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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/2879/2011 - EX[DB]
E/S/3699/11-EX

Date **25/04/2012**

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

To :
C.C.E. DELHI I
C.R. BUILDING, I.P. ESTATE, NEW DELHI 110002

C.C.E. DELHI I Appellant

Vs

M/S JAIN & COMPANY, **STAY ORDER NO. 690/2012-EX** Respondent

I am directed to transmit herewith a certified copy of **Final order No. A/457 2012 EX[DB]** dated 18-4-12 passed by the Tribunal under **Section 35-C(1)of Central Excises Act, 1944**

Assistant Registrar
(Excise Appeal Branch)

Copy to :

1. Respondent
M/S JAIN & COMPANY,
A-95/4, WAZIRPUR INDUSTRIAL
AREA, DELHI.

110052

2. Adv. / Consult SH. NAVEEN MULLICK, ADV, C/O RESPONDENT.
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)

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

West Block No.2, R.K.Puram, New Delhi

COURT-I

Date of hearing/decision: 18.4.2012

Stay Application No.3699 of 2011 and
Central Excise Appeal No.2879 of 2011

Arising out of the order in appeal No.67/CE/DLH/2011 dated 5.9.2011 passed by Commissioner of Central Excise (Appeals), Delhi I.

Hon'ble Mr. Justice Ajit Bharihoke, President
Hon'ble Mr. Rakesh Kumar, Technical Member

1	Whether Press Reporter may be allowed to see the Order for publication as per Rule 26 of the CESTAT (Procedure) Rules, 1982?	
2	Whether it should be released under Rule 26 of 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?	

C.C.E., Delhi I .. Appellant

Vs.

M/s Jain & Company .. Respondent

Present Shri Sanjay Jain, A.R. for the appellant Revenue

Present Shri Naveen Mullick, Advocate for the respondent

Coram: Hon'ble Mr. Justice Ajit Bharihoke, President
Hon'ble Mr. Rakesh Kumar, Technical Member

STAY order No. 690/2012-Ex(BR)
FINAL Order No. A/457/2012-Ex(BR)

Per Justice Ajit Bharihoke (Oral):

This is Revenue appeal against the impugned order of Commissioner (Appeals) whereby he partly allowed the appeal and directed refund of Rs.15 lakhs deposited by the respondent during the investigation conducted by the Department. Along with the appeal, instant application for stay of refund of Rs.15 lakhs is moved.

2. While hearing he argument on application for stay, we are of the view that a very short point is involved in this matter, therefore, we have decided to hear the argument on appeal with the consent of both sides.

3. Briefly stated the facts relevant for disposal of the appeal are that M/s Jain & Company, Wazirpur Industrial Area, Delhi are engaged in the manufacture of cold drawn steel wires falling under Chapter Heading No.7217 of the First Schedule to the Central Excise Tariff Act, 1985. The officers of the Anti Evasion Branch of Central Excise Commissionerate, Delhi I visited the factory premises of the respondent and seized certain documents for verification. While verification of documents was going on the respondents under pressure from the Department paid Rs.15 lakhs vide various cheques to the Department. The Department issued show cause notice to the respondent raising excise duty demand of Rs.1,58,73,034/-. During adjudicating proceedings, the respondent applied for refund of Rs.15 lakhs deposited by him under pressure from the Department and the jurisdictional Assistant Commissioner rejected the claim for refund vide letter dated 20.8.2010. Feeling aggrieved, the respondent preferred an appeal and the Commissioner (Appeals) vide impugned order relying upon the judgment of the Tribunal in the matter of Florida Electrical Ind. Ltd. vs. C.CE.., Delhi I - 2004 (168 ELT 393 (Tri-Del.) which was confirmed by the Supreme Court vide judgment reported as 2005 (187) ELT A 33 (SC) allowed the refund of Rs.15 lakhs after appropriating the penalty of Rs.20,000/- imposed on the respondent in some other matter and Rs.30,000/- redemption fine.

4. Shri Sanjay Jain, A.R. for Revenue submits that the order in appeal is not sustainable in law for the reason that on the basis of

incorrect reading of judgment of the Tribunal in the matter of Florida Electrical Ind. Ltd. vs. C.C.E.., Delhi I as also the judgment of the Supreme Court reported as 2005 (187) ELT A 33 (SC) vide which the appeal against the order of Tribunal was dismissed. Learned A.R. further submits that as per Section 11DDA of the Central Excise Act, 1944, the Department has a right to attach the property of the assessee in order to protect the interest of Revenue. This deposit of Rs.15 lakhs was made by the respondent only with a view to escape attachment order.

5. Shri Naveen Mullick, Advocate appearing for the respondent submits that the order of the Tribunal in Florida Electrical Ind. Ltd. (supra) as also the judgment of the Supreme Court reported as 2005 (187) ELT A 33 (SC) is clear to the effect that the Department has no right to retain the amount deposited by the assessee unless the demand has been adjudicated against him. He further submits that Section 11DDA is not applicable in this case for the reason that there is no attachment order. Thus, he prays for dismissal of the appeal as well as stay application.

6. We have considered the rival contentions and perused the record. Perusal of the impugned judgment would show that the Commissioner (Appeals) has allowed refund of Rs.15 lakhs deposited during investigation proceedings relying upon the finding of the Tribunal in the case of Florida Electrical Ind. Ltd. (supra) and also the judgment of the Supreme Court reported as 2005 (187) ELT A 33 (SC) and also on the basis of the finding of the Gujarat High Court in the case of Century Dying & Pritning Mills vs. UOI – 2006 (199) ELT 400 (Guj).The relevant portion of the aforesaid order is reproduced below:-

> ***" I find that Hon'ble Tribunal in the case of M/s Florida Electrical Ind. Ltd. vs. C.C.E., Delhi I – 2004 (168) ELT 393 (Tri-Del.) has held as under:***

4. We have considered the submissions made by both the sides. The facts which are not in dispute are that the appellants have deposited a sum of Rs. 15,00,000/- when the officers visited their premises and alleged removal of excisable goods without payment of duty. Though show cause notice has been issued and even personal hearing has been conducted by the adjudicating authority, no duty liability on the appellants has been determined so far. In the absence of any duty liability on the part of the appellants, the Revenue cannot retain the amount deposited by the appellants. We, therefore, set aside the impugned order and allow the appeal filed by the appellants.

The Hon'ble Supreme Court vide judgment reported as 2005 (187) ELT A 33 by dismissing the Revenue's appeal filed. In the instant case, even after a lapse of 20 months, neither any show cause notice demanding central excise duty has been passed against the appellants. Therefore, the ratio of the above mentioned judgments is squarely applicable to the case in hand. I further find that Hon'ble Gujarat High Court in the case of Century Dying and Printing Mills vs. UOI - 2006 (199) ELT 400 (Guj.) while dealing with identical issue, has also held as under:-

12. In absence of any statutory provision of the basis of which any such recovery can be made, the action of the respondent authorities in collecting the cheques from the petitioner cannot be sustained in law. The position in law is well settled that liability to excise duty can arise on the production/manufacture of the excisable goods or at best on removal of such excisable goods. In the present case, the respondent authorities have failed to show any such taxing event having taken place on the basis of which they would be entitled to effect such recovery. Any tax or duty can only be levied and collected in accordance with law, namely, backed by and supported by appropriate provision empowering the authority to undertake such an exercise of levy and collection. The respondent authorities must bear in mind that they are creatures of statute and are bound by statutory law; the powers that they exercise are granted to them by the statute and there are no powers dehors the statute. Therefore, the authorities are bound to act as provided by the provisions under which they can exercise such powers. The revenue is not an organization which is entitled to retain money without sanction of law. Therefore, without entering into the controversy as to whether payment was voluntary or otherwise, in absence of any statutory backing, the funds recovered by the respondent authorities by way of various cheques collected by them, cannot be permitted to be retained and are required to be refunded forthwith. The learned counsel for Revenue has failed to point out a provision which empowers the authorities to collect and retain cheques in this manner.

13. Needless to state that this action, namely, of refunding the amount, will not entitle the petitioner to contend that it is absolved on merits, in case at the end of inquiry and adjudication process, it is found that the petitioner becomes liable to pay duty in accordance with law. It is further made clear that the respondent authorities are entitled to proceed with the inquiries which are already in progress and if necessary and deemed fit, issue show cause notice to the petitioner in accordance with law; thereafter pass an order of adjudication in accordance with law after hearing the petitioner.

14. In the result, the action of the respondent authorities in collecting various cheques for various amounts is not sustainable in law and is accordingly quashed. The respondent authorities are directed to refund the total sum recovered by way of encashment of various cheques up till now to the petitioner forthwith but not later than 3 week from today i.e. on or before 13th May 2005, without waiting for a certified copy of the order or a writ of this court. Similarly, the respondent authorities are also directed to return the unencashed cheque/cheques that they might be holding out of the various cheques collected by them."

7. Admittedly, adjudication proceedings are on and demand is yet to be confirmed thereof in view of the legal position enumerated in above quoted judgment, Appellant Department has no right to retain the amount of Rs.15 lakhs till the demand is adjudicated against the respondent. Thus, we do not find any infirmity in the impugned order

8. As regards the plea of Section 11DDA of the Central Excise Act, 1944, it is suffice to say that this Section confers power upon the Central Excise Officer to provisionally attach property belonging to the assessee on whom show cause notice has been served with a view to protect the interest of Revenue. This power can be exercised by the concerned officer with proper approval of the Commissioner (Appeals). In the instant case appellant has failed to show approval for attachment given by the Commissioner, on the contrary , the Commissioner Central Excise vide impugned order has directed refund of the money which imply that approval for provisional attachment has not been granted. Thus this plea is of no help to the appellant.

9. In view of the above discussion, we do not find any merit in the appeal. Accordingly, the appeal is dismissed.

(Justice Ajit Bharihoke)
President

(Rakesh Kumar)
Technical Member

scd/