

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

Appeal No. C/670 /2007-673 /2007 - CU[DB]

Date 13/01/2012

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

To : 1. MR.NIZAMUDDIN,MD
2. M/S HI-TECH NEEDLES (P)LTD
PLOT NO AL-5/1,SECTOR-13, GIDA,
GORAKHPUR.- 273 209

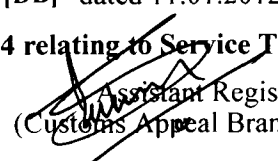
M/S HI-TECH NEEDLES (P)LTD

Appellant

C.C.ALLAHABAD

Vs
Respondent

I am directed to transmit herewith a certified copy of **Final order No.C/A/03-06/ 2012 CU[DB]** dated 11.01.2012
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.ALLAHABAD
38,M.G.MARG, CIVIL LINES,
ALLAHABAD

2. Adv. / Consult

MR.J M SHARMA

252, BASANT ENCLAVE, (NEAR VASANT VIHAR)
NEW DELHI-110057

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

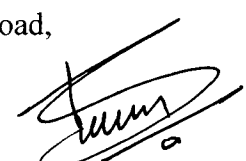
9. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road,
Ahmedabad-15

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
(Customs Appeal Branch)

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

**Date of Hearing : 11.10.2011
Date of Pronouncement : 11-1-12**

Coram:

Hon'ble Shri Ashok Jindal, Member (Judicial)

Hon'ble Shri Mathew John, Member (Technical)

1.	Whether Press Reporter 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

Custom Appeal No. 670-671 of 2007

[Arising out of Order-in-Appeal No.151-152/CE/ALLD/2007 dated 25.7.2007 passed by the Commissioner of Customs & Central Excise (Appeals), Allahabad]

M/s Hi-Tech Needles (P) Limited
Mr. Nizamuddin, M.D.

Appellants

Vs.

CC, Allahabad

Respondent

Custom Appeal No. 672-673 of 2007

[Arising out of Order-in-Appeal No.153-154/CE/ALLD/2007 dated 26.7.2007 passed by the Commissioner of Customs & Central Excise (Appeals), Allahabad]

M/s Hi-Tech Needles (P) Limited
Mr. Nizamuddin, M.D.

Appellants

Vs.

CC, Allahabad

Respondent

Appearance :

Appeared for the Appellant: Shri J.M. Sharma, Advocate

Appeared for the Respondent: Shri Sonal Bajaj, SDR

Coram: **Hon'ble Mr. Ashok Jindal, Member (Judicial)**

Hon'ble Shri Mathew John, Member (Technical)

Final Order No. C/A/23-06/12-Cus dated.....

Per Mathew John:

There are four appeals being considered in this proceeding.

2. Appeal No. 670 and 671 are against the same impugned order and filed by the Appellant-Company and by its Managing Director. This matter arises from Show Cause Notice dated 03-07-2001 for clandestine manufacturing activity for the period 26-07-2000 to 05-01-2001. 26-07-2010 was the date on which the stock of finished goods became nil as per their official records. 05-01-2001 is the date of visit by the officers to the factory.

3. Appeal No. 672 and 673 by the Company and the Managing Director are against another impugned order but involving the same appellants and same type of clandestine manufacturing. This matter arises from SCN dated 01-07-2004 issued for clandestine activity for the period 24-06-2000 to 25-07-2000. This is based on records recovered later from the Appellants for the previous period.

4. Appellants were registered as a 100% EOU for manufacture of Needles falling under Heading 9018.32 of Central Excise Tariff. cannulae is one of the major input for manufacturing needles. One cannulae was needed for manufacturing one needle.

The facts of Appeal 670/2007 and 671/2007

5. The facts of the case is that when the Central Excise officers visited the factory of the appellants on 05-01-2001 they found that the stock as per RG-1 was nil on 26-07-2000 and there was no production recorded from 26-07-2000 to 30-09-2000. After 30-09-2000 the appellants had stopped making entries in the RG-1 register. But the officers found 19,48,184 cannulae and 19,87,600 needles which were not accounted and the same were seized. Further they found private registers showing receipt and issue of cannulae. When the Managing Director and Authorized Signatory were confronted with this evidence he admitted clandestine procurement of raw materials and manufacture of unaccounted needles which were cleared without payment of duty.

6. Revenue considered that the Cannulae seized and also the ones used in in the manufacture of seized final product were imported by the appellants without payment of customs duty for manufacture of goods clandestinely.

7. Further the officers seized certain records like the one indicating "Daily Stock Position" showing that 129,44,000 numbers of cannulae were handled in the stock out of which 1948184 were seized as cannulae, 1987600 were seized in the form of final product, namely, needles. After deducting the the seized cannuale and cannulae used in sized needles, still 90,08,216 cannulae were not accounted for. Revenue was of the view that corresponding number of needles were manufactured and sold in domestic market without payment of duty. Further Revenue was of the view that such cannulae used in unaccounted production of needles were imported by the Appellants without payment of Customs duty.

8. So customs duties on import of 12944000 numbers of cannulae and excise duty on 10995816 numbers of needles including quantities seized were demand with applicable interest and also proposing penalties. Further the seized goods were proposed to be confiscated.

9.1. On adjudication Central Excise Duty amounting to Rs. 9,92,597 was confirmed, on needles, with interest and penalty of equal amount under section 11AC of Central Excise Act.

9.2. Customs duty of Rs. 6,41,401/- was confirmed on cannulae along with interest and a penalty of equal amount was imposed under section 112 of the Customs Act.

9.3. 19,48,184 cannulae were confiscated with option to redeem the goods on payment of Rs. 1,00,000/ as redemption fine.

9.4 19,87,600 needles were confiscated with option to redeem the goods on payment of a fine of Rs. 3,00,000/-.

9.5 Rs. 4,00,000/- was imposed as penalty under section 112 of Customs Act and Rule 209 of C. E. Rules on Shri. Nizamuddin, Managing Director.

10. The parties filed appeal with Commissioner (Appeal). On appeal the Commissioner (Appeal) gave the following orders:

“(A) I do not find any infirmity in the impugned order-in-Original on the issue of

- (i) Confiscation of 19,48,184 nos of cannulae
- (ii) Confiscation of 19,87,600 nos of Needles.
- (iii) Confirmation of demand of Customs duty of Rs.6,41,401.00 and imposition of penalty of equal amount; and
- (iv) Penalty of Rs.4,00,000.00 on the appellant No. 2.

Accordingly, the same is upheld on the above counts.

(B) However, I find that on the issue of confirmation of demand of Central Excise duty amounting to Rs.9,92,597.00 and the imposition of penalty of equal amount the Order-in-Original requires to be reconsidered

in order to arrive at exact determination of the No. of needles cleared without payment of Central Excise duty and correct assessment of the same by the original adjudicating authority.

Accordingly, on this score, the same is remanded back to the Adjudicating Authority."

11. Aggrieved by the order the Appellants have filed these appeals.

Facts of Appeal No. 672/2007 and 673/2007

12. In these appeals facts are similar. The case is made based on records recovered from the Appellants for period prior to the period for which the officers got record at the time of search. For this a separate SCN was issued. On adjudication an amount of Rs. 2,62,799/- is demanded as excise duty on needles along with interest. Penalty of Rs. 2,62,799 is imposed under Rule 173Q/209 of Central Excise Rules. Customs Duty of Rs. 1,18,182/- is confirmed on cannulae with interest, penalty of Rs. 1,18,182 each are imposed under section 112 on High-Tech Needles and on the Managing Director. On Appeal the Commissioner (Appeal) upheld the adjudication order. Aggrieved by the order of Commissioner (Appeal) these appeals are filed.

13. The arguments of the Appellants in respect of all the four appeals are broadly the same. They say that they were purchasing imported cannulae from local market. The onus of proving that the goods are smuggled is on the department. Department has not produced any evidence in this regard. The Appellants had no reason to smuggle in cannulae because as a manufacturer of cannulae they could have imported it free of customs duty under Notification 16/2000-Cus dated 01-03-2000 at S. No. 320.

14. They submit that the confiscation of cannulae is without any basis. The order does not even state which is clause under which

the said goods are confiscated. They also submit that the penalty imposed is far in excess of duty involved on the goods and hence not sustainable in view of provisions in section 112 of the Customs Act.

15. In respect of excise duty demand their submission is that department has adduced no evidence to show manufacture and clearance. The demand based on stock statement of cannulae is not maintainable because they were also trading in cannulae. There is no evidence regarding procurement of use of the other inputs required for making needles.

16. Further they submit that Rule 173Q is not applicable to 100% EOUs. So the penalty imposed is not legal. Penalty imposed on the Managing Director is a combined penalty under Customs Act and Central Excise Act hence not maintainable.

17. They also submit that after having issued one SCN dated 03-07-2001 for clandestine manufacturing activity for the period 26-07-2000 to 05-01-2001, issue of another SCN dated 01-07-2004 issued for clandestine activity for the period 24-06-2000 to 25-07-2000, ie an for an earlier period, is not maintainable in view of the decision of the Apex court In Nizam Sugar Factory Vs. CCE-2006 (197) ELT 465 SC. According to the appellants such SCN is time barred in view of the said decision.

18. The Revenue on the other hand submits that four months after the appellants had stopped making entries in the official records, when factory is visited by the officers they found raw material and manufactured goods. Their private records showed receipt and issue of main raw material namely, cannulae. So it is very clearly a case where the appellants were clandestinely manufacturing and clearing the goods. The cannulae seized were imported in nature. The appellants are not willing to disclose the source from which the goods were purchased. Since they are hiding the source of cannulae it is very obvious that they had

imported it clandestinely. The argument that they had no reason to evade customs duty is not correct because for availing exemption under 16/2000-Cus dated 01-03-2000 at S. No. 320, they had to account the goods which being imported in which case they could not have evaded customs duty on final product needles. Further the AR also argues that since the appellant is a Hundred Percent EOU, they have executed a bond for accounting all raw materials procured and finished goods manufactured and therefore the demands cannot be considered as time barred.

19. We have considered the arguments on both sides. We find that the decision of Nizam Sugar Mills (*supra*) is not applicable to the facts of the case. In that case the second demand was for a period after the issue of first SCN. During investigation for issue of this SCN the full facts were made known to the department. IN this case the second demand is for a period prior to the period covered by the first SCN. The second SCN is based on records obtained from the Appellants later. When there is suppression and clandestine manufacture the outer limit for issuing SCN is five years from the relevant date. The SCN is issued within this outer period. The decision in Nizam Sugar is being wrongly interpreted that the Revenue is bound to issue only one SCN invoking suppression irrespective of the nature of the period involved. The decision in Nizam Sugar is very much consistent with legal provisions and common sense. The interpretation of the decision that is canvassed is not consistent with legal provisions and common sense. So the plea on time bar is rejected.

20. The next issue to be considered is whether in the facts placed on record it can be concluded that the impugned cannulae were imported without payment of customs duty and also whether the import was made by the appellant. It is not disputed that the seized goods were of foreign origin. But this is not one of the items notified under section 123 of the Customs Act. If it were so the burden to prove that the goods were not smuggled would have been on the Appellants. That being not the situation the Revenue

had to lead evidence showing clandestine import of the goods. These are goods for the import of which there is no restriction. When such goods are seized from any person in the domestic market it is not legally proper to conclude, without any corroborative evidence, that the goods were smuggled by the person from whom the goods are seized and also that no customs duty has been paid at the time of import. So though there is a good chance that the cannulae in question were smuggled ones, it is difficult to conclude that the goods were smuggled by the appellants. So as far as the Customs duty is concerned we are of the view that the benefit of doubt should go to the appellants.

21. In the matter of excise duty, there is better proof. Unaccounted final products are seized from the possession of the Appellants. Their private records showed receipt and issue of cannulae. Though they claim that they were also trading in that item they do not want to disclose from whom the goods were purchased and to whom the goods were sold. The whole matter is a mystery and a matter of argument only but not supported by any documents. Here the appreciation of the facts leads to the conclusion that the appellants had manufactured the needles as alleged. As a Hundred Percent EOU they were supposed to maintain account of raw materials and finished goods. They preferred to show these items to be nil and to continue manufacturing activity. The argument that revenue has not able to lead evidence regarding procurement of other raw materials is weak argument because the appellants have no records for such goods even in the case of needles physically seized. So it is very obvious that they have been successful in their clandestine operations to some extent. But that is not a reason to give benefit of doubt to the appellants in this matter. So we are of the view that the finding regarding clandestine manufacture of excisable goods given in the impugned order is maintainable.

22. In the circumstances we uphold the impugned order in the matter of excise duty liability in the two impugned orders. The

argument that Rule 173Q is not applicable to a Hundred Percent EOU is not of much help to the appellants because Rule 209 is applicable to any manufacturer and this rule will apply to the situation. We find that the point argued is just about a wrong mention of the rules and cannot strike at the legal maintainability of the order. The confiscation of needles under the provisions of Central Excise Rules is upheld. The redemption fine on needles is upheld.

23. In the order impugned in appeal Nos. 670/2007 and 671/2007, the Commissioner (Appeal) took note of the contentions of the Appellants that the number of needles on which duty is demanded is wrongly worked out even if Revenue's arguments were accepted and the number should have been 54,25,216 instead of 90,98,216. Commissioner remitted the matter to the adjudicating authority to determine the number correctly and then determine the duty liability, interest and penalty. The appellants challenge this order on the ground that the Commissioner (Appeal) has no power to remand. Revenue has not come in appeal against this order or filed any cross objection to contest how the original number of 90,98,216 can be correct. In the circumstances, we are of the view that this matter should be examined by the adjudicating authority and decided. Though the Commissioner (Appeal) has no power to remand, Tribunal has necessary power and we remand the matter to the adjudicating authority to decide this matter.

24. Thus we set aside confiscation of cannulae and redemption fine imposed in both the impugned orders. Further demands for duty and penalties under Customs Act are set aside.

25. There is a submission that a combined penalty is imposed on the Managing Director under Customs Act and Central Excise Act and hence the penalty is not maintainable. A penal liability cannot abate on account of such errors of the adjudicator. There can at best be a need to remand the matter for deciding separate

penalties. Now that the matter is being remanded for determining the actual excise duty liability, the penalty applicable under Rule 209 also may be determined by the adjudicating authority. He may keep in mind that Rule 173 Q was not applicable to a 100% EOU, but Rule 209 was applicable.

26. Thus appeals are allowed partially by giving relief in matters relating to consequences under Customs act but rejecting the contentions in the matter of needles clandestinely manufactured, under Central Excise Act.

(Pronounced in Court on 11-01-12)

(Ashok Jindal)
Member (Judicial)

(Mathew John)
Member (Technical)