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

Appeal No. C/496 /2008 - CU[DB]   Date **24/05/2012**

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

To :
M/S ABB LIMITED
14, MATHURA ROAD, FARIDABAD(HR)

M/S ABB LIMITED   Appellant

Vs

C.C. NEW DELHI (IMPORT & GENERAL)   Respondent

I am directed to transmit herewith a certified copy of **Final order No.C/A/140/ 2012 CU[DB]** dated 08.05.2012 passed by the Tribunal under **Section 129, (B) of the Customs Act,1962 & Financial Act 1994 relating to Service Tax**

Assistant Registrar
(Customs Appeal Branch)

Copy to :

1. Respondent
C.C. NEW DELHI (IMPORT & GENERAL)
NEW CUSTOM HOUSE, NEAR I.G.I.
AIRPORT, NEW DELHI 110037.

2. Adv. / Consult
MR.V. LAXMIKUMARAN
B-6/10, SAFDARJUNG ENCLAVE,
NEW DELHI-110029

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
(Customs Appeal Branch)

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

Customs Appeal No. 496 of 2008

[Arising out of Order-in-Appeal No. CC(A)/Cus/I&G/REV/D-I/150/08 dated 24.3.2008 passed by the Commissioner of Customs (Appeals), New Delhi]

For approval and signature:

Hon'ble Mr. D.N.Panda, Member (Judicial)
Hon'ble Mr. Mathew John, Member (Technical)

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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 should 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 Departmental authorities? :

M/s. ABB Limited — Appellants

Vs.

Commissioner of Customs
New Delhi — Respondent

Appearance:
Ms. Charanya Laxmikumaran, Advocate for the Appellants
Shri Amrish Jain, AR for the Respondent

CORAM: Hon'ble Mr. D.N.Panda, Member (Judicial)
Hon'ble Mr.Mathew John, Member (Technical)

Date of Hearing/decision : 8.5.2011

Final **ORDER NO** C/A/140/12-Cus.

Per D.N.Panda (for the Bench):

Learned Counsel submits that consequent to provisional assessment, refund arising on final assessment does not require test of unjust enrichment. This is proposition of law laid down by the Tribunal in the case of Timken India Ltd. vs. CC, Kolkata reported as [2007 (217) ELT 197 (Tri-Kolkatta)]. Also the appellant relied on the decision of Hon'ble High Court of Delhi in the case of CC vs. Indian Oil Corporation [2012-TIOL-52-HC-DEL-Cus] and prays to allow the appeal. The period involved in this case is 1995 to 2003

2. Learned AR appearing for the revenue submits that refund has to undergo the test of doctrine of unjust enrichment.

3. Heard both sides and perused the records.

4. It is settled law that provisional assessment has to reach final assessment. On ...... final assessment, refund flowing shall be paid and duty short paid shall be recoverable. One such consequence flows, unless otherwise required by statutete specifically, refund need

not meet the test of unjust enrichment according to law in force at the

point of relevant time. In absence of specific denial provision, there is no scope to deny refund flowing from final assessment against provisional assessment. According to learned counsel, similar dispute was dealt by Kolkata Bench of the Tribunal in para 4.9 of the decision of Timken India Ltd. order cited (supra) by the learned Counsel. For convenience of reading, the said para is reproduced as under:

> "4.9 Hon'ble Supreme Court following the ratio laid down in Mafatlal Industries Ltd. case (supra), in the case of Commr. of Central Excise, Mumbai II v. Allied Photographics reported in 2004 (166) E.L.T. 3 (S.C.) decided on 18-3-2004 held that assessment means determination of tax liability and entitlement to refund would be known only when duty is finally adjusted (Para 7 of judgment). In Para 11 of the judgment it was held that in Para 104 of Mafatlal Industries Ltd. judgment - 1997 (89) E.L.T. 247 (S.C.) the Hon'ble Court stated that if refund arises upon finalisation of provisional assessment, Section 11B will not apply and any recoveries or refunds consequent upon the adjustment under sub-rule (5) of Rule 9B will not be governed by Section 11A or 11B, as the case may be. In Para 12 of the judgment in Allied Photographics case (supra) it was held that Section 11B and Rule 9B operate in different spheres and, consequently, in Para 104 of the judgment in Mafatlal case (supra) it was held that in cases where duty is paid under Rule 9B and refund arises on adjustment under Rule 9B(5), then such refund will not be governed by Section 11B. Accordingly, it was held that if an independent refund claim is made after adjustment on final assessment under Rule 9B(5), agitating the same issues, then such

claim would attract Section 11B. This is because when the assessee makes an independent refund claim after final order under Rule 9B(5), such application represents a claim for refund and it would not come in the category of making of refund and therefore, the bar of unjust enrichment would apply. In Para 7 of Allied Photographics judgment it was therefore held that Rule 9B of Central Excise Rules, 1944 was a complete code itself. On compliance with the conditions therein, the proper officer was duty bound to refund the duty without requiring the assessee to make a separate refund application. The Hon'ble Court in Para 14 of Allied Photographics case (supra) further held that judgment in Mafatlal's case stated the propostion of law that if refund arises upon finalisation of provisional assessment, Section 11B will not apply. It was therefore held in Para 14 that refund arising consequent upon finalisation of provisional assessment does not attract the bar of unjust enrichment. While deciding the case in Allied Photographics' case, the Apex Court also affirmed its decision in Collector of Central Excise, Chennai v. TVS Suzuki Ltd. - 2003 (156) E.L.T. 161 (S.C.). In TVS Suzuki's case, refund on finalisation of provisional assessment accrued to the assessee in the year 1996 and refund was claimed by making an application on July 5,1996 and that was prior to the amendment of Section 11B on August 1, 1998 by Act 21 of 1998. Repelling argument of Revenue that during pendency of the claim for refund dated July 5, 1996, the amendment to Rule 9B(5) had come into force with effect from June 25, 1999 and, therefore, the pending refund application dated July 5, 1996, has to be decided as per the amended Rule 9B(5) "The Hon'ble Supreme Court held that merely because the departmental authorities took a long time to process the application for refund, the right of the assessee therein does not get defeated by subsequent amendment to Rule 9B(5). The principles laid down in Allied Photographics case (supra) was followed by Hon'ble Supreme Court in CC v. Oriental Exports - 2006 (200) E.L.T. A138."

4. In the course of hearing no case was brought out by Revenue with the cogent evidence showing that appellant made refund claim not arising out of finalisation of provisional assessment. Learned Counsel for the appellant says that import was for captive consumption and appellant has not been unjustly enriched. Appeal is thus allowed.

(Pronounced in the Court)

(D.N.Panda)
Judicial Member

(Mathew John)
Technical Member

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