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

REGISTERED / AD
Mail : cestat08@gmail.com

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

CROSS Application No. : E/CROSS/207-207/2011
Appeal No. : E/1567-1568/2011-EX[DB]

Dated: **07/09/2012**

Assistant Registrar
C.E.S.T.A.T. New Delhi
To,
C.C.E Bhopal
Hoshangabad Road, 48, Administrative
Area, Area Hills, Bhopal (M.P.) 462011

C.C.E Bhopal (Appellant)

VS

BIRLA ERICSSION OPTICAL LIMITED (Respondent)

I am directed to transmit herewith a certified copy of Final Order No. **A/1147-1148/2012-EX[DB]** dated **29/08/2012** passed by the Tribunal under section **35-C(1) of the Central Excise and Salt Act, 1944.**

Assistant Registrar
EXCISE Appeal Branch

Copy To,
1. Respondent
BIRLA ERICSSION OPTICAL LIMITED
Udyog Vihar P.O Chorhata, Rewa(MP)

2. Advocate(s) / Consultant(s): MR. SUNIL KUMAR & PRIYADEEP, ADV., KHAITAN & KHAITAN, D-11, DEFENCE COLONY, N. DELHI-24

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. Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Ameer Pet, Hyderabad – 500038
13. Office Copy
14. Gaurd File

Assistant Registrar
EXCISE Appeal Branch

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

COURT NO. I
DATE OF HEARING/DECISION : 29/08/2012.

Excise Appeal No. 1567-1568 of 2011 with CO Application No. 206-207 of 2011

[Arising out of the Order-in-Appeal No. 87 and 89/BPL/2011 dated 30/03/2011 passed by The Commissioner, Central Excise, Bhopal.]

Hon'ble Shri Justice Ajit Bharihoke, President
Hon'ble Shri Rakesh Kumar, 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?	:
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 Lordships wish to see the fair copy of the order?	:
4.	Whether order is to be circulated to the Department Authorities?	:

CCE, Bhopal — Appellant

Versus

M/s Birla Ericssion Optical Ltd. — Respondent

Appearance

Shri M.S. Negi, Authorized Representative (DR) – for the appellant.

Shri Sunil Kumar and Ms. Priyadeep, Advocates - for the Respondent.

CORAM : **Hon'ble Shri Justice Ajit Bharihoke, President**
Hon'ble Shri Rakesh Kumar, Member (Technical)

FINAL Order No. A/1147-1148/12-Ex(BR) Dated : __________

Per. Rakesh Kumar :-

The respondent are manufacturers of Optical Fibre Cable and PIJF cable (Telecommunication Grade) falling under Chapter sub-heading No. 85444990-99 and 90011000 of the First Schedule to the Central Excise Tariff Act, 1985, which during the period of dispute had been supplied by them to M/s BSNL. The respondent during the period of dispute had made supplies to BSNL at a provisional price. During the period of dispute, in respect of supplies of Optical Fibre Cable and PIJF Cable to BSNL the assessment were provisional and the duty had been paid on provisional basis. Subsequently, the assessments were finalised which resulted in refund of duty. Though during the period of dispute, the respondent while supplying the Optical Fibre Cable and PIJF Cable to BSNL had issued the invoices to them mentioning the duty paid on provisional basis, there is no dispute that the payment against the same were received only after finalisation of the assessment and the respondent received reimbursement of duty, which was finally payable and not of the duty, which had been actually paid and which had been mentioned in the invoices. The respondent filed refund claims in respect of the excess duty paid by them. These refund claims were rejected by the Jurisdictional Assistant Commissioner vide orders-in-original each dated 28/12/10. On the ground of unjust enrichment. On appeals to Commissioner (Appeals), these orders of the Assistant Commissioner were set aside by the

Commissioner (Appeals) vide order-in-appeal No. 87/BPL/2011 dated 29/3/11 and 89/BPL/2011 dated 29/3/11. Against these orders of the Commissioner (Appeals), these two appeals have been filed by the Revenue and in respect of Revenue's appeal, the respondent has filed the Cross Objection.

2. Heard both the sides.

3. Shri M.S. Negi, the learned DR, assailed the impugned orders-in-appeal reiterating the grounds of appeal in the Revenue's appeal and emphasised that since the respondent had mentioned the higher amount of duty in the invoices, it has to be presumed that the burden of that duty, whose refund is being claimed by them, had been passed to the customer – M/s BSNL, that though in this regard, the respondent have produced a Chartered Accountant's certificate, production of Chartered Account certificate cannot be treated as the evidence in support of their claim that incidence of duty whose refund is claimed has been borne by the respondent and that in view of this, the impugned order is not correct.

4. Shri Sunil Kumar and Ms. Priyadeep, Advocates, the learned Counsels for the respondent, defended the impugned order and pleaded that though during the period of dispute in respect of supplies of Optical Fibre Cable and PIJF Cable to BSNL higher amount of duty had been paid and in the invoices only that duty had been mentioned, the payment had been received from BSNL only after the finalisation of the provisional

assessment and the reimbursement of duty by the BSNL was of the duty finally assessed which was lower than the duty originally paid, that in this regard Chartered Accountant's certificate had also been produced by the respondent, that when the respondent had produced the evidence showing that the incidence of higher quantum of duty paid by them and whose refund is claimed by them, had been borne by them and had not been passed on to their customer, the burden of proof in this regard in terms of the Section 12B would be shifted to the department and it is for the department to prove that this claim of the respondent is not correct, that no evidence in this regard has been produced by the department, and that when the department does not dispute that the payment from BSNL was received only after the finalisation of the provisional assessment and the duty reimbursement was on the basis of duty finally assessed and not on the basis of the duty originally paid, the department cannot allege that the respondent have passed on the incidence of duty whose refund is claimed by them, to the customers. They, therefore, pleaded that there is no infirmity in the impugned orders-in-appeal.

5. We have considered the rival submissions.

6. In these cases, during the period of dispute, the assessment of duty was on provisional basis and during that period the respondent had paid duty on provisional basis at a higher price. Though, the invoices had been issued by the respondent to BSNL on that basis, it is not disputed that the payment from the BSNL was received only after the finalisation of

the provisional assessment and the payment received from the BSNL does not include the excess duty paid by the respondent. Not only this, in this regard, the respondent have also produced a Chartered Accountant's certificate certifying that the incidence of excess duty whose refund is claimed by them had not been passed by them to their customers – M/s BSNL. Once evidence is produced by the respondent that they have borne the incidence of duty whose refund is claimed by them, the burden would shift to the department to prove that the respondent's claim is not correct. In this case, no such evidence has been produced by the department. In view of this, we do not find any infirmity in the impugned orders-in-appeal. The Revenue's appeals are dismissed. The Cross Objections also stand disposed of as above.

(Dictated and pronounced in the open court.)

(Justice Ajit Bharihoke)
President

(Rakesh Kumar)
Member (Technical)

PK