IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI

APPEAL NO: C/26/2010

[Arising out of Order-in-Appeal No: 277/2009/MCH/AC/Gr.VB/ 2008-09 dated 7th October 2009 passed by the Commissioner of Customs (Appeals), Mumbai – I.]

For approval and signature:

Hon'ble Shri C J Mathew, Member (Technical)
Hon'ble Shri Ajay Sharma, Member (Judicial)

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 should be released under Rule 27 of CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	:	Yes
3.	Whether Their Lordships wish to see the fair copy of the Order?	:	Seen
4.	Whether Order is to be circulated to the Departmental authorities?	:	Yes

Hindusthan National Glass Industries Ltd … ***Appellant***

versus

Commissioner of Customs (Import)
Mumbai ***…Respondent***

Appearance:

Shri Chirag Shetty, Advocate for appellant

Shri R Kumar, Assistant Commissioner (AR) for respondent

CORAM:

Hon'ble Shri C J Mathew, Member (Technical)
Hon'ble Shri Ajay Sharma, Member (Judicial)

Date of hearing: 18/03/2019
Date of decision: 18/03/2019

ORDER NO: A/85810/2019

Per: C J Mathew

This appeal of M/s Hindusthan National Glass Industries Ltd against order-in-appeal no. 277/2009/MCH/AC/Gr.VB/ 2008-09 dated 7th October 2009 of Commissioner of Customs (Appeals), Mumbai – I arises out of the disallowance of refund of duties that are claimed to have been paid in excess following the denial of benefit of notification no. 94/96-Cus dated 16th December 1996 despite being eligible.

2. Appellant had imported certain machinery against bill of entry no. 4512/11.11.1997 and after being assessed to duty of ₹3,32,82,324/-, was, on being found to be in severely damaged condition, re-exported under claim for drawback which, as per section 74 of Customs Act, 1962, was allowed to the extent of ₹ 3,26,16,676. Subsequently, the same was re-imported against bill of entry no. 11894/29.01.1999 and bill of entry no. 1889/16.03.1999 with claim for applicability of notification no. 94/96-Cus dated 16th December

1996. The assessing authority was of the opinion that the goods had not been compliant with the condition of ascertainment of matching with the goods exported earlier and denied the benefit of the notification following which appellant was required to pay duty ₹ 4,47,93,148/- to secure release of goods. On appeal, the claim of benefit of the notification was allowed except to the extent of one item among the packages. The appeal of Revenue before the Tribunal against the allowing of the benefit to a substantial extent was dismissed and appellant, thereafter, claimed refund of excess duty of ₹ 86,26,285/- which was partially allowed to the extent of ₹ 82,63,378 . The order of refund was reviewed by the competent authority and, upon consideration of the resultant appeal by the first appellate authority, was remanded back to the original authority who came to the conclusion that, instead of allowing the refund, the importer was liable to pay a further amount of ₹ 48,56,328/- which was ordered to be recovered and, with the appellate authority upholding that recovery, the present appeal is filed before us.

3. We have heard Learned Counsel for appellant and Learned Authorised Representative.

4. It is seen from the records that the refund claim was stood on its head by the finding that the importer

> '*would have availed MODVAT of 98% of CVD'*

and that availment of MODVAT is not permissible. The first appellate authority appears to have limited himself to the availment of MODVAT as sufficient to deny claim for refund.

5. The appellant had, indeed, discharged duty liability in the first instance, and, in accordance with section 74 of Customs Act, 1962, was entitled, on re-export, to 98% of the duty that they had paid. With the findings of first appellate authority, and confirmed thereafter by the Tribunal, to the effect that the re-imported goods, except for one item, and the goods exported in 1999 were the same, the eligibility for the exemption in notification no. 94/1996-Cus is undeniable. Appellant had discharged duty liability on re-import as though the goods had been imported for the first time. There can be no doubt that the excess duty collected was required to be dealt with in accordance with section 27 of Customs Act, 1962.

6. As pointed out by the Learned Counsel for appellant, notification no. 94/1996-Cus does not impose any condition pertaining to availment of MODVAT credit; indeed, except in certain exemption notifications dealing notably with export promotion schemes, the law relating to customs does not make any reference to MODVAT, or to its successor CENVAT, credit. To the extent that the notification is silent on this aspect, the lower authorities, exercising jurisdiction under Customs Act, 1962 could not have made

any reference to, or imposed, any condition not contemplated in the exemption notification. Just as exemption notification are to be strictly construed against the importer so, too, must there be no latitude vested with officers of customs to enforce any condition on whim or according to their wisdom.

7. Moreover, CENVAT credit is availed on entry of eligible goods in the factory of manufacture. There is no evidence here of such availment and there is mere presumption of availment, and extent, of such credit. Under the relevant rules, credit availed on goods that are not used in the factory should be reversed and in the event of failure to reverse consequences under other specific statutory provisions would arise . That cannot be read into the provisions of Customs Act, 1962 to deny refund of duty paid in excess of that which was to be collected and held to be so by the Tribunal.

8. Accordingly, we set aside the impugned order and allow the appeal with consequential relief.

(Pronounced in Court)

(Ajay Sharma)
Member (Judicial)

(C J Mathew)
Member (Technical)

**/as1803200301050205*