.A.

250005

M/S BHARAT HEAVY ELECTRICALS LTD.

Appellant

Vs
Respondent

C.C.E. MEERUT I

2012 EX[DB] dated 30-3-12

I am directed to transmit herewith a certified copy of **Final order No.A/379/**
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. MEERUT I
EXCISE CHOWK, UNIVERSITY
ROAD, MANGAL PANDEY
NAGAR, MEERUT - 250005.

2. Adv. / Consult

MR.RUPESH KUMAR

F-12A,(L.G.F)KAILASH COLONY, N DELHI.110048

3. C.D.R

4. Bar association. CESTAT. New Delhi

5. Director Publications, Customs, Excise. I.P. Estate, New Delhi

6. M/s Centax Publications 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)

**CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
Court No.III**

E/Appeal No.3894 /2005

(Arising out of order in appeal No.168/CE/MRT-I/2005 dated 30.9.2005 passed by the Commissioner of Central Excise (Appeals), Meerut)

Date of Hearing: 21.2.2012

Date of Pronouncement: 30.3.2012

For Approval and signature:

Hon'ble Mrs. Archana Wadhwa, Member Judicial
Hon'ble Mr. Mathew John, Technical Member

- | | | |
|----|--|------|
| 1. | Whether Press Reporters 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 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 BHEL Ltd

Appellants

Vs

CCE, Meerut

Respondent

Appeared for the Appellant: Shri Rupesh Kumar, Advocate
Appeared for the Respondent: Shri Nitin Pathak, DR

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

FINAL ORDER No. A/379/2012-EX (BR)

Per Mathew John:

The appellants are manufacturers of various excisable goods falling under chapters 72, 73, 84, 85 and 93 of the First Schedule of the Central Excise Tariff Act, 1985. During the period from 13.9.1996

to 6.9.1997, the appellants entered into a contract for supply of goods to Chanderpur TPS Unit which was a power project being executed by Maharashtra State Electricity Board with project name Maharashtra Power Project-II. The said project was being financed by the World Bank by its loan account No. 3498/IN for US \$ 350 Million and such fact was stated in tenders floated by MSEB. While supplying the goods to the said project, the appellants claimed exemption under Notification No 108/95-CE dated 28.8.95 by submitting the required certificates prescribed in the Notification.

2. The loan was sanctioned by World Bank on 8.7.92. Disbursals from the loan was continued till 22.10.96. The disbursement of the loan was suspended by the World Bank from 22.10.96 and the loan was closed on 30.6.98 with the cancellation of the undrawn balance of US \$ 237.746 Million. Revenue was of the view that since the World Bank did not disburse the full amount initially agreed to by the Bank and did not disburse the amount after 22.10.96, the appellants could not have claimed exemption from excise duty on goods cleared by the appellants to the said project during the period from 13.9.96 to 6.9.97. So in respect of such clearances, Revenue demanded duty by issuing show cause notice dated 22.7.04. The said show cause notice has been adjudicated confirming demand of amount of Rs. 4,49,69,295/- along with interest. Aggrieved by the order of the Commissioner, the appellants have filed this appeal.

3. The appellants submitted that the Revenue had issued another show cause notice vide F No.A/IN/68/2001/1705 dated 9.7.2001 proposing to recover Rs. 3,05,21,665/-. The said show cause notice was adjudicated by the Commissioner of Central Excise, Meerut

confirming the duty demand and appellants challenged the order in Appeal No. E/2602/02 before the Tribunal. Vide order dated 23.3.03, the appeal filed by the appellants was allowed by the Tribunal on the ground of time bar. The said order was not challenged by the Department and thus has attained finality. Revenue issued another show cause notice on the ground that they were finalizing the provisional assessment and at the time of such finalization, they find that duty has been short levied on account of exemption availed under Notification No. 108/95-CE for which they were not eligible.

4. It was the contention of the appellants that this matter is already decided by the Tribunal and such decision has been accepted by Revenue. They contend that Revenue cannot reopen the matter through another proceeding. They rely on the decision of Apex Court in the case of CCE Vs Flock (India) Pvt Ltd 2000 (120) ELT 292 and CCE Indore Vs Siddharth Tubes 2004 (17) ELT 331.

5. The learned AR for Revenue submits that all clearances of the appellants were provisional as per letter C. No. V-68(8)T-II/110/75/41928 dated 27.9.19975 because the appellants always had price variation clauses in their contracts. When assessments are provisional, the time limits prescribed in Section 11A will start from the date of finalization of the provisional assessment only. In this case, the assessment was not finalized earlier and the present demand has arisen during finalization of the amendment. The AR also points out that BHEL had initially cleared goods for the project on payment of excise duty and started claiming exemption under Notification No. 108/95-CE only from 13.9.1996 to 6.9.1997. By that time, World Bank had stopped disbursements from its loan and therefore, the

appellant could not have claimed the exemption. Further appellants received Rs. 1444.76 lakhs on account of price variation clause out of which Rs. 681.488 lakhs was received in 2000-01 and Rs. 25.11 lakhs was received in 2001-02.

6. The learned AR for Revenue submits that the earlier show cause notice was issued by DGCEI, New Delhi even before the assessments of goods cleared for Chandrapur project was finalized. The present demand is made as per provision of erstwhile Rule 9B(5) of Central Excise Rules, 1944 and its successor Rule 7(3) in Central Excise Rules, 2002. The demand is for a higher amount because the additional consideration received on account of price variation clause has been taken into account while issuing this show cause notice.

7. The Counsel for the appellants argues that there was no order passed for provisionally assessing the goods cleared to Chandrapur project. There was no case to consider the project to be assessed provisionally because at the time of clearance the goods were exempted as per provision of Notification No. 108/95. The correspondence between the Department and the appellant about pending provisional assessments vide letters dated 3.10.2002 and 24.4.2003 do not state that these supplies were provisionally made. The department is relying on a letter issued in 1975 to claim that all assessments were provisional.

8. The Counsel also has the argument that though the World Bank cancelled its disbursement after disbursing US \$ 112 mn, the project still continued to be a project financed by World Bank because World Bank had disbursed US \$ 112 mn for the project. He also has an argument that the appellants had provided all the certificates as

prescribed in the Notification No. 108/95-CE including certificate issued by Government of India and therefore, there is no case for denial of the exemption.

9. We have considered arguments on both sides. What we notice is that when the initial demand for Rs. 3,05,21,265/- was set aside by the Tribunal on the ground of time bar, the Revenue did not contest that the assessment was provisional. The said order was not contested in appeal either. No specific order issued under Rule 9B(5) of the Central Excise Rules, 1944 ordering provisional assessment in this case has been produced either. So at this stage, it is not open to the Revenue to re-agitate the matter based on a letter issued in 1975 to the appellants. In our view, this is a matter covered by the principle of resjudicata and the case of Revenue fails for this reason. So we are not dealing with the other arguments convassed by the appellants.

10. Consequently, the appeal is allowed by setting aside the impugned order.

(Order pronounced on 30/3/12)

(~~ARCHANA~~ WADHWA)
Judicial Member

(~~MATHEW~~ JOHN)
Technical Member

MPS*